
(2004) 12 BOM CK 0098

In the Bombay High Court

Case No : Writ Petition No. 4268 of 1999

Chief Engineer, Irrigation Department

APPELLANT

Vs

Woman Atmaram Lede and Another

RESPONDENT

Date of Decision : 23-12-2004

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices
Act, 1971 — Section 25F, 28

Citation : (2005) 2 BomCR 568

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

Bench : Single Bench

Advocate : J.T. Gilda, for the Appellant; M.V. Mohokar, for the Respondent

Final Decision : Dismissed

Judgement

Dharmadhikari B.P., J.—By this petition under Articles 226 and 227 of Constitution of India the petitioners, all officers of State Government of Maharashtra challenge the order dated Fifth of February, 1999 delivered by member Industrial Court Nagpur in U.L.P. Complaint Number 9 of 1993. This Court has notice before admission on 29-11-1999 and since then the matter is pending for admission. On 26 November, 2001 this Court fixed the matter on 22 December, 2001 for final hearing at admission stage itself. Accordingly, matter is taken for final hearing and the request of both the parties. Rule returnable forthwith. Heard finally. Advocate Gilda argued the matter on behalf of petitioners while Advocate Mohokar argued the matter on behalf of both the respondent No. 1. Nobody appears for respondent No. 2 though served.

2. The facts giving rise to the present petition can be briefly stated as under—Present respondent No. 1 Waman filed a complaint u/s 28 of Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Act, 1971 (hereinafter referred to as "the Act") on 15th October, 1992 before Industrial Court at Nagpur. He contended that he is working as labour in colony and Stores

of Sub-Division No. 4 PENCH Hydro Electric Circle of Irrigation Department at Totaladoh Circle, Tahasil Ramtek, and District Nagpur. It is his case that he was appointed in 1983 by Sub-Divisional Officer who has competent to appoint employees on daily wages and he was getting Rs. 14 per day for his work in the department. He states that his name was included on nominal muster rolls (NMR). He worked at Nagpur from 2nd April, 1983 to 23rd August 1991 and thereafter from 24th August, 1991 at sub division number 4 in Road branch till February, 1992. He was again transferred to steel and cement branch of sub division number one and it is his case that since 24th August, 1991 he is working at Totaladoh as labour. He contends that as per CRTEE (CONVERTED REGULAR TEMPORARY ESTABLISHMENT) Rules the complainant was taken on permanent basis in the department and was made regular. As per provisions of Rules he should have been made regular after five years and hence from 2nd April, 1988 he became regular employee. As per the list of daily wage employees submitted by petitioners, the State Government issued an order on 21st March, 1992 and he was appointed as regular labour with effect from 2nd April, 1989. He points out that respondent No. 5 (present respondent No. 2) was junior to him but he was granted post of clerk and name of complainant was recommended for the post of labour and his said junior employee got the post of Clerk. He points out that pay scale of a clerk is 950-20-1150 efficiency bar 25-1500. A labour gets salary in pay scale of 750-20-870 efficiency bar-14-920. It is further his case that he has studied up to B.Com. Final while said respondent is only Matric. He therefore contended that his employer has indulged in unfair labour practice falling under item number 5 (favouritism & partiality to one set of workers regardless of merit) and 9 (failure to implement agreement, settlement or award) of Schedule IV of the Act. Hence after seeking declaration that his employer has indulged in unfair labour practice, he sought declaration and direction that he should be appointed as Clerk with effect from 1st May, 1992 and should be given all consequential benefits accordingly.

3. His complaint was opposed by employer (present petitioners) who denied all these facts. Respondents before Industrial Court contended that the complainant was appointed as a labour and was transferred only in that capacity, they pointed out that the complainant was never allowed to sign N.M.R. though his name was included in it for attendance purposes. After completion of five years of service, his name was submitted to Government for approval for bringing him on C.R.T.E. and after approval he was taken as labour on C.R.T.E. with effect from 2nd April, 1988. It is admitted that he was subsequently transferred to Steel and Cement section of Sub Division Number 4 at Totaladoh and he never worked as Clerk. The department has further stated that present respondent Mo. 2 came to be appointed as skilled N.M.R., with effect from 1st August 1984 and from 1st of June, 1986 he is working as Clerk. Hence after completion of five years of continuous service, his proposal was forwarded for bringing him on C.R.T.E. and Government gave sanction on 21st March, 1992 and accordingly he was brought on C.R.T.E. with effect from 8th August, 1989. It is mentioned that said respondent No. 2

joined as Clerk with effect from 1st May, 1992. It is stated that there is no mistake or any unfair labour practice by employer in the matter.

4. It is in this background that the parties lead evidence before the Industrial Court. Complainant Waman examined himself a while the respondents examine 2 of their employees in defence. The learned Industrial Court thereafter heard arguments of parties and came to conclusion that complainant before it has proved that his employer has engaged unfair labour practice falling and Item 5 and Item 9 of Schedule IV of the Act. It therefore directed the employer to submit revised C.R.T.E. proposal in respect of complainant with specific mention that he was doing clerical work before completion of five years of service and also his educational qualifications. Time of two months was given to the respondents (present petitioners) for this purpose. This order of Industrial Court is challenged in present petition.

5. The petitioners/employer's have raised 3 fold contentions. The same are that the department of irrigating is not an industry, that there is no assertion in complaint filed by respondent No. 1 before Industrial Court that said department is industry and on the merit that relief granted by Industrial Court is uncalled for as there is no unfair labour practice. However the first contention that irrigation department is not an industry as declined in Section 2(j) of Industrial Disputes Act was given up as there is no issue and evidence before the Labour Court about this.

6. In support of contention that in absence of express assertion in the complaint that department is an industry, the Court below could not have taken cognizance of Complaint itself; Advocate appearing for petitioners/department/employer has relied upon the judgment of Hon"ble Apex Court reported at 2001(1) C.L.R. 968, State of Gujarat and Anr. v. Pratamsingh, a judgment of Division Bench of this Court reported at 2002(1) CLR 383, Haribhau v. State of Maharashtra, and judgment of learned Single Judge of this Court dated 19th August, 2003 in Writ Petition No. 2890 of 2003, Sudhakar v. Ranger Forest. Officer & Deputy Conservator of Forest. He points out that the complaint memo filed by present respondent No. 1 before Industrial Court does not contain a plea that the activity of respondent employer is an industry as is contemplated by Section 2(j) of Industrial Disputes Act and hence the learned member of Industrial Court ought to have dismissed the complaint on this ground. He further argues that even on merits the respondent No. 1" has failed to make out case as pleaded by his and learned members of Industrial Court has overlooked this aspect of the matter. He contends that a totally new case has been accepted by learned member and relief has been given to respondent No. 1.

7. Advocate Mohokar appearing for respondent No. 1 states that the cases on which reliance has been placed by petitioners are not attracted here because in those cases there was dispute raised about the aspect of industry and in this case the complainant has approached the Court pointing out violation of Kalelkar award and the reply filed by respondent/employer/present petitioners before

Industrial Court has also accepted the position that the department is industry and that the complainant is workman. He contends that no such dispute/objection was raised in before the Industrial Court and the same is sought to be raised for the first time in writ petition after several years, thereby depriving the complainant of an opportunity to amend this complaint to expressly incorporate said plea in it. He contends that both the contestant parties namely employer as also employee as also the learned member of Industrial Court have correctly proceeded under the presumption that there is no dispute between parties about the nature of activity of respondent department. He further contends that in any case before this Court the objection raised that department of petitioners is not an industry has been given up and hence, such an issue about "assertion" cannot be permitted to be raised for the first time in writ petition. He relies upon the judgment of Hon'ble Apex Court reported at 1996(I) L.L.J. 920, Food Corporation of India Workers Union v. Food Corporation of India, to submit that the Industrial Tribunal is not a Court and there has to be only "material" before it and not "evidence" as required by the Evidence Act. By relying upon a judgment of this Court reported at Bombay Mothers and Children's Society Vs. General Labour Union (Red Flag) and Another, , he contends that strict rules of pleadings do not apply to disputes before Industrial Court. He also points out judgment of Hon'ble Apex Court in Krishi Utpadan Mandi Samiti v. Arvind Chaubey, (2002) 9 SCC 549 , to contain that if the plea of "not an industry" is not taken by employer before Industrial Tribunal it cannot be permitted to be raised before higher forum. He also relies upon judgment of Hon'ble Apex Court, reported at Collector of Central Excise, Calcutta Vs. Alnoori Tobacco Products and Another, , to submit that the judgments of Hon'ble Apex Court are not to be followed blindly and he argues that the judgment on which reliance has been placed by petitioners are applicable only in the facts and circumstances of those cases. He argues that the non-existent ground is sought to be introduced latter on by petitioners in view of these rulings. He has relied upon the judgment of Hon'ble Apex Court reported at 1978 L.I.C. 467 (Bangalore Water Supply), judgment of Apex Court in case of Desraj v. State of Punjab, reported at 1988(1) C.L.R. 621 holding that irrigation department is an industry 1998(1) C.L.R. 866, Coir Board, Ernakulam v. Indira Devi, Division Bench and Pull Bench judgment of Hon'ble Apex Court between same parties reported at Coir Board Ernakulam Kerala State and Another Vs. Indira Devi P.S. and Others, , Apex Court judgment at 1999(83) F.L.R. 1109, wherein department of irrigation or management of TUNGABHADRA board was held to be industry judgment of Allahabad High Court reported at 2000(86) F.L.R. 639, State of Uttar Pradesh v. Labour Court, taking similar view to argue that as the law on the point is well settled, no such specific plea is raised by parties before Labour or Industrial Court and employer as also employee proceeded under the accepted position that the department is industry. He contends that same thing has happened even in this case. He further relies upon the judgment of this Court 1992 Bom.C.R. 701 : 1991 Mh.L.J. 1557, State of Maharashtra v. M.V. Ghalge, where the cases of employees covered by Kalelkar award were held maintainable

before Labour/Industrial Court and not transferable to Maharashtra Administrative Tribunal. He also relies upon judgment of Division Bench of Punjab and Haryana High Court reported at State of Haryana Vs. Jai Kishan and Another, , where the contention that Irrigation Department is not an industry was not permitted to be raised for first time in writ petition. With reference to his complaint filed before Industrial Court he states that the pleading therein clearly show that the plea that he is workman and department is industry is implicit and objection raised by petitioners employer is misconceived. He states that the learned Member of Industrial Court has correctly appreciated the controversy on merits and after recording evidence, has found that present respondent No. 1 (complainant before Industrial Court) was in fact working as Clerk and ought to have been brought on C.R.T.E. as Clerk. He places reliance upon provisions of Clause 28 of Kalelkar award for that purpose. He states that there is no merit in the petition and it should be dismissed.

8. In reply Advocate Gilda states that the rulings mentioned by him squarely clinch the issue and as in this case respondent No. 1 did not assert that the department of petitioners is an industry, there was no scope for framing the issue on the point and hence there is no evidence about the same. He clarified that as there is no evidence since there is no issue the exercise of finding put whether activities of irrigation department constitute industry or not is not possible in this petition and hence he has given up that issue/objection. He states that the question of assertion in complaint is altogether independent and separate issue not connected with the challenge given up and as such the petition must be allowed.

9. Perusal of writ petition filed by the original respondent (petitioners herein) reveal that on 10 October, 2001 two grounds have been added to it by way of amendment. Ground number "IV A" is about the nature of activities of irrigation department with contention that it is sovereign function of state while ground number "V" is about the applicability of Maharashtra Civil Service Rules to respondent employee and hence jurisdiction about the dispute with Maharashtra Administrative Tribunal. Thus the plea of absence of assertion in complaint is not taken in the petition. It is to be noted that it such a plea, which has the effect of divesting the Labour or Industrial Court of its competence to adjudicate, is allowed to be taken after expiry of almost ten years, consequences for complainant would be frustrating. On the other hand, if such plea is taken before the trial Court itself, complainant will get an opportunity to add plea to his complaint and also an opportunity to prove it by adducing the evidence about nature of activities of the department. If such course is followed it would enable Tribunals functioning under welfare jurisdiction to pronounce on merits of controversy without any prejudice to the parties. As held by Hon"ble Apex Court in Arvind Choube's case (supra) in paragraph 2, as this contention was not raised before Industrial Tribunal, it cannot be allowed to be canvassed before High Court. Even the Division Bench of Punjab High Court in case of State of Haryana (supra) has taken view that determination of plea of this nature

depends on evaluation of evidence of parties and hence it cannot be allowed to be raised for the first time before writ Court particularly when the department has failed to lay factual foundation for such plea. However, in view of the ruling of Hon''ble Apex Court and of the Division Bench of this Court about the assertion/pleading in the matter, the point needs to be examined further.

10. In 2001(1) C.L.R. 968, the Hon''ble Apex Court has expressed as under:

"5. If any dispute arises, as to whether a particular Establishment or part of its where in an appointment has been made is an industry or not, it would be for the person concerned who claims the same to be an industry to give positive facts for coming to the conclusion that it constitutes "an industry". Ordinarily, a department or the Government cannot be held to be an industry and rather it is part of sovereign function. To find out whether respondent in writ petition had made any assertion that with regard to the duty which he was discharging and with regard to the activities of the organisation where he had been recruited, we find that there has not been an iota of assertion to that effect though, no doubt, it has been contended that the order of dismissal is vitiated for non-compliance of Section 25F of the Act. The State, in its counter affidavit on the other hand, refuted the assertion of the respondent in writ petition and took the positive stand that Forest Department cannot be held to be an industry so that the provisions of Section 25-F of the Act cannot have any application. In the absence of any assertion by petitioner in the petition indicating the nature of duty discharged by the petitioner as well as the job of the establishment where he had been recruited, the High Court wholly erred in law in applying the principles initiated in the judgment of this Court in Jagnath Maruti Kondhare (supra) to hold that the forest department could be held to be "an industry".

"6. The learned Single Judge as well as the Division Bench of the High Court have failed to carefully examine the ratio of this Court's judgment in the case Jagnath Maruti Kondhare (supra), inasmuch as in para 15 of said judgment the Court has quoted the assertions made in the affidavit of chief convert of forest and then in para 17; the Court held that the scheme undertaken cannot be regarded as a part of sovereign function of state. We are afraid that the aforesaid decision cannot have any application to the facts of the present case where there has not been any assertion of fact by the petitioner in establishing that the establishment to which he had been appointed is "an industry". In this view of matter, we have no hesitation to come to conclusion that learned Single Judge as well as the Division Bench committed serious error of law in holding that to the appointment in question, the provisions of act apply. We would accordingly set aside the judgment of the Division Bench as well as that of learned Single Judge and hold that the writ petition would stand dismissed."

Thus, it is apparent that in this case before the Hon''ble Apex Court there already was a dispute about the nature of activity of the department raised before lower authority and the department came with specific stand that it cannot be held to be an industry. Thus "dispute" as to whether department is or is not an industry

was involved. With this, when the Division Bench ruling of this Court reported in 2002(1) C.L.R. 383 (supra) is perused, it is clear that the Division Bench was considering the issue of an condonation of delay and was about to remand the matter back to Labour Court when the above referred judgment of Hon''ble Apex Court in case of State of Gujarat v. Pratamsingh was pressed into service by learned A.G.P before it. From this judgment of Division Bench it appeared that there was dispute about industry already raised and therefore the Division Bench accepted this argument of learned A.G.P and found that in the absence of assertion in complaint, no purpose would be served by remanding the matter back to Labour Court. The view taken by learned Single Judge of this Court while deciding writ petition number 2890 of 2003 on 19th August, 2003 also reveals similar state of affairs. It further appears that the Division Bench or the learned Single Judge were not required to consider the Full Bench ruling of Hon''ble Apex Court reported at Krishi Utpadan Mandi Samiti v. Arvind Chaubey, (2002) 9 SCC 549 i.e. Arvind Choube's case.

11. The Hon''ble Apex Court has in paragraph 2 of the Arvind Choube's ruling observes "learned Senior Counsel for the appellant contended that the appellant Mandi samiti is not an "industry" governed by the provisions of U.P. Industrial Disputes Act, 1947. The High Court has held against the appellant on the ground that such a contention was not canvassed before the Industrial Tribunal and also following an earlier decision of another Bench, the High Court dismissed the writ petition. Once the appellant did not raise such a contention before the Industrial Tribunal, it was not available to be canvassed higher up".

12. In the Division Bench of Punjab and Haryana High Court that is it State of Haryana Vs. Jai Kishan and Another, , such plea of industry was not allowed to be raised as its determination depends on evaluation of evidence of parties and therefore it cannot be allowed to be raised for the first time before the writ Court. The Division Bench observed that the petitioner state has failed to lay factual foundation for such plea.

13. In order to find out whether activities of a Government Department or establishment fall u/s 2(J) of Industrial Disputes Act, in depth examination of actual work carried out therein, its purpose, its effect along with the need/reason for its creation or establishment and its history is essential. It is mixed question of law and fact. If such a plea that department is not an industry is itself not allowed to be raised for the first time in High Court, it is apparent that plea regarding absence of assertions in relation there to in complaint can also be not allowed to be raised for the first time in High Court. The Division Bench of this Court and the learned Single Judge were not called upon to consider this in earlier reported judgments. In the present case, the petitioners have given up the objection on the point of industry and are pressing only the ground of absence of assertions in complaint of respondent No. 1. It is thus apparent that when there was no and can be no dispute about the nature of activity of petitioners before the learned lower Court, such a ground cannot allowed to be

raised in this petition. Plea of absence of such assertion in complaint must be associated with dispute that activity is not an industry and such dispute is not being raised by petitioners. Here it is to be noticed that no such ground is actually pleaded though writ petition has been amended later on. In this background, the ground of absence of assertions about industry in the complaint of respondent No. 1 is not available in this petition as there is no "dispute" about the nature of activity of petitioners between the parties.

14. Coming to the relief granted to respondent No. 1 by learned Member of Industrial Court on merits, it is to be seen that the learned Member of Industrial Court has found that he was initially engaged on clerical work in the office while present respondent number 2 was engaged in 1984 as a watchman, it has found that respondent No. 2 has passed 10th class examination. It is further found that respondent No. 1 has passed B.Com. examination and he started working as Clerk on 2nd of April, 1983. It has found that respondent number 2 worked in Steel Cement dispatch store and Mechanical Branch and he was dealing with supply of irrigation material to the cultivators and the relevant time he was working in correspondence. It is further found that though employer denied that respondent No. 1 work as Clerk still documents at Exhibit Nos. 26 to 57 where proved to be in the handwriting of respondent No. 1 and hence respondent No. 1 was found maintaining cash book for the month of May, 1983, issuing receipts and bills from April to September, 1983. The Industrial Court found that respondent No. 1 was working as Clerk and not as labour. It found that the Kalelkar award gives duties to labour which are manual in nature. It has found that in proposal forwarded for C.R.T.E., respondent No. 1 was shown as performing labour works and not clerical work. It has found that in case of respondent number 2, though he was junior of respondent No. 1 and though he was less qualified, still it was shown that he was doing the work as Clerk. It is further noticed by learned member that in cross-examination witness No. 2 for the department admitted that upon completion of five-year service employee is to be brought on C.R.T.E. on the post on which he was working before submitting the C.R.T.E. proposal and Industrial. Court found that Clause 28 of Kalelkar award contains similar provisions. It therefore held that respondents did not submit correct proposal of complainant before it to State. Government and have committed unfair labour practice by failing to implement provisions of Kalelkar award properly. It has therefore issued directions to submit of respondent No. 1.

15. The complaint filed by respondent No. 1 before Industrial Court begins by saying that recently he is working as labour in paragraph 3 of his complaint he has made grievance about respondent No. 5 i.e. present respondent number 2 and has mentioned that said respondent was also appointed as labour in the year 1984 and therefore he is his the junior. Till this paragraph in his complaint respondent No. 1 has not made the grievance that he was working as Clerk. On the contrary he makes the grievance that his superiors have recommended name of present respondent number 2, for, the post of Clerk and his own name was recommended for the post of Labour and hence respondent, number. 2, though a

junior, got the order for the post of Clerk. The further makes a grievance that he being senior ought to have been appointed as a clerk and present respondent number 2 has been shown undue favour. In paragraph 4 of his complaint he has demonstrated how his educational qualification and experience in the department is more than present respondent number 2 and states that his employer should have appointed him as Clerk and by not giving improper posting, his employer has indulged in unfair labour practice falling under items 5 (favouritism to 1 set workers regardless of merits) and item 9 (failure to implement award, settlement etc.). Thus, in the entire complaint he has not made the grievance that though he was working as Clerk, he has not been given that post. Clause 28 of Kalelkar award reveal that post of the daily paid employee working on establishment for five years is converted as a post on converted temporary establishment (C.R.T.E.) and such employee is appointed on that post. The post remains personal for the employee and ceases as and when the holder employee ceases to be in service.

16. Arguments of learned Counsel for petitioners are therefore that in his complaint complainant nowhere expressly pleaded that he was working as Clerk already and was senior to present respondent No. 2 as Clerk and therefore he should have been brought on C.R.T.E. as Clerk. It is the argument that complainant before the Industrial Court sought post of clerk on account of his better qualification and seniority and not on account of his previous work on that post. It is the case of petitioners that respondent number 2 was already working as Clerk. This argument cannot be accepted. As held by this Court in case of Bombay Mother's and Childers Society v. General Labour Union 1999 Mh.L.J. 921 strict rules of pleading do not apply to disputes before Labour and Industrial Court. Even in case of Food Corporation of India 1996 L.L.J. 920 the Hon'ble Apex Court has held that there need not be any evidence to prove the facts before the Industrial Tribunal and what is required his only material on record. Here respondent No. 1 has clearly deposed that he was working as clerk and he also produced documents in support thereof. This evidence was not objected to by the respondents/present petitioners. Some of the documents (Exhibits 28 to 57) showing that the complainant before Industrial Court worked as Clerk are signed by the then Deputy Engineer Shri Sonkusare who has been examined as departmental witness by petitioners before Industrial Court. The findings reached by learned Member of Industrial Court are after appreciation if this evidence. Petitioners have not shown how this finding is perverse and further have not demonstrated any prejudice in the matter. On the contrary the petitioners themselves have given the suggestion to complainant during his cross-examination that he did the work of maintaining register of cement and other materials during absence of regular shall and complainant has answered in affirmative. This also shows that petitioners have taken work of clerk from respondent No. 1 complainant though he was paid as labour. It is in this background that the learned Member of Industrial Court has found fault with the proposal forwarded by petitioners for bringing respondent No. 1 on C.R.T.E. It is

to be noticed that learned member of Industrial Court has not given a direction to the petitioners to remove present respondent number 2 or to accommodate respondent No. 1 in his place. Only direction is to submit revised proposal to the Government with correct information about his qualification and work. I do not find that Industrial Tribunal discharging its jurisdiction and enforcing welfare laws has acted with any error or mistake in issuing directions to the petitioners as quoted above.

17. Under the circumstances. I do not find that any case is made out for interference in writ jurisdiction. The petition accordingly fails and is dismissed with no order as to costs.