

(2008) 10 BOM CK 0011

In the Bombay High Court

Case No : Writ Petition No's. 1114 and 2853 of 2007

Arvind Ramdas Valke

APPELLANT

Vs

Ispat Industries Ltd. and Others

RESPONDENT

Date of Decision : 16-10-2008

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 3(13)
Industrial Disputes Act, 1947 — Section 2, 3(5)
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 3(5)

Citation : (2009) 3 BomCR 471 : (2009) 2 LLJ 586

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : A.R. Valke, for the Appellant; S.N. Kumar, for the Respondent

Judgement

B.P. Dharmadhikari, J.—Writ petition No. 1114/2007 is by an employee, challenging order dated January 31, 2007 passed by Industrial Court in ULP Complaint No. 1012/1999 holding that the employee is neither a workman as defined in Section 2(s) of the Industrial Disputes Act nor an employee as defined in Section 3(13) of the Bombay Industrial Relations Act. It has, therefore, dismissed the complaint as untenable. The employer has filed Writ Petition No. 2853/2007 challenging the very order contending that the learned Member, Industrial Court has made certain observations on the merits of the controversy in that order. Basically, it is sought to be urged that the learned Member, Industrial Court has made certain observations about bar of the limitation and as the Industrial Court has ultimately found that the employee was not workman/employee and it had no jurisdiction, those observations were not necessary.

2. In this background, I have heard the employee Shri Arvind Valke in person and Shri Kumar, advocate for the employer. Shri Kumar has pointed out that the employer is a Company and while joining the employer as party-respondent before the Industrial Court, the employee Shri Valke has joined some of its officers like Vice President, Deputy General Manager, Assistant General Manager

by mentioning their names i.e. in the personal capacity. He submitted that no relief as such was claimed against those officers & then after some time, those officers have resigned and joined some other employer. He, therefore, stated that the dispute is between the employee Shri Valke and employer Company only.

3. Shri Valke has contended that issue framed by the Industrial Court was to find out whether the employee is workman as defined in Section 2(s) of the Industrial Disputes Act, 1947. He relied upon the judgment of the Hon''ble Apex Court in Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd. and Another, to state that this was the only objection taken in the written statement and there was no ground that he does not satisfy the requirements of Section 3(13) of the Bombay Industrial Relations Act, 1946. Ignoring the absence of the pleadings and grounds as also the issue, the learned Member, Industrial Court has proceeded to consider the status of the employee (Shri Valke) u/s 3(13) of the Bombay Industrial Relations Act and recorded a finding, at the end of paragraph 17, that he is also not an employee thereunder. He contended that this finding is perverse and also without jurisdiction. He also invited attention of the Court to the judgment in George Thomas Thakkeyil v. Sci-Tech Centre and Ors. 2007 III LLJ 574 (Bom) to contend that as the entire exercise of the show cause notice, charge-sheet issued to the employee and the punishment inflicted has been under the provisions of the Model Standing Orders, the employer cannot contend that Shri Valke is neither a workman nor an employee under both the Acts. He also relied upon the judgment of this Court Maharashtra State Road Transport Corporation Vs. Ambadas Sadviv Hingane, to urge that as the interim order granted by the Industrial Court in his favour continues to operate the employee could not have been terminated and ne must be presumed to be in service. He also relied upon the facts mentioned in the judgment Sohanlal Mijajilal Karotia v. Welcome Group Searock Sheraton 2002 IV LLJ (Supp) 30 (Bom) to urge that after completion of the departmental enquiry, the employer ought to have moved an appropriate application before the Industrial Court to seek its permission and thereafter only, the punishment order could have been passed. In this respect, he pointed out that he has moved an application (Exhibit -49) before the Industrial Court seeking his salary and allowances and that application is still pending. However, in the impugned order, the learned Member, Industrial Court, has made certain adverse observations in relation to the claim made in that application and he requested this Court to set aside those observations.

4. Lastly, he invited attention to affidavit-evidence and cross-examination on record to urge that learned Member, Industrial Court, has not properly evaluated the evidence. By placing reliance upon judgment of the Division Bench of this Court in Bombay Dyeing and Manufacturing Company Ltd. Vs. R.A. Bidoo and another, , he argued that the evidence on record ought to have demonstrated that supervision was done by the employee of men and not of machines. He stated that reliance upon only single line in Exhibit 50-A by employer or by the Industrial Court, to allege that duties of the employee were of supervisory nature, is misplaced and unsustainable. According to him, there is no evidence

on record, which shows that the employee was performing work of supervisory nature. He stated that the finding that the employee is not a workman u/s 2(s) of the Industrial Disputes Act is, therefore, clearly misconceived. Without prejudice to his contention that his status u/s 3(13) of the Bombay Industrial Relations Act, could not have been gone into the employee stated that his plea in the complaint that the provisions of the Bombay Industrial Relations Act are applicable to the employer, workmen cannot be read as final and conclusive. He argued that the nature of duties undertaken by the employee are not proved to be technical also and his duties and the work, which came on record, could have (been done by any layman. He stated that on merits, the finding is not proper and unsustainable.

5. As against this, Shri Kumar, advocate for employer, contended that the contention of the employer before the Industrial Court was that the employee was not a workman u/s 2(s) of the Industrial Disputes Act as also u/s 3(5) of the Maharashtra Recognition of Trade Union and Prevention of Unfair Labour Practices Act, 1971 i.e. M.R.T.U. & P.U.L.P. Act, for short. He stated that application of Bombay Industrial Relations Act was accepted by the employee himself and the learned Member, Industrial Court has found that it is not for the parties but for the Court to find out its relevant provisions applicable and the learned Industrial Court has applied law and has found that the employee is not an employee as required by Section 3(13) of the Bombay Industrial Relations Act. He also relied upon same facts and documents to urge that the evidence on record conclusively shows that the work performed by Shri Valke - the employee was supervisory in nature and in any case, it was technical. He points out that basic salary of present employee was more than Rs. 3800/- p.m. and as such, the learned Member, Industrial Court has rightly held that his complaint to be not maintainable.

6. Shri Kumar, advocate, further stated that reliance upon the charge sheet or show cause notice issued under the provisions of Standing Orders, is not conclusive of the status of employee. He invited attention to the judgments in S.A. Sarang Vs. W.G. Forge and Allied Industries Ltd., Thane and Others, and Shaukat Adam Malim v. Kokan Mercantile Co-Operative Bank Ltd. Mumbai and Ors. 2002 IV LLJ (Suppl) 1499 (Bom NOC) to urge that it is the continuous treatment spread over a sufficiently long time extended by the Management to the concerned employees, which has resulted in holding that the said person was an employee or workman. He points out that mere mention of Standing Order in such a document does not mean that the person is either an employee or a workman. He further stated that the contention of Shri Valke that, he was supervising the working of machines and not of men, is without any pleading and by placing reliance upon the Bombay Industrial Relations Act, 1946 and Shankar Chakravarti v. Britannia Biscuit Co. Ltd. and Anr. (supra), he tried to demonstrate that such an evidence was not admissible in the absence of any plea. He invited my attention to judgment in Northcote Nursing Nome Pvt. Ltd. Bombay and Anr. v. Zarine H. Rahina and Anr. 2002 IV LLJ (Suppl) 1502 (Bom NOC) to contend

that burden to show that he was an employee was upon employee and not upon employer. He urged that the law requires only the positive aspects to be proved and, therefore, negative burden is not placed upon the one who only denies it. He relied upon judgment in *The City and Industrial Development Corporation of Maharashtra Vs. M/s. R.M. Mohite and Company and others*, to contend that the parties by their consent cannot confer jurisdiction on any Court.

7. Lastly, he pointed out that the learned Member, Industrial Court having found that as complainant before it was not an employee, it could not have considered the other aspects on merits and comments on or consideration of issue of limitation was, therefore, unwarranted.

8. It is, therefore, clear that the question, which needs to be decided first is: whether the employee Shri Valke could have knocked the doors of Industrial Court by showing that he was either a workman u/s 2(s) of the Industrial Disputes Act or an employee u/s 3(13) of the Bombay Industrial Relations Act. It is to be noted that the learned Member, Industrial Court has answered both these issues after considering evidence and there is no challenge raised in this respect either before it or then before me by employer.

9. The contention that Shri Valke has been treated as employee by the employer because of application of provisions of the Standing Orders to him, needs to be looked into. Learned Counsel for the employer has not disputed that dismissal order dated July 29, 2003; show cause notice dated July 9, 2003; corrigendum dated July 10, 2003, charge sheet dated September 25, 2002 and October 5, 2002, expressly mention provisions of Model Standing Orders. The employee has invited attention to his examination-in-chief (on affidavit) wherein he stated that while initiating disciplinary action against his counterparts i.e. employees in his grade, the powers conferred under the Model Standing Orders were being resorted to by the employer. This is the material, which is available on record for deciding the question. The judgment of the learned single Judge of this Court in *S.A. Sarang v. W.G. Forge & Allied Industries Ltd. Thane and Ors.* (supra) in paragraph nos. 5 and 6 considers this controversy. This Court found that evidence on record was not clinching either way and was, therefore, ambiguous. It is, in this background, the attention of this Court was invited to show cause notice, charge sheet issued to that employee by employer W.G. Forge & Allied Industries Ltd. The show cause notices were of date August 23, 1971, December 4, 1972, March 25, 1974, July 1, 1974, September 28, 1974. The employee Shri Sarang was removed from service on December 6, 1975 and reference made by him before the Labour Court was registered as I.D.A. No. 211/1977. Before the Labour Court, for the first time, the grievance was made that the employee was not workman. It is, in this background, this Court has found that the employer has always treated him as an employee subject to the provisions of Model Standing Orders and this treatment implied that employee was workman for the purpose of Section 2(s) of the Industrial Disputes Act. Such employer is held to be estopped from denying such status of workman when dispute regarding

dismissal of employee finally lands up before the Industrial adjudicator.

10. In another judgment *Shaukat Adam Malim v. Kokan Mercantile Co-Operative, Bank Ltd. Mumbai and Ors.* (supra), the other learned single Judge of this Court has noticed in paragraph 11 similar evidence and has found that the continuous and consistent course of conduct, by which the employee is treated as an employee or as workman under the relevant statutory provision invites the rule of estoppel. It has been also observed that isolated or stray reference is not enough and continuous and consistent course of conduct must exist. Perusal of judgment of this Court in *George Thomas Thakkeyil v. Sci-Tech Centre and Ors.* (supra) again shows the same approach, however, what was the other evidence brought on record by the employer in this matter is not available in the report.

11. All these judgments, therefore, show that when consistently and for long time the employee is treated as subject to the Model Standing Orders, the rule of estoppel has been invoked and employer has not been permitted to deny the status of such an employee, who filed proceedings challenging the punishment inflicted upon him in it for the first time. In the present matter, the complaint was filed before the Industrial Court on November 22, 1999 by Shri Valke for declaration of unfair labour practice under Item 9 Schedule 4 of M.R.T.U. & P.U.L.P. Act, 1971 contending that he was not being permitted to join his duties after he recovered from his illness and this constituted unfair labour practice. There was no termination at that time and an application was also moved seeking direction to the employer to permit him to join duties. On December 13, 1999, the employer filed reply opposing the prayer for grant of interim relief. In that reply, the status of present employee Shri Valke as workman u/s 2(s) of the Industrial Disputes Act, 1947 has been expressly questioned and it has further stated that he is not a workman under the Industrial Disputes Act, 1947 read with Section 3(5) of the M.R.T.U. & P.U.L.P. Act, 1971. Said Section 3(5) covers status of complainant under the Industrial Disputes Act, 1947 as also under Bombay Industrial Relations Act, 1946. Argument of absence of plea by Shri Valke is therefore misconceived.

12. The second objection by the employee is that the Industrial Court did not frame any issue to find out status of the complainant as employee u/s 3(13) of the Bombay Industrial Relations Act. The Industrial Court has framed issue which reads. Does the complainant prove that he is a workman?.. Plea of employer u/s 3(5) of the M.R.T.U. & P.U.L.P. Act, 1971 covers status of complainant under the Industrial Disputes Act, 1947 as also under Bombay Industrial Relations Act, 1946. Moreover, it appears that the Industrial Court heard the arguments even in relation to the status of employee u/s 3(13) of the Bombay Industrial Relations Act, when it found that the Shri Valke himself has, in paragraph 2 of U.L.P. complaint, mentioned that it is an Industry governed by Bombay Industrial Relations Act. In said paragraph 2, the employee has pleaded that the provisions of the Bombay Industrial Relations Act, 1946 as also provisions of Industrial Disputes Act, 1947 are applicable to the Industry. The Industrial Court,

therefore, has proceeded to decide whether the work done by the employee was of supervisory nature or whether it was of technical nature. It found that the work was of supervisory nature and also of technical nature and considering basic salary of employee, it has answered that issue accordingly against the employee Shri Valke. Insofar as its finding on quantum of the basic salary is concerned, there is no debate about the same before me.

13. The consideration by learned Member, Industrial Court about supervisory nature of work of the present employee is based upon letters, which are at Exhibit 52-A and 52-C, in which Shri Valke described that his duties were predominantly of supervisory nature. But then his affidavit, filed in support of his claim (Exhibit 39), nowhere discloses that he was performing the duties of supervisory nature i.e. he was supervising the work of men. In his cross-examination also, nothing has been brought on record to show that during his duty he was required to supervise the work of men working under him. The concept of supervision is considered by the Division Bench of this Court in *Bombay Dyeing and Manufacturing Company Limited v. R.A. Bidoo and Anr.* (supra), and the appropriate evidence in that respect has not come on record at all. Even in the evidence of the Management, though Deputy Manager (Electrical) has been examined, there is absolutely nothing to show that the employee was required to supervise the working of men. The said witness of Management Shri Sanjay Barmase has in paragraph 7 given duties to be performed by the employee. None of the duties show that any persons were placed under him or were subordinate to him and he was required to watch or inspect the persons and their work. It has been attempted to be shown that the employee was also working as shift incharge. However, again it has not been brought on record that as shift incharge, all other employees in the shift were supposed to report to him and he was expected to supervise their work. No documentary evidence to show that any staff reported to him at any point of time and that he was supervising their working, or instructing them to perform their work in particular manner under his control is placed by the employer before Industrial Court. Nor there is evidence of any such subordinate staff about working under the supervision & control of Shri Valke. Even in his cross-examination, nothing in this respect has been brought on record. The names of alleged subordinates working under him are not even put to him. Reliance upon use of word supervisory by him some communications to describe his duties cannot be determinative in view of his evidence on oath and assertion therein that no subordinate worked under him. Supervision is the conclusion be reached on the basis of primary facts and no such facts are brought on record by the employer. I, therefore, find that the material on record is insufficient to conclude that the employee is not workman as defined in Section 2(s) of the Industrial Disputes Act.

14. The next question to be looked into is; whether Shri Valke was doing work of technical nature. Section 3(13) of the Bombay Industrial Relations Act excludes the person working in supervisory or technical capacity drawing basic pay exceeding Rs. 1,000/- per month. The employee in his affidavit-in-chief has

stated in paragraph nos. 3 and 4 as under:

3. I say that I was working under supervision and control of respondent No. 3 and no subordinate was working under me. I say that my work was technical in nature. I say that I was carrying out the work assigned to me by respondent No. 3 and my main work was to attend breakdowns in plant, based on electronics equipment, such as Direct Current Motors, Control Drives and Programmable Logic Controller Units. I say that my nature of work was entirely depending on mental soundness. I say that considering the requirement of my nature of work, I was sent for Simatics, Programmable Controller Advanced (PC10) training at Siemens Limited at Bombay which training I have successfully completed from September 24, 1990 to October 5, 1990. A copy of training Certificate issued by Siemens Limited is annexed herewith and marked as Document No. 2.

4. I say that during the course of my working the respondent-company till the filing of present Complaint, I have not received any memo, charge sheet, etc. However, I say that for initiating disciplinary action against employees of my Grade the respondents were exercising the power conferred under Model Standing Orders. I say that job description prescribed by respondent-company under para 4 of reply is not my job and, therefore, false and untrue.

In cross-examination he has stated that he was required to attend complaints of breakdown and repairs. The employee has volunteered that it was based on electrical equipments. He denied that he was attending the breakdown of electrical equipments. The nature of his duties described by witness for employer in paragraph 7 is as under:

- a. Attending the preventive maintenance jobs for Electrical/Electronics Systems of Continuous Galvanizing Line, Colour Coating Line, Cut-to-Length Line-II, cut-to- Length Line-III and other production and services units. Total area to be covered by walking about 400 meters several times during the course of duties.
- b. Attend to plant break down and repairs at minimum time and within specified targets in the above area.
- c. Attending Maintenance of Plant Service like Compressors, lighting etc, in the above area.
- d. Attending Maintenance of services like telephones, air conditioners etc. in the above area.
- e. Providing necessary assistance to colony electrical maintenance in the residential colony, 150 quarters spread over in about 2 Kms radius.
- f. Organizing at shift personnel for smooth manning/operation of all the production units, which are about 10 units.

15. Perusal of complaint filed by the employee before the Industrial Court shows that he joined on February 2, 1989 as a Graduate Trainee Engineer and then he was appointed as Engineer CGL Electrical Department. It has also come on

record in his examination-in-chief itself that he was sent for technical training at Siemens Ltd. Between April 24, 1990 to October 5, 1990. This material on record clearly shows that he was doing the work, which was technical in nature. His contention that even a layman could have done his work stands negated by the above evidence. He himself has stated that he was supervising the working of machines. It is, therefore, apparent that finding of the Industrial Court that he is not an employee as defined in Section 3(13) of the Bombay Industrial Relations Act, therefore, needs to be maintained.

16. In view of this finding, it is apparent that the operative order of the Industrial Court dated January 31, 2007 is unsustainable. However, as already mentioned above the parties have not advanced their arguments before me about the correctness of exercise of recording of findings by the Industrial Court on this issue both under the Industrial Disputes Act as also under the Bombay Industrial Relations Act. As I find that the operative order of the Industrial Court is unsustainable, in these circumstances, for proceeding further in accordance with law, the ULP Complaint is restored back to the file of the Industrial Court for taking further appropriate decision in the matter.

17. It is made clear that the Industrial Court was considering only question of status of Shri Valke and the observations made by it in relation to his claim for salary and wages made in Exhibit 49 are not binding as that claim was not before it. Similarly, the question of limitation also was not before it. Therefore, while considering these questions in accordance with law, any adverse finding recorded by it in order dated January 31, 2007 about the same shall not come in its way. It will record appropriate decision on the same after hearing the parties.

18. The impugned order dated January 31, 2007 to the extent it holds that employee Shri Valke is not a workman u/s 2(s) of the Industrial Disputes Act is quashed and set aside. All other issues which arise for determination are left open for consideration of the Industrial Court. Rule Accordingly. In view of the observations made above, it is apparent that the apprehension expressed by the petitioner i. e. the employer in Writ Petition No. 2853/2007 are already taken care of Therefore, no further orders are required to be passed in that writ petition. In view of the observations and clarifications given above, Writ Petition No. 2853/2007 is also disposed of.

19. In the circumstances of the case, both the petitions are disposed of as above with no order as to costs.