

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 20th December, 2012

+ **LPA No. 743/2004**

% **BATRA HOSPITAL & MEDICAL RESEARCH
CENTRE**

....Appellant

Through: Mr. A.K. Singla, Sr. Adv. with Mr.
Mridul Gupta, Adv.

Versus

BATRA HOSPITAL EMPLOYEES' UNION Respondent

Through: None.

CORAM :-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. This Intra-Court appeal impugns the judgment dated 19th May, 2004 of the learned Single Judge of this Court dismissing W.P.(C) No.7748/2002 preferred by the appellant. The said writ petition was filed impugning the order dated 10th October, 2002 of the Assistant Labour Commissioner allowing the application of the respondent no.1 Union and declaring the respondent no.3 Shri Vijay Singh as 'protected workman' for the period 30th April, 2002 to 10th May, 2002 and certain other workmen (who though have not been individually impleaded as parties to the writ petition or this appeal) as 'protected workmen' for the year 2002-2003.

2. Notice of this appeal was issued and vide order dated 4th August, 2004 the operation of the order dated 10th October, 2002 of the Assistant Labour Commissioner stayed. The appeal was admitted for hearing on 15th

November, 2006 and the interim order dated 4th August, 2004 made absolute. We have heard the counsel for the appellant. None has appeared for either of the respondents.

3. The respondent no.1 Union had filed the application aforesaid before the Assistant Labour Commissioner on 6th March, 2002 for declaring respondent no.3 Shri Vijay Singh, the President of the respondent no.1 Union and certain other office bearers of the respondent no.1 Union as 'protected workmen', pleading, that it was a recognised Union and had submitted a Demand Letter dated 16th January, 2002 to the appellant for recognising respondent no.3 Shri Vijay Singh and other office bearers as 'protected workmen' but the appellant had not initiated any action on the said Demand Letter and thus the application for declaring them as 'Protected Workmen' for the period 30th April, 2002 to 30th April, 2003, had been necessitated.

4. The appellant contested the aforesaid application *inter alia* on the ground that the services of the respondent no.3 Shri Vijay Singh had already been terminated w.e.f. 10th May, 2002.

5. The Assistant Labour Commissioner vide order dated 10th October, 2002 found that the respondent no.1 Union was registered with the Registrar of Trade Unions and after rejecting the other technical objections taken by the appellant, declared respondent no.3 Shri Vijay Singh as a 'protected workman' up to 10th May, 2002 and the other office bearers of the respondent no.1 Union as 'protected workmen' for the year 2002-03.

6. That it appears that the appellant, after dismissing the respondent no.3 Shri Vijay Singh from services on 10th May, 2002, filed an application under Section 33(2) (b) of the Industrial Disputes Act, 1947 (ID Act) seeking approval of the order of dismissal. However during the pendency of the writ petition from which this appeal arises, the proceedings in the said approval application under Section 33(2) (b) were stayed. It further appears that pursuant to the order dated 10th October, 2002, prosecution of the officers of the appellant under Section 31 of the ID Act was also initiated. The said prosecution was also stayed during the pendency of the writ petition.

7. The contention of the appellant in the writ petition as well as before us was/is that the Assistant Labour Commissioner, as on 10th October, 2002, could not have declared the respondent no.3 Shri Vijay Singh as a 'protected workman', when he, prior thereto on 10th May, 2002, had already been dismissed from service/employment.

8. The learned Single Judge, in the impugned judgment, relying on the judgment of the Division Bench of the Gujarat High Court in ***R. Balasubramanian Vs. Carborandum Universal Ltd.*** LLJ 1 1978 432 and on the judgment of this Court in ***Sunder Lal Jain Hospital Karamchhari Union (Regd.) Vs. Government of Delhi*** 95 (2002) DLT 640 has held, (i) that an employer, on failing to comply with the mandatory obligation of Rule 61 of the Industrial Disputes (Central) Rules 1957, cannot escape its statutory obligation; (ii) that the respondent no.3 Shri Vijay Singh was a 'protected workman' for the year preceding 2002-03 also; (iii) that the respondent no.1 Union had on 16th January, 2002 sought status *inter alia* of

the respondent no.3 Shri Vijay Singh as a 'protected workman' for the period 30th April, 2002 to 30th April, 2003 also; (iv) that the appellant had not communicated any objection to the said Demand Letter of the respondent no.1 Union within 15 days of the receipt of the notice dated 16th January, 2002; (v) that if the request/demand for declaration as 'protected workman' is not responded by the employer within 15 days of receipt of Demand Letter , it may be deemed that the workmen mentioned in the application begin to enjoy a protected status; the respondent no.3 Shri Vijay Singh was thus entitled to enjoy a protected status w.e.f. 30th April, 2002; and, (vi) that the employer cannot by merely delaying the response to the application, frustrate the object underlying Section 33(4) of the ID Act.

9. The senior counsel for the appellant has taken us through Rule 61 which reads as under:-

"61. 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 section 33, sub-section (4) 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

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, under section 33, sub-section (4), the employer shall recognise 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 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 any Regional Labour Commissioner (Central) or Assistant Labor Commissioner (Central) concerned, whose decision thereon shall be final."

10. Section 33(1) of the ID Act prohibits an employer from, during the pendency before the Conciliation Officer or before the Industrial

Adjudicator of proceedings in respect of an industrial dispute, punishing any workman concerned in such dispute for any 'misconduct connected with the dispute' save with the express permission in writing of the Authority before which the proceeding is pending. Section 33(2) requires an employer to obtain approval of any punishment meted out to the workman 'for misconduct not connected with the dispute' also. However as far as the 'protected workmen' are concerned, Section 33(3) provides for permission in writing before meting out any punishment for a misconduct not connected with the dispute also. It would thus be seen that 'protected workmen enjoy a special status under the Act. If the respondents no.3 Shri Vijay Singh were to be a 'protected workman', then under Section 33(3) of the Act, the appellant could not have dismissed him from service without the prior express permission in writing of the Labour Court/Industrial Adjudicator. However, if he were not to be a 'protected workman', only post facto approval of the disciplinary action is required to be taken under Section 33(2). This is the significance of the present dispute.

11. The core of the contention of the senior counsel for the appellant is that once a workman already stands dismissed from service, he cannot under Rule 61(4) be declared as a protected workman.

12. We however fully endorse the view taken by the learned Single Judge and do not find any merit in this appeal. The respondent no.1 Union had vide its letter dated 16th January, 2002, in compliance of Rule 61(1) supra, communicated to the appellant the names of its officer bearers including the respondent no.3 Shri Vijay Singh and who in the opinion of the respondent no.1 Union were sought to be recognised as 'protected workmen'. The

appellant, as employer, was in accordance with Rule 61(2) required to, within 15 days of the receipt of the letter dated 16th January, 2002 supra, recognise the workmen mentioned therein including respondent no.3 Shri Vijay Singh as 'protected workmen'. (The receipt by the appellant of the said letter dated 16th January, 2002 is not in dispute. It was not disputed by the appellant in the reply filed before the Assistant Labour Commissioner). The appellant however did not do so; rather the appellant chose to remain quiet. Due to such an attitude of the appellant, of neither, within 15 days of the letter dated 16th January 2002, recognising the workmen mentioned therein as 'protected workmen' nor controverting the same, the respondent no.1 Union deemed it to be a dispute within the meaning of Rule 61(4) and filed the application as aforesaid before the Assistant Labour Commissioner on 6th March, 2002.

13. The appellant before the Assistant Labour Commissioner did not dispute that the respondent no.3 Shri Vijay Singh or the other workmen who were sought to be recognised as 'protected workmen', were employed in that establishment or were the officers of the Union. Thus the communication dated 16th January, 2002 was in accordance with Rule 61(1). The said Rule does not appear to suggest that the employer otherwise has any right to contest the opinion of the Union as to who should be recognised as 'protected workmen'. The only grounds available to the employer to contest such opinion of the employer appear to be those mentioned in Rule 61(3) and the provisos thereto, viz, that the number of workers sought to be recognised as 'protected workmen' is more than that admissible under Section 33(4) of the Act or that there are more than one recognised trade

union and that the number of workers sought to be recognised as ‘protected workmen’ by that union are more than the share of that union. However, a reading of the entire Rule 61 is indicative of the employer being required to intimate such objections within 15 days of the receipt of the communication under Rule 61(1). The appellant before the Assistant Labour Commissioner also did not raise any objection within the ambit of Rule 61(3). The objection of the appellant before the Assistant Labour Commissioner, was only that the respondent no.3 Shri Vijay Singh could not be recognised as ‘protected workman’ for the year from 30th April, 2002 to 30th April, 2003 because the appellant had removed him from service, before filing the reply before the Assistant Labour Commissioner on 10th May, 2002. The question which thus arises for consideration is, if the employer within 15 days of receipt of communication under Rule 61 (1) from the Union does not recognise the workmen to be ‘protected workmen’, whether the workmen so mentioned in the communication can be deemed to be ‘protected workmen’ or acquire the status of ‘protected workmen’ only upon the Union raising a dispute under Rule 61 (4) and the Assistant Labour Commissioner rendering decision thereon.

If it were to be held that the status as a ‘protected workman’ in such an eventuality is acquired only on decision by the Assistant Labour Commissioner, axiomatically a person who has been dismissed from service and has thus ceased to be a workman under that employer cannot by the order of the Assistant Labour Commissioner be conferred any protection under that employer.

14. We may at the outset notice that if it were to be held that conferment of the status as a ‘protected workman’ is dependent upon the recognition by the employer and in the absence of such recognition upon the decision of the Assistant Labour Commissioner then the natural corollary thereto would be that the employer will have an option to inspite of receipt of communication of receipt under Rule 61 (1) not recognise the workmen mentioned therein as protected workmen and to at any time before the Assistant Labour Commissioner declares them so, dismiss them from service, making the entire exercise under Rule 61 infructuous. To say the least, such an interpretation appears to us to be preposterous and unacceptable

15. We however find a diversity of judicial opinion on the subject.

16. Notice may first be taken of the dicta of the 5 judge bench of the Supreme Court in *P.H. Kalyani v. Air France Calcutta* AIR 1963 SC 1756 on which reliance has been placed in numerous judgments of the High Courts. The Supreme Court in that case was concerned not with the extant rules but with the rules framed by the Government of West Bengal as to the recognition of ‘protected workman’. Further in that case, the employer on receipt of communication from the Union had in its reply pointed out certain defects. The Labour Court however held that “ there must be some positive action on the part of the employer in recognition of an employee as a ‘protected workman’ before he could claim to be a protected workman for the purpose of Section 33”. All that the Supreme Court observed after noticing the order of the Labour Court was, “ nothing has been shown to us against this view”

17. However a Division Bench of the Gujarat High Court in ***Carborandum Universal Ltd*** supra, after noticing ***P.H. Kalyani*** held that if the employer fails to reply in the prescribed time, the conclusion would be inescapable that the employer's default was from oblique considerations and his failure to communicate the list of the recognition of the 'protected workmen' would lead to the necessary inference of recognition. It was yet further held that there could be no *bona fide* dispute to be resolved in such cases. Relying on observations of ***Denning, L.J., in Seaford Court Estates Ltd. v. Asher*** [1949] 2 All ER 155 that when a difficulty appears in a legislation, a Judge cannot simply fold his hands and blame the draftsman but must set to work on the constructive task of finding the intention of Parliament and then supplementing the written words so as to give 'force and life' to the intention of Legislature, it was held that once the Union had communicated the list of workers whom it sought to be recognised as 'protected workmen', the employer can refuse to recognise them only if he can bring the case within the statutory grounds (as are mentioned in Section 33(4) of the ID Act and in Rules 61 supra) and when the employer does not within 15 days raise such dispute, deemed protection comes into being.

18. A Single Judge of the Bombay High Court however in ***Air India Limited Vs. Indian Pilots Guild*** MANU/MH/1028/2004 inspite of noticing the judgment of the Division Bench of the Gujarat High Court in ***Carborandum Universal Ltd*** and the judgment of the Single Judge impugned in this appeal (holding that on failure of the employer to communicate the decision within 15 days the workman whose names/particulars are communicated by the Union, are deemed to be

protected) disagreed with the same and held that deemed recognition can only be there if there is a specific provision in the Act or if otherwise on a reading of the provisions it can be implied that there is a deemed recognition; it was held that Section 33(4) does not provide for deemed recognition and the Rules require the employer to within 15 days of receipt of the communication recognise the workman; the same was held to be not leading to the inference that there is a deeming provision by which workman can be treated as duly protected merely on the failure of the employer to communicate its decision to the Union; it was further held that the ID Act having not provided so, the Rules which are a subordinate legislation could not provide so; it was yet further held that not only do the Rules require a positive act on the part of the employer to grant recognition but also in the event of dispute and which would include a failure of the employer to communicate its decision, the Assistant Labour Commissioner to decide the matter – the same was held to be indicative of the absence of any deeming provision. Reliance was placed on the judgment of the Apex Court in *P.H. Kalyani* and it was observed that had the Apex Court found such a deeming provision it would not have held the positive act on the part of the employer of recognition to be necessary. Reference was also made to the judgment of the Karnataka High Court in *M/s Canara Workshops Vs. Presiding Officer* (1986) 1 LLJ 181. However, having held so, the Bombay High Court further held that considering the object for which protection is given, the decision of the Assistant Labour Commissioner under Rule 61(4) of granting protection will relate back to the date of the communication of the Union under Rules 61(1).

19. In *Voltas Limited Vs. Voltas Employees' Union* 136 (2007) DLT 450 a Single Judge of this court held that the employer has a right to ensure that the status of 'protected workmen' is being sought for by genuine persons and the shield of 'protected workmen' is not sought to be misused; hence a trade union cannot refuse to provide the information to the employer as to how the office bearers have been appointed and simultaneously seek the status of 'protected workmen' for office bearers. It was further held that there is no presumption that once the names of office bearers are sent for being declared as 'protected workmen', the persons have been rightfully appointed as office bearers.

20. A Division Bench of the Karnataka High Court in *Bharat Fritz Werner Ltd. Vs. Assistant Labour Commissioner Division No. 11* MANU/KA/0023/2011 also, relying on the judgment of the Supreme Court in *P.H.Kalyani* held that before a workman can claim to be a 'protected workman', there must be some positive action on the part of the employer recognising that worker as a 'protected workman' and unless there is a positive decision taken by the employer and communicated to the Union within the stipulated time, it cannot be said that the workman has automatically acquired the status of 'protected workman'.

21. The Division Bench of the Madras High Court in *Parthasarathy N. Vs. Blue Star Limited* MANU/TN/1550/2009 after noticing the judgment of the Gujarat High Court in *Carborandum Universal Ltd* and the judgment of the Supreme Court in *P.H. Kalyani* and the judgment of the Karnataka High Court in *Canara Workshops Ltd* held that since Section 33 of the ID Act does not provide for any deeming recognition and rather states that

recognition has to be accorded in the manner as provided in the Rules, the subordinate legislation cannot create a deeming status.

22. A Division Bench of the Kerala High Court in ***H.L.L. Lifecare Ltd. Vs. Hindusthan Latex Labour Union*** MANU/KE/2040/2010 was faced with the question whether a Union is entitled to nominate a person against whom disciplinary proceedings are pending, basically to give him immunity from punishment under Section 33(3), without prior approval of the Authority before which the proceedings are pending and held that though the selection of office bearers of the Union for declaration by the management as ‘protected workmen’ is within the exclusive discretion of the Union but the employer is not bound to approve the list of names forwarded by the Union and it is up to the employer to consider whether any of the office bearers nominated by the Union is undesirable or ineligible for recognition and if they find so for valid reasons, they are free to reject the nomination of such office bearers and that if the management declines to recognise any office bearer as ‘protected workman’, it is for the Union to either contest the same by raising a dispute under Rule 61(4) or to send the name of other office bearers for recognition as ‘protected workmen’. It was yet further held that pendency of disciplinary proceedings can constitute a sufficient ground for the employer to refuse recognition as a ‘protected workman’ and the Union cannot exercise its powers under Rule 61(1) to give immunity to an employee against whom disciplinary proceedings have already been initiated by the employer.

23. Notice may finally be taken of another judgment of a Single Judge of this Court in ***Moolchand Khairati Ram Hospital and Ayurvedic Research***

Institute Vs. Vijender Singh MANU/DE/1046/2011, where, relying on *Sunder Lal Jain Hospital Karamchari Union (Regd.)* and the judgment of the Single Judge impugned in this appeal it was held that the onus is on the employer to respond within 15 days and if no response is sent by the management within 15 days of receipt of communication under Rule 61(1) deemed recognition as ‘protected workmen’ comes into play.

24. We may also mention that a Division Bench of the Calcutta High Court in *The Statesman Limited Vs. First Industrial Tribunal, West Bengal* MANU/WB/0952/2011 though without noticing *P.H. Kalyani* but following *Carborandum Universal. Ltd.* held that it is the duty of the employer to give reply to the Union within 15 days of the receipt of the names of the workmen sought to be protected and if the employer does not raise any objections or replies to the letter, the employer waives any right to raise any objection in respect of such declaration by the Union under the statutory Rules of the ‘protected workmen’.

25. A Division Bench of the Andhra Pradesh also in *Andhra Pradesh State Road Transport Corporation, Musheerabad, Hyderabad Vs. Mr. B. Samuel* MANU/AP/0708/2012 relying primarily on *P.H. Klayani* held a positive action of recognition by the employer to be mandatory.

26. It will thus be seen that while this Court and the High Courts of Gujarat and Calcutta have held that upon the employer maintaining a quietus after the receipt of communication under Rule 61(1), the workmen sought to be recognised as protected are deemed to have been so recognised, the High Courts of Karnataka, Madras, Kerala, Bombay and Andhra

Pradesh have held that there is no such deemed protection and if the employer maintains a quietus the only remedy of the Union is under Rule 61(4) supra, and till a decision under Rule 61(4) is taken, the workmen sought to be recognised as protected do not get the status of ‘protected workmen’. The Bombay High Court however has held that once such a decision is taken, the recognition dates back to the date of the communication under Rule 61(1).

27. A Division Bench of the Bombay High Court in ***Perfect Machine Tools Co. Ltd. Vs. State of Maharashtra*** MANU/MH/0202/2008 held that it is a settled canon of law that the legislature is quite competent to create the legal fiction or to enact a deeming provision and such legal fiction can be enacted without using express words. Mention may also be made of ***Commissioner of Income-Tax, Madras v. Urmila Ramesh*** AIR 1998 SC 2640 where also even though the word “deemed” was not used but a legal fiction was held to be created. Finally reference may be made to ***Union of India v. M/s. Jalyan Udyog*** AIR 1994 SC 88 where the contention that legal fiction can be created only by legislature and not by executive was not accepted and the government while exercising powers conferred by the Parliament was held to be empowered to create such a fiction. The Explanation to Section 33(3) of the ID Act defines ‘protected workman’ as one recognised as such “in accordance with Rules made in this behalf”. We fail to find any limitation therein on the rule making authority i.e. the Central Government, preventing it from providing for recognition as a ‘protected workman’ by a deeming provision. Rule 61 in Sub-Rule (3) limits the objections which the employer can raise to the workman for

whom protection is sought by the Union. Sub-Rule (4) by use of the word “dispute” as distinct from the words “where an employer fails to recognise” is indicative of the need for approaching the Assistant Labour Commissioner arising only when disputes within the domain of Sub-Rule (3) arise and not when the Union seeks recognition and the employer maintains quietus and does not raise any objection within the meaning of Sub-Rule (3). It was so held by the Supreme Court in ***Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority*** (1998) 2 SCC 338 by construing the word “dispute” under the Arbitration Act, 1940. It cannot be held that when the employer neither recognises as required to under Rule 61(2) nor raises a dispute as envisaged under Rule 61(3), there will be no protection and thus no need of prior approval under Section 33(3). Such an interpretation would give upper hand to the employer and take away the statutory benefits conferred by the legislature on the workers.

28. The purpose of providing a special protection to the office bearers of the workmen’s Union is to enable them to take up the workmen’s issue with the employer without any fear of a personal vendetta by the employer against them. Without such special protection, a workman would be hesitant to take up the position of an officer of the workers’ Union for the fear of being targeted by the employer and which would be antithesis to the Union as well as to the workers’ interest. It is for this reason that the legislature deemed it appropriate to grant special protection to the officer bearers of the workers’ Union under Section 33(3).

29. The protection aforesaid is only for an year. If Section 33 and Rule 61 were, notwithstanding the use of word “shall” in Rule 61(2) requiring the

employer to within 15 days of receipt of communication under Rule 61(1) to communicate to the Union the workmen so recognised, were to be held as giving an option to the employer to not comply therewith and without suffering any consequences, it would in our opinion defeat and set at naught the very purpose of protection. The employer then, after knowing of the officers of the Union and to prevent them from taking up issues on behalf of the workers, instead of recognising them as protected, would victimize them. Even if the Union in such a situation were to approach the Assistant Labour Commissioner under Rule 61(4), judicial notice can be taken of the time generally taken in such decision and by which time the period of one year of protection may lapse. An interesting discussion in this regard can be found in *Rodhee, Laxmi Prasad, Pardeep and Chhote Lal Vs. Govt. of Delhi* 2003 II LLJ 5 Del of the same learned Single Judge who had authored *Sunder Lal Jain Hospital Karamchari Union (Regd.)* and where it was observed that no purpose would be served in protecting the labour leaders if the management were to be free to terminate their services and it was reiterated that where no response to communication under Rule 61 (1) is made by the employer within 15 days approval should be deemed to have been accorded.

30. In the facts of the present case, even though the appellant had not responded but the respondent Union still treating it as a dispute approached the Assistant Labour Commissioner under Rule 61(4). The decision of the Assistant Labour Commissioner has necessarily to be held to be declaratory and dating back to the date of communication under Rule 61 (1) and cannot be held to be conferring the protection from the date of the decision. In this

respect we are one with the Bombay High Court. The protection contemplated is for the full year commencing from 30th April and the term of the protection cannot be reduced as would be the consequence if it were to be held from the date of the decision of the Assistant Labour Commissioner.

31. Thus the removal of the workman, after he has been notified under Rule 61(1) as protected and before the decision of the Assistant Labour Commissioner would be of no avail.

32. It axiomatically follows that the appellant before removing the respondent was required to obtain the prior approval under Section 33(3).

The appeal is therefore dismissed. The respondent having not contested the appeal, no cost.

RAJIV SAHAI ENDLAW, J

CHIEF JUSTICE

DECEMBER 20, 2012

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