PROTECTED WORKMEN UNDER INDUSTRIAL DISPUTE ACT

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ABSTRACT

The purpose of this paper is to shed light on the protected workmen under section 33 of the Industrial Disputes Act. The paper seeks to define protected workmen and how they are recognized under the law. It further states the object and purpose of this privilege granted to certain workmen. It then highlights various myths that are assumed by the trade unions about the meaning and scope of "protected workmen "and then attempts to underline the actual realities about the extent and scope of the rights provided to these workmen.

INTRODUCTION

The law has granted protection to some officials of the trade unions connected with the establishments during the pendency of the proceeding under the Industrial disputes Act. Such official is given protection against any action being taken by the employer against him, which amounts to prejudicial alteration in the service condition or any punishment[1]. Section 33(3) deals with the cases of '**protected workmen'** and incorporates cases of alternation of conditions of services or orders of discharge or dismissal proposed to be made to cases falling under section 33(1).

The phrase "**protected workmen**" is conceived by the legislature as the person who takes the onerous task of fighting for the rights of their fellow workers[2]. In order to protect them from being the target of the employer and to save them from the pressure by the management, the parliament enacted section 33 and gave them immunity.

The section acts as a ban imposed on the rights of the employer to take action against such official in the same manner as under section 33(1).

Section 33 does not take away any existing right of the management, it only requires them to submit its action for the scrutiny in the court in the form of an application for approval to an action taken against such workmen.

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[1] H.L. Kumar, *Labor Problems & Remedies* 201 (Universal Law Publishing, 2010). Also The Dharangadhra Chemical Works vs I.G. Thakore (AIR 1963 Guj 283)

[2] Sunder Lal Jain Hosiptal Karamchari union v govt of india (WP 760 of 2000)

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"*A protected workman enjoys immunity against being dismissed or discharged while the adjudication or conciliation proceedings relating to an industrial dispute are pending between the workmen and the employer*"[3].

Explanation to section 33(3)[4] defines protected workman as *"any workman who is a member of the executive or other office bearer of a registered trade union*"[5].

Under this subsection, a person gets protection of immunity only when certain conditions are fulfilled. Firstly, he should be workman of the establishment concerned. Secondly he must be an officer of trade union registered under the trade unions act, 1926 connected with the establishment. Thirdly the employer must recognize his status as an officer of the registered trade union in accordance with the rules framed by the appropriate government[6].

OBJECT AND PURPOSE OF SECTION 33

The courts in number of cases have highlighted the reasons for the blanket protection of the 'protected workman'. In *Gyanendra Mani Tripathi v Hindustan Aeronautics ltd*[7] it was stated that "*the legislature appears to be anxious, for the interest of healthy growth and development of trade union movements, to ensure for such a workman complete protection against every action or order of discharge or punishment for his special position as an officer of a registered trade union recognized as such in accordance with rules made in that behalf*".

The parliament had realized that an employer and an employee have competing and conflicting aspirations and therefore in the event of conflict between them, the protection is necessary for a workman.

A three judge bench of the Supreme Court in the case of *Air India v V.A. Rebellow*[8] has observed that this section is enacted '*to protect the workmen against the victimization or unfair labour practices consistently with the preservation of the employers bonafide right to maintain disciple and efficiency in the industry for securing maximum production in peaceful, harmonious atmosphere'*.

This section ensures that pending proceeding are brought to expeditious termination in a peaceful atmosphere undisturbed by subsequent cause tending to exacerbate the already strained relationship between the workman and the employer. It further enables the workman

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[3] Union of India v Rajasthan Annushakti Karamchari union Rawatbhata (1997 Lab IC 155)
[4] Explanation to section 33(3):- Explanation.-- For the purposes of this sub- section, a" protected workman", in relation to an establishment, means a workman who, being 1 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.
[5] S.C Brothers, Bombay v Sarva Shramik Sangh (1996) 74 FLR 2461. Also see DHL Worldwide express (India)(P) Ltd v AFL Employees union
[6] Dr. H.K. Saharay, *Textbook on Labour & Industrial Law* 349 (New Delhi: Universal Law Publishing, 2011)
[7] 1976 Lab IC 234
[8] AIR 1972 SC 1343

to have collective bargaining strength to countenance the unwarranted victimization and give a fillip to collective bargaining power with their employer. It also gives a protection to act without fair to raise legitimate demands on behalf of the worker before the employer and ensures that they are not at a disadvantage only because they had been elected as office bearers of trade union[9].

RECOGNITION OF PROTECTED WORKMEN

Section 33(4)[10] states that in every establishment the number of protected workmen must be one percent of the total number of workmen subject to a minimum of five and a maximum of one hundred. It further empowers the appropriate government to make rules for choosing and recognizing the protected workmen and their distribution among various trade unions in the establishment.

As per Rule 61[11] of the central rules, every registered trade union must communicate the names and addresses of office bearers to be recognized for this privilege by 30 April every year.

There has to be positive action, on the part of the employer i.e the employer has to sent his confirmation in regard to the recognition of an employee as a protected worker before he can claim to be a protected workman for the purpose of section 33[12].

As per rule 61, the management is bound to declare the list of protected workmen within 15 days after the letter of the union[13] but it is held by courts that mere failure on the part of employer to communicate within 15days would not lead to deem recognition unless there is a specific provision in the standing order[14] but a union always have right to approach labour officer on the failure of the employer to give recognition within the given time period[15].

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[9] Voltlas *limited v voltas employees union* (2007) 6 SLR 752(Del)

[10] Section 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.

[11] Rule 66(1):- (1) Every registered trade union connected with an industrial establishment, to which the Act applies, shall communicate to the employer before the 1[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.

[12] P.H. Kalyani v Air France, Calcutta (AIR 1963 SC 1756)

[13] Batra Hospital and medical research centre of Ch. Aishi Ram Batra Charitable trust v Batra Hospital employees union (2004) SCC OnLine Del 389

[14] Air india ltd v indian pilots guild 2005 (3) BomCR 405

[15] Blue start ltd v presiding officer, industrial tribunal (2006 SCC OnLine Mad 739)

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However the above law was challenged and now a wider right is given to the union. Supreme Court has held that if management fails to response to the notice of the union within the statutory period of 15 days, it gives deemed status of protected workman to the members mentioned by the union for recognition and the management later cannot argue. They can only later challenge if they prove that workman in the list was not bound to get this privilege[16].

Further, if there is only one name sent for recognition then there is no question of waiting and such a workman is bound to accept for the privilege[17].

In every establishment, the maximum number of protected workmen differs but if there is more than one union, then every union must be represented in a way that each union has representation in proportion to the membership of the unions. Nonetheless this protection is not only limited to the unions recognized by the management but also is equally available to every registered trade union associated with the establishment[18].

MYTHS AND REALTIES ABOUT PROTECTED WORKMEN

The term "**protected workman**" has now become a matter of confusion along the trade unions as well as the management. They do not give a correct appreciation of the meaning under the law and rather assumes a much wider scope for this privilege than what is actually provided in law. Trade unions tend to use this advantage for a variety of purposes and often get way with downright misuse of this privilege provided to them under the law[19].

Firstly there is a common misunderstanding that Section 33 provides an '**absolute protection'** for protected workmen, who enjoy immunity against being discharged or dismissed while adjudication/conciliation/arbitration is pending and no punishment in disguise can be given to such workmen.

Under law, this section does not give *'absolute freedom'* to a protected worker to get away with anything he or she does, during the period of such status. The Supreme Court[20] has held that, an employer has an implied right to suspend during the pendency of proceedings but the workmen would be granted with wages for suspension period[21]. However this implication is subject to the standing orders providing for suspension without pay for a limited period or not providing for suspension at all[22].

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[16] moolchand khairati ram hospital & ayurvedic research institute v Vijender singh WP(C) No.11851/05
[17] Divisional controller MSRTC v Conciliation Officer (1993 SCC OnLine Bom 175)
[18] E.I. Ravindranath, *Industrial Relations in India: A Practitioner's Handbook 136 (*New Delhi: Tata McGraw-Hill Education, 2013)
[19] ibid at page 136
[20] Kesoram cotton mills ltd v Gangadhar (AIR 1964 SC 708)
[21] Fakirbhai Fulabhai Solanki v Presiding Officer (1986 3 SCC 131)
[22] Sasa Musa Sugar works (P.) Ltd v Shobrati Khan (AIR 1959 SC 923)

Further if the employer notes any misconduct against protected workmen, establishment is free to initiate disciplinary proceedings even during the pendency of an industrial dispute with the express permission in writing of the authority before which the proceeding is pending[23].

Secondly, section 33(4) provides that only a certain percentage of workmen are required to be recognized as protected workmen for the purpose of section 33(3). The number of protected workmen shall be one percent of the total no of workmen employed in the establishment, subject to a maximum of one hundred. Thus it has been debated that there is a **'wide extent of discretion provided to the employer'** to choose the workmen for the grant of this privilege.

As per Rule 61 of the central rules[24], it is the union who makes it choice of 'protected workmen' and communicates it to the employer on or before[25] 30th April every year and Rule 66(1) casts a mandatory obligation on the employer to recognize all those workmen as 'protected workmen' mentioned by the union subject to the statutory provisions made in section 33(4). In view of language in Rule 66(2), the employer can only refuse to recognize such workmen if he can bring his case within the statutory grounds provided in section 33(4)[26]. Therefore it is not the employer but the union who chooses the office bearers among with trade union and gives a list of such office bearers to the employers for the recognition. The moment a communication is sent by trade union, it becomes obligatory on the part of the employer to recognize the workmen and give a written reply to the trade union[27].

Only when workmen elected as office bearers accidently happens to be more than one percent of the total number of workmen, the decision comes upon the employer. But again the advantage is given to union instead of the employer, because even when the employer chooses from the list to the extent of one percent, the chance to object is again given to the trade union in front of labour commissioner. Nonetheless if the list contains the exact number of office bearers to be recognized, the employer is bound to accept the list without any deliberation.

The management can only consider whether any of the office bearer nominated by the union is undesirable or ineligible for recognition. As per the Supreme Court, the management has a right to call for records of the union to ascertain the manner in which workmen who are sought to be declared as protected have been elected, selected or otherwise appointed as office bearers of the registered trade union[28]. And only if they find a valid reason, they can reject the nomination of such office bearer[29]. For instance, the management is given right to reject if there is any criminal cases pending against such official or any other good ground[30].

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23 Batra Hospital And Medical v Batra hospital employees union (2005 (1) SLJ 235 Delhi)
24 Supra note 9
25 S.C. Brothers v Sarva Shramik Sangh (WP No 1374 of 1996)
26 R Balasubramanian v Caebarandum Universal Ltd (1978) 1 LLJ 432.
27 Canara Workshops v Presiding officer (1986 1 LLJ 181)
28 Supra note 7
29 Hll Lifecare Ltd vs Hindustan Latex Labour Union (2010) WA. No. 1171 of 2010.
30 Fouress engg (India) Ltd v Fouress Engg. Karmika Sangha (2013 SCC OnLine Kar 7)

If the management declines to recognize any office bearer as protected workman, it is again for the union to either contest the same by rising a dispute before the labor commissioner as provided under rule 61(4) of the central rules or the union can send the name of another office bearer for recognition. Thus the management is only given minimum reasonable rights and not discretionary rights to ensure that a genuine person seeks the status of protected workmen and the shield of protected workmen is not misused.

Thirdly, Trade unions usually force the idea that '**once given the privilege, it will remain with the workmen till their employment with that establishment"** and hence a protected workman cannot be dismissed, terminated or transferred.

However as a reality the protection is available to protected workmen only during the pendency of the proceeding. The privilege goes with the conclusion of the proceeding, which includes the stages of conciliation, adjudication and arbitration.

The protection is only given for a period of 12 months by the management and the trade union has to apply as per the state rules every year. The courts in number of cases have stated that the "protection extended to a protected workman does not stand indefinitely even by the reason of the fact that that the employer has filled an application seeking permission of the concerned forum to impose penalty on the protected workman. The status of protected workman is limited to the period specified in the rules.[31]" Thus, there is no objection upon the employer-imposing penalty on a protected workman who was a protected workman and has now ceased to such workman.

Lastly there is also an underlying assumption, which the trade unions believe that **'all members of their executive committee and their office bearers ought to be granted the privilege of section 33'**. Firstly there is a limitation as to the number of workmen who can be granted the status of protected workmen by the management. A management is not permitted to recognize more than the number provided under the industrial dispute act[32]. Even after the union sends the list to the management for recognition of protected workmen, employer is entitled to decline much recognition to the person nominated by the union, if there is any disciplinary proceeding pending against such workman. But before rejected the name of a particular workman, the employer is bound to inform its intention within 15 days, failing to which it will be presumed that the establishment has no objection in the personal furnished by the union[33]. Therefore section 33 is not a blanket protection, which must be granted to all office bearers.

CONCLUSION

Thus, immunity of protected workmen under section 33 has become a very confusing, controversial and contentious issue. The false assumptions by the trade unions about the

[31] T Natarajan v Indian Oxygen Ltd (2003 SCC OnLine 775)
[32] Number of protected workmen already discussed in recognition of protected workmen section of the paper
[33] HLL Lifecare Ltd. v. Hindustan Latex Labour Union (AITUC), W.A 1171 of 2010

purpose, object and scope of this immunity are alarming. The privilege provided to the union cannot be overused and its benevolent purpose should not be frustrated. Trade unions tries to justify every activity and every office bearer under this privilege and at the end face dire consequences of their own false presumptions about the scope of privilege. They blame the management and employer for the misuse of their right but fails to understand their own misuse.

From the precedents, it can be proved that an employer is given much narrower rights than the trade unions as presumed. It is high time that the trade unions should realize that the privileges provided to them cannot be used as absolute provision and must be used to the extent and purpose it is provided so as to fulfill the purpose of the legislature rather than using the right as a blanket protection.