

(2013) 02 BOM CK 0057
In the Bombay High Court
Case No : L.P.A. No's. 223 and 224 of 2012

Maharashtra State Power Generation Co. Ltd.	APPELLANT
Vs	
Anan	RESPONDENT

Date of Decision : 07-02-2013

Acts Referred:

Constitution of India, 1950 — Article 12
Electricity (Supply) Act, 1948 — Section 79(c)
Industrial Disputes Act, 1947 — Section 2(s)
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 26, 3(5), 30

Citation : (2013) 137 FLR 802 : (2014) 1 MhLj 601

Hon'ble Judges : S.P. Deshmukh, J;A.H. Joshi, J

Bench : Division Bench

Advocate : R.P. Powar, for the Appellant; T.K. Prabhakaran and G.K. Thigale, for the Respondent

Final Decision : Dismissed

Judgement

A.H. Joshi, J.—These Letters Patent Appeals have come up for admission hearing. The learned Advocates for the parties have agreed for having the final hearing in the motion hearing itself.

Admit.

Advocate Shri G.K. Thigale waives service for the respondent in both the appeals. Therefore, the appeals are taken up for final disposal.

The respondents filed two separate cases. Those were complaints of unfair labour practice, in the Industrial Court of Maharashtra at Aurangabad.

The relief by way of declaration prayed for in the complaints is summarized as follows:

[a] Declaration that the respondent (present appellant's predecessor) had engaged in various unfair labour practices under Item 1(a) of Schedule H and

Items 2, 6, 9 and 10 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act (in short MRTU & PULP Act).

[b] Direction to the employer to desist from engaging in those unfair labour practices; and

[c] Direction that the workman be paid regular payment of wages etc. and all benefits of permanency in accordance with law.

2. The complaints were opposed by the employer by filing written statement. The objection to the maintainability of the complaint was raised.

3. The complaints were heard. The learned Judge, Industrial Court, has delivered a common judgment and dismissed the complaints. The finding, which is the basis of dismissal is seen in paragraph No. 25 of the complaint to following effect:

25. In the light of above discussed facts and circumstances and the ratio laid down in the various cases, it is clear that basically the complainant has failed to prove that there exists undisputed relationship between himself and the respondent of employee and employer. The complainant has failed to prove that he was appointed by following prescribed rules as telephone operator and as such, he is entitled to permanency benefits.

4. It is seen that the Industrial Court was persuaded with the ratio as laid down in the State of Maharashtra and Another Vs. Pandurang Sitaram Jadhav, .

5. The respondents preferred Writ Petition Nos. 2551/2011 and 2548/2011 in this Court. Those were heard and have been decided on 28.9.2012 by common judgment of learned Single Judge, which judgment is impugned in these appeals.

6. The respondents writ petitioners had reiterated their stand as averred in the complaint.

7. The learned Single Judge accepted the plea of the complainants and declined to accept the employer's plea that the complaint was not maintainable. Learned Single Judge relied upon the judgment of Hon'ble Supreme Court and mainly Maharashtra State Road Transport Corporation and Another Vs. Casteribe Rajya P. Karmchari Sanghatana, .

In the result, the learned Single Judge has held that the complaints deserve hearing on merits and remanded the complaints for rehearing and trial in accordance with law.

8. In the process of hearing of the Letters Patent Appeals, the learned Advocate Shri R.P. Powar appearing for the appellant has emphasized on following points:

[a] That the original employer Maharashtra State Electricity Board is a statutory Board, of which present appellant is a company fully owned and controlled by the Board, and hence is as much a State organization and falls within the purview of Article 12 of the Constitution of India.

[b] Appellant is bound by the law, rules, etc. which are statutory in the matters of recruitment.

[c] Appellant's plea is governed and supported by the Division Bench of this Court in the State of Maharashtra v. Pandurang Sitaram Jadhav (cited supra).

[d] The constitutional obligation fastened to the State and statutory corporations that its recruitment is for public employment and hence it has to be done in accordance with the rules and regulations relating to selection and appointment.

[e] The Model Standing Orders would never have overriding effect over the scheme of the Constitution of India.

[f] Though it cannot be disputed that the respondents have worked and the nature of work done by them falls in the work done by others who fall in the category of "workman", however, since they are not "regularly appointed employees" of the Board, they are not entitled to have the declaration as regards the unfair labour practice, as sought for by the complainants. The constitutional obligation on the appellant shall have overriding effect over Labour Laws.

[g] Therefore, the judgment of Industrial Court was perfectly within the four corners of law and it is wrongly set aside by the learned Single Judge.

[h] The judgment in Maharashtra State Road Transport Corporation v. Caste Tribe Rajya P. Karmchari Sanghatana, is not a judgment which would govern the case as a precedent since the aspect of public employment, as is ruled by the Division Bench of this Court, in case of State of Maharashtra v. Pandurang Sitaram Jadhav, is not overruled, and even today it holds the field as a good law, and it has to be followed.

[i] Reliance is also placed on Hindustan Coca Cola Bottling S/W Pvt. Ltd. and Another Vs. Bhartiya Kamgar Sena and Others, .

[j] In substance, the ground of appeal is that the learned Single Judge has exceeded the jurisdiction in allowing the writ petitions by disregarding the settled law.

9. The appeals have been opposed. The learned Advocate Shri T.K. Prabhakaran instructed by Advocate Shri G.K. Thigale for the respondents, has relied upon following judgments:

[1] Maharashtra State Road Transport Corporation and Another Vs. Casteribe Rajya P. Karmchari Sanghatana, .

[2] Fulchand Baburao Gedam Vs. Lokmat, Proprietors, Lokmat Newspapers Ltd., : Fulchand Baburao Gedam Vs. Lokmat, Proprietors, Lokmat Newspapers Ltd., .

10. The judgment in Maharashtra State Road Transport Corporation and another v. Caste Tribe Rajya P. Karmchari Sanghatana, is cited by the appellant as well as the respondents.

11. Other points urged by learned Advocate Shri T.K. Prabhakaran are:

[a] The question as to whether the workman would be entitled to get permanency would be a subject-matter of a decision on merits in the main complaint and could not be a matter to be prejudged or preempted at the time of decision on the point as to whether the complaint is maintainable or not.

[b] The relief for which the complaints would be entitled to would be a matter liable to be decided by the Industrial Court after hearing the complaints on merits and ought not be dilated at the stage of consideration as to whether it is maintainable.

[c] The authority, the power and extent of jurisdiction of an authority under the MRTU & PULP Act would be u/s 30 of the MRTU & PULP Act to granting the declaration as to whether unfair labour practice is engaged in and to issue an order of restraint for that matter.

[d] The dictum contained in paragraph Nos. 33 and 34 of the judgment in Maharashtra State Road Transport Corporation and another v. Caste Tribe Rajya P. Karmchari Sanghatana, is that if it is shown that the provisions contained in the Standing Orders are violated, the declaration in relation to failure to implement award/contract etc. could be validly made.

[e] Existence of posts and observance of recruitment procedure are wholly within the own province of the act of the employer (the department of the Government).

[f] The employer Board ought not be allowed to act in violation of law for its own pecuniary advantage or convenience, exploit the workmen, yet take shelter to protect itself from liability arising out of violation of Labour Laws particularly when it is not the employer's plea that the employees-workmen had fraudulently secured the employment.

[g] The employer had purchased a manually operated telephone exchange system. It was to be operative during day and night hours. The employer engaged the complainant and Mr. Ayachit for working for each shift of 12 hours and another complainant called to work by Mr. Ayachit had to work for remaining shift of 12 hours.

[h] The employer sought creation of four posts while only two were sanctioned by the competent authority.

[i] No efforts were taken to fill in these vacancies and complainants were continued with some status which was on even lesser pedestal than temporary or casual and this position of employment was continued for years together.

[j] These acts of employer, seen from any angle constitute commission of unfair labour practice. These acts of unfair labour practice cannot be left unenquired by giving a summary dismissal of complaint as done by the Industrial Court.

[k] This results in compounding an act which is prohibited by law by section 26

of the MRTU & PULP Act, 1971.

12. Reliance is also placed by Advocate Shri T.K. Prabhakaran for the respondents on the judgment in *Fulchand Baburao Gedam and others v. Lokmat*, (cited supra).

13. The case of *Lokmat* (supra), was decided by the Division Bench to which one of us (A.H. Joshi, J.) was a Member.

14. Case of *Lokmat* was a case where:--

The employer (*Lokmat Newspapers*) had taken up a plea that the complainant before the Labour Court was not employee of the employer (*Lokmat Newspapers*). It was then pleaded that the officer who could have at disposal an employee may have employed him and hence there was no employer employee relationship between the complainant and the respondent. The complaint was dismissed at the threshold on the ground that the employer employee relationship was in dispute due to the plea of lack of existence of employer employee relationship. The dismissal of complaint was maintained by the learned Single Judge.

The question which had arisen was as to whether the bare denial by an employer that there is no employer employee relationship could fall within the ambit of "undisputed or indisputable relationship". The Division Bench took a view that bare plea that someone is not employed in absence of demonstration of a fact that there exists intervening contractor or contract labour would not oust the jurisdiction of Labour Court or Industrial Court, and such plea would not bring the case within the ambit of objection to jurisdiction as to the maintainability of the complaint.

15. The judgment in case of *lokmat* (supra), is relied and/or countered by both sides.

16. Reliance was placed by the complainants/respondents in following premise:--

The complainants in present cases stand on a far better footing. There is no other intervening employer either as a contractor or as an officer as was a fact in case of *Lokmat* (supra). Rather complainant Mr. Sudhir Kamlakar Ayachit who himself is a workman is also shown as a contractor which is an act of camouflage while other complainant was shown working under alleged contractor-worker Mr. Sudhir Kamlakar Ayachit i.e. the complainant, who did same work in one shift of 12 hours. Therefore, in these circumstances, the case of *Lokmat* (supra), would lend support to the employees/complainants to urge that the complaint is maintainable and deserves to be tried and decided in accordance with law.

17. Reliance by employer appellant:--

The case of *Lokmat* (supra), does not lend any support to the respondents' submission in the background that it is a case arising in the background of the peculiar facts of the said case. In the case at hand, the employer is a State

within the compass of Article 12 of the Constitution of India and, therefore, entire spectrum would change. Therefore, the case of Lokmat (*supra*), would not in any manner guide or govern the situation at hand and hence cannot be relied upon.

18. In the background of rival submissions, it is necessary to have a quick look at the rival pleadings without which the decision in these appeals would not be convenient.

19. Considering that the pleadings are voluminous, it would be beneficial to draw the summary of pleadings as is effectively done by the learned Judge, Industrial Court in the body of judgment. It is extracted below by supplying the headings thereto.

20. Summary of Complaint:

4. According to the complainant, he is neither a registered contractor, nor a contract labour. He is a workman covered within section 2(s) of the Industrial Disputes Act, 1947 (ID Act) and section 3(5) of the MRTU & PULP Act. He is working in a clear vacant permanent post. The respondent-board has made regular appointment of Telephone Operators at various other places except the place where the complainant is working. It is contended that in the MSEB Employees Service Regulations, contractor or contract labour is nowhere defined. There is no genuine contract system prevailing in the board. As more than 100 employees are employed by the respondent, the provisions of Chapter V-B of the ID Act and Model Standing Orders are applicable. According to the complainant, though he is shown to have engaged on individual contract basis, he is working continuously without any break since the date of his appointment. The working hours are fixed and regulated by the respondents. The complainant is required to report for duties as regular employee and to follow the instructions of his superiors while discharging the duties. It is contended that the respondents by treating the complainant as contract labour is exploiting the complainant in order to compel him to discharge duties with his assistant another employee Mr. Anant Sonar who has filed similar complaint. The complainant and Mr. Sonar are working individually and independently with the respondent, but they are made victims of a camouflage contract. During last about 21 years, no other contractor has submitted tenders. The amount paid to the complainant and his assistant Mr. Sonar is quite below the minimum wages. Other service benefits are not extended to the complainant and his assistant.

5. Senior Officers of the respondent had requested for creation of posts to their Head Office. However, as yet, such permanent posts of Telephone Operator are not created and the complainant is not given regular appointment. It is contended that the officers of the respondent have engaged in unfair labour practices in continuing the services of the complainants on contract basis without issuing regular orders and without extending permanency benefits. On such grounds, it is contended that it be declared that the respondent has engaged in

unfair labour practice covered under various items referred above and request is made to direct the respondents to issue regular appointment orders to the complainant along with arrears of pay, if any.

(Extract is drawn from the judgment and order dated 27.8.2010 of the Industrial Court, Aurangabad, at page Nos. 296, 297 & 298 of the paper book of LPA 224/12)

21. Summary of Written Statement:--

6. The respondent resisted the claim by filing written statement at Exhibit C3. It is contended that the services of the employees of the respondent are regulated and governed by M.S.E.B. Employees Service Regulations framed u/s 79(c) of the Electricity (Supply) Act, 1948. Recruitment to various posts is controlled and governed by M.S.E.B. Classification & Recruitment Regulations, 1961. It is admitted that Thermal Power Station of the respondent at Parli Vaijnath is equipped with PBX Exchange. Initially from 9.11.1982, independent contractor Mr. Bhosale was entrusted with the work of operating PBX Exchange purely on contract basis. Complainant was engaged by contractor Shri Bhosale at the relevant time. Contract with Shri Bhosale came to an end on 30.5.1984. Thereafter from time to time contract is entered into with the complainant to operate PBX Exchange w.e.f. 1.6.1984. Temporary or permanent post on regular establishment can be filled in only in accordance with Service Regulations and Recruitment Regulations. Complainant was never employed as an employee of respondent.

7. Respondent has denied existence of any vacant permanent post. It is denied that, the respondent deprived the complainant of any legitimate claim of being employed as a permanent employee. On or about in the year 1982, there was no sanctioned post of Telephone Operator at Thermal Power Station. Two posts of Telephone Operators were sanctioned for the first time in June, 1996. But the same could not be filled on account of ban on fresh recruitment. In short denying the allegations in the complaint, it is contended that the respondent has not engaged in any unfair labour practice, as alleged. The complainant is not entitled for a declaration or a direction as claimed. On such grounds request is made for dismissal of the complaint.

(Extract is drawn from the judgment and order dated 27.8.2010 of the Industrial Court, Aurangabad, at page Nos. 298 & 299 of the paper book of LPA 231/12)

22. Facts which are not in dispute at this stage are narrated in following paragraphs.

23. As has been noted, it is not in dispute that the job undertaken by both the complainants was that of a Telephone Operator and that there existed work. The Superintending Engineer has sought for sanction of posts of Telephone Operators. In due course, though much later, two posts were sanctioned.

24. It is not in dispute that the entry of the respondents for work on that post

was not through the regular recruitment channel. This has happened because the recruitment procedure could not be resorted to for want of posts and could not have been resorted to for want of sanctioned post though work for four Telephone Operators existed.

25. Prima facie, the complainants had an entry to the work and had done actual work on the basis of a contract of service for operating PBX machine which was duly entered. The signing/ordering contract was done by an officer who was the highest in rank at the station and authority to induct them on the job. The induction of complainants cannot be denoted as an act of fraud by employees-workmen.

26. The question in issue before the Industrial Court was in fact whether the case would fall in the bracket of any of the unfair labour practices for which the complaints were filed.

27. The question as to whether the employer had engaged in an unfair labour practice is a question of fact to be proved by the employee and disproved by the employer. The process of proof or disproof would begin only after the Industrial Court takes cognizance of the complaints holding that it has jurisdiction.

Learned Judge of the Industrial Court has followed the ratio as laid down in case of State of Maharashtra and another v. Pandurang Sitaram Jadhav (cited supra), and refused to entertain the complaints.

28. As it is seen, the learned Single Judge has scrutinized the fact and found the fact that the respondents were actually undertaking the job is not in dispute. Therefore, on this simple and plain proposition, it is prima facie made out that the status of complainants on facts is that of workmen u/s 2(s) of the Industrial Disputes Act. This fact was rather an indisputable or undisputed fact.

29. From the language employed in the rival pleadings before the Industrial Court, it is evident and can be noted is that the complainants' status as a person doing work as workman with the employer was neither "disputed or disputable". The fact that the complainants have worked as if a workman but for nomenclature is not disputed. Work existed but posts were not created is a fact on record. It is not the employer's case that the complainants are fraudulent back door entrants.

30. The phrase or group of words "undisputed or indisputable status or relationship" would exclude from its arena facile or sheerly contentious and evasive pleas. It appears to us and we accordingly hold that the plea to which Industrial Court became prey is the ground based on the term "undisputed or indisputable status or relationship".

31. In the light of submissions now advanced before us, discussion is revolving around the phrase "undisputed or indisputable relationship" between the employer and employee. In the present case, the relationship is disputed by doing gimmick of words. It appears to us that the arena of undisputed or

undisputable relationship does not bring within its compass a sheerly contentious, facile or evasive plea of undisputed or indisputable relationship.

32. A question as to whether there exists employer employee relationship is a question of fact. The pleadings of admission or denial would constitute a foundation. Fact finding is always required to be done upon the trial of the contentious issue. Any conclusion in relation to this question, which is always a matter of fact cannot be adjudicated in absence of trial.

33. Therefore, the question liable to be considered by the Industrial Court as to whether the complaints were maintainable did not arise. Even if every word and contention of the employer is taken to be worthy of consideration that since the mandatory recruitment procedure was not followed while availing the serviced of the complainants, even then the employer cannot escape the responsibility of suffering the unfair labour practice was engaged and the workmen would still be entitled for benefit of permanency. At the most, a hanging sword may still remain on their head of the fear that eventuality may arise where they may have later on to suffer the termination by following procedure laid down by law as and when employment in accordance with law takes place.

34. We do not propose to deal with the submission of learned Advocate Shri R.P. Powar, which on merits, we record as follows:

That the employer being a State, it would be imperative for such employer to follow the recruitment procedure to answer the constitutional duty of giving wider access to all aspirants to have the recruitment done in accordance with law.

It is not shown that any such attempt was not possible. Therefore, it is not the employer's plea that the workmen have come in the way. Therefore, it will look allegoric, but we wish to employ the word that, these submissions are like giving sermons by a person, who himself does not believe in those words.

35. We leave these submissions unadjudicated and do not comment any further so that this aspect in any manner may not affect the merits of the case when the matter will be heard in future.

36. In the background discussed in earlier paragraphs, the submissions advanced before us, what emerges is that like an obedient State owned Corporation, the appellant herein did not want to give permanency to the workmen because it would thereby violate the opportunity of employment to members of public at large as is found by the Division Bench of this Court in State of Maharashtra and another v. Pandurang Sitaram Jadhav (cited supra). This submission, however, seems to be a chance submission advanced sheerly to let its behaviour like a law abiding Corporation and win the sympathy of the Court and fit the case within the compass of the reported judgment. The pleading in the written statement, which is reproduced in foregoing paragraph No. 23 and relevant part we reproduce below hereinafter will reveal that the plea raised before this Court is apparently lacking sincerity as well as honesty. Relevant averment reads as

follows:

But the same could not be filled on account of ban on fresh recruitment. In short denying the allegations in the complaint, it is contended that the respondent has not engaged in any unfair labour practice, as alleged.

[Reproduced from paragraph (xii) appearing at page No. 291 of the Letters Patent Appeal No. 224/2012 paper book.]

37. The appellant, who is a fully owned Government Corporation being an organ of the Government ought to prove itself to be an ideal employer. The Telephone Exchange equipments were purchased, posts were not created, services were availed as a contractor from individuals. Their status was that of a workman for all purposes, but for the camouflage of the nomenclature. The appellant has, thus, utterly failed in discharging the obligation as a Government organization, as an ideal employer.

In the result, we hold that the judgment and order dated 28.9.2012 passed by the learned Single Judge meets the ends of justice. It does not call for any interference.

The Letters Patent Appeals are dismissed with costs.