
(2019) 03 BOM CK 0090
In the Bombay High Court
Case No : Writ Petition No. 1218 Of 2008

Rajesh

APPELLANT

Vs

Secretary And Ors

RESPONDENT

Date of Decision : 26-03-2019

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 10(1)

Citation : (2019) 03 BOM CK 0090

Hon'ble Judges : Sunil B. Shukre, J; Pushpa V. Ganediwala, J

Bench : Division Bench

Advocate : S.S. Ghate, U.M. Aurangabadkar, K.K. Pathak

Final Decision : Allowed

Judgement

Sunil B. Shukre, J

1. Heard Shri S.S. Ghate, learned counsel for the petitioner, Shri U.M. Aurangabadkar, ASGI for respondent No. 1 and Ku. K.K. Pathak, learned counsel for respondent Nos. 2 & 3.

2. We have gone through the reply filed on behalf of respondent Nos. 2 & 3.

3. It is stated in the reply filed on behalf of respondent Nos. 2 & 3 that no employer and employee relationship was created between respondent Nos. 2 & 3 and the petitioner. It is also stated in the reply in the words "if at all the petitioner worked with respondent Nos. 2 & 3, depending upon the exigencies of work of temporary nature, then also it cannot be said that he is an employee of respondent Nos. 2 & 3." Such averment made in the reply would show that even though there is no categorical admission regarding employer and employee relationship, it is not the case of respondent Nos. 2 & 3 that the petitioner, insofar as respondent Nos. 2 & 3 are concerned, was and has always been a stranger to respondent Nos. 2 & 3, having got nothing to do with respondent Nos. 2 & 3. In fact, it appears also from the averments made in the reply that it was not a categorical contention of respondent Nos. 2 & 3 in the Conciliation

proceedings that the petitioner had never rendered even temporary service of any nature whatsoever. This is the reason why the Assistant Labour Commissioner (Central), Nagpur, submitted his failure report, seeking reference of the dispute to the appropriate authority for recording a decision as to whether or not there existed any industrial dispute between the petitioner and respondent Nos. 2 & 3.

4. When such facts being there on record, we are of the view that the law settled by the Hon'ble Apex Court in the case of *Telco Convoy Drivers Mazdoor Sangh & Anr. vs. State of Bihar & Ors.*, reported at (1989) 3 SCC 271, would be squarely applicable to this case. In this case, the Hon'ble Apex Court has interpreted the expression used in the context of dispute as "exists or apprehended" to mean that the decision of the appropriate government to refer or not to refer the dispute for its adjudication by Labour or Industrial Court should not be based upon the merits of the dispute itself. This could mean that when the disputed question of fact as regards existence of employer and employee relationship arises, such disputed question of fact cannot be decided by the appropriate government by saying that the employee could not be said to be a workman within the meaning of Industrial Disputes Act, 1947, (hereinafter referred to as I.D. Act) and, therefore, cannot refuse to refer the dispute for its adjudication.

5. In the case of *Telco Convoy Drivers Mazdoor Sangh & Anr. vs. State of Bihar & Ors.*, (supra), the dispute related to a fact which raised a question as to whether or not Convoy Drivers of Telco were to be treated as workmen and in such a context of the facts, the Hon'ble Apex Court held that the Appropriate Government was not entitled to go into the question where master and servant relationship existed and could not refuse to make reference of the dispute.

6. Similar are the facts of present case. As stated earlier, there is no categorical denial of the employer and employee relationship in the present case and what is stated is that if the petitioner had worked for few hours in it, it will not amount to completion of relationship of employer and employee between the petitioner and respondent Nos. 2 & 3. Certainly, this is the question which has to be decided on merits of the matter that is to say by considering the facts established on record and the law applicable to it and this cannot be done in the discharge of function of the Appropriate Government under Section 10 of the I.D. Act. In fact, the Hon'ble Apex Court in the case of *Telco Convoy Drivers Mazdoor Sangh & Anr. vs. State of Bihar & Ors.*, (supra) has held that basically the government functions under Section 10(1) of the I.D. Act, are administrative. The relevant observations of the Hon'ble Apex Court, as they appear in paragraph 13, are as reproduced thus :

"13. Attractive though the contention is, we regret, we are unable to accept the same. It is now well settled that, while exercising power under Section 10(1) of the Act, the function of the appropriate government is an administrative function and not a judicial or quasi-judicial function, and that in performing this administrative function the government cannot delve into the merits of the

dispute and take upon itself the determination of the lis, which would certainly be in excess of the power conferred on it by Section 10 of the Act. See *Ram Avtar Sharma v. State of Haryana* (1985) 3 SCC 189, *M.P. Irrigation Karamchari Sangh v. State of M.P.* (1985) 2 SCC 103; *Shambhu Nath Goyal v. Bank of Baroda, Jullundur* (1978) 2 SCC 353)."

7. The learned counsel for respondent Nos. 2 & 3 has placed her reliance upon the following five cases to support her contention that this is not a fit case for making reference of a dispute. These cases are as follows :

1. *Prem Kakar vs. State of Haryana & Anr.*, reported at (1976) 3 SCC 433.
2. *Sultan Singh vs. State of Haryana & Anr.*, reported at (1996) 2 SCC 66.
3. *Secretary, Indian Tea Association vs. Ajit Kumar Barat & Ors.*, reported at 2000 I CLR 625.
4. *Bongaigaon Refinery & Petrochemicals Ltd. vs. Samijuddin Ahmed*, reported at (2001) 9 SCC 557.
5. *Nilesh Shivaji Sapkar vs. State of Maharashtra & Ors.*, reported at 2015 (4) Mh. L.J. 829.

8. Firstly, we wish to make it clear here that we are not recording any finding that this is a fit case for making of reference. We are saying here that while forming an opinion as a part of discharge of administrative duty under Section 10(1) of the I.D. Act, the appropriate government must refer to the material available on record, apply its mind to this material and then render a decision in accordance with law. Here, we find that the appropriate government has not taken into consideration some of the submissions which are material ones, made by respondent Nos. 2 & 3 in order to arrive at the conclusion that this is not a fit case for making of a reference. The relevant portion of the report of respondent Nos. 2 & 3 which has already been reproduced by us in earlier parts of this judgment suggests to us that there is a disputed question of fact regarding existence of employer and employee relationship or otherwise and this question needs to be answered by considering the law laid down by the Hon'ble Apex Court in the case of *Telco Convoy Drivers Mazdoor Sangh & Anr. vs. State of Bihar & Ors.*, (supra) and other cases referred to in this judgment only. Even then, we would like to deal with the aforesaid cases on which reliance has been placed by respondent Nos. 2 & 3.

9. In the case of *Prem Kakar vs. State of Haryana & Anr.*, (supra), it has been held that the appropriate government has to make a reference of a dispute only when it is satisfied that a case in this regard is made out. We have made our observations earlier only by following this principle of law.

10. In the case of *Sultan Singh vs. State of Haryana & Anr.*, (supra) it has been held by the Hon'ble Apex Court that appropriate government is entitled to go into the question as to whether or not an industrial dispute exists or is apprehended

and the opinion in this regard is only in the nature of subjective satisfaction arrived at by considering the material available on record. Again we would like to say that by following this principle of law, we have made our conclusions earlier.

11. In the case of Secretary, Indian Tea Association vs. Ajit Kumar Barat & Ors., (supra), the Hon'ble Apex Court has held that the State Government had rightly upheld the question as to whether or not, respondent No. 1 therein was a workman and passed an administrative order that respondent No. 1 was not a workman. Here also, we have held that this issue would have to be decided by the appropriate government by considering the relevant material available on record.

12. In the case of Bongaigaon Refinery & Petrochemicals Ltd. vs. Samijuddin Ahmed, (supra), it was found by the Hon'ble Apex Court that the documentary evidence available on record clearly showed that the respondent therein had never entered into any employment with the appellant and, therefore, it found that the Division Bench of High Court was not right in forming an opinion that the controversy raised by the appellant should have been left to be adjudicated upon by the Industrial Tribunal. The facts of the instant case are quite different. In the present case, the material available on record does not clearly show that there has never been at any point of time any employer and employee relationship between the petitioner and respondent Nos. 2 & 3. Therefore, in our respectful submissions, said case may not be of much assistance to respondent Nos. 2 & 3.

13. In the case of Nilesh Shivaji Sapkar vs. State of Maharashtra & Ors., (supra), the Division Bench has followed the same principles of law as have been propounded in the case of Prem Kakar vs. State of Haryana & Anr. (supra) and Telco Convoy Drivers Mazdoor Sangh & Anr. vs. State of Bihar & Ors., (supra).

14. Thus, we find that the impugned order does stand the scrutiny of law and, therefore, this petition deserves to be allowed.

15. Writ Petition is allowed. The impugned order is quashed and set aside. The matter is remanded to respondent No. 1 for deciding the Conciliation failure report appropriately in accordance with law, in the light of the general principles settled by the Hon'ble Apex Court in the matter. The decision may be taken on or before 31.07.2019. Rule is made absolute in these terms. However, there shall be no order as to costs.