
(1995) 04 BOM CK 0037

In the Bombay High Court

Case No : Writ Petition No. 389 of 1992 and W.Ps. No's. 486, 488 and 489 of 1992

Abbott Laboratories (India) Ltd.

APPELLANT

Vs

Jamdar J. D. and another

RESPONDENT

Date of Decision : 18-04-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 19 Rule 1, Order 19 Rule 2
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 28

Citation : (1995) 3 BomCR 425 : (1997) 3 LLJ 1101 : (1995) 2 MhLj 122

Hon'ble Judges : A.P. Shah, J

Bench : Single Bench

Advocate : J.P. Cama, for the Appellant; R.J. Kochar, for the Respondent

Judgement

This group of four Writ Petitions under Article 226 arises out of complaints filed under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 ("Act", for short) by the Abbott Laboratories Employees' Union ("Union", for short) and the Abbott Laboratories (India) Ltd. ("Company", for short). By two separate judgments, the Industrial Court, Bombay, while dismissing Complaint (ULP) No. 387 of 1991 filed by the Company and Complaint (ULP) No. 462 of 1991 filed by the Union, allowed Complaints (ULP) Nos. 336 of 1991, 461 of 1991 and 848 of 1991 all filed by the Union.

2. The facts leading upto these complaints out of which these petitions arose, are long and complicated and have been related in the judgments delivered by the Industrial Court. No useful purpose will be served by repeating them, since the only question agitated before this Court is whether the Industrial Court was right in disposing of the complaints solely on the basis of the affidavits filed by the parties.

3. It appears that after filing the complaints, interlocutory applications were made for interim relief and those interlocutory applications were placed before

the learned Judge of the Industrial Court, Mr. Jamdar. The learned Judge, however, proceeded to bear and decide the main complaints on the basis of affidavits filed by the parties at the interim stage as the learned Judge was of the opinion that there was no scope for leading any evidence because the factual position was almost admitted by both parties. It is also required to be mentioned that the company made a request to the learned Judge seeking permission to lead oral evidence, but the request was turned down, since the learned Judge felt that provisions of Rules 1 and 2 of Order XVII (sic) of the CPC confer on the Court power to dispose of a case solely on the basis of affidavits. As the learned Judge declined the request of the company to lead oral evidence, written submissions were filed and thereafter the learned Judge decided the complaints in the manner indicated earlier.

4. The only question, which falls for my consideration, is whether the course adopted by the learned Judge in disposing of the complaints solely on the basis of the affidavits is in accordance with the provisions of Order XIX(1) and (2) of Civil Procedure Code.

5. It is now well settled that in the absence of any agreement between the parties and in the absence of any order made by the Court under Rule 1, Order XIX of CPC and except in cases in which an order is made for examination by interrogatories or examination on commission, the witness at the trial should be examined viva voce and in open Court. Order XVIII of CPC deals with the subject of hearing of the suit and examination of witnesses and Rule 4 makes it mandatory to take evidence of a witness orally and in open Court in the presence and under the personal supervision of the Judge. These basic features are not without exception. Section 30 of the Code which invests Civil Courts with certain powers says that the Court may, at any time, either of its own motion or on the application of any party, order any fact to be proved by an affidavit. This clearly shows that the Court can treat affidavits as proof of the facts contained therein, the prior requisite, of course, being there. The rules are to be found in Order 19. That Order consists of three rules. With the third rule I am not concerned because it provides for matters to which the affidavits have to be confined. The first two rules read as follows :

"1. Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable :

Provided that where it appears to the Court that either party "bonafide" desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

2.(1) Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court "otherwise" directs."

6. On a plain reading of Rule 2 of Order XIX, it is clear that the said Rule applies to all the applications - whether interlocutory or substantive. However, it is equally clear that the Court cannot, under Rule 2 of Order XIX, direct the parties to give evidence upon an application only by affidavit. The language of Rule 2 when contrasted with that of Rule 1, makes it clear that unlike Rule 2, Rule 1 is an enabling provision entitling the parties to give evidence by affidavit upon any application and does not confer power on the Court to compel the parties to do so. Turning then to Rule 1, it is seen that it provides that the Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable. However, this rule is subject to the proviso contained in the said rule, which provides that where it appears to the Court that either party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit. Thus, it is not open for the Court to order evidence on affidavits if the parties bona fide want to lead oral evidence and the witnesses are available.

7. In *Khandesh SPG. and WVG. Mills Co. Ltd. Vs. The Rashtriya Girni Kamgar Sangh, Jalgaon*, the Apex Court held that the power of the Court to order any particular fact or facts to be proved by affidavit contained in Rule 1 is subject to the proviso to the said Rule. Subba Rao, J. speaking for the Bench observed at PP 545-546 :

"For the purpose of holding an enquiry or a proceeding under the Bombay Industrial Relations Act, 1946, Sec. 118 of the said Act confers on the Industrial Court the same powers as are vested in Courts in respect of - (a) proof of facts by affidavits; (b) summoning and enforcing the attendance of any person and examining him on oath, (c) compelling the production of documents; and (d) issuing commissions for the examination of witnesses. In Courts facts have to be established either by oral evidence or by documentary evidence proved in the manner prescribed by law. But Order XIX of the CPC empowers the Court to have particular facts proved by affidavits. Under Rule 1 thereof, "any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable". But it is subject to the proviso that where it appears to the Court that either party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit. Under Rule 2, "upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent." A combined effect of the relevant provisions is that ordinarily a fact has to be proved by oral evidence, but the Courts, subject

to the conditions laid down in Order XIX, may ask a particular fact or facts to be proved by affidavits."

8. The recent decision of the Supreme Court in the case of *Sudha Devi Vs. M.P. Narayanan and Others*, , also shows that the affidavits are not included in the definition of "evidence" in Section 3 of the Evidence Act and can be used as evidence only if for sufficient reason Court passes order under Order XIX, Rule 1 or 2 of the Civil Procedure Code. It has been consistently held by various Courts in India that normally the trial should be conducted in the manner prescribed by Order XVIII, Rule 4 and the provisions of Order XIX, Rule 1 or 2 should not be readily resorted to save in exceptional cases like when a formal proof is necessary or where the Court is proceeding ex parte against the defendants *Mangilal v. MOIL* 1987 Mh.L.J. 383 ; *Bai Zabu Khima Vs. Amardas Balakdas*, , *B. N. Munibasappa v. Gurusiddaraja Desikendra Swamigal* AIR 1959 Mys. 139.

9. In my opinion, the Industrial Court was clearly wrong in disposing of the complaints on the basis of affidavits. The learned Judge was not right in rejecting the Company's request for leading oral evidence and in proceeding with the complaints on the basis of affidavits. In view of the foregoing discussion, the impugned orders dated October 18, 1991 passed by the learned Judge of the Industrial Court, Bombay, are set aside. The matter is remanded to the Industrial Court for disposing of the complaints in accordance with law after giving an opportunity to the parties to lead evidence.

10. It is made clear that pending the hearing and final disposal of the complaints, the interim relief granted by this Court shall continue to operate. The Industrial Court shall endeavour to dispose of the said complaints as expeditiously as possible and in any event within four months from today.