

(2004) 09 BOM CK 0094

In the Bombay High Court

Case No : Writ Petition No. 2424 of 2002

Britannia Industries Ltd.

APPELLANT

Vs

Maharashtra General Kamgar Union and Others

RESPONDENT

Date of Decision : 22-09-2004

Acts Referred:

Constitution of India, 1950 — Article 226

Industrial Disputes Act, 1947 — Section 10, 11, 11(2), 11(5), 11A

Citation : (2005) 2 BomCR 837 : (2005) 2 LLJ 519

Hon'ble Judges : Rebello F.I., J

Bench : Single Bench

Advocate : C.U. Singh and P.M. Palshikar, for the Appellant; Gayatri Singh and Apporva Kaiwar, for the Respondent

Judgement

Rebello F.I., J.—Rule. By consent of parties heard forthwith. Petitioner employer, by the present petition, has approached this Court on account of what is alleged to be failure on the part of respondent No. 2 to decide issue 5-A as a preliminary issue, by order dated 21st August, 2004. The issue which was framed read as under :-

Whether the reference as framed and worded, referring application dated 24th January, 2004 is maintainable,"

2. The petitioner had earlier filed a petition being W.P. 1298/2004 wherein prayer (a) read as under :-

(a) This Court be pleased to issue writ of certiorari, or writ in the nature of certiorari or any other writ, order or direction under Article 226 of the Constitution of India, calling for the records and proceedings from the Commissioner, Greater Mumbai, Government of Maharashtra, Mumbai and after perusing the legality, propriety and validity thereof to quash and set aside the impugned order dated 5th April, 2004 passed in the review application filed by the first respondent union, a copy of which is annexed as Exh. G. hereto to the

extent that it refers to the adjudication of the matter in the application dated 24th January, 2004 made by the petitioner u/s 25-O(1)] of the Industrial Disputes Act, instead of referring for adjudication the matter relating to order dated 23rd March, 2004 passed u/s 24-4(2) of the Act."

When the matter came up before this Court for hearing, the petition was withdrawn in terms of order dated 12th July, 2004 which reads as under;-

Mr. Singh, learned Counsel appearing on behalf of the petitioner prays for leave to withdraw the petition with liberty reserved to raise the contentions which are sought to be advanced in the petition, in the pending reference before the Industrial Tribunal. Petition dismissed as withdrawn with liberty reserved as prayed."

3. A few additional facts may now be set out to enable disposal of the controversy which has arise. The petitioner-employer had applied for closure of its industrial establishment at Reay Road (East) u/s 25-O of the I.D. Act by application dated 24th December, 2003. That application was granted by the appropriate Government by order dated 23rd March, 2004. The respondent No. 1 being aggrieved filed an application for review/reference before the appropriate Government. The appropriate Government by an order dated 5th April, 2004 was pleased to pass the following order :-

The matter in the application dated 24-1-2004 filed by M/s. Britannia Industries Ltd., Reay Road, Mazgaon, Mumbai 400 010 u/s 25-O(1) of the Industrial Disputes Act, 1947 seeking closure permission of its Industrial establishment situated at Reay Road is hereby referred u/s 25-O(1) of the said Act to the Industrial Tribunal consisting of Shri P.P. Patil"

It is thus clear that the reference by the appropriate Government was in respect of the subject-matter of the application dated 24th January, 2004 filed by the respondent company. That subject-matter was an application to grant permission for closure of the industrial establishment.

4. At the hearing of this petition, on behalf of the petitioner, it is sought to be contended that considering the language of Section 25-O(5) what the appropriate Government could refer for reference was the order made u/s 25-O(5). It is sought to be contended that the application for closure itself could not have been referred, as a perusal of Section 25-O would indicate the steps to be taken while passing the order either granting or rejecting the application for closure. Considering the limitation in terms of time by which the reference, if made, has to be answered, it is pointed out that it would only be the order made u/s 25-O(2) of the I.D. Act. It is then pointed out that the specified authority having made a reference, which it could not have made, the Industrial Tribunal was duty bound to answer the said issue 5-A which has been framed as a preliminary issue, as it goes to the very root of the jurisdiction of the Tribunal to answer the reference made to it.

On the other hand, on behalf of the respondents, their learned Counsel contends that the Industrial Tribunal cannot go into the terms of reference as to whether it is competent or not, the Tribunal being a creature of the statute, is bound to answer the reference as made by the appropriate Government. In the alternative, it is submitted that this is an issue which relate to a mixed question of fact and law and it was always open for the industrial Tribunal not to have treated the issue as an preliminary issue and to decide the said issue along with other issues. It is also pointed out that the petitioners themselves had come to this Court to challenge the said reference. They withdrew their petition with liberty to raise the contention before the industrial Tribunal. What that meant was disposal of the reference finally, without the issue as framed being answered as a preliminary issue.

Both the learned Counsel have relied upon authorities, which will be adverted to in the course of the discussion.

5. It would, therefore, be relevant for the purpose of the discussion to reproduce Sub-sections (1) to (5) of Section 25-O of the I.D. Act which read as under :-

25-O(1); An employer who intends to close down an undertaking of an industrial establishment to which this chapter applies shall, in the prescribed manner, apply, for prior permission at least ninety days before the date on which the intended closure is to become effective, to the appropriate Government, stating clearly the reasons for the intended closure of the undertaking and a copy of such application shall also be served simultaneously on the representatives of the workmen in the prescribed manner;

Provided that nothing in this sub-section shall apply to an undertaking set up for the construction of buildings, bridges, roads, canals, dams or for other construction work.

(2) Where an application for permission has been made under Sub-section (1), the appropriate Government, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen and the persons interested in such closure may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the general public and all other relevant factors, by order and for reasons to be recorded in writing grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(3) Where an application has been made under Sub-section (1) and the appropriate Government does not communicate the order granting or refusing to grant permission to the employer within a period of sixty days from the date on which such application is made the permission applied for shall be deemed to have been granted on the expiration of the said period of sixty days.

(4) An order of the appropriate Government granting or refusing to grant permission shall, subject to the provisions of Sub-section (5) be final and binding

on all the parties and shall remain in force for one year from the date of such order.

(5) The appropriate Government may, either on its own motion or on application made by the employer of any workman, review its order granting or refusing to grant permission under Sub-section (2) or refer the matter to a Tribunal for adjudication;

Provided that where a reference has been made to a Tribunal under this Sub-section, it shall pass an award within a period of thirty days from the date of such reference.

From a perusal of the language of Sub-section (2) what the appropriate Government must do is

- (i) make an enquiry as it thinks fit;
- (ii) give a reasonable opportunity of being heard to the employer, the workmen and the person interested in such closure;
- (iii) having regard to the genuineness and adequacy of the reasons stated by the employer, interest of general public and all other relevant facts, and;
- (iv) by order and reasons to be recorded in writing grant or refuse to grant such permission.

Under Sub-section (4) the order granting or refusing to grant permission subject to the provisions of Sub-section (5) is final and binding on all parties and is to remain in force for one year from the date of such order.

We then have Sub-section (5) which empowers the appropriate Government to :-

- (a) either on its motion or an application made by the employer or a workman;
- (b) to review its order granting or refusing to grant permission under Sub-section (2) or
- (c) refer the matter to a Tribunal for adjudication.

6. To answer the contention raised by the petitioner, it will be necessary to consider the scope of the expressions inquiry, order, review and reference. While so answering, the preliminary issue itself is bound to be answered. The issue, therefore, would be as to what is the meaning of the expression "refer the matter to a Tribunal for adjudication". Does it mean as contended by the employer to refer the order for adjudication or as contended by the workman what has to be referred to, is the entire subject-matter of the application for closure. An appropriate Government under Sub-section (2) has to make an enquiry as it thinks fit. This enquiry is limited to the material available and placed before the Tribunal and limited to the genuineness and adequacy of the reasons; interest of the general public and all other relevant factors. The enquiry is limited in its very scope on the untested material available to it. Consequence of the

order granting or refusing to grant permission must be communicated within sixty days as otherwise it is deemed to have been granted. An adjudication on the other hand would require the Tribunal to assess the genuineness of the evidence before it and whether on the material placed before it, it would arrive on a preponderance of probabilities to a conclusion whether the permission ought to be granted or not. The language used in Sub-section (2) of Section 5 is itself different. If the language of the Sub-section uses different terminology it must follow that the scope of enquiry under Sub-section (2) and the scope of adjudication under Sub-section (5) is different. If the arguments on behalf of the petitioners is to be considered, the Tribunal will be bound to only consider and re-assess only the material to find out whether the order of the appropriate Government suffers from non-consideration of the tests it had to apply whilst granting permission or refusing permission under Sub-section (2) and in a case of a deemed permission even these tests are not required to be fulfilled considering that permission is deemed to be granted by fiction of law. In such circumstance, there will be no order to be examined by the Industrial Tribunal. The Tribunal, when conferred with the power of adjudication in terms of Sub-section (5) is not trimmed by the limitations as contained in Sub-section (2). It is as to answer the reference made to it and the reference made to it cannot be limited to the question whether the permission granted by the appropriate Government is good or bad. There would also then be not much of a difference between the expressions reviewing an order and making a reference. The expression "adjudication" is also found in Sections 10 and 11A of the I.D. Act. The Tribunals conferred with the power of adjudication can exercise any of the powers of a Civil Court as set out in Section 11 of the I.D. Act, 1947. The two different expressions used in Sub-section (5) will have to be given their due meaning. A review necessarily contemplates as to whether the order discloses an error apparent on the face of record and in limited number of cases where fresh material has come for consideration, which if so taken, could result in the authority possibly taking a different view from the view earlier taken. Apart from that the other expression used is "reference". The expression "reference" as known to industrial jurisprudence can only be made by an appropriate Government on the existence of an industrial dispute or individual dispute between the workmen on the one hand and the employer on the other. It is these disputes which can be the subject-matter of a reference. The expression "adjudication of a reference" cannot be equated with an order passed by the appropriate Government under Sub-section (2). An order arises from a culmination of the exercise of a judicial or quasi judicial power and determination of the question. Suffice it to say that the expressions used in Section 25-O must be given their due meaning as intended in law considering that Parliament itself has chosen distinct terminology. Review of an order cannot be placed on the same footing as a reference and neither can reference be equated with order. If that be the case, clearly the contentions urged on behalf of the petitioners that what can be considered both in review or reference is the order passed must be rejected. If the exercise in both review and reference is to be the same, then one

cannot understand the Parliamentary intention of using two different expressions for the exercise of power. One limited to a review of the order and the other of adjudication of the disputes referred, to it. Excepting the petitioners contention would mean to hold that the Government has no jurisdiction to make a reference of the dispute. Its jurisdiction is limited to merely make a reference of the legality of the order for adjudication by the Tribunal. On the reference of the order being made, Tribunal is bound to only consider whether the Government has considered the tests as set out in Sub-section (2), relying on the material which the Government considered in the course of its enquiry. In other words to adjudicate on the legality of the order when the reference is made to it. That cannot be so read considering that the Tribunal has to adjudicate the reference of the dispute made to it and not decide an appeal.

7. In so far as to the issue whether the Tribunal can hold that the reference is not maintainable, in my opinion, the issue is no longer *res integra*, having been considered as answered by the Apex Court in *National Engineering Industries v. State of Rajasthan and Ors.*, 2000(1) S.C.C. 371. The Apex Court therein, in para 27 was pleased to observe as under :-

The Industrial Tribunal is the creation of a statute and it gets jurisdiction on the basis of reference. It cannot go into the question of validity of the reference...."

It may be clarified here that we may distinguish those cases where even if a reference is made, it is open to the Industrial Court to answer the reference in terms of maintainability on the ground either that a party involved in the reference, are not workmen and/or employer, that the dispute does not partake of industrial dispute and/or that the industry is one in respect of which a reference could not be made and/or the appropriate Government was not the competent Government to make a reference. These are issues which arise from the reference. In my opinion, once a reference is made to the Tribunal, it is the Tribunal that will have to answer the reference, unless it has no jurisdiction. In the instant case, as discussed in the earlier part of the judgment, the language of Sub-section 25(4) makes it clear that a reference in respect of permission for closure, if granted or not granted, if raised by the employer or workmen, can be referred to the Tribunal. On reference to it, the Tribunal is bound to adjudicate the disputes referred to it. The time for disposal of the reference under the proviso to Sub-section (5) of Section 25, is directory and not mandatory. Once this is answered the issue whether, it ought to be answered as a preliminary issue or not becomes academic.

8. It would, however, be necessary to refer to the judgments referred to by the parties. In the case of *The Management of Express Newspapers Ltd. Vs. Workers and Staff Employed under it and Others*, , one of the contentions raised was as to the jurisdiction of the Tribunal to assume jurisdiction over a non industrial dispute. The Apex Court answered the issue in the following manner.

If the Industrial Tribunal proceeds to assume jurisdiction over a non industrial

dispute that can be successfully challenged before the High Court by a petition for an appropriate writ. It is also true that if the dispute is tried by the industrial Tribunal at the very commencement, the Industrial Tribunal will have to examine as a preliminary issue, the question as to whether the dispute referred to it is an industrial dispute or not, and the decision of this question would inevitably depend upon the view which the Industrial Tribunal may take as to whether the action taken by the respondent..."

Reference was then made to the judgment of a Division Bench of the Karnataka High Court in the case of *Management of Rangaswamy & Co. v. D.V. Jagadish* 1990(11) C.L.R. 56, where the Division Bench has taken a view under what circumstances an issue ought to be decided as a preliminary issue. Reliance is then placed on the decision in the case of *Arun Agarwal v. Nagreeka Exports*, (2002) 10 SCC 101, where the issue before the Apex Court was whether in the civil proceedings an issue as to the jurisdiction is raised that has to be decided as preliminary issue. Reference was also made to a Division Bench judgment of this Court in the case of *Jaslok Hospital and Research Centre v. B.V. Chavan* 1987(1) C.L.R. 81 to contend that if there is a objection as to the validity of the reference that has to be challenged in the very first instance and the employer ought not to be permitted to question the validity of the reference after the award is given in such a reference.

On the other hand the Apex Court in the case of *D.P. Maheshwari Vs. Delhi Administration and Others*, has taken a view that it will be open to the Industrial Tribunal considering the facts and circumstances whether to treat the issue as preliminary issue or decide the said issue along with other issues. If the Tribunal decides to decide the issue with the other issue, then the writ Court in exercise of its extra ordinary jurisdiction under Article 226 ought not to interfere with the exercise of such jurisdiction of the Tribunal. Similar view was taken in *National Council for Cement and Building Materials Vs. State of Haryana and Others*, .

9. In the instant case, considering the facts and material, apart from the fact that the issue prima facie was not within the jurisdiction of the Tribunal and even otherwise as the reference as made was competent, the Tribunal in the facts of the case was right in refusing to treat the issue as preliminary issue. The matter pertains to grant of permission for closure. The only issue before the Tribunal is to answer the reference made to it, namely whether the application for closure as made by the company ought to be granted. Whatever other incidental issues which may arise the Tribunal cannot be detracted from answering the main issue which has been referred to it. In the instant case, the petitioner had filed the petition in this Court wherein they had challenged the reference. They chose not to pursue the petition, but instead chose to go before the Tribunal and get the issues re-case and then get a preliminary issue framed and thereafter wanted the Tribunal to answer the said issue as a preliminary issue, which very point was given up by them before this Court when they refused to pursue their petition to challenge the reference. The entire action seems to be delay answering the

reference. In my opinion, therefore, the Tribunal was right in holding that the said issue can be decided along with other issues and not as a preliminary issue. Therefore, no case is made out for interference in the exercise of the extraordinary jurisdiction of this Court. Rule discharged. There shall be no orders as to costs.