

(1999) 07 BOM CK 0086
In the Bombay High Court
Case No : O.O.C.J.W.P. No. 2310 of 1994

B.E.S.T. Workers Union

APPELLANT

Vs

Bombay Electric Workers Union and Others

RESPONDENT

Date of Decision : 07-07-1999

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 16(1), 23(4), 3(25)
Bombay Industrial Relations Rules, 1947 — Rule 19A, 28A

Citation : (2001) 3 LLJ 540

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

Bench : Single Bench

Final Decision : Dismissed

Judgement

A.P. Shah, J.—This petition under Article 226 of the Constitution challenges the order dated June 30, 1994 passed by the Industrial Court, Mumbai in Appeal (IC) No. 11 of 1983 and Appeal (IC) No. 12 of 1983, a proceedings under the Bombay Industrial Relations Act, 1946 (hereinafter referred to as "the said Act").

2. Briefly stated, the facts giving rise to this petition are these: Respondent Nos. 4 and 5 namely, Bombay Electric Supply and Transport Company Limited (BEST) and the Bombay Suburban Electric Supply Company Limited (BSES) are engaged in the supply of electrical energy in this metropolis. Respondent No. 4 in turn runs two industries, public passenger transport and the supply of electrical energy. Several employees are employed by both the Undertakings, the total roughly would be 5500 being the strength at the relevant point of time. The petitioner and respondent No. 1 are unions registered under the Trade Unions Act, 1926. Prior to August, 1972 the petitioner Union was accepted as the representative and approved Union of these employees. This position was, however, changed as the said Union was replaced by respondent No. 1 Union and thereby getting recognition of an approved representative Union in August, 1972 and that status is being enjoyed by the said Union since August 30, 1972. Some time in July, 1980 the petitioner Union filed two applications being Applications

Nos. 5 and 6 under Sections 16(1) and 23(4) of the Act respectively, before the Assistant Registrar for being registered as the representative Union in the two Undertakings mentioned above on the ground that it enjoyed a larger number of membership during the period of the said three months immediately preceding the month in which the applications were filed, which was in the month of July 1980. The petitioner alleged that the number of membership in the industry enrolled by the petitioner during the said three calendar months . - April, May and June 1980 as being 2905, 2926 and 2834 as against the membership of the registered Union in the said three months was 2647, 2671, 2659 respectively.

3. On the basis of these two applications, enquiry was held by the Assistant Registrar when documentary evidence was produced by the rival parties. The Assistant Registrar, on the basis of sample interrogation of the employees who were available and after making certain deductions based on the interrogation result, held that the applicant Union did not have larger membership than the registered Union with the result that both the applications came to be dismissed. This order was challenged by respondent No. 1 Union before the Industrial Court by filing Appeal Nos. 11 and 12 of 1983 under Sections 20 and 24 of the Act which came to be allowed by the Industrial Court vide order dated April 27, 1984 whereby the said two applications filed by the petitioner Union were accepted. Respondent No. 1 aggrieved by the order of the Industrial Court filed Writ Petition Nos. 2311 and 2312 of 1984 which came to be disposed of by the Division Bench by order dated July 4, 1988. The Division Bench set aside the order of the Industrial Court and the said two appeals I were remitted to the Industrial Court with a direction to hold a fresh enquiry after giving full opportunity to both the sides to place whatever material if they so desire including the material which is already placed on record and to decide the said original applications filed by the petitioner Union on merits in accordance with law. After the remand, both the Unions led oral as well as documentary evidence. The Industrial Court, upon consideration of the evidence led by the parties, came to the conclusion that the petitioner Union has failed to discharge the primary burden to establish that during the said three months i.e. April, May and June, 1980 it had larger membership than the registered Union and that it could also not prove the membership for maintaining the application u/s 23(4) of the Act and hence dismissed both the appeals.

4. Mr. Bharucha, learned counsel appearing on behalf of the petitioner raised multi-fold contentions. Mr. Bharucha contended that Section 16 of the Act makes it essential for the Industrial Court to determine the membership of the two rival Unions. The Industrial Court by the impugned order has not determined the membership of the two Unions inspite of a very lengthy order of 136 pages and, therefore, the impugned order, which rejects the applications of the petitioner, is contrary to the provisions of Section 16 of the Act. Secondly, Mr. Bharucha submitted that Sub- rules (7) and (8) of Rule 28-A of the Bombay Industrial Relations rules provides for the sampling method to ascertain the; membership. The Industrial Court, however, did not carry out any sampling. On the other

hand, it merely proceeded on the basis of 109 affidavits filed by the registered Union of which only 89 were examined by the registered Union. The next submission of the learned counsel is based upon the decision of this Court in M. P. R. B. B. C. K. Sangh v. Industrial Court, 1975 I LLN 451 wherein the Division Bench held that absence of the bank record is not necessarily fatal to the Union's claim when the audited records have been produced before the Court. Relying upon this judgment, learned counsel contended that the Industrial Court wrongly refused to accept the case of the petitioner on the basis that the membership dues collection was not reflected in the bank pass book of the petitioner. He next contended that the Industrial Court wrongly excluded from the membership of the petitioner 638 navganies (casual workers). This exclusion, according to the learned counsel, is contrary to the law laid down by this Court in Maharashtra Girni Kamgar Union Vs. S. Bhattacharji and others, . He also submitted that the Industrial Court should have, in view of the findings recorded in its order and the evidence of the Joint Treasurer of respondent No. 1 Union, ought to have cancelled the registration of the registered Union u/s 15(d) of the Act.

5. Before advertng to the submissions of the learned counsel, it would be useful to refer to the relevant provisions of the Bombay Industrial Relations Act, 1946. The Act was essentially enacted to regulate the relations of the employees and employers and to make provisions for certain other purposes. Section 3(25) defines "Member" and is a material provision for the purpose of the present petition and reads thus:

"Definition 3(25) - "Member" means a person who is an ordinary member of a union and who has paid a subscription of not less than twenty five paise per calendar month:

Provided that no person shall at any time be deemed to be a member if his subscription is in arrears for a period of more than three calendar months during the period of six i months immediately preceding such time.

Explanation : A subscription for a particular calendar month shall, for the purposes of this clause, be deemed to be in arrears if such subscription is not paid by the end of the calendar month in respect of which it is due."

The concept of membership, as enunciated by Section 3(25), has been explained in number of judgments of this Court. It is not necessary to refer to those judgments but suffice it to say that a plain reading of the definition suggests that the subscription of membership is payable per month and by the end of the month and if it is not so paid then the member shall be deemed to be in arrears for that month and thereby he would be in default for that month. If he remains in arrears for more than three calendar months during the preceding six months period then his capacity and entitlement to be accepted as a member is snatched away.

6. Chapter III deals with the process of registration of the Union. Section 13

prescribes the filing of the application for registration indicating that any Union which has for the whole of the period of three calendar months immediately preceding the calendar month in which it so applies under this section a membership of not less than twenty five per cent of the total number of employees employed in any industry in any local area may apply in the prescribed form to the Registrar for registration as a representative Union for such industry in such local area. Section 14 prescribes further process which contemplates an inquiry by the Registrar after receipt of that application to satisfy whether the condition requisite for registration has been fulfilled or not and if he is so satisfied about the fulfilment and requirement under the Act and if the Union is not otherwise disqualified then he has to enter the name of the said Union in the appropriate register and issue a certificate of registration. Section 15 contemplates situation when registration so granted may be cancelled in the appropriate case, on the happening of such an event one of which being that the membership of the Union has for a continuous period of three calendar months fallen below the minimum required u/s 13 for its registration though it makes certain qualification. u/s 15(b)(1) registration is liable to be cancelled if the same is done under mistake, misrepresentation or fraud etc. Section 16 permits any union to apply to the Registrar for being registered for an industry in a local area on the ground that it has a larger membership of employees employed in such industry on the receipt of which the Registrar has to follow further procedure and issue a show cause notice and after holding inquiry that if he reaches the conclusion that the applicant-Union complied with these conditions necessary for registration u/s 13 and its membership for the said three calendar months is larger than that of the registered union then he has to register that applicant-Union in place of the registered union and issue a certificate in that behalf.

7. Rule 28-A of the Bombay Industrial Relations Rules (hereinafter referred to as "the said Rules") provides the procedure to ascertain the membership of the Union. Rule 28-A prescribes the procedure for holding an inquiry by the Registrar for ascertaining the membership of the Unions for the purposes of the provisions of Sections 13, 16, 17 and 23. The various Sub-rules prescribe the mode and details of the said inquiry. For instance, on receipt of a notice from the Registrar the Union is required to produce before the Registrar documents like membership register, counterfoils" book, minutes book, cash book, bank pass-book, if any, etc. Sub-rule (8) enables the Registrar to carry the sampling if the number of witnesses to be examined is very large.

8. In the context of the relevant provisions of the Act and the Rules, it is obvious that a valuable right is given to every Union to get the status of the registered and approved Union, which contains implicit therein the further valuable right to represent the employees in the matter of statements and other collective bargaining for and on behalf of the employees in that particular industry. At the time of application for registration itself u/s 13, a detailed enquiry is contemplated and the same process follows when there is an application for cancellation. Having regard to these provisions, to become manifest that the

onus is on the applicant Union to establish that it had larger membership than the registered Union. Thus the basic question is whether the petitioner Union had established larger membership during the relevant period. In support of its claim, following documents were relied upon by the petitioner Union.

(i) Membership registers for 1979 and 1980.

(ii) Counterfoils of receipts of subscription book, 442 in number.

(iii) Minutes books of General Body, Executive Committee and Managing Committee.

(iv) Cash books for 1979 and 1980

(v) Bank pass book of New India Co-operative Bank, Girgaum branch for the month of July, 1978 to November, 1980.

(vi) Audited statements of membership.

On a very thorough and exhaustive examination of the documentary as well as oral evidence of the witnesses examined, the Industrial Court has found that on a good number of counterfoils there are no dates, months and year. It was also found that 80% of the counterfoils of subscription receipts do not bear dates nor the check numbers on the counterfoils, and that names have been subsequently written while submitting the records before the Registrar. As regards the counterfoils, the Industrial Court has held that the Union has failed to prove (a) that the alleged members have really paid the subscription and (b) that the subscription was paid by the members during the relevant period. It was also held by the Industrial Court that the petitioner Union has failed to establish co-relation between the counterfoil books and the bank deposit books. With regard to the membership registers, the Industrial Court has found that the registers were written at one stretch by Mr. Nalawade, Secretary of the petitioner Union and, in any event, the entries in the register are not co-related with the counterfoil receipt books. Similarly, the cash books produced by the Union were also found to be unreliable and totally unconnected with the counterfoils of subscription receipts. It was also found that the amount of the alleged subscription was not deposited in the bank in the same month and whatever amounts have been deposited, pertain to subscription from the supply section only. The Industrial Court has also noted that nearly 109 employees filed affidavits that they do not belong to the petitioner Union and out of these 109 employees, 85 were examined before the Court. The Industrial Court concluded thus:

"(i) 80% of receipts are undated, (ii) Amounts collected in a particular month are not deposited at the end of the month, (ii) The amounts shown in the deposit receipt books are common i.e., the subscription collected from transport section as well as from the supply section, (iv) That the amount of subscription entered in the cash book is also common comprising membership of both the sections i.e., transport section as well as supply Section (v) The membership registers for

the relevant period are entered at one stretch in one sitting by Shri S.S. Nalawade, (vi) The amounts shown in the cash book are not deposited in the Bank, because the entries in the bank pass book do not show that how much amount of subscription exclusively pertaining to the supply section is deposited in bank, (vii) Non-production of counterfoils of membership receipts in respect of transport section during the relevant period in spite of making a specific application to that effect at Exh. UA-6, (viii) Handwriting of different persons on the counterfoils, though the same person/s was/were not the collector/s (ix) Retaining large amount i.e., more than Rs. 100/- in hand and not depositing the same in the bank, (x) No details of the statements made by the respondent Union in UA-5 and chart enclosed therewith, (xi) Retaining large amount on suspense account as per the cash books of the appellant Union, (xii) Not examining any individual members (though the respondent Union has examined 109 workers and has offered 85 out of them for cross- examination)".

9. With the assistance of both the learned counsel I have gone through the entire text of the impugned decision and have also perused the evidence led by the parties and in the ultimate analysis, I have absolutely no reservation to hold that the petitioner Union has miserably failed to establish the requisite membership during the relevant period. After going through the evidence of the petitioner, I find that there are serious infirmities and deficiencies in several vital respects. It is pertinent to note that prior to October, 1979 the membership shown in the register of the petitioner Union was around 1160 between six months. It is inflated in the range of 1500 to 1900 and during April, May and June, 1980 the membership is further inflated upto 2900. There is no explanation why there was sudden spurt in the membership of the petitioner Union. Similarly the amount deposited from the electric supply section as membership subscription is only Rs. 230/- and Rs. 58/- while during the relevant period the amount shown is Rs. 3000/- and to nearly Rs. 7000/-. The cash books do not give the break-up of transport and electric supply section of BEST. The main trouble with the evidence of the petitioner is that a very large number of counterfoils do not mention the date although in some of the receipts month and year are mentioned. Out of the 440 counterfoils produced on record, 374 counterfoil books have been written by Mr. Nalawade. The version of Mr. Nalawade that he alone used to collect the subscription from members from different establishments is simply unbelievable having regard to the fact that the establishments are located in different localities at considerable distance. It is important to note that Mr. Nalawade admitted that the names of the employees have been written subsequently although a feeble attempt was made to explain away this lacuna by saying that this was done at the behest of the Assistant Registrar. Under the circumstances, it is not possible to attach any evidentiary value to the counterfoil books. This is only a part of the story. It is further revealed from the evidence of Mr. Wagh, the handwriting expert that the membership registers were written at one sitting by the same person. But that apart, the petitioner has failed to establish any correlation between the counterfoil receipts and the membership registers. Even the

entries made in the cash books were found to be unconnected with the counterfoil receipts. The fact that the alleged membership subscription was not deposited in the bank in the same month may not be necessarily fatal to the Union's case as laid down in *M.P.R.B.B.B.C.K. Sangh v. Industrial Court*, (supra). But having regard to the fact that the evidence of the Union is found to be totally inconsistent and unreliable, the failure of the Union to deposit the subscription in the bank assumes great importance, particularly in the context of Rule 19-A of the Rules, and cannot be lightly brushed aside. If we compare the deposit books and the amounts deposited in the bank, it will show that large amounts of subscription fees have not been deposited in the bank. This lends credence to the case of the registered Union that the deposit books, cash books and counterfoil books were fabricated with a view to show inflated membership. In these circumstances, the Industrial Court has rightly come to the conclusion that the petitioner has failed to prove that during the relevant period the membership of the petitioner was larger than the registered Union.

10. Mr. Bharucha has not challenged the above findings of the Industrial Court. But he contends that u/s 16, a duty is cast on the Court to ascertain the membership of the two Unions and since the Industrial Court has failed to ascertain this the decision of the Industrial Court is vitiated. I do not find any merit in the submission of the learned counsel. When the evidence produced by the petitioner suffers from serious infirmities and discrepancies, it is virtually impossible for the Court to determine the exact membership of the petitioner. Even the minimum members of 25%, which is a prerequisite for maintaining an application under the relevant provisions, has not been established. Under the circumstances, it cannot be said that there was non-compliance of Section 16. The submission of the learned counsel that the Industrial Court ought to have adopted sampling method to ascertain the membership, is equally without any merit. Ordinarily, sampling method is required to be adopted when the competent Authority is unable to decide the membership of the rival Unions in view of the conflicting claims of membership in respect of the same employees. In the instant case, the documentary evidence of the petitioner was found to be totally unreliable. Moreover, not even a single employee was examined by the petitioner to establish the membership. On the other hand, 89 employees were examined by the 1st respondent who deposed that they did not belong to the petitioner Union. The provision relating to sampling is an enabling provision and not carrying out the sampling will not vitiate the order of the Industrial Court in the facts and circumstances of the case.

11. As regards the submission of Mr. Bharucha relating to navganies, it is true that the expression "employee" will include navganies but the Industrial Court found that the petitioner Union has failed to prove that the navganies were working during the relevant period and in the absence of any cogent evidence in this behalf, the claim for inclusion of navganies is clearly unacceptable. In this context, the evidence of Mr. Nalawade reads as follows:

"Navganies appointment is for a fixed period and on expiry their services are terminated in writing. Upon availability of work, navganies are re-appointed on the same check number where they had worked previously. From the navganies we collected subscription. The subscription used to be for the month when the same was recovered. We have considered for our membership claim the figure of the navganies as well. It is true that the services of the navganies as were terminated during the relevant period and there were fresh employment as well and about them the BEST has submitted a chart."

In view of the clear admissions of Mr. Nalawade, submission of the counsel relating to navganies, is liable to be rejected.

12. Lastly, Mr. Bharucha argued that the evidence on record shows that the respondent Union has manipulated the membership receipts. It is argued that the receipt books, which are used by the registered Union accepting subscription from certain members, were not in existence or printed at the relevant time, but those were printed subsequently and that is how the manipulation is done. In that behalf, reliance is sought to be placed on the evidence of Mr. Mehta. It is, therefore, argued that the registration of the respondent Union ought to have been cancelled u/s 15(d). However, the Industrial Court has pointed out that the allegations made by the petitioner in this connection are rather vague and inconclusive. In the absence of any clinching evidence, it is difficult to accept the submission of Mr. Bharucha that the registration of the respondent Union is liable to be cancelled.

13. In view of the foregoing discussions, petition fails and the same is dismissed with no order as to costs.

14. On the oral application of the counsel for the petitioner, ad interim relief granted is continued for a period of eight weeks.