

(2012) 09 BOM CK 0027

In the Bombay High Court

Case No : Writ Petition No. 2613 of 2001

General Manager, Western Coalfields Ltd. and General
Manager, Western Coalfields Ltd.

APPELLANT

Vs

Shri Sumit Mullick, Div. Commissioner Amravati Division,
Amravati and Others

RESPONDENT

Date of Decision : 28-09-2012

Acts Referred:

Arbitration Act, 1940 — Section 10, 4, 5
Arbitration and Conciliation Act, 1996 — Section 34
Civil Procedure Code, 1908 (CPC) — Section 9
Constitution of India, 1950 — Article 226, 227
Industrial Disputes Act, 1947 — Section 1, 10, 10A, 10A(3), 10A(3A)

Citation : (2012) 6 ALLMR 661 : (2013) 1 MhLj 296

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

Bench : Single Bench

Advocate : S.C. Mehadia, for the Appellant; D.P. Thakare, AGP for R1 Shri D.V. Chavan, with Shri A.S. Dabadghan for R 6 to 11, for the Respondent

Judgement

B.P. Dharmadhikari, J.—The matter is part heard. It was adjourned on 25.9.2012 and 26.9.2012 to enable the parties to further assist the Court. Today, respective Counsel have completed their arguments. This petition under Articles 226 and 227 of the Constitution of India is filed by the employer-Western Coalfields Limited against the Divisional Commissioner, Amravati Division, Amravati (in person) and four Trade Unions as also some individual workmen against the award, dated 16.7.2001 passed by respondent No. 1 - Shri Sumit Mullick, the then Divisional Commissioner of Amravati after industrial dispute was referred to him.

2. For deciding the present controversy, it is not necessary to delve deep into facts. On 8.5.2001 the petitioners had communicated to respondent No. 1 Divisional Commissioner, Amravati Division, Amravati the fact that they have already submitted statement of claim. Respondent No. 1 has been mentioned as

an Arbitrator in earlier communication dated 28.3.2001. The said communication is on the subject of arbitration in case of so-called sons-in-law. The letter mentions that Trade Union and the concerned dismissed employees have agreed to terms of reference and those terms are as under :

As to whether the action of the management in dismissing the services of S/Shri Gajanan Vishwanath Jeurkar, Gajanan Pandurang Ghotekar, Surendra Neelkanth Khutemate, Sanjay Wasudeo More, Dilip Digambar Chopne, Vikas Ramesh Rao Bhongle, Cat. I general Mazdoors, Wani North Area and Shri N.T. Ledange, Cat. I General Mazdoor, Majri Area on being found that they secured employment on fake declarations sons-in-law of land oustees is justified?

The relief if any to be given to the dismissed employees.

Persons named therein are respondent Nos. 6 to 12.

3. Thus, it is obvious that dismissal of those respondents by the petitioners on the ground that employment provided to them as sons-in-law was not properly formed the subject of arbitration proceeding. The parties do not dispute that an industrial dispute was thus referred to arbitration to respondent No. 1.

4. Respondent No. 1 has delivered his award in the said matter on 16.7.2001. After mentioning that these workers were represented by four different Trade Unions, the Divisional Commissioner has noted rival contentions and found that employment was provided with knowledge that recruits were not sons-in-law. It was only after newspaper reports and vigilance objection, the Management of petitioners panicked and terminated their services. Respondent No. 1 also concluded that these employees had filed false declaration, claiming to be sons-in-law, however, in the peculiar facts, the said Arbitrator directed the petitioners to reinstate them with full back wages. This Court has issued Rule in the matter on 6.4.2001 and no interim relief has been granted, with the result the respective respondents-workmen, total seven in number claim to be continuing in the employment.

5. In this background, Advocate Shri Mehadia on behalf of the petitioners has invited attention to the Scheme contained in Section 10A of the Industrial Disputes Act, 1947 to show that the agreement to refer the industrial dispute to Arbitrator is required to be forwarded to an appropriate Government as also to the Conciliation Officer and the appropriate Government thereafter is expected to publish the same in official gazette within one month. Sub Section 3A of Section 10A of the Industrial Disputes Act expects the Government to undertake scrutiny of that agreement and to issue a notification so as to enable the other employers and other workmen who are not the parties to the arbitration agreement but are concerned in the dispute to participate in arbitration proceeding. As these steps are not taken, the award must fall to ground.

6. He has, in support of his contentions, relied upon various judgments to which reference will be made at appropriate juncture. According to him, as the award is

without jurisdiction, the same needs to be quashed and set aside.

7. Learned Assistant Government Pleader Shri Thakare appearing for respondent No. 1 and Advocate Shri Chavan appearing for respondent Nos. 6 to 12 have opposed the petition.

8. Advocate Shri Chavan submits that the petitioners had an alternate and equally efficacious remedy u/s 34 of the Arbitration and Conciliation Act, 1996 and therefore, the writ petition ought not to have been entertained. He submits that as statutory remedy is available to the petitioners, the question of delay in raising this objection is immaterial. He is taking support of the judgment of the Hon''ble Apex Court in the case of State of Uttar Pradesh and another Versus Uttar Pradesh Rajyakhaniy Vikas Nigam Sangharsh Samiti and others, reported at 2008 (12) Supreme Court Cases 675 for the said purpose. He has also relied upon several other judgments to substantiate the contention that the arbitration award, as delivered by the agreed Arbitrator, cannot be allowed to be challenged by the petitioners. The petitioners willingly participated in those proceedings and only after an adverse award, have found it proper to make grievance of procedural or technical nature. He, therefore, prays for dismissal of petition.

9. In reply, Advocate Shri Mehadia relied upon the judgment of the Hon''ble Apex Court in the case of The Rajasthan State Road Transport Corporation and another etc. etc Versus Krishna Kant etc. etc., reported at AIR 1995 Supreme Court 1715, particularly paragraph 13 to urge that it is only the Arbitrator under the Industrial Disputes Act who can take cognizance of dispute and it has to be inconsonance with the scheme of Section 10A of the Industrial Disputes Act. He urged that permitting the respondents to raise an objection on alternate remedy at this stage i.e. almost after 11 years is, therefore, unjust in present facts.

10. Perusal of the judgment in the case of State of Uttar Pradesh and another Versus Uttar Pradesh Rajyakhaniy Vikas Nigam Sangharsh Samiti and others, (supra), particularly paragraph Nos. 37 and 38 shows that there the objection raised was about premature filing of writ petition before the High Court and it was also pointed out that several disputed questions on facts were involved. Respondent No. 1 had pointed out that there was illegal closure of undertaking and there was non-payment of wages by the employer. One of the Judges constituting Division Bench of High Court upheld the contention and observed that employees should have asked compensation u/s 25 FFF of the Industrial Disputes Act. It is in this background, the Hon''ble Apex Court has observed that it has never laid down a proposition that once petition is admitted, it cannot be dismissed on the ground of an alternate remedy. The observation of the Hon''ble Apex Court, therefore, shows that availability of alternate remedy is one of the relevant considerations and writ petition cannot be said to be not maintainable merely because the alternate remedies are available. In view of this position, it is not necessary for this Court to dwell more on this issue.

11. Coming to the merits of writ petition, parties do not dispute that what is

referred to Arbitrator is an industrial dispute. Section 2 (k) of the Industrial Disputes Act defines that industrial dispute to mean any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour of any person. Here, the issue pertains to dismissal i.e. non-employment of seven so called sons-in-law. That dispute constituted industrial dispute, was agreed to be referred to by the Trade Unions representing those seven workmen (sons-in-law) for arbitration to Divisional Commissioner, Amravati. Respondent No. 1-Sumit Mullick was then the learned incumbent. He has passed the impugned award in that capacity.

12. Section 10A of the Industrial Disputes Act is about voluntary reference of disputes to arbitration. Its Sub Section 1 enables employer and the workman to agree to refer the dispute to arbitration, if there is recognized union in respect of any undertaking. The reference can be to such person or persons including the Presiding Officer of a Labour Court or Tribunal or National Tribunal as an Arbitrator or Arbitrators as may be specified in arbitration agreement. Only condition is reference can be made by written agreement at any time before the said dispute is referred u/s 10 of the Industrial Disputes Act to Labour Court or Tribunal or National Tribunal. Sub Section 1A of Section 10A of the Industrial Disputes Act is a procedural part which envisages the reference to an even number of Arbitrators and need of an opinion of an umpire. Sub Section 2 stipulates that arbitration agreement has to be in such a form and signed by the parties thereto, in such manner as may be prescribed. There is no dispute between the parties in relation to compliances with these provisions.

13. Sub Section 3 of Section 10A of the Industrial Disputes Act mandates that copy of such agreement is to be forwarded to appropriate Government and Conciliation Officer. The appropriate Government thereafter has to publish that agreement in Official Gazette within one month of its receipt. There is additional requirement in Sub Section 3A that if after receipt of such agreement and when dispute is referred to arbitration, appropriate Government is satisfied that the persons making the reference represent the majority of each party, it has to issue a notification in such manner as may be prescribed, within aforesaid period of one month and after publication of such notification the employers and workmen not parties to arbitration agreement but are concerned in the dispute, get an opportunity of presenting their case before the arbitrator. This Sub Section 3A has no application if the dispute is referred to arbitration in pursuance of an agreement between the employer and recognized union under Sub Section (1). Sub Section 4 requires arbitrator to investigate the dispute and then submit his award to the appropriate Government. Sub Section 4A stipulates that where dispute has been referred to arbitration and notification has been issued under Sub Section 3A or when there is recognized union for any undertaking, the appropriate Government may, by order, prohibit continuation of any strike or lockout in connection with such dispute which may be in existence on the date of

reference. Sub Section 5 lays down that nothing in Arbitration Act, 1940 (10 of 1940) applies to arbitrations u/s 10. There is no dispute between the parties that this Sub Section also excludes application of the Arbitration and Conciliation Act, 1996 so far as arbitration u/s 10A of Industrial Disputes Act is concerned.

14. The Division Bench of Madras High Court in the case of Madras Machine Tools Mfres, Coimbatore Versus Spl. Dy. Commissioner of Labour, Madras and another, reported in 1979 (II) L.L.J. page 331 has looked into Section 10A of the Industrial Disputes Act and noted that there are two stages contemplated in that section. First is the stage of agreement and the other is the stage of award. Non-publication of agreement under Sub Section 3 is held not to render arbitration agreement itself invalid. For said purpose the Full Bench judgment of that Court reported in the case of R.K. Steels (P) Ltd Versus Their Workmen, reported at 1977-I L.L.J. 382 has been relied upon. The Division Bench, however, found that said conclusion was applicable only to the stage of agreement and cannot be extended beyond that stage. It cannot therefore be extended to award. It found that as Section 10A (3A) was not complied with, award cannot be characterized as valid. The said Bench holds that any other view will jeopardise the industrial peace and harmony and the State Government will also lose its jurisdiction to issue notification u/s 10A (4A) of the Industrial Disputes Act. The Division Bench of Orissa High Court in the case Rasbehary Mohanty Versus Presiding Officer, Labour Court and another, reported at 1974 L.L.J. 222 has been relied upon by Madras Division Bench. The Division Bench of Madhya Pradesh High Court in the case of Singh (K.P.) and Another Vs. Gokhale (S.K.) and Another, has also been relied upon to reach this conclusion. The Division Bench of Madhya Pradesh High Court holds that if procedure prescribed under Sub Sections (3) and (4) is not followed, award made by the Arbitrator u/s 10A of the Industrial Disputes Act will be invalid. The learned Single Judge of Madhya Pradesh High Court has reiterated same view in the case of Sanyukt Koyla Mazdoor Sangh Versus The General Manager, Western Coalfields Ltd. and others, reported at 1997 (76) FLR 844.

15. In the case of Air Corporations Employees' Union and another Versus D.V. Vyas and others, reported at AIR 1962 Bom. 274 (V 49 C 61), the Division Bench of this Court has considered power of superintendence of High court over Arbitrator's functioning u/s 10A and held that said Arbitrator acts as quasi-judicial body and his orders can be corrected in writ of certiorari. The Hon'ble Apex Court in the case of Karnal Leather Karamchari Sanghatan (Regd.) Vs. Liberty Footwear Company (Redg.) and others, has held that the requirement of publication of agreement under Sub Section (3) of Section 10A of the Industrial Disputes Act is mandatory and non-compliance with that requirement renders award invalid. Consideration of this controversy in paragraph Nos. 26 and 27 made by the Hon'ble Apex Court reveals that a provision may be required to be construed as mandatory even in absence of any penal provision dealing with its non-compliance. Paragraph No. 27 gives the reason as to why the Hon'ble Apex Court finds compliance of Section 10A (3) of the Industrial Disputes Act mandatory. Said paragraph No. 27 reads as under :

27. Now look at the provisions of sub-section (3). It is with respect to time for publication of the agreement. But publication appears to be not necessary for validity of the agreement. The agreement becomes binding and enforceable as soon as it is entered into by the parties. Publication is also not an indispensable foundation of jurisdiction of the arbitrator. The jurisdiction of the arbitrator stems from the agreement and not by its publication in the Official Gazette. Why then publication is necessary ? Is it an idle formality? Far from it. It would be wrong to construe sub-section (3) in the manner suggested by counsel for the appellant. The Act seeks to achieve social justice on the basis of collective bargaining. Collective bargaining is a technique by which dispute as to conditions of employment is resolved amicably by agreement rather than coercion. The dispute is settled peacefully and voluntarily although reluctantly between labour and management. The voluntary arbitration is a part of infrastructure of dispensation of justice in the industrial adjudication. The arbitrator thus falls within the rainbow of statutory tribunals. When a dispute is referred to arbitration, it is, therefore necessary that the workers must be made aware of the dispute as well as the arbitrator whose award ultimately would bind them. They must know what is referred to arbitration, who is their arbitrator and what is in store for them. They must have an opportunity to share their views with each other and if necessary to place the same before the arbitrator. This is the need for collective bargaining and there cannot be collective bargaining without involving the workers. The union only helps the workers in resolving their disputes with management but ultimately it would be for the workers to take decision and suggest remedies. It seems to us, therefore, that the arbitration agreement must be published before the arbitrator considers the merits of the dispute. Non-compliance of this requirement would be fatal to the arbitral award.

16. The Hon''ble Apex Court has also made reference to various judgments including the judgment of Orissa High Court already referred to supra. This judgment of the Hon''ble Apex Court shows that view taken by the full Bench of Madras High Court in the case of R.K. Steels (P) Ltd. Versus Their Workmen, reported in 1977 (I) L.L.J. 382 cannot be said to be a good law.

17. Perusal of unreported judgment delivered by learned Single Judge of Madras High Court in Writ Petition No. 5831/2003 (Rap Mfrs Employees Welfare Union Versus The Deputy Commissioner of Labour) on 29.7.2008 reveals that on 15.12.2004 a reference to Full Bench was sought on question whether an award u/s 10A of the Industrial Disputes Act which is rendered invalid due to non-compliance of the requirement of Section 10A (3) of the Act could be enforced by one of the parties as an award on private arbitration under the provisions of the Arbitration and Conciliation Act, 1996. In paragraph No. 9, the learned Single Judge has noted answer given by this Full Bench. That answer is as under :

9. The Hon''ble Full Bench answered the issue as follows:-

it is not disputed by the respondents/management there was no publication of the arbitration agreement as required under Sec. 10A(3) of the I.D. Act.

However, it is the claim of the management that though the award may be invalid under the I.D. Act, the award will be enforceable as an award under private arbitration..

the arbitration agreement as entered into between the parties is traceable only u/s 10A of the I.D. Act and the agreement being statutory agreement, passed in pursuance of the provisions of the Act whether it is enforceable or not is to be decided only under the provisions of the I.D. Act. We reiterate that if the award fails to satisfy the requirements under the I.D. Act, then the same becomes invalid and unenforceable. To put it clear that non-publication of the arbitration agreement in terms of Section 10A (3) of the I.D. Act vitiates the award and it cannot be enforced by one of the parties, as an award in private arbitration under the provisions of Arbitration Act, 1996.

In the light of the above observation, we hold that an award u/s 10-A of the I.D. Act, which is rendered invalid due to non-compliance of the requirement u/s 10-A (3) of the I.D. Act, cannot be enforced by the parties as an award in private arbitration under the provisions of Arbitration Act, 1996. The reference is answered accordingly.

18. Thus, the Full Bench has found that such invalid award cannot be enforced by one of the parties as an award on private arbitration under the provisions of Arbitration Act 1996.

19. These judgments, therefore, conclusively established that the agreement between the parties to refer the dispute to arbitration u/s 10A of the Industrial Disputes Act needed to be sent to Conciliation Officer as also to appropriate Government and appropriate Government ought to have published the same within one month of its receipt in Official Gazette. The appropriate Government was also duty bound to apply its mind to ingredients of Sub Section 3A of Section 10A of the Industrial Disputes Act to find out whether opportunity needed to be given to other employers or other workmen, not party to arbitration agreement, so as to enable them to appear before the Arbitrator and present their case. This procedure appears to be mandatory for finally resolving the industrial dispute once for all and to restore and preserve industrial peace and harmony in the industry. Any deviation from this procedure may result in private and at the most a temporary resolution of problem, which may again erupt in due course after others, who are interested or concerned, get knowledge of its such clandestine settlement.

20. In the case of The Rajasthan State Road Transport Corporation and another etc. etc. Versus Krishna Kant etc. etc. (supra) the Hon'ble Apex Court in paragraph No. 32 summarized the principles regarding jurisdiction of civil Court in relation to dispute between employer and employee. Principle No. 3 shows that when the dispute involves the recognition, observance or enforcement of rights and obligations created by enactments like Industrial Disputes Act or Industrial Employment (Standing Orders) Act, 1946 only remedy is to approach

the forums created by the Industrial Disputes Act. This can also be seen from principle Nos. 2 and 7. The Hon''ble Apex Court has found that an effort was to provide an alternate dispute resolution mechanism to the workmen, a mechanism which is speedy, inexpensive, informal and un-encumbered by the plethora of procedural laws and appeals upon appeals and revisions applicable to civil Courts. It has been noted that powers of Courts and Tribunals under the Industrial Disputes Act are far more extensive in sense that they can grant such relief as they think proper.

21. This judgment of the Hon''ble Apex Court therefore shows that the Industrial Dispute between parties before this Court could not have been placed before the civil Court u/s 9 of the Code of Civil Procedure. It is, therefore, obvious that the said dispute could not have been subjected even to the Arbitration and Conciliation Act, 1996. The Industrial Dispute and its resolution is the exclusive province and necessary mechanism including forums therefore are provided under the Industrial Disputes Act, 1947. Contention of Advocate Shri Chavan that award impugned before this Court, therefore, needed to be challenged by filing proceeding before the District Court u/s 34 of the Act for setting aside the same is misconceived. Award delivered by respondent No. 1 cannot be treated as an award under the Arbitration and Conciliation Act, 1996. Industrial dispute cannot be settled in any other mode and manner or de hors Section 10A of the Industrial Disputes Act.

22. The judgments noted supra had taken care of the similar arguments and found it necessary to preserve the industrial peace and harmony. Precisely, for the said purpose, the provisions of the Arbitration and Conciliation Act, 1996 are not extended to voluntary reference of disputes to arbitration u/s 10A of the Industrial Disputes Act. In facts before me, admittedly, procedure envisaged by Section 10A (3) (3A) of the Industrial Disputes Act has not been followed. The impugned award dated 16.7.2001, therefore, cannot be said to be legal and valid, it is not enforceable also. The same is accordingly quashed and set aside.

23. The matter is placed back for a fresh consideration before respondent No. 1. The copies of agreement to refer the dispute to arbitration shall be forwarded by the parties to Conciliation Officer and to the State Government and the State Government shall comply with the provisions of Section 10A (3) & (3A) of the Industrial Disputes Act within statutory time.

24. If respondent No. 1 - Sumit Mallic is not available as Divisional Commissioner, the parties are free to name another person as an Arbitrator within a period of one month from today or they can also accept the present incumbent holding the post of Divisional Commission, Amravati as their Arbitrator, provided said incumbent agrees to take up this responsibility.

25. Advocate Shri Mehadia states that respondent Nos. 6 to 12 are out of employment. Needless to mention that till the industrial dispute is resolved in arbitration u/s 10A of the Industrial Disputes Act, status quo as on today, in

relation to employment or services of respondent Nos. 6 to 12, shall be maintained. This petition is, thus, party allowed. Rule is made absolute accordingly. However, in the circumstances of the case, there shall be no order as to costs.