

(2008) 10 BOM CK 0108

In the Bombay High Court

Case No : C.A.J.W.P. No. 7153 of 2008

DHL Worldwide Express (India) Pvt. Ltd. (Now known as DHL Express (India) Pvt. Ltd.)

APPELLANT

Vs

AFL-DHL Employees" Union and Another

RESPONDENT

Date of Decision : 23-10-2008

Acts Referred:

Industrial Disputes (Bombay) Rules, 1957 — Rule 66, 66(1), 66(2)
Industrial Disputes Act, 1947 — Section 33(2), 33(3), 33(4)

Citation : (2009) 120 FLR 1090 : (2009) 2 LLJ 108

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : J.P. Cama and Neel Helekar, instructed by Haresh Mehta and Co, for the Appellant; S.K. Talsania Kiran S. Bapat and Jayesh Desai, instructed by Desai and Desai Associates, for the Respondent

Final Decision : Dismissed

Judgement

D.Y. Chandrachud, J.—An order has been passed by the Conciliation Officer on August 18, 2008 holding that the President, Vice-President and three members of the executive committee of the first respondent union whose names were communicated to the Petitioner are protected workmen u/s 33(4) of the Industrial Disputes Act, 1947 for the year 2007-08.

2. The first respondent, it is undisputed in these proceedings, is a trade union registered under the provisions of the Trade Unions" Act, 1926 and is the only union functioning in respect of the establishments of the petitioner. On June 19, 2007 the first respondent communicated to the petitioner the names of its office bearers in respect of whom, a status as protected workmen was being asserted. From the record before the Court it appears that the Conciliation Officer had held, in respect of the period between 2003 and 2007, that the office bearers of the first respondent whose names were communicated by the union to the petitioner had the status of protected workmen for the purposes of Section 33(4)

of the Industrial Disputes Act, 1947. On a communication addressed on June 19, 2007 by the first respondent, the petitioner raised its objections contending that (i) The union was not a recognized union; (ii) The five workmen were under suspension pending disciplinary proceedings; and (iii) No information was provided as to whether the union continued to be a registered union and whether the office bearers were "really office bearers as claimed". Reliance appears to have been placed on a judgment of the Delhi High Court in *Voltas Limited Vs. Voltas Employees' Union and Another*, in which it has been held that if an employer doubts whether an office bearer has not been appointed in accordance with the rules, he has a right to ask the trade union to provide him the details of the appointment of the office bearers and the manner in which they had been elected. The order of the Conciliation Officer records that the union produced all documents and furnished them to the management in respect of the holding of the meeting of the General body and of the conduct of the election in pursuance of which the five workmen were elected as office bearers for the period 2007-08.

3. The Conciliation Officer held that no dispute is pending either before the Registrar of trade unions or before a Court of law regarding the election of office bearers of the union. The first respondent is the only union functioning in respect of the petitioner. The first respondent had demanded recognition of the status of protected workmen only for five of the office bearers which is the minimum provided u/s 33(4). The Conciliation Officer emphasized that the object underlying the concept of "protected workmen" for the purposes of Section 33(3) is to prevent victimization of office bearers of a union. The Conciliation Officer held that the five workmen whose names were communicated on June 19, 2007 were protected workmen u/s 33(4) for the year 2007-08.

4. At the hearing of these proceedings, counsel appearing for the petitioner has submitted that the union had not established that the five workmen were duly and validly elected in pursuance of elections held under the Constitution of the union. According to the petitioner the workmen were elected not in the course of an Annual General Meeting that was to be held in January or February but at an extra ordinary general meeting held in the month of May 2006. On this ground, it was urged, relying on the judgment of the Delhi High Court in *Voltas Limited v. Voltas Employees' Union* (supra) that the Conciliation Officer ought to have considered the objection of the employer, but that he had failed to do so.

5. Section 33(3) of the Industrial Disputes Act, 1947 provides as follows:

33(3) Notwithstanding anything contained in Sub-section (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 proceeding; 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.

6. By and as a result of the aforesaid provision an embargo is placed on the employer, during the pendency of a proceeding in respect of an industrial dispute from altering the conditions of service of a protected workman to his prejudice or from discharging or punishing a protected workman save with the express permission in writing of the authority before which the proceeding is pending. The explanation defines who is a protected workman for the purposes of Sub-section (3). A protected workman is a workman who is a member of the executive committee or office bearer of a registered trade union connected with the establishment and is recognized as such in accordance with the rules made in that behalf.

7. Sub-section (4) of Section 33 stipulates the number of workmen who are to be recognized as protected workmen and is to the following effect:

33(4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of Sub-section (3) shall be one per cent, 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 protected workmen.

For the purposes of these proceedings what is relevant is that there has to be a minimum of five protected workmen. Another important aspect that needs to be noted is that under the explanation to Sub-section (3) the recognition of a protected workman has to be in accordance with the rules made in this behalf. Under Sub-section (4) the appropriate government is empowered to make rules for the distribution of such protected workmen amongst various trade unions.

8. Rule 66 of the Industrial Disputes (Bombay) Rules 1957 deals with protected workmen and provides as follows:

66. Protected workmen - Every trade union committee with an industrial establishment to which the Act applies, shall communicate to the employer, before the 30th September of every year, the name and addresses of such of the officers of the trade union who are employed in that establishment and who, in the opinion of the trade union should be recognised as protected workmen. Any change in the incumbency of any such officer shall be communicated to the employer, by the trade union within fifteen days of such change.

(2) The employer shall, subject to the provisions of Sub-section (4) of Section 33 recognise such workmen to be protected workmen for the purposes of Sub-section (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 of workmen recognised as protected workmen.

(3) Where the total number of names received by the employer, under Sub-rule (1) exceeds the maximum number of protected workmen admissible for the establishment under Sub-section (4) of Section 33, the employer shall recognise as protected workmen only such maximum number of workmen.

Provided that, where there is more than one 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 union 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 each union the number of protected workmen allotted to it:

Provided further, 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 trade union in any matter connected with the recognition of protected workmen under the rule, dispute shall be referred to the Conciliation Officer concerned, whose decision thereon shall be final.

9. Under Sub-rule (1) of Rule 66 the committee of each trade union is required to communicate to the employer before 30th September the names of the officers of the trade union employed in the establishment who in the opinion of the trade union should be recognized as protected workmen. Sub-rule (2) of Rule 66 is significant in that it lays down that the employer shall subject to Sub-section (4) of Section 33 recognize such workmen to be protected workmen for the purposes of Sub-section (3) and communicate within 15 days of the receipt of the names, the list of workmen recognized as protected workmen. Where the total number of names communicated is in excess of maximum number of protected workmen, the employer is duty bound to recognize only such maximum number as stipulated in law. The proviso to Sub-section (3) lays down the modalities for the distribution of protected workmen between different unions where there is more than one union. The second proviso to Sub-section (3) emphasizes that where the entitlement of a union is less than the number communicated, it is for the union to select office bearers to be recognized as protected workmen within the number permissible in law. Sub-section (4) confers upon the Conciliation Officer the power to resolve a dispute, where one

arises, between the employer and the trade union in any matter connected with the recognition of a protected workman.

10. The object which underlies Sub-section (3) of Section 33 is to protect against the victimization of office bearers and members of the executive of a trade union during the pendency of an industrial dispute. An embargo is cast upon the employer against varying the service conditions and from discharging or punishing a protected workman save with the express permission in writing of the authority before which the industrial dispute is pending. In order to claim the status of a protected workman, the workman has to be a member of the executive or an office bearer of a registered trade union connected with the establishment and recognized in accordance with the rules framed by the government. Rule 66(1) requires the union to communicate the names of the workmen in respect of whom protected status is claimed. Under Sub-rule (2) the employer is duty bound to recognize such workmen whose names have been communicated subject to the maximum number that is stipulated in Sub-section (4) of Section 33. It is no part of the duty or function of the employer to raise a dispute in regard to the validity of an election held for electing office bearers of a union. The Trade Unions Act provides a comprehensive procedure for the resolution of disputes in regard to the election of office bearers of a trade union. Insofar as the employer is concerned, he is duty bound upon the receipt of a communication under Rule 66(1) to notify the list of workmen recognized as protected workmen. The obligation of the employer under Sub-rule (2) of Rule 66 is absolute subject to the provisions of Sub-section (4) of Section 33. Sub-section (4) of Section 33 relates to the number of workmen who are to be recognized as protected workmen.

11. In the case which arose before the Delhi High Court *Voltas Limited v. Voltas Employees' Union* (supra), the employer had pleaded that since 1998 no election had taken place to the union and no returns were filed with the Registrar as required by the law. The Delhi High Court observed in paragraph 15 of its judgment that these averments of the employer were neither controverted before the Conciliation Officer nor were they refuted before the High Court. It is in this background that the High Court referred to the admitted position in the following terms *Voltas Limited Vs. Voltas Employees' Union and Another*, :

75. Thus, this is an admitted position that the names of the persons sent for being declared as protected workmen, were not duly appointed office bearers of the union, neither the trade union/respondent placed on record the rules either before the ALC or before this Court, according to which these office bearers were to be elected/appointed.

In this context, the Delhi High Court observed that if the employer had a doubt whether an office bearer had been appointed in accordance with the rules, he had every right to seek information from the trade union for, it was only appropriate that the status of a protected workman ought not to be misused. The Delhi High Court held that compliance with the rules of the union and the

appointment of office bearers in accordance with the rules is built into the provisions governing the grant of status of protected workmen.

12. In the present case as the order of the Conciliation Officer records, the facts are to be distinguished from what happened before the Delhi High Court in *Voltas Limited v. Voltas Employees' Union* (supra). In the present case, the Union produced all documents and furnished them to the management in respect of the holding of the meeting and the conduct of the election during the course of which the five workmen in question came to be elected as office bearers of the union. The objection of the employer, however, is that the election took place not in an annual general meeting which should have been held in the month of January or February but in the course of an extraordinary general meeting which was held in the month of May 2006. The objection, besides lacking any substance is one which could not have been entertained. Clause 22 of the Constitution of the union requires the general meeting to be held in the month of January or February inter alia to elect the office bearers and Clause 11 provides for the office bearers of the union. The objection of the employer that the election was held not in the month of January or February but in May and that an extraordinary general meeting as opposed to a general meeting was held is thoroughly misconceived and is only an effort to somehow evade compliance with the mandate of Section 33(3) read with Rule 66(2). It has also been urged on behalf of the union that disciplinary proceedings against the workmen have been kept pending since 2003 and the workmen have been suspended since then and it was urged that the object of the employer in contesting the grant of protected status is only to attempt to evade the requirement of seeking the permission of the authority before whom the industrial dispute is pending for the discharge of the workmen. It is not necessary for this Court to express any view in regard to the motive of the employer in contesting the proceedings. The Court is concerned with the legality of the direction issued by the Conciliation Officer in regard to the grant of status of protected workmen on the five persons who were notified. Each of the five persons continues to be a workman of the establishment. Suspension does not result in the termination of the contract of employment and fairly, the objection in that regard which was raised before the Conciliation Officer was not pressed during the course of these proceedings. The objection which has been pressed by the employer in these proceedings in regard to the validity of the election is thoroughly misconceived. The Petition shall accordingly stand dismissed.