

(2013) 01 BOM CK 0105

In the Bombay High Court

Case No : Writ Petition No. 10286 of 2012

M/s. Glasstech Industries (India) Pvt. Ltd. Plot L-113,
M.I.D.C., Taloja Industrial Area Taloja, Raigad

APPELLANT

Vs

The Workmen and Union of India

RESPONDENT

Date of Decision : 16-01-2013

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2013) 3 ALLMR 307 : (2013) 7 BomCR 340 : (2013) 136 FLR 946 :
(2013) 2 LLJ 159 : (2013) 2 MhLj 332

Hon'ble Judges : R.M. Savant, J

Bench : Single Bench

Advocate : J.P. Cama, with Mr. Hamed Kadiani, Ms. Rutuja Joshi, Ms. Bhagyashree Lumbhe and Ms. Dhruti Kapadia instructed by ALMT Legal, for the Appellant; N.M. Ganguli for the Respondent No. 1 and Mr. M.S. Bhardwaj with Mr. Rui Rodrigues for the Respondent No. 3 (Union of India), for the Respondent

Judgement

R.M. Savant, J.—Rule. With the consent of the parties made returnable forthwith and heard. The Writ Jurisdiction of this under Article 227 of the Constitution of India is invoked against the Award dated 30-6-2012 passed by the Learned Member of the Industrial Court, Thane. By the said Award the Reference which was made to the Industrial Court for adjudication being Reference IT No. 20 of 2006 came to be allowed and the Petitioner company was directed to reinstate the 48 workmen whose names are mentioned in the schedule of Reference with continuity of service and payment of full back wages from 18-11-2005.

2. Considering the nature of the order that is to be passed, it is not necessary to go into unnecessary details. Suffice it to say that the Reference arose out of the demand made by the Respondent Union in respect of reinstatement with continuity of service and payment of full back wages in respect of the said 48 workmen. In the statement of claim, it is the case of the Respondent Union that the Petitioner which is a private limited company had 13 permanent workmen and who are said to be plant operators and they are operating the cutting and

other machines and the said 48 workmen which the union was representing were performing all the production duties namely operating the cutting, washing machines, Furnace, Technorov machine and various maintenance jobs and that some of them were working as helpers for carrying huge glass sheets for processing and since the glass sheets are heavy at a time about 4 to 8 workmen are necessary to lift and carry the sheets. It is further stated in the statement of claim that on 11-11-2005 all the 48 workmen joined the Maharashtra General Kamgar Union i.e. Respondent Union and addressed a letter to the Company to the said effect and it is its case that after the company came to know about the aforesaid facts that they stopped the said 48 workmen from entering the premises, whose names are listed in the Reference. It is further the case of the Respondent Union that one Arvind Patil, Labour Contractor visited the residences of the workmen and threatened them that they should not come to the factory. The workmen accordingly complained to the concerned police station and thereafter raised the dispute before the Assistant Labour Commissioner of Labour, Panvel, by a demand letter and justification statement dated 24-11-2005. It seems that the company sent a letter to the Respondent Union on 28-11-2005 informing it that all the 48 workmen are the employees of the contractor of M/s. Venkatesh Construction and Earth Movers Company and that they do not have regular work in the factory. It is further the case of the Respondent Union that in place of the 48 workmen, the contractor has brought new workmen in a jeep and that these new workmen have been performing the duties which were performed by the 48 workmen and that they are involved in the regular production work. It is further stated in the statement of claim that the Assistant Labour Commissioner has submitted a failure report on 27-1-2006. It is further stated that there is no licence with the contractor for engaging the 48 workmen and a false statement has been made by the contractor that the licence has not been obtained as only 12 to 13 workmen were engaged in a day. It is further stated that the 48 workmen have produced documents signed by them to show that they are regularly working in the factory and that only three workmen were performing sweeping jobs.

3. In respect to the statement of claim, the Petitioner company filed its Written Statement. The Petitioner Company disputed the employer-employee relationship between the company and the said 48 workmen. An objection was also raised as regards the maintainability of the Reference. It was the case of the Petitioner company that the employees named in the Annexure to the statement of claim were the employees of the contractor, M/s. Venkatesh Construction and Earth Movers Company and since the said contractor was not made a party to the said Reference, the Reference was suffering from an inherent defect of non joinder of a necessary party and was required to be dismissed on the said ground. It was the case of the Petitioner company that the said workmen were engaged through the contractor from May 2005 for house keeping and sanitary work, but thereafter due to the heavy rain more particularly on 26-7-2005, the company being flooded by heavy rain water as a result of which the raw material was

damaged and therefore the work force was increased temporarily for clearing of the glasses and thereafter when the work load was reduced, the company informed the contractor of termination of the contract from November 2005 by their letter dated 17-10-2005. It was further the case of the Petitioner Company that the contractor has addressed a letter to the Assistant Commissioner of Labour Panvel stating that the said workmen were working for only 7 months but not a single workman has completed 240 days of service at the point when their services were terminated. It was further the case of the Petitioner Company that the workmen have resigned from the Respondent Union and have joined another Union i.e. Rashtriya Shramik Sangh and therefore the Respondent Union did not have the locus to file the statement of claim on behalf of the said workmen. It was the case of the Petitioner company that it is registered under the Contract Labour (Regulation and Abolition) Act 1970 and that the said M/s. Venkatesh Construction and Earth Movers Company was engaged as a contractor.

4. The Industrial Court considering the pleadings of the parties i.e. statement of claim and the Written Statement framed the following issues:

1. Whether the Second party proves that workmen under the Reference were the employees of the First party

2. Whether the Second party proves that the services of the workmen under Reference have been illegally terminated by the First party

3. Whether the Second party is entitled for the relief sought

4. What Award

5. The issue is to whether the workmen were entitled to back wages therefore does not find a place in the said issues. The parties went to trial in the Reference and adduced evidence in support of their respective assertions. In so far as the Respondent Union is concerned who had raised the demand it adduced the evidence of one of the workmen Mr. Bhalchandra Harishchandra Bhopi. In so far as the Petitioner company is concerned, it adduced the evidence of one of its managers Mr. Kanagan. It has come in the evidence of Mr. P.S. Kanagan that there were 24 permanent workmen. The Petitioner Company also produced xerox copies of the muster rolls which were annexed as Annexure A, for the relevant period. The Petitioner Company however, did not produce the originals of the said muster rolls. The Petitioner Company also did not produce its registration under the Contract Labour Regulation and Abolition Act. The Petitioner company also did not produce any document to show the appointment of the said M/s. Venkatesh Construction and Earth Movers Company as being engaged as contractors neither was any contract produced. The Industrial Court on the basis of the evidence on record both the original and documentary recorded a finding that the Petitioner company has failed to substantiate its case that the said 48 workmen were the employees of the contractor and that the Petitioner company had engaged them through the contractor. The Industrial Court drew an adverse inference against the Petitioner Company on the ground of it having not

produced the originals of the muster rolls. The Industrial Court also found inherent contradiction in the case of the Petitioner Company that the workmen were engaged from July 2005 till November 2005 when in fact the registration of the Petitioner Company under the CLR Act was made only in October 2005. The Industrial Court therefore allowed the Reference and granted the reliefs which have been adverted to in the earlier part of this Order. However, in so far as the Respondent Union is concerned, though it was claiming the relief which was in general in nature against the Petitioner Company namely that the said 48 workmen are the direct workmen of the Petitioner company and that they have been wrongly terminated, significantly only the evidence of one witness that is Bhalchandra Bhopi was led. In so far as the evidence of the said Bhopi is concerned, though in his examination in chief he has stated that he is deposing on behalf of the other workmen in the cross-examination, he has admitted that he has no document to show that he was so authorised by the other workmen. In a Reference which arose out of the demand made by the Respondent union for reinstatement with back wages where incidentally the employer-employee relationship is to be adjudicated, the evidence is required to be more substantial and elaborate. The evidence of the witness of the Union i.e. Mr. Bhopi can hardly be said to be an evidence which is in, keeping with the pleadings in the statement of claim. Though it has been pleaded that the contractor one Arvind Patil came to the residences of the workmen and threatened them but there is no evidence to that effect. Though the cases of the other workmen might be identical to the case of the workman who had deposed, there has to be evidence to that effect. A solitary witness on the basis that he has been authorised by the other workmen cannot depose as to the circumstances of each of the workmen. As indicated above, there has to be more substantive evidence may be that all the 48 workmen, are not required to be examined but there undoubtedly has to be substantial and corroborative evidence to the evidence of the main witness. The Industrial Court it seems has without appreciating the fact that initially it is the burden of the Union to bring on record such material to substantiate its case that the 48 workmen are the direct workmen of the Petitioner company has virtually placed the initial burden on the Petitioner company of proving that the 48 workmen are the workmen of the contractor. It is after the Respondent Union discharges its burden that the rebuttal evidence would have to be led by the Petitioner Company. However, as can be seen from the impugned Award, the Industrial Court has laid the initial burden on the Petitioner Company and on the basis of the material on record has come to a conclusion that the Petitioner Company has not discharged the said burden.

6. In so far as the muster rolls are concerned which were produced by the Petitioner company if the Respondent Union had found that the Petitioner Company has only produced the Xerox copies, it was necessary for the Respondent Union to call upon it to produce the originals and only if the originals were produced by the Petitioner company then an adverse inference could have been drawn against the Petitioner company. But such is not the case in the

instant matter as the Respondent union did not call upon the Petitioner Company to produce the originals of the muster rolls and that the Industrial Court has without there being any such requisition by the Union has drawn an adverse inference against the Petitioner Company for non producing the originals. This is as regards the merits of the main claim of the Respondent Union for reinstatement.

7. In so far as the aspect of back wages is concerned, the Learned Senior Counsel appearing on behalf of the Petitioner Company would contend that the issue of back wages has to be decided on the touch stone of the pleadings and the evidence on record. The Learned Senior Counsel would contend that since the facts as regards his employment or non employment or attempts made to secure employment are within the special knowledge of a workman, it is necessary for the workman to state whether he was employed or not, the nature of the efforts made by him for securing alternate employment or the circumstances which prevented him from making such efforts. The Learned Senior Counsel would contend that the burden of proving the said fact lies on the employee. In support of the said contention he seeks to draw my attention to the Judgment of a Division Bench of this Court reported in *Sadanand Patamkar Vs. New Prabhat Silk Mills*, as also the Judgment of the Apex Court reported in *U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey*, . The Apex Court has held that the onus is on the workman to plead and then to prove that he was not gainfully employed and therefore he claims back wages.

In the instant case, as can be seen, neither there are pleadings nor there is any evidence on record to the said effect. However, the Industrial court as can be seen has mechanically granted the relief of full back wages. In the instant case when 48 workmen are involved, the evidence had to cover the said 48 workmen. Since there are no pleadings nor evidence on record, the Industrial Court erred in granting the relief of back wages. In my view, in the light of the fact that the Industrial Court has relied upon the evidence of only one witness whose evidence was adduced on behalf of the Respondent Union, in a matter concerning about 48 workmen and that the back wages have been granted to the workmen without there being any pleadings or evidence in that respect, the impugned Award is required to be quashed and set aside and the matter is required to be relegated back to the Industrial Court for a de novo consideration of the said Reference IT No. 20 of 2006. Hence the following directions:

(i) The impugned Award dated 30-6-2012 passed by the Learned Member Industrial Court is quashed and set aside. The matter is remanded back to the Industrial Court for a de novo adjudication of the Reference.

(ii) The Respondent Union would be entitled to amend the statement of claim. The Petitioner Company would be entitled to file its additional Written Statement if so advised. The same to be done as would be directed by the Industrial Court on the application being moved by the Respondent Union in that behalf. The Industrial Court may add to or amend the issues as per the amended pleadings.

(iii) Both the parties would be entitled to lead additional oral as well as documentary evidence in support of their respective cases.

(iv) The Industrial court on remand to hear and decide the said Reference within a period of 6 months of the parties appearing before it. The parties to appear before the Industrial Court on 28-1-2013.

(v) Both the Learned Counsel i.e. Senior Advocate Mr. J.P. Cama and Mr. N.M. Ganguli are agreeable to this course of action being followed.

(vi) Needless to state that the contentions of the parties in respect of both the aspects that is the main issue as regards the reinstatement and back wages is explicitly kept open for being urged before the Industrial Court. The Industrial Court would decide the Reference uninfluenced by any observations made in the instant order.

Rule is accordingly made absolute in the aforesaid terms with parties to bear their respective costs.