

(2013) 01 KAR CK 0179

In the Karnataka High Court

Case No : Writ Appeal No. 1088 of 2006 (L-Res)

M/s. Fouress Engineering (India) Ltd.

APPELLANT

Vs

Fouress Engineering and The Asst. Labour Commissioner

RESPONDENT

Date of Decision : 09-01-2013

Acts Referred:

Industrial Disputes (Karnataka) Rules, 1957 — Rule 62
Industrial Disputes Act, 1947 — Section 2(s), 33(3), 33(4)

Citation : (2013) 3 AKR 94 : (2014) 141 FLR 725 : (2013) ILR (Kar) 1531 :
(2013) 5 KarLJ 382 : (2013) 2 KCCR 1747 : (2013) LabIC 2458 : (2014) LLR 592

Hon'ble Judges : N. Kumar, J;B. Sreenivase Gowda, J

Bench : Division Bench

Advocate : S.N. Murthy, for M/s. S.N. Murthy Associates and Sri. Somashekar,
for the Appellant; K.S. Subrahmanya, for C/R1, for the Respondent

Final Decision : Allowed

Judgement

N. Kumar, J.—This appeal is preferred by the Management challenging the order passed by the learned Single Judge, who has set-aside the order passed by the Assistant Labour Commissioner refusing to recognize the protected workmen as sought for by the Union. Further he has directed the Management that all the persons in respect of whom a request was made to recognize as protected workmen should be recognized. For the purpose of convenience, the parties are referred to as they are referred to in the writ petition.

2. The petitioner Fouress Engineering Karmika Sangha is a Trade Union and represents the workmen of the 2nd respondent i.e., Fouress Engineering (India) Limited since the year 1998. The petitioner approached the Management of the 2nd respondent by a letter dated 21.04.2000 seeking recognition of five workmen u/s 33(4) of the Industrial Disputes Act read with Rule 62 of the Industrial Disputes (Karnataka) Rules, 1957. According to the petitioner, there was no response from the 2nd respondent. Therefore, the petitioner approached the Assistant Labour Commissioner by letter dated 08.05.2000 seeking

intervention in the matter and to accord recognition as protected workmen to the named five employees. The 2nd respondent was notified to send their objections to the said request. They contended that there is yet another registered Union representing some of the employees and therefore five persons could not be recognized. On 02.02.2001 they filed additional objections contending that two of the five employees in respect of whom recognition is sought have been dismissed from service with effect from 27.01.2001. Hence, they should not be given a status of protected workmen. After considering the rival contentions, the 1st respondent was of the view that Sri. R. Kumaraswamy, Organising Secretary and Sri. H. Jairam, Executive Committee Member cannot be given the status of protected workmen as they have been dismissed from service. Omitting those two names, recognition was given to the remaining three names as protected workmen. Aggrieved by the said order, the petitioner preferred the writ petition.

3. The learned Single Judge, who heard the matter was of the view that on the day the representation was made, those two workmen had not been dismissed from service. If recognition had been given, it would have dated back to 1st May of the year in which the representation was made. Therefore, that cannot be a ground for refusing recognition. Therefore, he allowed the writ petition, set-aside the order of the 1st respondent and directed the Management to give recognition to those two workmen and he also held the order of dismissal to that extent would stand nullified. Aggrieved by the said order, the Management has preferred this appeal.

4. Sri. S.N. Murthy, learned Senior counsel appearing for the appellant - Management assailing the impugned order contended that for the purpose of recognition u/s 33(4) of the Industrial Disputes Act, 1947 (for short hereinafter referred to as the Act") those two persons were not workmen as defined u/s 2(s) of the Act. Therefore, the question of recognizing them as protected workmen would not arise. Consequently, he contended on the day the 1st respondent passed an order, they had been dismissed from service. Therefore, he could not have granted the recognition sought for to a dismissed employee. It runs contrary to the object of the Act. Thirdly, he contended that the Union was formed in the year 1988. On 15.06.1989 there was violence in the factory premises. The Management lodged police complaint against several workmen including the aforesaid two persons, which resulted in the jurisdictional police filing charge-sheet against those two workmen. Thereafter, Departmental Enquiry was initiated against them and Article of charge was served on 27.07.1999. When the Departmental Enquiry was in progress, to overcome the consequences of the Departmental enquiry and prevent any punishment being imposed on the said employees, on 08.05.2000 application is filed u/s 33(4) of the Act seeking recognition. Therefore, in the facts of this case, it was not a bonafide request and the Management was justified in not recognizing them as protected workmen, which action has been rightly upheld by the 1st respondent. The learned Single Judge without properly appreciating these facts committed an error in passing the impugned order, which is illegal and is required to be set-aside.

5. Per contra, Sri. K.S. Subrahmanya, learned counsel appearing for the Union contended that merely because a workman is dismissed from service, he will not cease to be a workman as defined u/s 2(s) of the Act and therefore, even a dismissed workman is a workman who can be recognized as a protected workman u/s 33(4) of the Act. The 1st respondent has rejected the claim of the Union solely on the ground that those two workmen have been dismissed from service. Forgetting for a moment on the day the request was made, they were in service, that is a crucial date, which is to be taken into consideration. That is how the learned Single Judge has set-aside the order of the 1st respondent. It is further contended that neither in the order passed by the 1st respondent nor by the learned Single Judge, there is any reference to any Criminal case being filed against these persons. Even otherwise, subsequently, the Government has withdrawn those Criminal cases and therefore, that cannot be held to be a justification for rejecting the status of a protected workmen to those two employees. In fact criminal cases were registered against remaining three persons, whom the benefit has been given and the Management has not chosen to challenge the said recognition. Therefore, he submits no case for interference is made out.

6. In the light of the aforesaid facts and circumstances, the points that arise for our consideration is as under:

- (a) Whether the recognition to be given by the Management as protected workman is automatic or do they have any discretion?
- (b) Whether the dismissed workman loses the right to be recognized as a protected workman?
- (c) Whether the Management is justified in refusing to recognize a dismissed employee or an employee against whom criminal cases are pending as a protected workman?

7. In order to answer the aforesaid questions it is necessary to look into the statutory provisions.

Point No. 1.

Sections 33(3) & 33(4) of the Act read as under:

33(3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceedings 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 proceedings is pending.

Explanation.- For the purposes of this subsection, 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 recognized as such in accordance with rules made in this behalf.

33(4) In every establishment, the number of workmen to be recognized 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 union, if any, connected with the establishment and the manner in which the workmen may be chosen and recognized as protected workmen.

Rule 62 of the Industrial Disputes (Karnataka) Rules, 1957 which deals with "Protected Workmen" reads as under:

62. 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 years, 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 recognized 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 Section 33, sub-section (4) recognize 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 recognized as protected workmen for the period of twelve months from the date of such communication.

(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, u/s 33, sub-section (4), the employer shall recognize as protected workmen only such maximum number of workmen:

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 recognized 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 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 recognized, 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.

8. The Apex Court in the case of P.H. Kalyani Vs. Air France Calcutta, has held as under:

...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 protected workman before he could claim to be a protected workman for the purpose of Section 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 u/s 33(3) of the Act is not necessary before his dismissal.

9. The Madras High Court in the case of Parthasarathy N. Vs. Blue Star Limited and Another, dealing with this recognition at para 46 has held as under:

In view of the specific language employed in Section 33 of the Act and Rule 65(2) of the Rules framed thereunder requiring specific recognition in the manner as provided for, we are of the considered view that there must be a positive action on the part of the employer to recognize the employees mentioned in the list of Union as Protected Workmen before they could claim protection guaranteed to them u/s 33 of the Industrial Disputes Act and the concept of "deemed recognition" cannot be impliedly imported into the Section to provide legislative safeguards. Unless there is a positive decision taken by the management in this regard and communicated to the trade union in writing within the stipulated time, it cannot be said the workmen have automatically acquired the status of "protected workmen" on the failure of the employer to communicate within 15 days.

10. Following the aforesaid two judgments, a Division Bench of this Court in the case of Bharat Fritz Werner Ltd., Bangalore, rep. by its Bharat Fritz Werner Ltd. and Machine Tools Manufacturers Vs. Assistant Labour Commissioner Division No. 11 and Bharat Fritz Werner Karmika Sangha, held as under:

...the High Court of Madras has taken a just view by enlarging the scope of dispute referred to in Rule 66(5) of the Tamil Nadu Rules which is similar to Rule

62(4) of the Karnataka Rules and has held that there has to be a positive action on the part of the employer recognizing the employees as "Protected Workmen" and in case if there is any failure on his part to recognise the employees, the dispute has to be decided by the Conciliating Officer. The respondent No. 1 after hearing both the parties has taken a just decision refusing to recognize the aforesaid workmen and that order has to be upheld.

11. In the light of the aforesaid judgments and on a careful perusal of the aforesaid statutory provisions, it is clear, every registered Trade Union connected with an Industrial Establishment shall communicate to the employer before 30th April every year, the names and addresses of such other Officers of the Union, who are employed in the establishment and who in the opinion of the Union should be recognized as "Protected Workmen". On such written request being made, the employer has to recognize such workmen to be "Protected workmen" for the purpose of Sub-Section (3) of Section 33 of the Act. After such recognition, the Management is under an obligation to communicate to the Union in writing, the list of workmen recognized as Protected Workmen". The said recognition has to be granted within 15 days from the date of receipt of such request. Once recognition is given, it would be valid for a period of 12 months from the date of such communication. The number of persons to be so recognized as "Protected Workmen" is five, which is maximum. If there are more than one registered Trade Union, depending upon the strength of the said Union, these "Protected Workmen" have to be distributed among such Unions. If recognition is not made within 15 days from the date of receipt of the communication, then the Union has a right to raise a dispute and seek a reference to the Conciliation Officer, whose decision thereof shall be final. Once such a status of a "Protected Workmen" is given to an employee then Sub-Section (3) of Section 33 imposes an embarkment on the employer to take any action against such "Protected Workmen" without the express permission in writing of the authority before which that dispute is pending. This is the scheme of the Act. Therefore, the recognition of a "Protected Workmen" is not automatic. Until and unless the employer recognizes the status in the manner set out in the aforesaid provisions, the employee does not get the status of a "Protected Workmen". A positive act specifically recognizing an employee as a protected workmen by the employer is the requirement of law. Therefore, the contention that once a request is made and he is a Workman as defined under the Industrial Disputes Act, the Management has no option, but to protect the workman, is without any substance.

Point No. 2

12. The workman is defined under the Act in Section 2(s). A reading of the aforesaid provision makes it clear that even a dismissed, discharged or retrenched employee falls within the definition of a workman. The argument was insofar as the dismissed, discharged or retrenched workmen are concerned, they are treated as workmen only in respect of the dispute regarding dismissal,

discharge and retrenchment and for the purpose of deciding whether a person should be given the status of a protected workmen, he cannot be treated as a workman under the Act. No such distinction could be gathered from the aforesaid provision. In Section 33 the word "Protected Workmen" is used and the workman as defined u/s 2(s) is the workman whom the said benefit is conferred. Merely because a workman is dismissed from service, he does not cease to be a workman for the purpose of Section 33(3) & 33(4) of the Act. The question whether such a dismissed workman could be recognized as a protected workman or not is altogether a different matter, but he will not cease to be a workman for the purpose of Section 33(3) & 33(4) also.

Point No. 3

13. In the light of what is stated above, when the recognition of a workman as a "Protected Workman" is not automatic, a certain amount of discretion is conferred on the employer to recognize or not to recognize a workman as a "Protected Workman". Such a discretion cannot be exercised by him according to his whims & fancies. If he chooses to recognize a particular workman as "Protected Workman" probably the employer need not give any reasons, but if he wants to deny such a right to a workman or to the Union which has made the request, there should be a sufficient cause for refusing recognition. If a workman is dismissed from service on the ground of gross misconduct, it is in the interest of the Industry and the workmen, such persons are not given the benefit or a privilege to indulge in such misconduct. Otherwise, law abiding workmen would get frustrated. Similarly, if a person is charged with a criminal offence and facing criminal trial, if such person is given the status of "Protected Workman" it only encourages people to indulge in such illegal activities. The whole object of conferring such a status of "Protected Workman" is to see that they espouse the cause of workmen while dealing with the Management without any fear of reprisal. If persons who are already indulged in such act or given the status it would send wrong signals. In those circumstances, if a Management in order to maintain Industrial peace refuses to recognize them as "Protected Workmen" they cannot be found fault with. When a Trade Union makes such a request, they should see that the persons to whom such protection is sought are law abiding workmen, who can fight for the cause of the workmen and who do not indulge in illegal activities. Therefore, a positive act specifically recognizing an employee as a protected workmen is required to be taken by the employer. There is an element of discretion vested with the employer in order to protect the interests of the industry and maintain industrial peace which is in the interest of the workforce. Therefore, the rejection of the request for granting the status of a protected workmen either on the ground that there are criminal cases pending against them or on the ground that they are dismissed from service is a good ground and such an action cannot be found fault with. In the instant case, the Union came into existence in the year 1988. On 15.6.1989 there was a strike in the second respondent-establishment. The workers were incited to strike, stop work and go slow. There was also riotous or disorderly behaviour within the

factory premises. There was intimidation, assault of workmen or staff or superior who wanted to attend the work. It is in those circumstances criminal complaints were lodged against all the five persons on whose behalf the Union made a request for the status of protected workmen. Similarly, departmental enquiry was initiated against all of them. It is after the initiation of the departmental enquiry and criminal proceedings, an application was filed on 8.5.2000 requesting for recognizing these five persons as protected workmen. If the protection sought for had been given by the Management then even if they were found guilty in the departmental enquiry, the Management could not have proceeded against them without seeking the permission of the Court, that is the object behind such request. The proceedings were concluded. Two of the aforesaid five persons were dismissed from service on 27.1.2001 on the proved misconduct. Because of the pendency of the departmental enquiry as well as criminal cases, the Management not at all considered their request in respect of all the five persons. It is in those circumstances, the Union approached the first respondent. The first respondent refused to extend the status of protected workmen in respect of the aforesaid two dismissed employees by its order dated 27.1.2001 though the said benefit was conferred on the other three persons. On the date the first respondent passed the order those two employees had been dismissed from service. It is stated that subsequently the Government has withdraw the criminal case lodged against them also. Be that as it may, it is in this background that the first respondent has refused to extend the benefit of protected workmen to those dismissed employees and the Management also refused to extend the said benefit. It cannot be said that their action is perverse or arbitrary. It is a lawful act on their part. It is also necessary to notice that the request for such recognition was made on 21.4.2000. If that request had been granted it would be in force from 1.5.2000 to 31.4.2001. That period is over. Therefore, the learned Single Judge on 1.6.2006 was not justified in setting aside the order passed by the first respondent on the ground that the order of dismissal being subsequent to the date of application, that would not come in the way of they getting the benefit of status of protected workmen. He proceeds on the basis that when once such request has been made, the Management has no option but to grant the said recognition, which is not the correct legal position. Therefore, the order passed by the learned Single Judge is contrary to law declared by the Apex Court as well as this Court and cannot be sustained.

Hence, we proceed to pass the following:-

ORDER

The appeal is allowed. The order passed by the learned Single Judge is hereby set aside. Parties to bear their own costs.