
(1985) 04 KAR CK 0022
In the Karnataka High Court
Case No : Writ Petition No. 8399/84

Canara Workshops

APPELLANT

Vs

Presiding Officer

RESPONDENT

Date of Decision : 02-04-1985

Acts Referred:

Industrial Disputes Act, 1947 — Section 33 (2) (b), 33 (3), 33 A

Citation : (1985) ILR (Kar) 2846 : (1986) 1 LLJ 181

Hon'ble Judges : M. Rama Jois, J

Bench : Single Bench

Judgement

1. In this Writ Petition in which the petitioner M/s. The Canara Workshops Ltd., Maroli, Mangalore, has prayed for quashing the order made by the Additional Industrial Tribunal, Bangalore, on the application presented by the 2nd respondent under S. 33-A of the Industrial Disputes Act ("The Act" for short) and directing his reinstatement with back wages, the following questions of law arise for consideration -

1. Whether without a positive action on the part of the employer, recognising a workman as a protected workman or an order made by the Conciliation Officer under Rule 62(4) of the Industrial Disputes (Karnataka) Rules, 1957 declaring that a workman is a protected workman, the workman could claim the status of a protected workman ?

2. Whether on an application made under S. 33-A of the Act, the Industrial Tribunal/Labour Court could make an award directing reinstatement and for payment of backwages to a workman, on mere proof of contravention of S. 33(3) of the Act, without giving the opportunity sought for by the management to justify the termination of service of the complainant/workman ?

3. The facts of the case, in brief, are as follows :

(i) The petitioner is a limited company. It has its factory at Mangalore. The 2nd respondent was a Clerk in the service of the petitioner. He also possessed Junior

Typewriting qualification. Disciplinary proceedings were instituted against him on the charge that inspite of his being transferred to the sales section in the same building, in the place of one Kaushalya, Clerk/Typist, who was on maternity leave, the 2nd respondent disobeyed the order and refused to report for duty inspite of repeated letters addressed to him. The Enquiry Officer appointed by the petitioner held an enquiry and found him guilty of the charge levelled against him. The petitioner accepted the said finding and terminated the services of the 2nd respondent with effect from 7th September, 1981. By that time, an Industrial Disputes between the workmen of the petitioner and the petitioner had been referred by the State Government for industrial adjudication on 17th August, 1981. As the 2nd respondent was a person concerned with the dispute, the petitioner filed an application before the Tribunal under S. 33(2)(b) of the Act seeking its approval to the order of dismissal made by the petitioner. The 2nd respondent filed his objections. Shortly thereafter the 2nd respondent also filed a complaint under S. 33-A of the Act before the Tribunal. In the complaint the 2nd respondent pleaded that he was a protected workman and, therefore, as his services were terminated during the pendency of an Industrial Dispute with which he was concerned without securing the permission of the Tribunal, the termination was invalid.

(ii) The petitioner filed his objections to the said complaint and submitted that the 2nd respondent was not a protected workman and, therefore, the question of seeking permission under sub-s. (3) of S. 33 did not arise.

(iii) The Tribunal by its order dated 16th August, 1982 held that the 2nd respondent was a protected workman, and, therefore, his, dismissal was in contravention of S. 33(3) of the Act. The Tribunal then posted the case for arguments to hear as to whether the petitioner should be permitted to adduce evidence in support of the charges levelled against the 2nd respondent or whether there should be an order straightway directing reinstatement of the 2nd respondent on the ground that there had been breach of the condition specified under sub-s. (3) of S. 33 of the Act. The Tribunal by its subsequent order dated 31st may, 1983 (Annexure-F) held that once the breach of S. 33(3) of the Act was established, there was no question of taking any evidence on the merits of the case though the petitioner pointed out that in view of the pronouncements of the Supreme Court in number of cases and in particular in the case of The Punjab National Bank Ltd. Vs. Its Workmen, that the 2nd respondent could not straightaway succeed in getting a order of reinstatement on the mere proof of violation of S. 33(3) of the Act and it was obligatory for the Tribunal to go into the merits of the case as if it was a reference and to decide the case once for all. The Tribunal however, rejected the above submission made for the petitioner and directed the re-instatement of the 2nd respondent leaving liberty for the management to take fresh action on the same cause of action and to obtain approval under S. 33(2)(b) of the Act. It is in these circumstances, the questions set out first arise for consideration.

3. (a). The facts which are relevant for considering the first question are as follows : For the first time before the Tribunal the 2nd respondent produced a copy of the letter dated 5th March, 1981 (Exhibit-C 12 before the Tribunal) which according to the 2nd respondent was a copy of the original addressed to the petitioner informing it to the effect that the 2nd respondent had been elected as an office-bearer of the Trade Union and that the Trade Union desired that the 2nd respondent and another whose names were specified in the said letter, be recognised as protected workmen. According to the petitioner, no such communication was received by the petitioner. There is, however no dispute that no communication was sent by the petitioner to the Trade Union as required under Rule 62(2) of the Rules recognising the 2nd respondent as protected workman.

4. The contention of the 2nd respondent before the Tribunal was that when the Trade Union had sent the communication informing the petitioner that two of the office-bearers named therein were to be recognised as protected workmen and that request was in conformity with S. 33 of the Act Rule 62 of the Rules framed thereunder, those workmen automatically became protected workmen.

5. Learned Counsel for the petitioner submitted that unless there was a positive action by the management, no one can claim to be protected workmen and in the present case first of all the petitioner had not received the original of the letter and 5th March, 1981 which was produced by the 2nd respondent at a very late stage and for which there was no reference either in the application under S. 33-A of the Act or in the objections filed to the application of the petitioner under S. 33(2)(b) of the Act and, therefore, the 2nd respondent was not a protected workman and that the finding of the Tribunal on the question of fact was perverse and its view on the interpretation of the Act and the Rules was patently erroneous.

6. In order to appreciate the contention, it is necessary to refer to the relevant provisions. Sub-ss. (3) and (4) of S. 33 of the Act, which are relevant read -

"33. (3) Notwithstanding anything contained in sub-s. (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute.

(a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or

(b) by discharging or punishing, whether by dismissal or otherwise such protected workman.

save with the express permission in writing of the authority before which the proceeding is pending.

EXPLANATION : For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being a member of the

executive or other office bearer of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

(4) In every establishment, the number of workmen to be recognised as protected workmen for the purpose of sub-s. (3) shall be one percent. of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as a protected workman."

It may seem that sub-s. (3) of S. 33 is intended to give complete protection to the workmen who are recognised as protected workmen against any arbitrary action by way of terminating their services either for misconduct or otherwise. The support of sub-s. (4) of S. 33 is that in respect of an industrial establishment, the minimum number of protected workmen would be five and that the number of protected workmen in respect of an industrial establishment having more than five hundred employees would be at the rate of one per cent. of the workmen subject to a maximum of 100. Further, according to the said provision when there are more than one trade union in respect of workmen of an industrial establishment, the number of office bearers of each of these unions, who could be recognised as protected workmen would depend upon the number of workmen, who are members of each of the trade unions. In other words, the number of protected workmen in respect of each of the trade union would have to be in proportion to the membership of the trade union. According to the above provision, the recognition of protected workmen has to be done in the manner prescribed under the Rules. (Rule 62 of the Rules is the relevant provision. It reads -

"62. (1) Protected Workmen : (1) Every registered trade union connected with an industrial establishment, to which the Act applies shall communicate to the employer, before the 30th April every year, the names and addresses of such of the officers of the union who are employed in that establishment and who in the opinion of the union, should be recognised as "protected workmen". Any change in the incumbency of any such officer shall be communicated to the employer by the union within fifteen days of such change.

(2) The employer shall, subject to S. 33, sub-s. (4) recognise such workmen to be "protected workmen" for the purposes of sub-s. (3) of the said Section and communicate to the union in writing, within fifteen days of the receipt of the names and addresses under sub-rule (1), the list workmen recognised as protected workmen.

(3) Provided that, where there is more than one registered trade union in the Establishment, the maximum number shall be so distributed by the employer among the unions that the numbers of recognised protected workmen in

individual unions bear roughly the same proportion to one another as the membership figures of the unions. The employer shall in that case intimate in writing to the President or the Secretary of the Union the number of protected workmen allotted to it.

Provided further that where the number of protected workmen allotted to a union under this sub-rule, falls short of the number of officers of the union seeking protection, the union shall be entitled to select the officers to be recognised as protected workmen. Such selection shall be made by the union and communicated to the employer within five days of the receipt of the employer's letter.

(4) When a dispute arises between an employer and any registered Trade Union in any matter connected with the recognition of "protected workmen" under this rule, the dispute shall be referred to the Conciliation Officer concerned, whose decision thereon shall be final."

According to sub-rule (1) of Rule 62, every trade union is required to send the names of office bearers of that union in respect of whom the trade union seeks recognition from the employer as protected workmen before 30th April of the year concerned. After the receipt of such requisition from the trade union or trade unions concerned, the employer is under a duty to recognise the office bearers so named as protected workmen, if the persons in respect of whom a trade union seeks recognition are office bearers of that trade union and their number is within the limit permitted under sub-s. (4) of S. 33 of the Act. Rule 62(2) requires the employer to send a communication to that effect to the trade union concerned within fifteen days from the date of receipt of communication from the trade union under Rule 62(1). It is only in cases where the management finds that the trade union concerned is seeking recognition for more number of office bearers than permissible, under S. 33(4) of the Act, the employer will have the liberty of recognising only the permitted number as protected workmen. Even so, the management is required to send a communication to the trade union within 15 days.

7. In the present case admittedly no communication was sent by the petitioner recognising the 2nd respondent as protected workman. Indeed the plea of the petitioner is it had not received any communication from the trade union in terms of Rule 62(1) and, therefore, question of its recognising the 2nd respondent as protected workman did not arise. Therefore the question for consideration, is whether even in the absence of a communication by the management recognising or accepting the list of protected workmen, any workman can claim to be protected workman.

8. Learned Counsel for the petitioner contended that a positive action of recognition on the part of the management was a must and without that no workman can claim the status of a protected workman. In support of this submission, Learned Counsel relied on the judgment of the Supreme Court in

P.H. Kalyani Vs. Air France Calcutta, The relevant portion of the judgment reads - (at P. 682).

"(5) Learned Counsel for the appellant has further raised some points which were raised on behalf of the appellant before the Labour Court. In the first place, he contends that the appellant was a protected workman and the Labour Court was not right when it held that the appellant was not a protected workman. We are of opinion that the question whether a particular workman is a protected workman or not is a question of fact, and the finding of the Labour Court on such a question will generally be accepted by this Court as conclusive. Besides, the Labour Court has pointed out that the mere fact that a letter was written to the Manager of the Respondent company by the Vice-President of the union in which the name of the appellant was mentioned as a joint Secretary of the union and the manager had been requested to recognise him along with others mentioned in the letter as protected workmen would not be enough. The company had replied to that letter pointing out certain legal defects therein and there was no evidence to show what happened thereafter. The Labour Court has held that according to the Rules framed by the Government of West Bengal as to the recognition of protected workmen there must be some positive action on the part of the employer in regard to the recognition of an employee as a protected workman before he could claim to be a protected workman for the purpose of S. 33. Nothing has been shown to us against this view. In the absence therefore of any evidence as to recognition, the Labour Court rightly held that the appellant was not a protected workman and therefore previous permission under S. 33(3) of the Act would not be necessary before his dismissal."

The above decision was rendered by the Supreme Court interpreting a corresponding rule of the rules framed by the State of West Bengal under the provisions of the Act. It was Rule 61 of the West Bengal Rules. A comparison of the West Bengal Rules and Rule 62 of the Rules shows that both the rules are similarly worded except to the extent of an additional requirement imposed under the West Bengal Rules. The only difference between the two, is while Rule 62(2) of the Rules requires the employer to send a communication regarding the recognition of the workmen as protected workmen to the trade union concerned, the West Bengal Rules requires the employer to send the communication also to the Labour Commissioner and the Conciliation Officer concerned. In other respects, there is no difference at all.

9. The clear pronouncement of the Supreme Court in the Kalyani's case (supra) extracted above, is that a positive action of recognition by the employer is necessary in order that an office bearer of a trade union secures the status of a protected workman.

10. Learned Counsel for the 2nd respondent relied on the Judgment of the Gujarat High Court in R. Balasubramanian and Others Vs. Carborandum Universal Ltd., Okha, and in particular paragraphs 3 to 7. In that case, a Division Bench of the Gujarat High Court took the view that as there was only one trade union

consisting of workmen of the industry concerned in that case and as a communication had been sent by the trade union concerned seeking recognition to the petitioner therein as protected workman and as the number specified in the communication was within the provisions of Sub-s. (4) of S. 3 of the Act and the employer had no grounds to refuse to recognise the workmen named in the communication as protected workmen, even in the absence of a positive act of recognition by the employer, the Petitioner thereunder could claim the status of the protected workman.

11. With great respect to their Lordships, I find it difficult to agree. In my opinion, both having due regard to the clear and unambiguous wording of Explanation to S. 33(3) of the Act and of Rule 63 of the rules as also the pronouncement of the Supreme Court, in the absence of proof of recognition by the employer of the concerned workman as protected workman, the workman concerned cannot claim to be a protected workman. The communication to the employer from the trade union seeking recognition in respect of its office bearers named in its communication, the status of protected workmen and a written reply by the employer according recognition is must. It is true that the moment a communication in terms of Rule 62(1) is sent by a trade union, it becomes obligatory on the part of the employer, subject to provisions of Sub-s. (4) of S. 33 to recognise the workmen specified in the requisition as protected workman, and to give a written communication to the trade union. If the management has any legitimate objection either falling under sub-s. (4) of S. 33 or otherwise, it should communicate the same to the trade union. If communications have been received from more than one trade union or if the number of persons in respect of whom the status of protected workman is claimed, exceeds the permitted number or if for that reasons or any other good reason the employer is unable to take a decision, it could communicate its difficulty to the trade unions and request them to amend the list and give recognition after having consultation with the office bearers of the trade union/unions. The management could also raise a dispute before the Conciliation Officer under Sub-rule (4) of Rule 62 and request the Conciliation Officer to give his decision in the matter. Unless and until the employer recognises the workman whose names are mentioned in the communication sent under Rule 62(1) as protected workmen or the Conciliation Officer makes an order under Rule 62(4) and specifies the names of protected workmen, a workman does not secure the status of protected workman. The Learned Counsel for the 2nd Respondent submitted that such a construction of the provisions would lead to a situation unintended by the Act and the rules, in that the question of recognition of protected workmen would be at the sweet will and pleasure of the employer and defeats the protection intended to be given to the protected workmen under S. 33 of the Act as observed by the Division Bench of the Gujarat High Court in the case of *R. Balasubramanian* (supra).

12(1) I am unable to agree that the construction as above would lead to any such result. The Act and the rules do not leave it to the sweet will and pleasure of the employer to deny the protection to the protected workmen under S. 33(3)

by with holding the written communication which the employer is bound to give under rule 62(1). If any employer fails to send a communication of acceptance of the list of protected workmen within fifteen days from the date of receipt of the list from a trade union, whether intentionally or otherwise, on the sixteenth day itself or any day thereafter the trade union concerned could raise a dispute before the Conciliation Officer under rule 62(4) about the failure of the employer to send the communication as required under Rule 62(2) and the Conciliation Officer, is under a duty to approve the list of protected workmen, after notice to both the parties and hearing them, at the earliest and his order in that behalf would be final. The employer cannot escape.

(ii) But if a trade union fails to send a communication or keeps quiet even after the employer failed to recognise the protected workmen within the stipulated time by not making a demand before the employer and securing the recognition or by not raising a dispute before the Conciliation Officer and securing an order from him, the trade union stands deprived of the protection of S. 33(3) to its office bearers by its own in action. A trade union therefore must be vigilant in securing recognition as protected workman and if it is vigilant, the employer cannot avoid the recognition of the required number of workmen as protected workmen, at his sweet will and pleasure.

(iii) If the intention of the rule making authority was that if within fifteen days after the receipt of the letter from the trade union seeking recognition as protected workmen to its office bearers the management fails to send a reply, the workmen whose names are mentioned in the communication shall be deemed to be protected workmen, the rule would have been appropriately worded. In the absence of any such provision, it is impermissible to hold that just because a communication had been sent under rule 62(1) and there had been no reply from the employer within fifteen days, the persons whose names are found in the communication sent under Rule 62(1) becomes protected workmen.

iv) Therefore in case where no reply is received from the management accepting the list of protected workmen within fifteen days, unless the trade union chooses to approach the management and secure recognition, the only course open to the trade union is to secure recognition through an order of the Conciliation Officer. Learned Counsel for the 2nd Respondent submitted that if such a view is taken, the workmen would be deprived of the status of protection till the date of the order of the Conciliation Officer. This submission is also not tenable. The recognition whether through a written communication from the employer sent under Rule 62(2) or through an order of the Conciliation Officer would be, irrespective of the date of communication or the date of the order, effective for the whole year, as the rule provides for recognition of protected workmen for an year i.e. an year commencing from 1st May of an year ending 30th April of the next year, and not from the date of communication by the management of the order. It is only in cases where the trade union sends a belated communication i.e. after 30th April, the recognition would be effective from the date of

communication and holds good for the balance of the period of the year concerned.

v) For these reasons, I answer the first question set out first in the negative and hold that a positive action on the part of the employer is essential for claiming the status of a protected workman and in the absence of such positive action on the part of the employer, such a status could be secured only through an order made by the Conciliation Officer made under Sub-rule (4) of Rule 62.

14. In view of the above conclusion, it follows as there was neither a communication to the trade union from the petitioner nor an order of Conciliation Officer to the effect that the 2nd respondent was recognised as a protected workman, he could not be regarded as a protected workman and therefore his complaint under S. 33-A for violation of S. 33(3) was not maintainable.

15. Learned Counsel for the 2nd respondent however, submitted that the Tribunal had recorded a finding of fact to the effect that the 2nd respondent had been recognised by the petitioner as protected workman and in view of such a finding of fact, the complaint of 2nd respondent under S. 33-A was maintainable. Learned Counsel also maintained that a finding of fact so recorded cannot be interfered with in the exercise of the power of this Court under Art. 226 of the Constitution. In support of this submission, Learned Counsel relied on the following decisions.

(i) Syed Yakoob Vs. K.S. Radhakrishnan and Others,

(ii) State of Andhra Pradesh and Others Vs. Chitra Venkata Rao,

There is no doubt about the proposition that if a finding of fact recorded by a Tribunal is based on evidence, such a finding cannot be interfered with in a petition under Art. 226 and that if only a finding of fact is based on no evidence i.e. if it is perverse, it could be interfered with.

17. As stated earlier, the 2nd respondent was dismissed from service on 7th September, 1981. On the same date, the petitioner made an application before the Industrial Tribunal under S. 33(2)(b) of the Act seeking approval of the Tribunal for the order of dismissal. The petitioner made the said application because the 2nd respondent as a workman who was concerned with the Industrial dispute which was pending before the Industrial Tribunal. According to the petitioner, it did not file an application under Sub-s. (3) of S. 33 as according to the petitioner, the 2nd respondent was not a protected workman. In the objection filed to the application filed by the petitioner under S. 33(2)(b) of the Act, the 2nd respondent stated as follows :

"That the applicant has had an evil eye over the opponent as the opponent is a protected workman being the General Council Member of the Mercantile Employees Association and the applicant was planning to get rid of the opponent ever since the fact of his election to the General Council was intimated to the applicant by means of letter addressed to them.

In the above paragraph, the 2nd respondent claimed that he was a protected workman because he was a member of the Mercantile Employees Association and that his having been elected to the general council had been intimated to the petitioner. No specific statement was made that a communication had been sent by the trade union to the petitioner seeking recognition of the 2nd respondent as a protected workman.

18. The objection statement was filed on 28th September, 1981. Thereafter on 29th November, 1981, that is after about one and a half month after the date on which the services of the 2nd respondent were terminated and after about a month after the 2nd respondent had filed his objections to the application of the petitioner under S. 33(2)(b) of the Act, a complaint under S. 33-A was filed. Paragraph 1 of the said complaint reads :-

"1. That the complainant at the material time, was working as a clerk under the Respondent. The complainant is a protected workman, to the knowledge of the respondent."

It may be seen from the above paragraph also, there is no reference either to the communication sent by the trade union to the petitioner under Rule 62(1) nor to the recognition by the petitioner to the effect that the 2nd respondent was a protected workman. All that the 2nd respondent stated was that to the knowledge of the petitioner he was a protected workman. In the reply of the complaint, the petitioner stated as follows :

"While admitting that the Complainant was working as a clerk under the opposite party, it is emphatically denied that he was a "protected workman" at the material time. At any rate it is not within the knowledge of the opposite party that the complainant was a "protected workman".

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(c) Para 3 : It is true that during the pendency of the reference the service of the complainant were terminated with effect from 7th September, 1981, and opposite party filed an application for approval of the action taken against the Complainant under S. 33(2)(b) of I.D. Act. Section 33(3) of the Act is not at all applicable and therefore the application under S. 33(3) of the I.D. Act to seek permission of the Tribunal is not contemplated under the Act.

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(e) Para 5 : It is true that the Opposite Party filed an application Sl. 46/81 before this Hon"ble Tribunal seeking approval of the action taken which is pending before the Tribunal. It is entirely for the complainant to prove to the satisfaction of the Tribunal as to why permission ought to have been taken when the Complainant is not a "protected workman" under the Act and Rules made thereunder."

It is only on 9th December, 1981 an application was made before the Tribunal by

the 2nd respondent for the issue of a direction to the petitioner to produce the original of the letter dated 5th March, 1981 said to have been addressed by the trade union to the petitioner. That applications reads :-

MEMO CALLING FOR RECORDS FILED BY THE OPPONENT

It is submitted on behalf of the Opponent Workman named above that this Hon"ble Tribunal may be pleased to direct the Applicant-Management named above to produce the following listed records which are essential to come to a just conclusion in the above case.

List of records to be called for

- 1) xxxxx
- 2) Letter dated 5th March, 1981 issued by Secretary, the Mercantile Employees" Association, Calicut to the Managing Director, Canara Workshops Ltd., Maroli, Mangalore.
- 3) The Inward Register of the Applicant Management from 5th March, 1981 to 31st March, 1981.

The petitioner replied that no such letter had been received by the petitioner and, therefore, the question of its production by the petitioner did not arise. Thereafter, in the course of evidence given by C.W. 2 Sahadevan a copy of the letter dated 5th March, 1981 said to have been sent by the trade union to the petitioner was produced. It reads :

"The Managing Director Canara Workshops Ltd., Maroli, Mangalore-3. 5th March, 1981.

Dear Sir,

We have pleasure to inform you that the following persons have been elected as our General Council Member of the respective units shown against their names. We, therefore request you be pleased to treat them as protected workmen as contemplated under Rule 62 of the Kerala Industrial Dispute, Rule 1957 and to render all assistance and co-operation in the discharge their association activities.

1. Shri J. Raveendra Naik, Canara Workshops Ltd. 2. Shri D. Ramachandra, Mangalore-3. Yours Faithfully, for the Mercantile Employees" Assn. Sd/- Secretary".

In support of the despatch of the said letter a stamp register maintained at the office of the trade-union was produced (Exhibit C-13). Reliance was placed on the entries dated 10th March, 1981 in that register to the effect that a letter addressed to the petitioner was affixed with a stamp of 35 paise and another addressed to the Vice-Chairman of the petitioner-company was a long cover affixed with a stamp of 95 paise. C.W. 2 in the course of this deposition said that the cover to which 35 paise stamp was fixed contained the original of Exhibit 12 and was dispatched to the petitioner and the cover to which 95 paise stamp was

affixed contained a copy of the letter dated 5th March, 1981 and was dispatched to the Vice-Chairman of the petitioner-company. The manager of the company examined as O.W. 1 said that letter dated 5th March, 1981 had not been received by the petitioner. He also said that no inward register had been maintained by the petitioner but only a despatch register was maintained for postal accounts purposes. The Tribunal held that the above evidence proved (i) the despatch of the letter dated 5th March, 1981 to 10th March, 1981. and (ii) its receipt by the petitioner shortly thereafter. On this basis the Tribunal further held that in the absence of any communication from the petitioner and in the absence of any valid ground falling under S. 33(4) not to accord recognition, the 2nd respondent became a protected workman.

19. On giving careful consideration to the matter, I am satisfied that the criticism that the finding is perverse and is based on no evidence is well founded. First of all, there is no reference to the letter dated 5th March, 1981 either in the objection statement filed to the application filed by the petitioner under S. 33(2) (b) of the Act or in the complaint filed by the 2nd respondent and made after one month thereafter under S. 33-A of the Act. The stamp register produced does not even state that the letter dispatched on 10th March, 1981 was the one connected with seeking of recognition of Protected Workmen. Certificate for posting the letter was not obtained. The person who is said to have posted the said letter is not examined. There was no idea of evidence to prove that the letter had been received by the petitioner, and that the petitioner had recognised the 2nd respondent as protected workman. At the best the evidence was sufficient to record a finding that the trade union had prepared a letter dated 5th March, 1981 and intended to despatch on 10th March, 1981. There was no evidence for its posting as admittedly no certificate of posting was obtained and produced and the person who is said to have posted the letter was not examined and in any event, there was no evidence for the receipt of the letter by the petitioner. Further even according to the evidence of the 2nd respondent who was examined as O.W. 1 there were about 250 workmen in the service of the petitioner and there were 3 unions. According to the evidence of O.W. 1, 200 of them were members of the other two trade unions, one being I.N.T.U.C. and the other C.I.T.U. The union of which the petitioner was a member was affiliated to Mercantile Employees' Association. Therefore, the maximum number of protected workmen in respect of the petitioner industry could only be 5 and these had to be proportionately, distributed between the 3 unions. In a situation like this, there could be no presumption both as to the number and person to be recognised as protected workmen, in respect of any of the unions. If the number of members of the union to which the 2nd respondent belonged was only 50 then the number of protected workmen in respect of that union could only be one, but in the letter dated 5th March, 1981 the union claimed recognition for two. The existence of three trade unions, though admitted by respondent-2 has gone unnoticed by the Tribunal. Further even assuming that the 2nd respondent was eligible to be recognised as protected workman, a mere communication under Rule 62(1)

there would be no automatic recognition for, as held earlier a positive action of recognition by the employer or an order of Conciliation Officer under Rule 62(4) could alone confer the status of protected workmen on a workman. For these reasons, I hold that the finding recorded by the Tribunal that the 2nd respondent was protected workman is based on no evidence and liable to be set aside.

20. Learned Counsel for the 2nd respondent submitted that there was a clear admission by the petitioner in Exhibit C-4 before the Tribunal, that the 2nd respondent was a protected workman and, therefore, the Tribunal was right in recording the finding. At paras 11 and 12 of the order of the Tribunal, the Tribunal said that there was considerable force in the submission of the 2nd respondent that to the knowledge of the petitioner, the 2nd respondent was a protected workman. The basis for stating so was the contents of the letter of the petitioner dated 10th August, 1981. This was the letter written by the petitioner in reply to the letter of the 2nd respondent also dated 10th August, 1981 (Exhibit C-3 before the Tribunal) written after the 2nd respondent was transferred by the petitioner. In that letter dated 10th August, 1981 the 2nd respondent said that to the knowledge of the petitioner he was a general council member and as such he was a protected workman and therefore, he could not be transferred from one Section to another Section. The management in its reply (Exhibit C-4 before the Tribunal) also dated 10th August, 1981 said that the transfer of the petitioner in the place of Mrs. Kausalya who had gone on maternity leave was not as a punishment and in that context said that the reference to the 2nd respondent being a general council member or being a protected workman was thoroughly irrelevant. All that the petitioner said in the letter was that the petitioner was bound to obey the order of transfer and in that context the claim that he was a general council member or a protected workman was irrelevant. There was no admission that the 2nd respondent was a protected workman. Hence I find no substance in the submission.

21. Learned Counsel for the 2nd Respondent submitted that as observed by the Tribunal, it was for the petitioner to have raised a dispute under Rule 62(4) and as it had not raised the dispute, that circumstance was sufficient to hold that the 2nd Respondent had been accepted as a protected workman. This submission is clearly untenable. The plea of the petitioner has been that it had not received the communication dated 5th March, 1981. Therefore the question of the petitioner raising a dispute did not arise. Even assuming that letter dated 5th March, 1981 was received by the petitioner, admittedly no written communication from the petitioner as required under Rule 62(2) was received by the trade union. Therefore it was open for the trade union to raise the dispute. It is significant to note that no further correspondence was made by the trade union with the petitioner and no application was made by the trade union before the Conciliation Officer under Rule 62(4) complaining of non-recognition of the list of protected workmen by the petitioner. Drawing of an adverse inference against the petitioner on the ground that it had not made an application before the Conciliation Officer under Rule 62(4) of the Rules is patently untenable.

22. The next contention urged for the Learned Counsel for the petitioner was that even if the 2nd respondent were to be regarded as a protected workman, the Tribunal committed an act of great impropriety in brushing aside the law declared by the Supreme Court in the case of Punjab National Bank (supra) and directing his reinstatement refusing to give opportunity to the petitioner to adduce evidence about the misconduct of the 2nd respondent.

In Punjab National Bank's case (supra), the Supreme Court interpreted S. 33-A of the Act. Relevant part of the Judgment reads -

"xxx xxx xxx xxx

Thus there can be no doubt that in an enquiry under S. 33-A the employee would not succeed in obtaining an order of reinstatement merely by proving contravention of S. 33 by the employer. After such contravention is proved it would still be open to the employer to justify the impugned dismissal on merits. That is a part of the dispute which the tribunal has to consider because the complaint made by the employee is treated as an industrial dispute and all the relevant aspects of the said dispute fall to be considered under S. 33-A. Therefore we cannot accede to the argument that the enquiry under S. 33-A is confined only to the determination of the question as to whether the alleged contravention by the employer of the provisions of S. 33 has been proved or not."

The above view has been reiterated by the Supreme Court in the case of Punjab Beverages Pvt. Ltd., Chandigarh Vs. Suresh Chand and Another, in which the Supreme Court after referring to all the earlier decisions on the point stated thus - (Para 11 at Page 8).

"It will, therefore, be seen that the first issue which is required to be decided in a complaint filed by an aggrieved workman under S. 33-A is whether the order of discharge or dismissal made by the employer is in contravention of S. 33. The foundation of the complaint under S. 33-A is contravention of S. 33 and if the workman is unable to show that the employer has contravened S. 33 in making the order of discharge or dismissal the complaint would be liable to be rejected. But if the contravention of S. 33 is established the next question would be whether the order of discharge or dismissal passed by the employer is justified on merits. The Tribunal would have to go into this question and decide whether, on the merits the order of discharge or dismissal passed by the employer is justified and if it is, the Tribunal would sustain the order, treating the breach of of S. 33 as a mere technical breach.

From the above pronouncements, it is clear that if an employer terminates the services of a workman in contravention of any one of the sub-sections of S. 33, the workman can lodge a complaint before the authorities before whom the proceedings are pending under S. 33-A of the Act complaining that his services had been terminated in violation of the concerned sub-section. When such an application is presented, the authority concerned in the first instance has to find out as to whether there has been violation of the sub-section as alleged in the

complaint. Once it comes to conclusion that the violation is established automatically the said application is required to be disposed of as a reference under S. 10(1) of the Act. In other words, the usual procedure of raising an industrial dispute before the Conciliation Officer under S. 12 of the Act, submission of failure report by the Conciliation Officer to the Government, consideration of the said report and the passing of the order by the State Government under sub-s. (5) of S. 12 of the Act either refusing to refer or deciding to refer the dispute and in the latter case making an order under sub-s (1) of S. 10 of the Act, stands dispensed with. Straightaway the complaint lodged by the workman concerned has to be treated as a reference and the Tribunal is bound to go into the merits of the case.

23. In view of the clear pronouncement of the Supreme Court in Punjab National Bank's case (supra) on the scope of S. 33-A of the Act, there is no room for doubt that even on the basis that the Tribunal was right in the present case in coming to the conclusion that the 2nd respondent was a protected workman and, therefore, his dismissal from service without securing permission as required under sub-s (3) of S. 33 was violative of that provision, it was obligatory for the Tribunal to have considered whether the domestic inquiry held by the petitioner was valid and if it was not valid to have proceeded to hold the inquiry itself giving opportunity to the petitioner to adduce evidence and to decide as to whether the termination of service was justified and to make a final award.

24. But inspite of the petitioner inviting attention of the Tribunal to the aforesaid pronouncement of the Supreme Court, the Tribunal stated as follows :

"13. In the second case, the query raised was whether an employer is justified in terminating the services of the employees without a charge sheet and an enquiry and whether such an action is consistent with the principles of natural justice and fair play and it was urged that the orders of dismissal were wholly invalid. In that context Ss. 33, 33-A and 10 have been discussed from pages 678 to 682. In my opinion the observations made in the authority are only an obiter as regards the question whether a dismissal in contravention of S. 33(3) of the I.D. Act of a protected workman without prior permission of the Tribunal is valid. The question now is whether it still requires to be decided by the Tribunal on the merits of the charge, in a serial application, when once it is held that he was protected workman at the relevant time."

In my opinion, the Tribunal committed the greatest impropriety in brushing aside the law declared by the Supreme Court in such clear terms stating that it was only an obiter. First of all the Tribunal was wrong in characterising the law declared by the Supreme Court as obiter for, in the above decision the scope of S. 33-A which does not make any distinction as among the three sub-sections of S. 33 came up for consideration and was interpreted. Whichever sub-section of S. 33 is violated only one procedure is prescribed under S. 33-A and that is fully expounded by the Supreme Court when that question directly arose for consideration. Even on the basis, it was an obiter the Tribunal had no business to

disregard the law declared by the Supreme Court even though an obiter, as it is well settled that an obiter by Supreme Court has also binding force. (See : Air-India Corporation, Bombay Vs. V.A. Rebellow and Another,

25. Learned Counsel for the 2nd Respondent submitted that a distinction has to be made in respect of violation of S. 33(3). In support of this, he relied on the observation of the Supreme Court in Air-India Corporation, Bombay Vs. V.A. Rebellow and Another, which reads thus - at Para 12 at Page 507 and 508.

"In this connection reference by way of contrast may be made to sub-s. (3) of S. 33 which imposes an unqualified ban on the employer in regard to action by discharging or punishing the workman whether by dismissal or otherwise. In this sub-section we do not find any restriction such as is contained in Clause (b) of sub-ss. (1) and (2). Sub-s. (3) protects "protected workman" and the reason is obvious for the blanket protection of such a workman. The legislature in the case appears to be anxious for the interest of healthy growth and development of trade union movement to ensure for him complete protection against every kind or order of discharge or punishment because of his special position as an officer of a registered trade union recognised as such in accordance with the rules made in that behalf. This explains the restricted protection in sub-ss. (1) and (2)."

Learned Counsel submitted that as sub-s (3) of S. 33 is intended to give blanket protection mere proving of violation of sub-s. (3) in a complaint under S. 33-A constitutes the ground for ordering reinstatement. The contention is untenable. In the above paragraph, the Supreme Court only pointed out the distinction between sub-ss. (1) and (2) of S. 33 and sub-s. (3) of S. 33 in that the ban imposed by the first two sub-sections was only for imposing penalty for misconduct, whereas under sub-s. (3) in respect of protected workmen, the ban imposed was not only in respect of removal for misconduct, but also against termination of service otherwise than misconduct also.

26. It is true that the scope each of the sub-section of S. 33 is different. In fact there is one aspect which places sub-ss. (1) and (3) in one category and sub-s. (2) in a Separate category i.e. in cases falling under sub. s. (1) and sub-s. (3) the employer is required to secure express permission of the Tribunal or the authority concerned for making an order falling with those two sub-sections, but in a case falling under sub-s. (2) the employer is at liberty to pass an order complying with the mandatory requirements of sub-s. (2) and apply for approval. The Supreme Court in the case of The Management of Hotel Imperial, New Delhi and Others Vs. Hotel Workers" Union, held that even in cases falling under sub-s. (1) of S. 33, the management after recording a finding of guilt against a workman, could suspend the workman without liability to pay the salary and apply for permission and if permission is accorded, it would have effect from the date of the application. The position under sub-s (3) which deals with the case of protected workmen is also similar for, it also requires the taking of express permission of the authority concerned before terminating the service of protected workmen whether for misconduct or otherwise. But in cases falling under sub-s.

(2) of S. 33 the employer could impose the penalty of dismissal from service on the workman concerned by complying with the three conditions prescribed therein and apply for approval. In such a case, naturally the employer is not liable to pay wages to the workman from the date of the order. The resultant position is the distinction between an order of suspension without liability to pay salary from that date and applying for permission either under sub-s. (1) or sub-s. (3) and an order of dismissal, without liability to pay salary from that date and applying for approval under S. 33(2)(b) is only in form and not in substance.

27. Learned Counsel for the 2nd respondent pointed out that in a case falling under S. 33(2)(b) of the Act, if for any reason the workmen concerned lodges a complaint under S. 33-A of the Act, he would be in a disadvantageous position because even if it is established that the application preferred under S. 33(2)(b) is liable to be dismissed for non-compliance with the mandatory requirements of that provisions he would have to face the inquiry on merits before the Labour Court/Industrial Tribunal whereas in the same case if the workman did not choose to file a complaint under S. 33-A he would be in a better position as the application of the employer would be dismissed and as a result the workman would get automatic reinstatement into service.

28. It is true that the above anomaly pointed out by the Learned Counsel for the petitioner has come into existence. In fact on consideration of this and other anomalies in the implementation of the Industrial Disputes Act this Court has stated in the case of *Workmen of Mysore Lamp Works v. State of Karnataka* ILR 1984 Kant. 778 at 823, thus -

"Before concluding, I should observe that in the light of the multiplicity of proceedings which have been taking place viz. first under S. 33 of the Act, and again a repetition of it under S. 10 of the Act, with reference to the same dispute, the repetition of which is time consuming and purposeless, it appears to me that an amendment of S. 33 of the Act on the following lines, namely -

(i) Removing the power conferred on Conciliation Officer and thereby confining the power under the Section only on the Labour Court or Tribunal empowered to decide a reference under S.10, and

(ii) to treat an application made under S. 33 of the Act as a reference under S. 10 of the Act, as has been provided for under S. 33-A of the Act.

would result in the speedy finality of such disputes and would be in the interest of both the workmen and the employers."

It is a matter for the legislature to consider. But the existence of anomaly is no ground to hold that under S. 33-A of the Act, the Tribunal could straightway direct reinstatement, the moment the violation of sub-s (1) or (2) or (3) of S. 33 of the Act is established without going into the merits of the case when S. 33-A itself requires that such a course has to be followed as pointed out by the Supreme Court in its decisions in the cases of *Punjab National Bank*'s (supra)

and Punjab Beverages (supra).

29. For the aforesaid reasons, I answer the two questions set out first as below :

(i) Without a positive action on the part of the employer recognising a workman as a protected workman or an order made by the Conciliation Officer under Rule 62(4) of the Industrial Disputes Karnataka Rules, 1957 declaring that a workman is a protected workman, the workman could not claim the status of a protected workman.

(ii) On an application made under S. 33-A of the Act, the Industrial Tribunal/Labour Court could not make an award directing re-statement and for payment of backwages a workman, on mere proof of contravention of sub-s. (3) of S. 33 of the Act, without giving opportunity to the management to justify the termination of service of the complainant/workman.

30. I also hold that the finding recorded by the Tribunal that the 2nd respondent workman was a protected workman was based on no evidence and therefore liable to be set aside.

31. In the result, I make the following order :

(i) Rule is made absolute.

(ii) The impugned orders of the Tribunal dated 16th August, 1982 (Annexure-E) and dated 31st May, 1983 (Annexure-F) are set aside.

(iii) The Tribunal is directed to dispose of the application presented by the petitioner under S. 33(2)(b) of the Act in accordance with law.

(iv) No costs.