
(2009) 02 BOM CK 0127

In the Bombay High Court

Case No : Writ Petition No. 2907 of 2006

Force Motors Limited (formerly known as Bajaj Tempo Ltd.)	APPELLANT
Vs	
Poona Employees Union and Shri S.M. Kolhe, Member	RESPONDENT

Date of Decision : 02-02-2009

Acts Referred:

Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 10, 11, 12, 14, 14(3)

Citation : (2009) 2 BomCR 5 : (2009) 111 BOMLR 1058 : (2009) 121 FLR 662 : (2009) 3 LLJ 455

Hon'ble Judges : J.H. Bhatia, J; Bilal Nazki, J

Bench : Division Bench

Advocate : K.K. Singhavi, S.K. Talsania and Pallavi Dhedia, instructed by Sanjay Udeshi and Co. in WP 2907/06 and S.G. Anney and K.S. Bapat, instructed by A.V. Fatangare, in WP 2878/06, for the Appellant; K.K. Singhavi, S.K. Talsania and Pallavi Dhedia, instructed by Sanjay Udeshi and Co. for Respondent No. 2 in WP 2878/06, S.G. Anney and K.S. Bapat, instructed by A.V. Fatangare in WP 2878/06 and for Respondent No. 2 in WP 2907/06 and Gayatri Singh, for the Respondent

Final Decision : Allowed

Judgement

Bilal Nazki, J.—These two writ petitions have been filed by the petitioners challenging the same order, therefore they are being disposed of by the common judgment and order. The Writ Petition No. 2907 of 2006 is filed by the Company while Writ Petition No. 2878 of 2006 is filed by the Union. For the purpose of reference to contesting parties, reference is made to the Writ Petition No. 2907 of 2006.

2. The order challenged in both the petitions is dated 22nd March, 2006 passed by the Industrial Court, Pune on an application made by respondent No. 1 Union u/s 14 of the Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as "the MRTU & PULP Act"). By the impugned order, the Industrial Court cancelled the status of recognised

Union of respondent No. 2 and granted recognition to respondent No. 1 Union in respect of the Company - Bajaj Tempo Limited, Akurdi, Pune. So the union which was earlier recognised has filed one petition and the Company has filed another petition.

3. The Company's case is that it is incorporated under the Companies Act and is engaged in manufacturing of commercial vehicles. One of the factories of the Company is located at Akurdi, Pune in which 2100 employees are employed. Respondent No. 1, who claimed to be registered trade union filed application u/s 14 of the MRTU & PULP Act for cancellation of the recognition of respondent No. 2. Respondent No. 1 made an application under the provisions of the MRTU & PULP Act claiming that for the period preceding six months of the application it had membership of 1973 employees out of total number of 2100 employees employed under the petitioner undertaking. Respondent No. 1 Union, therefore, prayed that the recognition of Bharatiya Kamgar Sena should be cancelled and in its place respondent No. 1 should be granted recognition. The Company as well as respondent No. 2 Union filed written statement denying respondent No. 1 Union's membership as claimed. They also denied that respondent No. 1 union was eligible to the grant of recognition in respect of the undertaking. Respondent No. 2 - Bharatiya Kamgar Sena (hereinafter referred as "BKS") claimed that it was recognized union since 1998 and it continued to enjoy membership of the employees of the Company. Even basic registration of respondent No. 1 Union was challenged by the BKS and the Company. The Industrial Court decided this issue as preliminary issue by an order holding that respondent No. 1 was a registered trade union. Certain other facts have been also mentioned in the writ petitions which are not necessary for the purpose of deciding these writ petitions. But a development which took place during the course of hearing before the Industrial Court needs to be mentioned as a ground related to it had been agitated by the petitioner to challenge the order of the Tribunal. On 16th September, 2004 the BKS filed an application alleging that respondent No. 1 union had directed the employees to attend the office of the Industrial Court and sign affidavits to the effect that they were members of respondent No. 1 union. The BKS prayed that the Registry should be asked not to entertain the affidavits as it was a settled position in law that verification of membership can not be done on the basis of such affidavits. The respondent No. 1 union filed reply submitting that the affidavits were being filed for some different purpose and the same shall not be relied upon for the purpose of verification of membership. The Industrial Court on 29th September, 2004 rejected the application of BKS making it clear that the affidavits would not be taken into consideration for the purpose of verification of membership. The Industrial Court appointed an Investigation Officer and directed him to verify membership of respondent No. 1 union as well as of BKS for the period of six calendar months, immediately preceding the month of September, 2003. The Investigation Officer submitted report on 26th October, 2004. As per the said report, BKS had exclusive membership of 270, respondent No. 1 had exclusive membership of 26, whereas 1908 employees

were common members. The Investigation Officer also observed that respondent No. 1 Union had never deposited any amount in the Bank. Respondent No. 1 union also filed an application along with a list and identical affidavits of 1556 employees on 26th November, 2004 alleging that they had ceased to be the members of BKS and had become members of respondent No. 1 Union from 12th December, 2002. The objections were taken to such affidavits. But Industrial Court held that such affidavits shall not be taken into consideration for the purpose of verification of membership. The Industrial Court, however, on 29th November, 2004 permitted cross examination of 99 employees out of 1556 employees who had filed their affidavits. Out of 99 employees 17 employees in their cross examination admitted that they still continued to be the members of BKS. 7 employees admitted in their cross examination that they had filed affidavits only on an assurance by respondent No. 1 union that they would be reimbursed the wages deducted on account of goslow resorted to by them. Having regard to the fact that 17 employees in cross examination had stated that they continued to be the members of BKS and 7 employees had turned hostile, BKS applied that it should be allowed to cross examine all 1556 employees. On 30th April, 2005, however, the Industrial Court rejected the application.

4. These facts which have been narrated are almost undisputed facts. The main grounds of attack on the impugned order by the Senior Counsel appearing for the petitioner are:

Firstly, respondent No. 1 union had no right to represent the automobile union; Secondly, the Industrial Court could not have relied on affidavits to come to the conclusion as to the respective number of membership of the union and it had to go by the report of the Investigation Officer who was appointed in terms of the of the MRTU & PULP Act, and Thirdly, Section 19 of the of the MRTU & PULP Act was not complied with. On all three grounds the learned Senior Counsel appearing for the respondents have submitted that there has been no violation of any of the statutory provisions and there was nothing to come to a conclusion that respondent No. 1 union should not be treated as a registered union.

5. Coming to the first ground of attack, elaborating his arguments, learned Senior Counsel for the petitioner has drawn our attention to the constitution and rules of respondent No. 1 Union. Object 2(a) of the Union as enumerated is:

To organize and unite the persons employed in the Industry, any Factory, any Section, any shop and any establishment within the district of Poona as per Schedule in the _____ and to regulate their relations with their employers.

With other objects, for the present, we are not concerned. The argument is that the object of the Union was to organize and unite the persons employed in the Industry, any Factory, any Section, any shop and any establishment within the District of Poona as per Schedule. However, since no schedule was annexed to the constitution, it was a purposeless Union. Elaborating further, the learned

Senior Counsel submitted that the recognition of respondent No. 1 for its union u/s 11 of the MRTU & PULP Act was not itself maintainable. Section 11 of the MRTU & PULP Act lays down:

Application for recognition of union: (1) Any union (hereinafter referred to as "applicant union") which has for the whole of the period of six calendar months immediately preceding the calendar month in which it so applies under this section a membership of not less than thirty per cent of the total number of employees employed in any undertaking may apply in the prescribed form to the Industrial Court for being registered as a recognised union for such undertaking.

(2) Every such application shall be disposed of by the Industrial Court as far as possible within three months from the date of receipt of the application, where a group of concerns in any industry which is notified to be one undertaking for which recognition is applied for is situated in the same local area; and in any other case, within four months.

Rule 4 under the Rules framed under the MRTU & PULP Act lays down that the application by any union for registration u/s 11 shall be in Form A and in Form A one of the columns is Col. 5, which lays down,

The undertaking for which this trade union seeks recognition as a recognised union is engaged in industry/trade. The undertaking is known as ... and is located at the following address." It is submitted that it was a mandatory requirement to spell out the industry in which the union was interested. The learned Counsel for the respondent on the other hand submits that though in the constitution it has been mentioned that as per schedule, but since no schedule was attached to the constitution, it should be considered that the union was interested in organising and uniting persons employed in the industry in Poona. He also submits that this was the argument which was made for the first time before this Court. But the learned Counsel on the other hand submits that since it goes to the root of the matter and no disputed facts are involved, this argument can be raised before this Court. He also relies on the judgment of this Court in the case of Indian Express Newspapers (BOM) Employees Union v. K.M. Desai and Ors. reported in 1995 1 CLR 677.

6. Before going to the Judgment, it will be necessary to understand the scheme of recognition of a union and recognition of other union under the Act. Section 11, which has been quoted above lays down the methodology by which an application for recognition of the union can be made. Section 14 of the of the MRTU & PULP Act is reproduced below:

14. Recognition of other union:

(1) If any union makes an application to the Industrial Court for being registered as a recognised union in place of a recognised union already registered as such (hereinafter in this section referred to as the "recognised union") for an undertaking, on the ground that it has the largest membership of employees

employed in such undertaking, the Industrial Court shall, if a period of two years has elapsed since the date of registration of the recognised union, call upon the recognised union by a notice in writing to show cause, within thirty days of the receipt of such notice, as to why the union now applying should not be recognised in its place. An application made under this subsection shall be accompanied by such fee not exceeding rupees five as may be prescribed.

Provided that, the Industrial Court may not entertain any application for registration of a union, unless a period of one year has elapsed since the date of disposal of the previous application of that union.

(2) If, on the expiry of the period of notice under Sub-section (1), the Industrial Court finds, on preliminary scrutiny, that the application made is in order, it shall cause notice to be displayed on the notice board of the undertaking, declaring its intention to consider the said application on the date specified in the notice, and calling upon other union or unions, if any, having membership of employees in that undertaking, employer and employees affected by the proposal to show cause within a prescribed time as to why recognition should not be granted.

(3) If, after considering the objections, if any, that may be received under Sub-section (2) and if, after holding such enquiry as it deems fit (which may include recording of evidence of witnesses and hearing of parties), the Industrial Court comes to the conclusion that the union applying complies with the conditions necessary for recognition specified in Section 11 and that its membership was, during the whole of the period of six calendar months immediately preceding the calendar month, in which it made the application under this section, larger than the membership of the recognised union, then the Industrial Court shall, subject to the provisions of Section 12 and this section, recognise the union applying in place of the recognised union, and issue a certificate of recognition in such form as may be prescribed.

Explanation: For the purpose of this subsection, the other union shall be deemed to have applied for recognition in the same calendar month as the application.

(5) Every application under this section shall be disposed of by the Industrial Court as far as possible, within three months, from the date of receipt of the application, where a group of concerns in any industry which is notified to be one undertaking for which recognition is applied for is situated in same local area; and in any other case, within four months.

Explanation: "local area" for the purposes of this subsection means the area which the State Government may, by notification in the Official Gazette, specify in such notification." These provisions enable the Industrial Court to replace a recognised union by another union and if a union is recognised u/s 11, another union at its place can be recognised u/s 14 of the MRTU & PULP Act. The only requirement of the Section is that the new union should have larger membership of the employees employed in such an undertaking. Such application can be made only after two years of the recognition of the first union. Under Sub-section

(3) of Section 14, the Industrial Court is empowered to hold an inquiry, as it deems fit, which may include also the recording of evidence of the witnesses and hearing of the parties and after holding inquiry if the court is satisfied that the union satisfies the conditions necessary for recognition specified in Section 11 the court shall recognise the union applying in place; of the recognised union. Therefore, the requirements of Section 14 for recognition are necessary to be fulfilled before an application u/s 14 is allowed. This question was considered by this Court in *Indian Express Newspapers (BOM) Employees Union* (supra).

7. Now coming to the judgment of this Court in *Indian Express Newspapers (BOM) Employees Union* (supra), the union had filed an application u/s 11 of the MRTU & PULP Act which was allowed by the Industrial Court. The matter pertained to a company which was publishing several newspapers. The petitioner before the Court was a trade union, registered under the Trade Unions Act, 1926, and had been representing a working journalists and nonjournalists employed with the company from 1953. Another union which was also a trade union, registered under the Trade Unions Act, filed an application before the Industrial Court for recognition of itself in place of the recognised union. So the facts are almost similar to the facts of the present case. The constitution of the newly formed union laid down that the objects of the union would be as mentioned in Schedule "A". Schedule "A" did not bear an entry of the newspaper establishment or a newspaper industry. The claim of the applicant was contested on the ground that the constitution of the applicant did not permit it to enroll employees from the newspaper industry as its members. Therefore, it could not represent employees of the company and the application for recognition was not as such maintainable. Paragraph 6 of the said judgment reads thus:

6. Taking exception to the said order, the petitioner has preferred the present petition. The short question that arises for consideration is whether respondent No. 2 is entitled, under the terms of its Constitution, to enroll as its members journalists and nonjournalists employed by respondent No. 3. A copy of the Constitution of respondent No. 2 is annexed at Exhibit A to the petition. The objects of respondent No. 3, as is evident from the Constitution, is to organise and unite the persons employed in the industries mentioned in Schedule (A) and to regulate their relations with their employers. Then follows Schedule 'A' which describes the industries whose employees respondent No. 2 - union can seek to introduce within itself as its members in order to regulate their relations with their employers. Amongst the industries mentioned is the industry of printing press. It is apparent that the industry of newspapers and journals is conspicuously absent. Hence the short question which falls for our consideration is whether respondent No. 2 can legitimately enroll the employees of respondent No. 3 as its members on the strength of the entry 'printing press'. In this context it has to be noticed that respondent No. 3, which is a newspaper industry, apart from publishing daily newspapers, it also publishes weeklies. It, no doubt, uses a printing press for the purpose of publishing. That, however, is not the entire function of respondent No. 3. It is only one of its functions. Apart

from the printing press, it has journalists as also nonjournalists in their employment. Respondent No. 3 is a newspaper industry and it cannot be termed as part and parcel of printing press. In this context our attention is drawn to the list of industries appended to the Bombay Trade Unions Regulations, 1927. At serial No. 28, we have an entry "printing, publishing and allied industries". It is next pointed out that as far as the Constitution of Respondent No. 2 is concerned, it has included the industry of printing press and has omitted "publishing and allied industries". In our view, the omission is significant. What has been included is merely the business of printing press. It has not included within its compass the industry of newspaper which could have fallen in the entry "printing, publishing and allied industries". The publishing of newspapers has several functions apart from the function of printing. Hence merely because the printing press is one of the components of newspaper industry, it cannot be gainsaid that the entire newspaper industry is nothing other than a printing press. A printing press may be included in a newspaper industry. It may be one of the functions of a newspaper industry. However, a newspaper industry cannot be equated with the "printing press" industry as publication of newspaper and periodical involves many more functions than are involved in printing. A printing press industry cannot include within its compass all the employees of respondent No. 3 who includes journalists and nonjournalists who may have no role to play in the printing of newspapers and journals being published by respondent No. 3. In the circumstances, we are constrained to hold that the Constitution of respondent No. 2 does not permit it to enroll journalists and nonjournalists employed by respondent No. 3 as its members. This being the position, what follows is that the application of respondent No. 2 for recognition of its union u/s 11 of the MRTU & PULP Act is not maintainable. The impugned order passed by respondent No. 1, taking a contrary view, is thus liable to be set aside. In view of our finding that the application of respondent No. 2, is not maintainable, the application, being Application (MRTU) No. 6 of 1983 is also liable to be dismissed.

This was a case where the purpose was the persons were to be organised and united, mentioned against an entry "printing press" in schedule but the Court came to the conclusion that a newspaper industry could not be equated with the printing press industry. We have a case where no purpose is mentioned in the constitution at all.

There is another judgment of this High Court in the case of Maharashtra Engg. Plastic & General Kamgar Union v. Chamundi Petroleum and Ors. reported in 2007 1 CLR 810. In paragraph 2, the Court held:

2. It is undisputed fact that on the date of filing of the complaint under the said Act, the petrol pump was not included in Schedule A to the constitution of the appellant and that there is concurrent finding in that regard by the Labour Court and the Industrial Court as well as the Learned Single Judge after taking into consideration all the materials on record. It is also undisputed fact that the petrol pump industry was sought to be included as forming part of the constitution of

the appellant union after filing the complaint and registration in that regard was obtained in the month of June, 2000. Section 28 read with Section 3(17) of the said Act clearly requires the Union to be registered one to enable such Union to file complaint under the said Act. Considering the same, the view taken by the learned Single Judge while confirming the decision of the Labour Court and the Industrial Court, cannot be found fault with. The decision of the Apex Court sought to be relied upon by the learned advocate for the respondents in the matter of Indian Oxygen Ltd. Vs. Their Workmen, , clearly supports the view taken by the learned single Judge in the facts and circumstances of the case.

We find ourselves in agreement with the law laid down in the above referred cases by the two Division Benches of this Court. Since respondent No. 1 Union had not mentioned any purpose for which the Union was being established in their constitution, they could not have been recognised u/s 11 of the MRTU & PULP Act and there was no question, therefore, of an application u/s 14 of the MRTU & PULP Act being entertained.

8. Coming to the second ground, that the learned Judge of the Industrial Court accepted affidavits and decided issue on the basis of an inquiry conducted through the Investigation Officer, it is contended by the learned Counsel that the Industrial Court has not only violated the law but relying on the affidavits without rebuttal as no chance of rebuttal was given is even against the rules of natural justice. In order to appreciate this argument, certain orders of the Tribunal need to be examined. On 29th September, 2004, when affidavits were sought to be filed by respondent No. 1 union, respondent No. 2 union made an application praying that Investigation Officer be appointed and affidavits be not entertained. The Court, however, on the question of filing of affidavits noted, "Moreover, the learned Advocate for the applicant union has made it clear that for proving the membership, the affidavits of the employees would not be filed, but for some other relevant purpose, the affidavits may be filed. In such circumstances, I am of the opinion that the present application, vide Exh. NAU14 is premature and filed on hypothetical basis that the affidavits would be filed to prove the membership of the Union. So such an application cannot be allowed." Therefore, it is contended by the learned Counsel that the Tribunal allowed those affidavits to be filed but not for the purpose of proving the membership. But ultimately he relied on these affidavits for proving the membership of the union. This order was also challenged by way of writ petition being Writ Petition No. 9502 of 2004 but the writ petition was dismissed. The petitioner was granted liberty to agitate this issue also in case the final order went against him. Again on 29th November, 2004 by an order, the Industrial Court allowed taking on record 1556 affidavits. This application was made by respondent No. 1.

After discussing the application and objections to it by the petitioner and referring to its earlier order, the Industrial Court passed the following order:

Application for production of the affidavits is allowed with condition that these affidavits would not be used for proving the point of membership of the applicant

Union and may be used for other ancillary or relevant aspect. At the same time, the Nonapplicants are at liberty to file counter affidavits or to adduce rebuttal evidence in respect of alleged ancillary or relevant aspect which emerged from the affidavits in this proceeding.

The Industrial Court allowed filing of affidavits with liberty to the other side to file counter affidavits or adduce rebuttal evidence. It also allowed the cross-examination of the persons who filed the said affidavits. By an order of 30th April, 2005, the Industrial Court rejected the application of the petitioner to cross-examine the persons who had filed affidavits and the reasons given in the order are very interesting, namely, "All the affidavits are similar and identical. In such circumstances, opportunity to cross-examine 100 affiants, as given to the nonapplicants, is quite sufficient and just. It is not equitable and probable to direct all 1556 affiants to face the cross-examination. It will take years together to decide the matter. In fact, the nonapplicants are also at liberty to file counter affidavits. Since the original petition is made time bound and nonapplicant union is restrained from signing the settlement with the company till decision of this main petition, I am of the opinion that the prayer of nonapplicant union to call remaining affiants for cross-examination cannot be granted". If, a person gives an affidavit that he belongs to a particular union, what type of a counter affidavit can be given. The only mode to rebut such an affidavit or to demolish the assertion made in such an affidavit, which appeals to the commonsense, is the cross-examination of such person. On the one hand the Court allowed 1556 affidavits to be taken on record. On the other hand, the Court confined cross-examination only against 99 persons and, therefore, on the basis of these affidavits if any conclusions were drawn about the membership of respective union would be clearly faulty and unfair.

9. Therefore, let us now examine as to how far the court has relied on these affidavits to come to the conclusion that respondent No. 1 was representing the majority of the workers as on the crucial date. Although in its earlier orders the Industrial Court had said that the affidavits would be only for the ancillary purposes and not for coming to a conclusion with regard to the strength of membership of respective union, but the learned Counsel submits that, this was the sole evidence the Industrial Court relied upon to come to a conclusion that respondent No. 1 was the union representing majority of the members.

10. Before going to the findings, it will also be profitable to note some relevant findings of the Investigation Officer. About applicant union, i.e. respondent No. 1, it is stated that they claimed that 1973 workers were their members. Out of the list, the names of 12 members were shown twice in the report. 26 workers in the list of Union were not at all employees of the company. One more worker was also not found in the list. Therefore, the Investigation Officer deleted 39 workers as not eligible members. As such the claim got reduced to 1934 from 1973. In the receipt with regard to the payment of the Union's contribution, no dates were found by the Investigation Officer on many of the receipts. About the

recognised union i.e. one of the petitioner who claimed that they had membership of 2166 members, it was found that 41 workers were not seen in the list. Therefore, they were deleted and the claim was as such reduced to 2125 from 2166. From January, 2003 to December, 2003, 2166 members were shown as registered in their books but no responsible officer of the union had signed on the record book. The said recording was not maintained as per the provisions of the Act. The annual fee of the union was Rs. 60/-. The receipts showing collection from 2166 members were submitted. The contribution of workers were reflected in cash book, but the cash book was not maintained in the prescribed specimen and responsible officer of the union had not signed the cash book. 54 workers had retired/resigned and some of them had even expired. Thereafter the Investigation Officer proceeded to verification of members. He found that both the Unions gave the list of eligible members which was compared with the list of the workers of the company. Out of 1934 eligible members, there were only 26 members exclusively with respondent No. 1 union. 1908 members, who were shown to be members by respondent No. 1 union were also members of the other union i.e. recognised union. So the Investigation Officer came to the conclusion that 1908 members had a dual membership. They were members of both the unions and ultimately he found that the recognised union had 217 members which was the exclusive membership of that union and only 26 persons were exclusive member of respondent No. 1 union which claimed recognition.

11. In the impugned Judgment and Order, the learned Industrial Court had framed Issues. Issue Nos. 1 and 2 are important for the present question, which read as under:

1. Whether the applicant Union proves that it has membership of not less than 30% of the total number of the employees, employed in the undertaking for the whole of the period of six months, immediately preceding the calendar month, in which it so applies?

2. Whether the membership of Applicant Union was larger than that of the membership of the Nonapplicant No. 2 (Recognised Union), during the whole of the period of six months, prior to the filing of the petition?

Both these Issues were decided in favour of respondent No. 1 Union. We have found that basically the approach of the Industrial Court in proceeding with the controversy was defective. Respondent No. 2 Union - BKS was recognised union. It had not to prove any case. The onus was on respondent No. 1 union to prove that BKS had lost its representative character within the meaning of Section 11 of the MRTU & PULP Act and they were eligible to be recognised u/s 11 of the Act. This approach can be seen from the observations made by the Industrial Court in paragraph 21 of the impugned Judgment. The relevant observations are as under:

At this juncture, alone, I would like to point out that the entire record of B.K.S. pertaining to membership fees as produced before Investigating Officer, is

suspicious. I will point out the remarks of Investigating Officer as given on Page 8 of the report. Investigating Officer has remarked that whatever membership fees collected on 7th February, 2003 was shown as received two days earlier i.e. on 5.2.2003 in the cash book. Similarly, whatever membership fees collected on 10th February 2003 is shown as collected two days prior i.e. on 8.2.2003 in cash book. It is very surprised to see that on 5th February 2003 and 8th February 2003 the amounts shown as collected towards membership fees by B.K.S. were not at all collected on those respective days. So, both entries in cash book pertaining to collection of membership fees in cash book, are false and incorrect. Investigating Officer has specifically pointed out on page 8 of his report that cash book maintained by B.K.S. is not in prescribed proforma and it is not signed by any of the office bearers of B.K.S. Moreover, Investigating Officer has also reported on page 5 of his report that membership registers of B.K.S. for the relevant period were not signed by any of the office bearers and moreover, said registers were not in prescribed proforma i.e. in Form J as prescribed under the Act. Such documentary evidence of cash book and membership registers without bearing the signature of any of the office bearers of the Union and without maintaining those in prescribed proforma, it can be easily said that such documents are not authentic and authorised and cannot be relied upon. I would like to point out from oral evidence of responsible office bearer of B.K.S. i.e. Vice President of B.K.S. namely, Deoram Bhosale that inspite of holding responsible post of B.K.S. he has not yet read the constitution of B.K.S.

We do not find from the impugned order that the onus was discharged by respondent No. 1 to prove that it was, at the relevant point of time, representing majority of the members. In paragraph 25 of the said judgment, the Industrial Court dealt with the affidavits and noted the arguments and counter arguments. The learned trial Judge was of the view that though these affidavits could not be taken as proof of membership but these affidavits could be taken to be the proof of the Deponent's declaration that he had relinquished his membership from B.K.S. Thus in effect was an attempt to rely on these affidavits for proving the membership of respondent No. 1 union. The court said, "So, affidavits of 1556 employees of the Company filed on behalf of Applicant Union, can be accepted to substantiate the point that they brought an end to their relationship with B.K.S. and had not paid the membership fees to B.K.S. after December, 2002. Intention of as many as 1556 employees is very clear from their affidavits that they disconnected their tie as members with B.K.S. and come forward to file their respective affidavits of and on behalf of applicant union in this matter for getting the status of recognised union.

This was not only against the rules of natural justice, as also about the established law, but against the order passed by the Industrial Court itself earlier. Even if these affidavits could have been taken into consideration, none of the affiants, except 100 affiants for which crossexamination was allowed, could have been taken into consideration. But admittedly the membership cannot be proved on the basis of the affidavits as it is the settled law and we will refer to the

judgment in this connection shortly. The conclusion drawn by the learned Judge was, "So, after comparing the entire evidence adduced by both unions on the point of strength of their membership read together with report of Investigating Officer as well, 1556 affidavits of the employees filed on record by Applicant Union, I am of the opinion that the Applicant Union was having more than 30% of membership of the total employees of the Company as well as larger membership than the membership of B.K.S. during the period of six months from the month of March, 2003 till August, 2003." So the affidavits filed by 1556 workers plays a decisive role in making the Court to reach the conclusion that the applicant Union represented more than 1556 of the total number of the workers of the undertaking. Therefore, on this ground the petitions are required to be allowed.

12. Whether the said affidavits can be taken into consideration or not, is according to the learned Counsel for the petitioner, concluded by the judgment of the Supreme Court in the case of Automobile Products of India Employees' Union v. Association of Engineering Workers, Bombay and Ors. reported in 1990 61 F.L.R. 369. This was a case where the Industrial Court tried to find out as to who was representing majority of the members by adopting a method of secret ballot with the consent of contesting parties. This was also not approved by the Supreme Court. The Supreme Court dealt with the scheme of the Act and observed as under:

The facts in the present case would reveal that what was done by the Industrial Court was to permit the registration of the union as a recognised one by a method which was clearly alien to the Act. The Court in effect allowed the parties to circumvent the provisions of the Act and by adopting a simplistic method directed that whoever commanded a majority of votes of the employees voting on a particular day, would be entitled to the status of the recognised union. In effect, therefore, the Court ignored in particular the mandatory provisions of Sections 10, 11, 12, 14 and 19 of the Act. Not only that, but by adopting this method, the Court also failed to find out whether any of those workers, who voted, were members of any of the two unions at any time including on the day of the ballot. This is apart from the fact that what has to be found out is the exclusive membership of the contesting unions continuously over the specified period, the overlapping membership being ignored.

The consent of the parties to follow a procedure which is against the mandatory provisions of the Act, cannot cure the illegality. For reasons which we have indicated earlier the Legislature did not opt for the ballot as a method for determining the representative character of the union and laid down as elaborate procedure with necessary safeguards to do so. In the circumstances, to permit the parties by consent to substitute a procedure of their own is in effect to permit them to substitute the provisions of the Act.

Following this Judgement of the Supreme Court, the impugned order of the Industrial Court cannot be sustained.

13. Coming to the third ground, which challenges the order of the Tribunal on the ground that respondent No. 1 union had not complied with the requirement u/s 19(4) of the MRTU & PULP Act, we feel that since we are allowing the writ petition on other two grounds, it may not be necessary to go into that question.

14. For the reasons aforesaid, both the writ petitions are allowed. The impugned order of the Industrial Court is quashed and set aside. However, respondent No. 1 if, feels, that it deserves to be recognised in terms of law, it can make a fresh application in accordance with law.

15. Rule made absolute in terms aforesaid.

16. There shall be no order as to costs.