

Bharat Containers Pvt. Ltd. and anr. Vs. Engineering Workers Union and anr.

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SooperKanoon Citation : sooperkanoon.com/362780

Court : Mumbai

Decided On : Apr-11-2000

Reported in : (2002)IVLLJ312Bom

Judge : J.A. Patil, J.

Acts : [Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971](#)

Appeal No. : C.A.J.W.P. No. 1834/1990

Appellant : Bharat Containers Pvt. Ltd. and anr.

Respondent : Engineering Workers Union and anr.

Disposition : Petition partly allowed

Judgement :

J.A. Patil, J.

1. This is a Writ Petition under Articles 226 and 227 of the Constitution of India, challenging the order dated February 8, 1990 passed by the learned member of the Industrial Court, Mumbai, in the Complaint (ULP) No. 47 of 1986, granting certain reliefs to Respondent No. 1 union against the Petitioners. Petitioner No. 1 is a private limited company, incorporated under the Companies Act, and is engaged in the business of manufacture of collapsible tubes. It has its factory at Anik Mahul,

Chembur, Mumbai 400 074. PetitionerNo. 2 is the Joint Managing Director of]Petitioner No. 1. Respondent No. 1 is arecognised Trade Union under the MaharashtraRecognition of Trade Unions and Prevention ofUnfair Labour Practices Act, 1971 (the Act,for short).

2. On January 13, 1986, the Respondent No. 1 union filed a complaint against the Petitioners alleging that from December 20, 1985 they had engaged in unfair labour practices under Items 1(a) of Schedule II and Items 6, 9 and 10 of Schedule IV of the Act. It was the case of Respondent No, 1 that the Petitioners were employing a number of temporary workmen and continuing them as such for years with the object of depriving them of the status and privileges of becoming permanent workmen. It was further alleged that under the settlement dated May 4, 1984, the workmen were entitled to daily wages at the rate of Rs. 27.73 per day. However, the Petitioners had paid wages at the rate of 12.00 per day to the 16 workmen named in Annexure B to the complaint. Respondent No. 1 alleged that the Petitioners had in contravention of the terms of Clause 1 of the settlement dated December 19, 1984 terminated the services of many workmen and had not given preferenceto the 29 workmen in employment as required by the said Clause. The fourth grievance of Respondent No. 1 was that the Petitioners were giving artificial breaks in service to the 42 workmen named in Annexure C to the Complaint in order to deprive them of the benefits of permanency, to which they were entitled to under the existing settlements and awards. These activities, according to Respondent No. 1, were done by the Petitioners with a view to disrupt the union (Respondent No. 1). It is alleged that the workmen were entitled to be paid 20 per cent bonus for the accounting year 1984-1985, as agreed in the letter dated December 10, 1984. However, the Petitioners failed to implement the agreement evidenced by the said letter.

3. The Petitioners resisted the complaintand denied that the services of temporary employees were arbitrarily terminated or that artificial breaks were given in their service. They contended that they engaged temporary employees to meet exigencies of work due toseasonal demands and high absenteeism amongst the permanent workmen. The Petitioners further contended that the 13 female and 3 male workmen whose names were mentioned in Annexure B to the complaint

were not in their employment and that there was no relationship of employer and employee between them. They pointed out that the said persons were employed by a contractor, who had been engaged by the Petitioners from time to time to do certain work and that the Petitioners were in no way concerned with the wages paid or payable to those employees of the contractor. The Petitioners maintained that they were paying their workmen wages strictly in accordance with the settlements in force. The Petitioners denied the contents of Annexure C to the complaint and also denied that the 42 persons named therein had been employed by them. On the question of non-payment of bonus, the Petitioners denied that the workmen were entitled to 20 per cent bonus for the accounting year 1984-1985. They pointed out that what was agreed to, vide letter dated December 10, 1984 was that for the accounting year 1984-1985 the workmen would be paid bonus at the rate of 8.33 per cent and an additional ex gratia amount at the rate of 11.67 per cent, both of which were to be calculated in accordance with the provisions of the Bonus Act, 1965 as it stood on December 8, 1984. The Petitioners submitted that as a consequence of the dispute, the workmen declined to accept the bonus amount of 8.33 per cent. The Petitioners denied that they committed any unfair labour practice as alleged and contended that the complaint filed against them was not maintainable.

4. In support of its case, the Respondent union examined Sudhakar Warang, who is its leader. The Petitioners, on the other hand, examined their Production Manager Prabhakar Aher. Both the witnesses produced some documents. The learned member of the Industrial Court, upon consideration of the same, found that the Respondent failed to prove that the Petitioner company had engaged in unfair labour practices as described in Item 1(a) of Schedule II and Item 10 of Schedule IV to the Act. The learned member, however, found that it was proved that the Petitioner company engaged in unfair labour practices under Items 6 and 9 of Schedule IV to the Act. In this view of the matter, the learned member proceeded to grant the reliefs to the Respondent union as indicated earlier.

5. I have heard Ms. Meena Doshi, the learned counsel for the Petitioners and Ms. Nishita Mhatre, the learned counsel for Respondent No. 1. Referring to the complaint filed by the Respondent union, Ms. Doshi pointed out that the

Respondent union had attributed certain unfair labour practices to the Petitioners and one of the reliefs by it is a direction to reinstate the 16 workmen named in Annexure B to the complaint with continuity of service and back wages. Ms. Doshi further pointed out that the complaint contains an allegation about the termination of the services of the said 16 workmen. She, therefore, submitted that the alleged unfair labour practice attributed to the Petitioners falls under Item 1 of Schedule IV and as such under Section 7 of the Act it is the Labour Court and not the Industrial Court which has jurisdiction to decide the complaint relating to the said unfair labour practice. In short, Ms. Joshi raised a question about the jurisdiction of the Industrial Court to deal with the complaint in respect of Item 1 of Schedule IV. Ms. Mhatre, however, pointed out that the question about the jurisdiction of the Industrial Court is being raised before this Court for the first time and as such it should not be allowed to be raised. Ms. Doshi, however, submitted that the question of jurisdiction being a question of law, it can be raised even in the Writ Petition for the first time.

6. Ms. Doshi referred to two cases; the first of which is *S.D. Phanasekar v. N.T.C.(S.M.) Ltd.* 1997 2 C.L.R. 801 wherein it was pointed out that termination of service may be by an overt act of the employer or it may be a consequence of closure or abandonment of service by the workman. The Industrial Court has, therefore, to decide whether termination on account of unfair labour practice or whether it was on account of violation of the rules of natural justice or victimisation. It was held that in the circumstances of the case it was necessary for the Industrial Court to decide the question whether the complaint falls under Item 1 or Item 9 of the Act. The second case is *A-Z Industrial Premises Co-operative Society Ltd. v. A.T. Utekar*, 1997 2 C.L.R. 1033. In that case the complainant alleged unfair labour practices under Item Nos. 1 and 9 of Schedule IV and the Industrial Court held that as one item viz. Item 9 is triable by it, the entire complaint can be tried by it. I ODHA J., however, observed that in no case the Industrial Court can try and decide the complaint relating to unfair labour practices described in Item 1. Referring to Section 32 of the Act which deals with the 'power of the Court to decide all connected matters', the learned Judge pointed out that the said provision does not enlarge the scope or extent of jurisdiction of the Industrial Court beyond what is conferred upon it by other provisions of the Act.

7. There is no dispute of the fact that in view of the provisions of Section 5 and Section 7 of the Act, complaints relating to unfair labour practices falling in Item 1 of Schedule IV can be decided by Labour Court only and not by the Industrial Court. However, this objection as to the jurisdiction of the Industrial Court was admittedly never raised when the complaint was pending before that Court. It is raised for the first time before this Court. It would, therefore, not be proper and fair to allow it to be raised now. Moreover, the Petitioner-company's witness Aher has admitted in his cross examination the contents of the list Annexure B as true and correct. This list contains names of 16 workmen (13 females and 3 males), all of whom joined the company, either in June or July 1984 and since then each of them put in more than 400 days of work. The Respondent union did not press its demand of reinstatement in respect of one female worker, namely, Sunita Shantaram Sawant. The Industrial Court accordingly granted relief in respect of the remaining 15 workmen only.

8. According to the Petitioner company, the workmen mentioned in the list Annexure B were not its employees but those of the contractor by name Vilas Shinde. Witness Aher stated that the Petitioner company was giving some work on contract basis for two reasons, namely, (1) workers were not available due to absenteeism and available workmen were not giving the required output. He further stated that the Contractor used to submit his bills to the Company and the Company used to pay him the cheques. The learned member of the Industrial Court has not accepted the Petitioner company's contention in this respect and held that the concerned 15 workmen were the workmen in the service of the Petitioner company and not the contractor. I think that the reasons given in support of this conclusion are quite strong and sound. The Petitioner company did not examine the said contractor Vilas Shinde as its witness to prove the fact of contract nor did it produce and prove the deed of contract under which he was assigned the contract work. Then, how in the absence of such evidence, it could have been accepted that the said workmen were the employees of the Contractor.

9. The learned member of the Industrial Court has further pointed out that the said contractor had not obtained any registration certificate under Section 7 nor any licence under Section 12 of the Contract Labour (Regulation and Abolition) Act,

1970 and in the absence of any of these two documents, the concerned workmen will have to be treated as the employees of the principal employer viz., the Petitioner company. In this respect, Ms. Doshi submitted that it is an error to hold so. Relying upon the decision in *Dinanath v. National Fertilizers Ltd.* : (1992)ILLJ289SC, she submitted that in the absence of any such documents only consequence would be exposure of Petitioner Company and the contractor to prosecution under Sections 23 and 25 of the said Act. According to her, at any rate, the contract labourers employed do not become the direct employees of the principal employer. This submission, however, loses its force since in the instant case it is not first proved that the Petitioner company had engaged a contractor who had employed the workmen mentioned in Annexure B to do the job of Petitioner company on contract basis. Therefore, no further question arises.

10. The Industrial Court has further held the Petitioner company guilty of unfair labour practices under Items 6 and 9 and directed it to make all the 18 temporary workmen mentioned in Exhibit C-29 permanent and give them the benefits of the settlement dated May 4, 1984. In addition, it has also directed the Petitioner company to make 18 other workmen (named Clause 5 of the impugned order) permanent and give them the benefits of the said settlement. The grievance of the Respondent union in its complaint is to the effect that the Petitioner company employs some workmen on temporary basis and continues them as such with the object of depriving them of the status and privileges of permanent workmen. Admittedly, there are 102 permanent workmen in the Petitioner company. It is also an admitted fact that the Petitioner company had engaged certain temporary workmen. According to the Respondent union, the number of such temporary workmen is 58 (42 + 16), whereas, according to the Petitioner company it is only 28. Both the parties filed their respective lists of temporary workmen. The list filed by the Respondent union is in Annexure 'C' to the complaint page 65, whereas that filed by the Petitioner union is Annexure 'E' to the statement of objections and it is marked as Exhibit C-108. It, however, contains the names of 26 and not 28 temporary workmen. There is unanimity in respect of the names of 14 workmen. There is, however, difference so far as the dates of joining service are concerned.

11. In its statement of objections, the Petitioner company has averred that it engages temporary manual employees to meet the urgent increased volume of work due to seasonal demands. The learned member of the Industrial Court has referred to Clause 6 of the consent award dated August 14, 1975 (Exhibit U-235). Demand No. 6 therein is about permanency benefit and it reads:

'Demand No. 6-Permanency.

Such of the workmen who may be recruited in the company's factory in future and who put in the aggregate of 180 days of work in a period of two years, will be made' permanent and they will be eligible for all the facilities and benefits accruing to the permanent workmen but they will not be eligible for special pay of Rs. 70/- per month provided under Demand No. 1'.

In short, it means that if a workman recruited after August 14, 1975 puts in a service of 180 days in aggregate in two years, he will be eligible for all the facilities and benefits except the special pay available to the permanent workman. In the instant case, the Respondent union has accused the Petitioner company of having denied this benefit and thereby committed unfair labour practice under Item 6 of Schedule IV. The Industrial Court has recorded its finding in favour of the Respondent union.

12. Ms. Doshi attacked this finding by pointing out that it is not based on any evidence and that the respondent union miserably failed to discharge its burden on this issue. She relied upon the decision in *Prav Plast Private Ltd. v. K.A. Chaudhari* 1999 L IC 3749 wherein it was held by a learned single Judge (KOCHAR J.) of this Court that a very heavy burden is placed on the workman to prove to the hilt the failure of the employer to comply with Section 25-F of the Industrial Disputes Act and that he is required to lay legal and valid proof of his having completed continuous service of 240 days. Ms. Doshi submitted that in the instant case no valid evidence is produced by the Respondent union to prove (i) that there are 58 temporary workmen in the employment of the Petitioner company and (ii) that each of them has completed aggregate service of 180 days in period of two years. Ms. Mhatre on the other hand referred to the decision in *The Ichalkaranji Co-operative Spinning Mills Ltd, v. Deccan Co-operative Soot Girni*

Kamgar Sangh : (1991)ILLJ220Bom and submitted that this Court in its writ jurisdiction cannot interfere with the findings of the Industrial Court if they are possible on the basis of the evidence on record. The rival submissions made at the Bar naturally require me to examine the correct position in this respect.

13. As per the list Annexure 'C' (page 65) filed by the Respondent union, there are 42 temporary workmen who were recruited by the Petitioner company between May 10, 1983 and June 26, 1984. The list Exhibit C-108 filed by the Petitioner company (page 113) mentions the names of only 26 and not 28 temporary workmen employed by it on January 13, 1986, that is, the date on which the complaint was filed. On comparison of the same with the list filed by the Respondent union, it is seen that only 14 names are common. The Petitioner company has filed two more lists one at Annexure 'D' (page 111) and the other at Annexure 'F' (page 115). The former states the names of 18 temporary workmen, the earliest of whom was appointed on May 30, 1983 and the latest on March 15, 1986. All these 18 workmen are found in the list of 42 temporary workmen submitted by the Respondent union. The list at Annexure 'F' filed by the Petitioner company is in fact a statement explaining the position with respect to the 42 temporary workmen mentioned in the list (Annexure 'C') filed by the Respondent union. In short, the Petitioner company has stated therein that out of the said 42 temporary workmen, only 18 were in its employment, 1 had resigned, 5 abandoned their services and 18 were never in its service. In view of this position, the burden of proof obviously lay on 1 the Respondent union to prove that all the 42 workmen were in the temporary service of the Petitioner company.

14. The Respondent union examined its leader Sudhakar Warang, who deposed that the contents of the list Exhibit 'C' containing the names of 42 temporary workmen as well as the dates of their joining are correct. In the cross-examination, he stated that the concerned workmen had informed him about the dates of their joining service. He admitted that the Petitioner company issues letters of appointment even to its temporary workmen and he undertook to produce the appointment letters. However, they were never produced. Similarly, none of those 42 workmen was examined before the Court to state that he was employed as a temporary workman on a particular date and that thereafter he was continued as

such even beyond 180 days. On the other hand, the Petitioner company examined its Production Manager Aher who stated that only 18 workmen were on the muster rolls of the company as temporary workmen. He further stated that out of the list of 42 temporary workmen submitted by the Respondent union, only 9 were working with the company. This means that in all 27 (18+9) temporary workmen were serving with the Petitioner company. It may be recalled that in its statement of objections, the Petitioner company has averred that there are 28 temporary workmen with it. It is material to note that the Petitioner company had produced the relevant documents and musterrolls at the instance of the Respondent union. The learned member of the Industrial Court has accepted the Respondent union's case in respect of 36 workmen and directed the Petitioner Company to give them the benefits of permanency as well as the benefits of the settlement dated May 4, 1984. In doing so, he has accepted the list Exhibit D (page 111) submitted by the Petitioner company. In addition, he has sorted out 18 other temporary workmen (5 + 5 + 8) as discussed in paragraphs 42 to 44 of his judgment. He has observed in para 42 that the Petitioner company has admitted in ExhibitC-108 that (1) Gaikwad Dharam Deoji (2) Jadhav Tulasahab V. (3) Paradkar (4) Parekh and (5) Parmar were in its temporary service. A look at the said list (page 113) will show that the observation of the learned Member is not correct in so far as it relates to Jadhav, Paradkar and Parmar. The learned member has further listed 5 more workmen whose names are, according to him, incorrectly mentioned in the list submitted by the Respondent union. For instance, the name of Narendra S. Gaikwad is wrongly shown as Narendra S. Himod and that of Udaykumar S. Sankpal as Udaykumar Sanupur. The learned member has then mentioned the name of 8 more workmen as having been included in the list Annexure 'C' (page 65) filed by the Respondent union. He has further observed: '... There is no reason whatsoever for not accepting the dates of their joining as correct. ...' In the said list, the dates of joining of some workmen are shown to be of the year 1983 and those of others as 1984. The names of those 8 workmen, namely, Satish Chavan, L.S. Gangare, Vasant L. Jagtap, Mane, Pakhode, T. S. Waghmare, Deres L. Vindre and Rajan S.Yadav are found mentioned in the statement (Annexure F page 115) as the workmen who were never employed by the company. It will thus be seen that in the absence of any convincing evidence on record, the learned Member of the

Industrial Court has concluded that 18 workmen (Narendra Gaikwad and 17 others mentioned in Clause 5 of the impugned order) were in temporary service of the Petitioner company. It is true that the Petitioner company has admitted that 18 out of the 42 workmen to be in its service. Assuming that in Addition 18 more workmen, namely, Narendra Gaikwad and 17 others were in its service as temporary workmen, still none of them would be entitled to get the permanency benefit as well as the benefit of the settlement dated May 4, 1984. This is because none of them has put in the aggregate of 180 days of work in a period of two years as stipulated by Clause 6 of the consent award dated August 14, 1975. Further, Respondent union's witness Sudhakar Warang has clearly admitted in his cross-examination that only permanent workmen are entitled to the benefits of the settlement dated May 4, 1984. In short, the position is that the workmen recruited after April 18, 1975 who have put in 180 days work is aggregate in a period of two years alone is entitled to be made permanent and only permanent workmen are entitled to the benefit of the settlement. It is, therefore, obvious that the conclusions drawn by the learned Member in this respect are not possible conclusions based on positive evidence and, therefore, they cannot be sustained.

15. In the result, the Writ Petition is partly allowed. The directions contained in paragraphs 4 and 5 of the impugned order relating to giving of permanency benefits and the benefits of the settlement dated May 4, 1984 to 36 workmen (18+ 18) are hereby quashed and set aside. The remaining part of the said order is, however, not disturbed and to that extent, the Writ Petition stands dismissed. Rule is accordingly made partly absolute in the above terms.

16. Ms. Doshi pointed out that 8 workmen mentioned in the list (Annexure F page 115) have been made permanent in service. It is clarified that this order will not affect them in any way.

17. Parties and the concerned authorities to act on an ordinary copy of this judgment and order duly authenticated by the Sheristadar of this Court. Certified Copy expedited.