

(1987) 02 BOM CK 0035

In the Bombay High Court

Case No : Writ Petition No. 2081 of 1985

Keshariprasad Tiwari

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 05-02-1987

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 3(13), 42(4)
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 28(1)

Citation : (1987) 3 BomCR 74

Hon'ble Judges : M.S. Deshpande, J

Bench : Single Bench

Advocate : Anand Parchure, for the Appellant; D.K. Khamborker and M.A. Garud, A.G.P. for respondent Nos. 1 and 3, for the Respondent

Judgement

M.S. Deshpande, J.—This petition is directed against the order of the First Labour Court holding that a complaint by an employee u/s 28 (1) of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as "the Unfair Labour Practices Act"), is not maintainable, without his complying with the provisions of section 42(4) of the Bombay Industrial Relations Act, 1946 (hereinafter referred to as "the Bombay Act").

2. The petitioner was employed by the respondent No. 3 Nagpur District Central Co-operative Bank, as a jeep-driver from 4-2-1969. A charge sheet was served on him on 1-10-1975, and after holding a Departmental Enquiry, his services were terminated on 18-9-1976. The termination order was challenged before the First Labour Court, Nagpur, on 15-3-1977 and as a result of a compromise, the petitioner was reinstated in service, without back wages. On 19-4-1979, he was suspended with a view to holding a Departmental Enquiry. The Enquiry Officer recorded statements of the witnesses on 20-4-1979, and made a report to the respondent No. 3, and a show-cause-notice was served on the petitioner on 24-11-1979. The petitioner replied to the show-cause-notice, his grievance being

that the statements of the witnesses came to be recorded behind his back. The Board of Directors of the respondent No. 3, however, decided to terminate the petitioner's services on 9-2-1980, but the order of termination was not served on the petitioner. Apprehending that he would be visited with the penalty of dismissal, the petitioner filed a complaint before the respondent No. 2, the First Labour Court, Nagpur, on 1-3-1980, u/s 28 of the Unfair Labour Practices Act.

3. The respondent No. 3, by his written-statement, denied the allegations. On 10-2-1983, the petitioner applied for amending his complaint with a view to challenging the order of dismissal allegedly passed on 12-2-1980 and published in the Daily "Tarun Bharat" on 18-2-1980. This amendment was allowed on 8-3-1983. During the hearing, the respondent No. 3 conceded that the enquiry held was not legal and proper and sought an opportunity to prove the alleged misconduct before the Labour Court. Evidence was allowed to be led in this respect. But on 9-4-1985, without examining the witnesses, the respondent No. 3 applied for amending the written-statement and urged that the issue, as to whether the petitioner was an employee as defined under the Unfair Labour Practices Act, should be tried as a preliminary issue. Upon hearing the parties, the First Labour Court took the view that the petitioner was not an employee within the meaning of section 3(13) of the Bombay Act, which definition was adopted by section 3(5) of the Unfair Labour Practices Act, for the purposes of that Act, because the petitioner had not proceeded in the manner required by section 42 of the Bombay Act, and dismissed the complaint.

4. In this Court, it was urged on behalf of the petitioner that the petitioner came within the first part of the definition of "employee" u/s 3(13) of the Bombay Act and, therefore, Clauses (a) and (b) of the definition did not apply to him, and it was not necessary for him to have taken recourse to section 42 of the said Act. Alternatively, it was urged that the definition of "employee", insofar as it related to an employee, inasmuch as it required him to take recourse to section 42 of the Bombay Act, was violative of his right of equality granted under Article 14 of the Constitution, because there was no such requirement. In so far as the definition applied to a workmen as defined in Clause (s) of section 2 of the Industrial Disputes Act, and the earlier part of the definition arbitrarily subjected him to pursuing a course which was not to be followed, if the definition in the Industrial Disputes Act had to be adhered to. However, at the stage of hearing, Shri Parchure, the learned Counsel for the petitioner, did not press the second point of the argument regarding the violation of Article 14 of the Constitution by the definition and urged that the matter may be decided only upon the scope of the definition of "employee" given in the first part in section 3(13) of the Bombay Act.

5. On the other hand, Shri Khamborkar, the learned Counsel for respondents, supported the order of the First Labour Court, on the ground that the term "employee" had reference only when there was a subsisting employment and would not cover a person who had been dismissed, discharged or retrenched or

whose services have been terminated from employment ; as that category would be covered by Clause (b) of the inclusive part of the definition of "employee".

6. The Maharashtra Recognition of Trade Union and Prevention of Unfair Labour Practices Act, 1971 (Maharashtra Act No. 1 of 1972), came into force on 8th September, 1975. Under sub-sections (1) and (2) of section 3 thereof; in this Act, unless the context requires otherwise, "Bombay Act" means the Bombay Industrial Relations Act, 1946, and "Central Act" means the Industrial Disputes Act, 1947. Under sub-section (5). "Employee" in relation to an industry to which the Bombay Act for the time being applies, means an employee as defined in sub-section (13) of section 3 of the Bombay Act; and in any other case, means a workman as defined in Clause (s) of section 2 of the Central Act.

Under sub-section (13) of section 3 of the Bombay Act, "employee" means any person employed to do any skilled or unskilled work for hire or reward in any industry, and includes :-

(a) a person employed by a contractor to do any work for him in the execution of a contract with an employer within the meaning of sub-clause (o) of Clause (14);

(b) a person who has been dismissed, discharged or retrenched or whose services have been terminated from employment on account of any dispute relating to change in respect of which a notice is given or an application made u/s 42 whether before or after his dismissal, discharge, retrenchment or, as the case may be, termination from employment;

but does not include---

(i) a person employed primarily in a managerial, administrative, supervisory or technical capacity drawing basic pay excluding allowances exceeding one thousand rupees per month;

(ii) Any other person or class of persons employed in the same capacity as those specified in Clause (i) above irrespective of the amount of the pay drawn by such persons which the State Government may, by notification in the Official Gazette, specify in this behalf.

Under Clause (s) of section 2 of the Central Act "workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenchment in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person---

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a

prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the power vested in him, functions mainly of a managerial nature;

7. The preamble of the Unfair Labour Practices Act shows that it is an Act to provide for the recognition of trade unions for facilitating collective bargaining for certain undertakings, to state their rights and obligations; to confer certain powers on unrecognised unions; to provide for declaring certain strikes and lock-outs as illegal strikes and lock-outs; to define and provide for the prevention of certain unfair labour practices; to constitute Courts (as independent machinery) for carrying out the purposes of according recognition to trade unions and for enforcing the provisions relating to unfair practices; and to provide for matters connected with the purposes aforesaid.

Section 28 provides for procedure for dealing with complaints relating to unfair labour practices; and under it, where any person has engaged in or is engaging in any unfair labour practice, then any union or any employee or any employer or any Investigating Officer may, within ninety days of the occurrence of such unfair labour practice, file a complaint before the Court competent to deal with such complaint either u/s 5, or as the case may be, u/s 7, of this Act. The Court has to take a decision on every such complaint as far as possible within a period of six months from the date of receipt of the complaint, and may direct an investigation into the complaint by an Investigating Officer who may also make efforts to promote settlement of the complaint, and the Court has to give its decision in the event it finds that the complaint has not been settled satisfactorily after considering the complaint.

Under section 29, an order of the Court shall be binding on all parties to the complaint.

Section 30, which occurs in Chapter VII enumerates the powers of Industrial and Labour Courts, including the powers to declare engagement in unfair labour practices and pass such interim order as may be just and proper. It also provides a machinery for execution of its order. The "unfair labour practices" are categorised in Schedules II to IV of the Act. It is noteworthy that while the Central Act and the Bombay Act require certain steps to be taken by the parties before access can be had to the Labour Court or the Industrial Court, section 28 of the Unfair Labour Practices Act affords direct access, without recourse to such steps, to the Labour Court or Industrial Court, as the case may be, in respect of any matter cognizable by these courts.

8. It is in the context of these provisions that the learned Counsel for the petitioner urged that the definition clauses regarding "employee" in the Bombay

Act and "workman" in the Central Act assume importance. The contention of Shri Khamborkar, the learned Counsel for the respondents was that the definition of "employee" in Clause (13) of section 13 of the Bombay Act, in the first part, would have reference to an employee, while the employment is in subsistence, and not after the contract of employment comes to an end, whatever be the manner in which that end is brought about. In sub-clause (b) of the latter part of the definition, for the original words "dismissed or discharged", the words "dismissed, discharged or retrenched or whose services have been terminated" came to be substituted by Maharashtra Act 22 of 1965, section 4(b)(i), and when this definition was adopted in the Unfair Labour Practices Act, it was adopted together with the amendment.

9. The scope of the jurisdiction of the Labour Court u/s (1)-D of the Bombay Industrial Relations Act came to be considered by Supreme Court in Chhotobhai Jethabhai Patel and Co. Vs. The Industrial Court, Maharashtra Nagpur Bench, Nagpur and Others, , and after considering all the provisions of the Act, it was held that the Labour Court cannot exercise jurisdiction u/s 78(1)-D in a case where the employee of an industry governed by the Act has not complied with the provisions of section 42(4) read with the proviso to the subsection. It is necessary for an employee first to approach the employer before he can apply to the Labour Court for any relief u/s 78(1)-D. It is further observed that the legislature by inserting paragraph D in section 78(1) did not intend to chalk out a wholly different course of action to be adopted when powers u/s 78(1)-D are to be exercised to that prescribed in Chapter VIII dealing with changes. The scheme of Chapter VIII is that in regard to any "change" in an industrial matter there must be compliance with the provisions of that Chapter. In other words, effort must first be made by the employer intending to effect any change in respect of matters covered by section 42(1) or an employee desiring a change in respect of any order passed by the employer under standing orders which would of necessity include an order of dismissal, to see whether it is possible to come to any agreement and an application to the Labour Court can only be resorted to after efforts have been made to settle the dispute and no agreement has been arrived at.

10. It may be noted that the different provisions came to be considered for the purpose of finding out the powers of the Labour Court in granting relief. The decision was reached not on the basis of the definition of "employee" in Clause (13) of section 3 of the Bombay Act, but on the basis of the other provisions of the said Act. The observations in para 16 of the report are important and they are as follows :

"It must be held that a person who is dismissed would be an employee within the meaning of section 3(13) of the Act and we can see no valid reason for differentiating the case of a dismissed employee from one who complains of some other change. As the scheme of the Act is that disputes should be settled as far as possible and primarily through conciliation and agreement, it does not

stand to reason that an employee should be able to side-step all this by a direct reference to the Labour Court. A Labour Court is a creature of the statute and it can only exercise such jurisdiction as the statute confers on it. If there are certain pre-conditions to the exercise of its jurisdiction, it must refuse to entertain any such application unless such pre-conditions are first complied with."

11. The submission of Shri Khamborkar was that a person dismissed was held to be an employee within the meaning of section 3(13) of the Act because of the inclusive part of the definition and because sub-clause (b) expressly includes dismissed, discharged or retrenched employees. However, what is important is that the right to relief did not flow from the other provisions of the Act, including those of Chapter VIII headed "changes" meaning alteration in the industrial matter and providing requirement of giving a notice of the contemplated changes, and the provisions of section 78, which enumerated the powers of the Labour Court. Once this position is understood, it would be evidence that the definition of "employee" as given u/s 3(13) would have no relevance to the mechanism of approaching the authority and invoking its powers and exercising powers by the authority, except showing the person who would be entitled to seek the remedy. The decisions in M/s. Chhotabhai Jethabhai Patel Co.'s case was rendered before the Unfair Labour Practices Act came into force.

12. The scope of the first part of the definition of "employee" in Clause (13) of section 3 of the Bombay Act fell for consideration by a Full Bench of this Court in K.B. Khatavkar v. S. Taki Beligrami 1971 Mh.L.J. 753. This was before the changes were incorporated into the Act by Maharashtra Act 22 of 1965, and the Full Bench observed that since the cases of retrenchment, which had to be considered by it, took place in the year 1963, the amendments were not attracted. This was why Shri Khamborkar urged that we will have to consider the definition, together with the changes, which came to be incorporated into it by Maharashtra Act, 22 of 1965, because that was the definition adopted in the Unfair Labour Practice Act 1971, which came into force on 8th September, 1975.

13. The question before the Full Bench was whether a retrenched employee could, before the amendment, be said to be an employee within section 3(13) and could apply for reinstatement to a Labour Court under sections 78 and 79 of the Act. In this context, the Full Bench observed that a definition in an enactment cannot be considered in isolation but must be considered in the context of other definitions and the various provisions of the enactment in which the expression defined is to be found in order to gather its true meaning. The Full Bench further observed in para 14 as follows :---

"On the other hand, it seems to us that the definition of "employee" in section 3(13) is wide enough to cover a retrenched employee. All that it says is that "employee" means any person employed to do any skilled or unskilled work for hire or reward in any industry. The essential thing to find is therefore whether a person is employed for work in any industry and receives remuneration therefore. It is not necessary to limit the meaning of the word "any person

employed" to "any person employed at the time that the dispute arose," and therefore we can safely hold having regard to the clear indication given by the other provisions of the Act that it means any person employed to do work at any time and that the definition has no reference to the point of time at which the person whose case is under consideration was doing this work. It is also clear from what we have said above that in the context of the other provisions of the Act to which we have referred above, it is necessary that we should hold that an employee means any person employed at any time to do any skilled or unskilled work for hire or reward in any industry."

14. With regard to the argument of Shri Khamborkar, that what is said to have been included by the latter part of the definition, must be regarded as not to have been included in the latter part of the definition, the answer is provided by the Full Bench itself by reference to the observations in *Western India Automobile Association v. Industrial Tribunal Bombay*, 51 Bom.L.R. 894, while dealing with the provisions of section 2(12) and section 2(13) of the C.P. and Bearer Industrial Disputes Settlement Act which are substantially in pari materia with section 2(k) of Act No. 14 of 1974, that the clause was inserted ex abundanti cautela to repel a possible contention that employees discharged under sections 31 and 32 of the Act would not fall within section 2(10), and cannot be read as importing an intention generally exclude dismissed employees from that definition.

15. In *Bennett Coleman and Co. (P) Ltd. Vs. Punya Priya Das Gupta*, , a decision under the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act (1955), it was observed that the scheme of all these Acts dealing with industrial questions is to permit an ex-employee to avail of the benefits of their provisions, the only requirement being that the claim in dispute must be one which has arisen or accrued whilst the claimant was in the employment of the person against whom it is made. The distinction, that is being sought to be made by Shri Khamborkar on the basis that the matter of retrenchment which was not covered when the Full Bench gave its ruling, by an amended provision, which had to be considered by it, and that the words "dismissed and discharged", which then existed in sub-clause (b) of the definition of "employee", would distinguish the case of a dismissed employee from a retrenched employee and would not be covered by the ratio of the decision of the Full Bench, is without substance. Both on principle and authority, therefore, the case of the petitioner, even on the footing that he was a dismissed employee to whom sub-clause (b) of the definition of "employee" u/s 3(13) of the Bombay Act applied, would non-the-less come under the first part of the definition of "employee" under the clause. The scheme of the Bombay Act, which came to be considered in *M/s. Chhotabhai Jethabhai Patel And Co.*'s case (cited supra), was entirely different from the scheme of the Unfair Labour Practices Act, 1971, and the conditions and limitations, to which the rights of the employer and employee would be subjected under other provisions of that Act, cannot be imported into the Unfair Labour Practices Act, 1971. The scheme of the Unfair Labour Practices Act, 1971 is

entirely different and merely because the definition from the Bombay Industrial Relations Act is adopted in the Unfair Labour Practices Act, the restrictions imposed by virtue of the other provisions of that Act cannot be imported into the Unfair Labour Practices Act. That is not a consequence which will flow from the adoption of the definition into the Unfair Labour Practices Act, from the Industrial Disputes Act and the Bombay Industrial Relations Act.

16. The learned Judge of the Labour Court has referred in his judgment to certain other aspects, which, in his view, would render the provisions of the Bombay Act and the Central Act discriminatory, depending on the remedies to be pursued by an employee under the Bombay Act or a workman under the Industrial Disputes Act. Again, it must be remembered that the schemes of these two Acts are also different, and even though they are in certain respects dissimilar, it cannot be said that they are discriminatory. Much more is needed, besides a mere comparison of the different provisions of the two Acts, to show that they would operate in a discriminatory manner on the employees covered by the different definitions. As I have pointed out, whatever may be the difference in the other provisions of the Bombay Act and Central Act, in so far as the remedies that are available to them under the Unfair Labour Practice Act, once they are covered by the definitions either of "employee" or "workman", the right of access to Labour Court or Industrial Court and the remedies available would be identical. In fairness to Shri Parchure, it may be mentioned that he did not pursue this line during his arguments and conceded that even recourse to conciliation and settlement "is" within the purview of the Unfair Labour Practices Act, after a complaint is filed u/s 28(1) of that Act. It cannot, therefore, be said that what would amount to side-stepping in respect of the Bombay Industrial Relations Act by direct reference to the Labour Court, would be so by filing a complaint u/s 28(1) of the Unfair Labour Practices Act, as direct access to the Labour Court and Industrial Court is permitted by its express provisions.

17. In this view of the matter, the order passed by the First Labour Court, dismissing the complaint u/s 28(1) of the Unfair Labour Practices Act, 1971, because the provisions of section 42(4) of the Bombay Industrial Relations Act were not complied with, cannot be sustained. The order of dismissal of the complaint is, therefore, quashed, and the Labour Court is directed to proceed to hear the complaint filed before it, according to law. The Labour Court shall decide the complaint before it, as expeditiously as possible. Rule is made absolute in these terms. There will be no order as to the costs of this writ petition.