

(2008) 12 BOM CK 0048
In the Bombay High Court
Case No : Writ Petition No. 814 of 2007

Dockyard Employees Union

APPELLANT

Vs

Mazgaon Dock Ltd., Rear Admiral Krishnan, Chairman and
Managing Director Mazgaon Dock Ltd., Mr. R. Dayal, General
Manager, Mazgaon Dock Ltd. and Mazgaon Godi Kamgar
Sanghatana

RESPONDENT

Date of Decision : 12-12-2008

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 19, 226
Industrial Disputes Act, 1947 — Section 18, 18(1), 2

Citation : (2009) 121 FLR 1068

Hon'ble Judges : R.S. Mohite, J; F.I. Rebello, J

Bench : Division Bench

Advocate : Arshad Shaikh and R.M. Pethe, for the Appellant; R.S. Pai, instructed by Sanjay Udeshi and Co. for Respondent Nos. 1 and 3 and Gayatri Singh, for the Respondent

Judgement

F.I. Rebello, J.—Rule. Heard forthwith.

2. Petitioner is a Trade Union registered under the provisions of the Trade Unions Act. It has amongst its members workmen working with respondent No. 1, which is a State or other authority or instrumentality within the meaning of Article 12 of the Constitution of India and hence amenable to the writ jurisdiction of this Court. Respondent Nos. 2 and 3 are sued in their capacity as Chairman and Managing Director and General Manager of respondent No. 1. Respondent No. 4 is the intervenor Union which has also membership amongst workmen engaged by respondent No. 1. Since 10th February, 1992 pursuant to cancellation of certificate of Recognition granted to the Association of Engineering Workers, there is no recognised/representative union of the workmen. The 1st Respondent in the year 1992 had decided to form a bargaining Council consisting of some management representative and two representatives each, from the then four registered trade unions for the purpose of resolving disputes of their employees.

Presently there are nine unions on the bargaining Council.

3. The respondent company has entered into various settlements u/s 2(p) read with Section 18(1) of the Industrial Disputes Act, in the matter of various service conditions. One such settlement was entered into on 17th September, 1998. The unions had fulfilled their obligations under the Memorandum of Settlement dated 17th September, 1998. Pursuant to further negotiations settlements were signed on 14th May, 2003, 8th July, 2003, 13th July, 2004, 19th October, 2004 and 20th October, 2005. According to the petitioners their members have accepted the settlements and have fulfilled their obligation under each of the aforesaid settlements. A promotion policy was formulated and which has been amended from time to time resulting in what is known as Promotion Rules. Under the promotion Rules, the normal pre-requisite for promotion for the post of Special Grade to the Post of Mistry, is that, the incumbent should have three years confirmed service in Special Grade and the ratio of vacancy would be 1:20 on total strength of Skilled Grade I, Skill Grade II, Highly Skilled and Special Grade and the minimum average report as per A.A.Rs. for past three years without any adverse remarks and with good conduct and attendance.

3. Under the Settlement of 1998 and the promotion policy there was a Special one time concession for promotion from Special Grade to Mistry and was applicable to those operatives who were already in the Special Grade or promoted to Special Grade as on 1st October, 2004. This concession of waiver of mandatory service of three years as Special Grade was made available till 30th September, 2010. According to the petitioners fifteen members of the Union became eligible and due for promotion to the post of Mistry from the dates ranging from 1st April, 2006 to 1st October, 2006 depending on the date on which they were confirmed in the Special Grade and having completed six months of probation period. The chart annexed to the Petition show that out of 15 employees one was confirmed on 1st February, 2006, seven were confirmed in the Special Grade on 19th September, 2006, 3 were confirmed on 27th April, 2004 and four were confirmed on 1st October, 2004. As there were clear vacancies the Unions and the Bargaining Council approached the General Manager, seeking implementation of the agreed terms relating to promotion. Finally by letter dated 19th January, 2007 demanded to pass the orders of promotion immediately. As the frequent requests and reminders had no effect, the petitioners through their Advocates served a notice on 5th March, 2007 to promote the employees who were eligible. Though the employees are eligible and there being clear vacancies the respondents have withheld intentionally the promotion of their members to enable others to supersede their members. Persons who have superseded, it is submitted, are those who had not sent the declaration accepting the settlement and have thereafter pursuant to opposition accepted the same. According to the petitioners only the fifteen members set out in the list are eligible for promotion and the present petition has been filed as raising industrial dispute is not an equally efficacious remedy and, therefore, the reliefs as prayed.

5. Reply has been filed on behalf of respondent Nos. 1 to 3. The following preliminary objections have been raised.

(a) The petitioners union represents the workmen of the 1st respondent company who are covered by the provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as the I.D.Act). The subject matter involved relates to alleged claim of promotion of employees referred to in Exhibit "C". This is a dispute falling within the purview of the I.D. Act. As the petitioners have alternative remedy, hence petition is not maintainable.

(b) The petitioners have allegedly raised a dispute with regard to the promotion of those workmen to the post of Mistry disregarding their seniority. The claim for promotion is contrary to settlement dated 20th October, 2005, award dated 7th October, 2006 in Reference (IT) No. 61 of 2004 and the minutes of the meeting dated 6th March, 2007. The petition as filed is not maintainable.

(c) The petitioner union has not impleaded the affected workmen who were promoted to the post of Mistry in accordance with the provisions of the settlement dated 20th October, 2005 and Award dated 7th October, 2006 and the minutes of the meeting dated 6th March, 2007. On this ground also the petition is liable to be dismissed.

(d) As per the minutes of the meeting held on 6th March, 2007 all the unions have agreed that while effecting promotions to the employees under the settlement, seniority of the employees should not be adversely affected. In the circumstances the promotion of the employees in Special Grade to the post of Mistry is required to be considered along with the seniority of the eligible employees. Further to the settlement of 17th September, 1998 between the respondent No. 1 and the Unions there have been subsequent settlements in respect of promotion policy, etc. The last being on 20th October, 2005. In terms of Clause 6 of the settlement dated 20th October, 2005 all the Unions have agreed for amendment of the promotion policy as set out in Appendix-II to the settlement. The said settlement dated 20th October, 2005 stood modified by Award dated 7th October, 2006 in Reference (IT) No. 61 of 2004 and the minutes of the meeting dated 16th March, 2007. Clause 6 of the settlement reads as under:

The promotion of employees shall continue to be governed as per the Promotion Rules of the MOS dated 14th May, 2003 as amended thereunder on 8th July, 2003 and 19th October, 2004 and as further amended now as addendum to Appendix-II to this MOS. Management shall consider release of additional vacancies as necessary in respect of ratio-based posts in consultation with signatory Unions.

6. According to the management the Union cannot seek promotion of the workmen as Mistry disregarding seniority in Special Grade. Respondent Nos. 1 to 3 have specifically denied that the employees referred to in Exhibit "C" are entitled to get automatic promotion from the dates referred to in Exhibit "C".

6. From the averments in the pleadings and the contentions raised, we will first have to deal with the following issues:

(i) Whether a Writ Petition is maintainable at the instance of a Union in respect of conditions of service of their employees pursuant to settlements u/s 2(p) and 18 of the I.D. Act, 1947?

(ii) If the dispute partakes of an industrial dispute, can the Union without taking recourse to the remedy under the provisions of the Industrial Disputes Act, 1947, invoke the extra ordinary jurisdiction of this Court under Article 226 in respect of individual rights of its members?

(iii) Can the reliefs prayed for be granted in the absence of those workmen who have already been promoted and occupying the posts in respect of which posts the petitioners are claiming promotion for their members.

(iv) On merits have the petitioners made out any case, if the petition is otherwise maintainable to get the reliefs as prayed for.

7. We proceed to answer the first issue. The petitioner is a registered union having the right to sue or being sued. It seeks to sue the respondent Nos. 1 to 3 for the purported violation of the promotion policy pursuant to the settlements dated 17th October, 1998 and further settlements. The last settlement was entered into on 20th October, 2005. Can the petitioner, not being a citizen, contend that its fundamental rights or the fundamental rights of its members having been violated, they can maintain this Petition. Workmen who are affected by the non-promotion are not parties to the petition? The promotion policy does not affect any of the fundamental rights of its members under Article 19; it may still be possible to contend that based on the averments that the action of the Respondents is violative of Article 14 of the Constitution of India. The rights, if any, created by the settlement or promotion policy are not statutory rights, but conditions of service binding on Respondent No. 1 pursuant to a settlement. Conditions of service may be contained in the certified standing orders applicable to respondent No. 1 establishment or if not certified, the model standing orders as also by settlements or awards. If the Respondent No. 1, which is a State has laid down a procedure under which its workmen are eligible to be considered for promotion, the Respondent No. 1 cannot depart from that procedure. Rights created by a settlement are enforceable. The petitioners, therefore, could have brought the petition under Article 226 as a collective body, for enforcing the rights of its members. The rights claimed are not the rights of the Union but a right which each member of the union would have, for non-consideration for promotion to the post of Mistry.

8. In this context let us examine the position of law. We may point out that the learned Counsel for the petitioner has relied upon the judgment in D.S. Veer Ranji v. Ciba Speciality Chemicals (I) Ltd. and Ors. 2002 I CLR 267 to contend that the petition against the respondent No. 1 would be maintainable. In our opinion the judgment of the Full Bench in D.S. Veer Ranji (supra) clearly does not

answer the issue raised here. The issue there was in respect of companies which were private limited companies not falling under the expression "State" or other instrumentality. The issue was whether a writ could go to such a company. That was the issue answered in those petitions.

In *Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others*, the Supreme Court was considering the issue as to whether the petitioner therein had a locus standi to maintain the petition. The issue there was whether the petitioner who was a member of the Trust could maintain the petition. The Court held that the personal right need not be in respect of a proprietary interest. It can also relate to an interest as a trustee and as such the petitioner had locus standi to maintain the petition.

Answering the issue the Court held that Article 226 of the Constitution confers a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. Apart from persons claiming under a fundamental right others who claim any other rights can also approach the Court seeking exercise of its extra ordinary jurisdiction. The article does not describe the class of persons entitled to apply, but it is implicit in the exercise of its extra ordinary jurisdiction, that the relief asked for must be one to enforce a legal right. The right that can be enforced under Article 226 ordinarily, has to be personal or individual right of the petitioner himself, though in the case of some of the writs like habeas corpus or quo warranto this rule may have to be relaxed or modified.

In *Jasbhai Motibhai Desai Vs. Roshan Kumar, Haji Bashir Ahmed and Others*, , the petitioner a rival in the trade sought a writ of certiorari to quash the license granted to his rival on the ground that it suffered from defect of jurisdiction. After analysing the law, the Court held, that in order to have locus standi to invoke the extra ordinary jurisdiction, an applicant should ordinarily be one who has a personal or individual right in the subject-matter of the application. As a general rule, infringement of some legal right or prejudice to some legal interest inhering in the petitioner is necessary to give him locus standi in the matter. The expression "ordinary" would indicate that this is not a cast-iron rule. It is flexible enough to take in those cases where the applicant has been prejudicially affected by an act or omission of an authority, even though such applicant has no proprietary or even a fiduciary interest in the subject-matter. That apart, in exceptional cases even a stranger or a person who was not a party to the proceedings before the authority, but has a substantial and genuine interest in the subject-matter of the proceedings will be covered by this rule. In so far as the writ of certiorari is concerned, the Court categorised the applicants in the context of locus standi (i) "person aggrieved"; (ii) "stranger"; (iii) "busybody or meddlesome interloper. The Court held that in case of a busybody or meddlesome interloper petitions at their instance should not be entertained. The distinction between the other two categories of applicants, though real, is not always well-demarcated. In the category of persons aggrieved would fall in two

concentric zones; a solid central zone of certainty, and a grey outer circle of lessening certainty in sliding centrifugal scale, with an outermost nebulous fringe or uncertainty. Applicants falling within the central zone are those whose legal rights have been infringed. Such applicants undoubtedly stand in the category of "persons aggrieved". All persons in the outer zone may not be "persons aggrieved".

9. On behalf of the petitioner learned Counsel drew our attention to the observations in *The Mumbai Kamgar Sabha v. Abdulbhai Faizullabhai and Ors.* AIR 1996 SC 1455. The Court held that when the Union files a petition it represents the workmen a collective noun, as it were, the numerous humans whose presence is indubitable in the contest, though formally invisible on the party array. These observations were made in the context of an order in a reference pertaining to bonus which was espoused by the Union. It is in that context that the Court said that it is enough from the facts of this case for the Court to take the Union as an akin for the totality of the workmen involved in the dispute. Applying the ratio of the judgment in *Mumbai Kamgar Sabha (supra)* the petitioner is no stranger as it had entered into a settlement with Respondent No. 1 and to that extent would be a person aggrieved if the promotion policy is not followed.

10. The question of locus standi will have therefore, to be considered on the touchstone of the issue before the Court as to whether the union is aggrieved by the action of the employer. This must result in enquiring whether the rights of the workmen are affected which are based on a settlement or promotion policy which the union as the bargaining agent on behalf of its member can pursue. In such matters it must be held that the Union is no stranger. it is a person interested or aggrieved and can invoke the extra ordinary jurisdiction on behalf of its members, if the duty cast on Respondent No. 1 is public or statutory duties. The duty to the public must flow from the statute, prerogative common law, charter, custom or even contract. Mandamus is available remedy whenever there be injustice by violating public duty by any person or body. The Court then must reach out, to undo it or for doing justice. The petitioner, therefore, can maintain the petition.

11. Is the issue raised an industrial dispute and as such not open to the Union to invoke the extra ordinary remedy as it has alternative and efficacious remedy under the I.D.Act 1947. The petitioners have approached this Court on the basis that there exists a settlement and a promotion policy under which their members are entitled to be promoted. The respondent employer has raised a contention that the promotion policy has been amended by subsequent settlements and joint discussions between all unions including the petitioners. Can, therefore, the Union be precluded from maintaining the petition, on the ground that there are remedies available under the Industrial Dispute Act. The issue as to whether a Union could maintain a petition in the matter of service conditions of employees came up for consideration before the Supreme Court in *U.P. State Bridge*

Corporation Ltd. and Others Vs. U.P. Rajya Setu Nigam S. Karamchari Sangh, . Workers were dismissed due to unauthorised absence. A writ petition filed by a worker was dismissed with the direction to raise an industrial dispute. A second Writ Petition was filed by Respondent Union which was allowed and the order of termination quashed. The Division Bench upheld the judgment of the single Judge. In Appeal preferred before the Apex Court the orders of the High Court were set aside. While considering whether the Writ Petition would be maintainable, the Court noted that the rights and obligations sought to be enforced by the Respondent Union in the Writ Petition are those created by the Industrial Disputes Act. Reliance was placed in the judgment in The Premier Automobiles Ltd. Vs. Kamlekar Shantaram Wadke of Bombay and Others, . The Supreme Court noted that though the observations in Premier Automobiles Ltd. (supra) were in the context of jurisdiction of the Civil Court, nevertheless it would need a very strong case indeed, for the High Court to deviate from the principle, that where a specific remedy is given by the statute, the person who insists upon such remedy can avail of the process as provided in that statute and in no other manner. The Court considered the observation in D.K. Yadav Vs. J.M.A. Industries Ltd., . Certified Standing Orders have been held to constitute statutory conditions of service, though the Certified Standing Orders do not constitute "Statutory Provisions" in the sense that dismissal or removal of an employee in contravention of the certified standing orders would not be a contravention of statutory provisions enabling the workman to file a writ petition for their enforcement placing reliance on Rajasthan State Road Transport Corporation and Another Vs. Krishna Kant and Others, . Thus standing orders and/or settlements by themselves would not constitute statutory provisions, violation of which would enable the union to approach this Court on the ground of breach of statutory conditions of service. It is in the context that the Court held that the petitioner union must first raise an industrial dispute and the extra ordinary jurisdiction was not the appropriate remedy.

12. This judgment came up for consideration in U.P. State Spinning Co. Ltd. Vs. R.S. Pandey and Another, . The Court noted that there are two well recognised exceptions to the doctrine of exhaustion of statutory remedies. First is when, the proceedings are taken before a forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby, to move the High Court for quashing the proceedings, on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. The Court then added that when the proceedings themselves are an abuse of process of law, the High Court in an appropriate case can entertain a writ petition.

13. If, therefore, a dispute pertains to an industrial dispute or individual dispute and where statutory remedy is available under the I.D. Act, unless there be exceptional circumstances the writ jurisdiction ordinarily cannot be invoked. On the facts, in the instant case, there are disputes as to the promotion policy itself

based on which the members of the petitioner union can claim right to be considered for promotion. In that context in our opinion in so far as the Union is concerned as they have a remedy of raising an industrial dispute or if there be a breach of settlement of invoking the remedy under the provisions of the I.D.Act, the Writ Petition as filed would not be maintainable and on this count the petition is liable to be dismissed.

We, however, make it clear that if individual rights of an employee have been affected on account of non-promotion even if the settlement cannot be considered as statutory, a petition against a State or other authority could still be entertained if otherwise their rights have been infringed. The respondent No. 1 would be bound to follow the settlement or promotion policy pertaining to conditions of service as a public authority. Failure to comply or acting contrary would give a workman the right to move this Court to contend that the action of respondent Nos. 1 to 3 is arbitrary being in violation of Article 14 of the Constitution of India. Consequently a petition at the instance of a workmen could still be maintainable. We do not foreclose such a petition, if filed and that can be decided on its own merits.

14. It is alleged that workmen who are not entitled have been promoted to the exclusion of those who had the right to be considered. In such a case the petitioner ought to have joined all those persons as parties, who are already promoted, to which posts the petitioners claim on behalf of its members of such persons right is bound to be affected if this Court allows the petition. Such persons would be necessary parties to the petition. In the absence of their joinder, the petition will be liable to be dismissed considering the reliefs as prayed for. If the reliefs sought would have been granted, it would have resulted in persons who are not before the Court having to suffer the consequences of an adverse order of this Court without having an opportunity of being heard. In our opinion on this count also the petition is liable to be dismissed.

15. Let us examine some factual aspects of the matter. In terms of Clause 23 of the Settlement dated 17th September, 1998 entered into, for skilled and above category, the promotion policy was to be evolved under Clause 23 separately covering all the employees within a period of six months from the date of signing of the settlement. The promotion policy have since been formulated. Under the promotion policy there is a provision for special one time concession for various posts. There is a concession for promotion from skilled Grade II to highly skilled, from special grade to Mistry. We may reproduce this special one time concession for Mistry which reads as under:

SPECIAL ONE TIME CONCESSION FOR PROMOTION FROM SPECIAL GRADE TO MISTRY:

APPLICABLE TO THOSE OPERATIVES WHO ARE ALREADY IN SPECIAL GRADE OR ARE PROMOTED TO SPECIAL GRADE AS ON 1ST OCTOBER, 2004.

(a) Those operatives who are in Special Grade and have signed the Undertakings

prior to 30th September, 2004 will be considered for promotion to the Grade of Mistry on 1st October, 2004, provided that they meet the following criteria:

- (i) They have satisfactorily completed 6 months probation time,
- (ii) They are in the zone for promotion as per the Seniority criteria of the Revised Promotion Rules.
- (iii) They have fulfilled all other criteria of the revised Promotion Rules.
- (iv) A clear vacancy exists as per the ratio applicable to day i.e. 1:20.

(b) Those Operatives who sign the undertaking on 1st October, 2004 and prior to or on 16th November, 2004 and are promoted to Special Grade on 1st October, 2004 will be considered for promotion of Mistry on 1st April, 2005, provided that prior to promotion, they meet the following criteria:

- (i) Completed 6 months probation time in Special Grade.
- (ii) Fulfilled all other criteria as per Revised Promotion Rules.
- (iii) They are in the zone of promotion as per the Seniority criteria of the Revised Promotion Rules.
- (iv) A clear vacancy exists as per the ratio applicable to day i.e. 1:20.

(c) For such operatives, at para.(b) above the post of Mistry will be kept vacant till 1st April, 2005 from the vacancies as calculated at para.(a) and (b) above.

(d) For promotions effected on or after 1st October, 2005 to Mistry and Chargehands posts, Ratio for calculating vacancy for promotion to Mistries and Chargehands posts will become 1:15 and 1:45 respectively with effect from 1st October, 2005, subject to satisfactory implementation of Multi Trade and Production Norms Rules.

(e) This concession of waiver of mandatory service of 3 years as Special Grade will be available only till 30th September, 2010.

Thus it would be clear that in terms of this Special Concession, the Operatives already in Special Grade or are promoted to Special Grade as on 1st October, 2004 would be entitled to the Special One Time Concession as set out above. It is not as if others holding the post of Special Grade are not entitled for promotion, only that they will be covered by clause (d). Clause (e) merely sets out that the concession of waiver of mandatory service of three years as special grade will be available only till 30th September, 2010. In respect of employees who were eligible for the one time concession if they could not be accommodated on the post of Mistry in the absence of a vacancy being available, they can be considered for promoted upto 30th September, 2010. It does not mean that those who had not filed undertaking as set out therein were not entitled for the one time concession. Concession would be restricted to those who had filed undertaking. Even this promotion policy in terms of the reply filed by the

employer company was modified by subsequent settlement dated 20th October, 2005. At the instance of one of the Unions, respondent No. 3 herein, there was a reference which was numbered as I.T. No. 61 of 2004. This reference came to be disposed of in terms of the pursis Exhibit U-1 and an award came to be passed. The said pursis was basically placing on record the settlement of 28th September, 2006 which contained the promotion policy as modified. That promotion policy now would be governed by the provisions of the Award in terms of the settlement. Considering these aspects in our opinion even on merits at the instance of the Union it would not be possible to grant the reliefs as prayed for. We make it clear that dismissal of this petition will not stand in the way of the Union raising an industrial dispute if so advised.

16. Learned Counsel for the petitioner submits that some of their members have already been promoted. We make it clear that as we have not gone into the individual cases and if promotion has already been affected, disposal of this petition would not affect promotions already made if in law they could be made.

17. In the light of the above, Rule discharged. There shall be no order as to costs.