

(1997) 07 BOM CK 0112
In the Bombay High Court
Case No : O.O.C.J. W.P. No. 941 of 1997

Sandoz (India) Ltd.

APPELLANT

Vs

Association of Chemical Workers and Another

RESPONDENT

Date of Decision : 15-07-1997

Acts Referred:

Industrial Disputes Act, 1947 — Section 36(4)

Citation : (1997) 3 MhLj 684

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

Bench : Single Bench

Advocate : J.P. Cama, for the Appellant; Ms. N.D. Buch, for the Respondent

Judgement

R.M. Lodha, J.—Rule. Returnable forthwith. Ms. Buch waives service for Respondent No. 1. Respondent No. 2 is formal party and, therefore, service is dispensed with. By consent, writ petition is heard finally at this stage.

2. The only question involved in the present writ petition filed at the instance of the employer Petitioner Sandoz (India) Ltd. is whether the Industrial Tribunal Mumbai erred in upholding the objection raised by the Respondent No. 1 union to appearance of the Advocate for the employer first party in the reference before the said Court.

3. Short facts necessary for disposal of the writ petition are that upon charter of demands submitted by the union to the employer, the employer refused to have any negotiation or discussions with union. Conciliation failed and the Industrial dispute was referred by the appropriate government to the Industrial Tribunal, Bombay which was registered as Reference (IT) No. 55 of 1995. In the said reference the petitioner employer is first party (for short, "employer") while the union Respondent No. 1 is second party (for short, "union"). On 8-2-1996 Shri K. T. Rai, Advocate for the employer though nobody was Present on behalf of the union. Shri K. T. Rai, Advocate has filed his Vakalatnama on the next date. 22-2-1996 was fixed as next date by the Industrial Tribunal for filing statement

of claim. On that day Presiding Officer of the Industrial Tribunal was on leave. Shri K. T. Rai, Advocate appeared for the employer while the union was represented by its representative. Since the Presiding Officer was on leave, 22-4-1996 was fixed as next date for filing statement of claim. On that date Shri K. T. Rai, Advocate appeared for the employer and the representative of the union was present and he made an application objecting to the appearance of the Advocate by the employer. The said application was replied by 1st party employer on 5th August, 1996 and a plea was set-up inter alia that the first appointed date of the adjudicational proceedings was on 8-2-1996. Thereafter, the second appointed date of adjudicational proceedings was on 22-2-1996 and the third appointed date of adjudicational proceeding was on 22-4-1996 on which date for the first time the second party union preferred the application registering their objection for the appearance of advocate for and on behalf of the employer and since the objection was not raised on the first date of adjudicational proceedings, it would be deemed that the union second party had given its implied consent for appearance of the advocate on behalf of employer 1st party. The Industrial Court heard the application made by the union raising objection of appearance by the advocate on behalf of employer and by the impugned order dated 6-5-1997 upheld the objection of the union for the appearance of the advocate representing the employer.

4. Mr. Cama, the learned Senior Counsel strenuously argued that the Vakalatnama was filed by Shri K. T. Rai, advocate on behalf of employer on 8-2-1996 and though nobody was present on behalf of the union on that day, on the next date of hearing i.e. 22-2-1996 the representative of the union was present and he had knowledge of appearance of Shri K. T. Rai, Advocate on behalf of employer but no objection was registered by the union on that day and thus under law it would be assumed that the union had given its implied consent for appearance of Shri K. T. Rai, Advocate on behalf of the employer. Mr. Cama relied on Division Bench judgment of this Court in *Engineering Mazdoor Sabha, Bombay v. Mehar (M.R.)* (Industrial Tribunal, Bombay) 1996 I LLJ 580, and, a single bench judgment of this Court in *MSCO (P) Ltd. v. S. D. Rane*, 1982 I LLJ 431. Mr. Cama submitted that the present case is almost identical to the facts of the case in *Engineering Mazdoor Sabha* and applying the said principles, the order passed by the Industrial Tribunal is unsustainable in the eye of law.

4-A. On the other hand Ms. Buch, the learned counsel appearing for the respondent No. 1 union urged that prerequisite conditions for appearance of an advocate on behalf of party u/s 36(4) of the Industrial Disputes Act, 1947 is consent of the opposite party and leave of the Court. According to her both conditions must coexist and only then an advocate or legal practitioner can appear on behalf of party. She relied upon a Division Bench judgment of this Court in *Kamakshi R. Iyer (Mrs.) v. Hindustan Door-Oliver Ltd.* 1996 1 CLR 88. She submits that union on the first available date raised objection about the appearance of the advocate on behalf of 1st party employer and, therefore, question of implied consent by the second party union did not arise in the facts

of the present case.

5. Before I come to facts I may refer to the relevant provisions contained in Section 36 of the Industrial Disputes Act, and, the authorities relied upon by the learned counsel for the parties.

6. Section 36 of the Industrial Disputes Act, 1947 reads thus :

"Section 36. - Representation of parties. - (1) A workman who is a party to dispute shall be entitled to be represented in any proceeding under this Act by -

(a) 4 {any member of the executive or other office bearer} of a registered trade union of which he is a member;

(b) 4 {any member of the executive or other office bearer} of a federation of trade unions to which the trade union referred to in clause (a) is affiliated;

(c) where the worker is not a member of any trade union, by 1 {any member of the executive or other office bearer} of any trade union connected with, or by any other workman employed in, the industry in which the worker is employed and authorised in such manner as may be prescribed.

(2) An employer who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by -

(a) an officer of an association of employers of which he is a member;

(b) an officer of a federation of association of employers to which the association referred to in clause (a) is affiliated;

(c) where the employer is not a member of any association of employers, by an officer of any association of employers connected with, or by any other employer engaged in, the industry in which the employer is engaged and authorised in such manner as may be prescribed.

(3) No party to a dispute shall be entitled to be represented by a legal practitioner in any conciliation proceedings under this Act or in any proceedings before a Court.

(4) In any proceedings 2 {before a Labour Court, Tribunal or National Tribunal}, a party to a dispute may be represented by a legal practitioner with the consent of the other parties to the proceedings and 3 {with the leave of the Labour Court, Tribunal or National Tribunal, as the case may}."

7. Division Bench of this Court in Engineering Mazdoor Sabha, (Supra) was dealing with a case where an application for interim bonus was made by the union. On September 12, 1963 advocate Mr. Phadke appeared for the employer and one Joshi, General Secretary of the Engineering Mazdoor Sabha, Bombay appeared and prayed for adjournment since one Mr. Mehta who appeared for union was out of Bombay. Mr. Phadke had no objection to the adjournment being granted and matter was thereupon adjourned to September 21, 1963. On that

date an objection was raised to the appearance of Mr. Phadke. The tribunal held that objection ought to have been taken at the first hearing of the matter and it was too late to take such an objection subsequently. Aggrieved by the order passed by the Tribunal the union filed writ petition before this Court. The Division Bench held that though the union had not given express consent to the appearance of Shri Phadke the union must be held to have given its consent impliedly by not objecting to the appearance of Shri Phadke on 12 September, 1963. It was not open to the union to object thereafter. The Division Bench did not find the case fit for interference and accordingly dismissed the writ petition.

8. The scope of Section 36 of the Industrial Disputes Act, 1947 came up for consideration before the Apex Court in *Paradip Port Trust, Paradip Vs. Their Workmen*, and the Apex Court held thus :

"10. Section 36 provides for representation of parties before the Tribunals and the Labour Court. u/s 36(1) a workman who is a party to dispute shall be entitled to be represented in any proceeding under the Act by three classes of officers mentioned in (a), (b) and (c) of that sub-section. Similarly u/s 36(2) an employer who is a party to a dispute shall be entitled to be represented in any proceeding under the Act by three classes of officers mentioned in (a), (b) and (c) of that sub-section. By sub-section (3) a total ban is imposed on representation of a party to a dispute by a legal practitioner in any conciliation proceedings under this Act or in any proceedings before a Court of enquiry. Then comes Section 36(4) which introduces the requirement of prior consent of the opposite party and leave of the Tribunals and of the Labour Court, as the case may be, for enabling a party to be represented by a legal practitioner.

11. Under the scheme of the Act the parties to an industrial dispute are employers and employers; employers and workmen; and workmen and workmen S. 2(k). The definition of "appropriate Government" u/s 2(a) of the Act lays bare the coverage of industrial disputes which may be raised concerning, amongst others, several types of corporations, mentioned therein, companies, mine, oil field, cantonment board and major port. The definition of employer u/s 2(g), which is a purposive but not an exhaustive definition, shows that an industrial dispute can be raised in relation to an industry carried on even by the Government and by local authorities. It need not be added that industry is also carried on by private owners, private companies and partnerships. "Employers and workmen will, therefore, be drawn from numerous sources. Leaving aside for the present industrial disputes between employers and employers and workmen and workmen, such disputes, almost always are between employers and workmen. Prior to the insertion of Section 2(a) in the Act by the Amendment Act 35 of 1965 a dispute raised only by a single individual workman did not come under the category of an industrial dispute within the meaning of Section 2(k). Left to himself, no remedy was available to such an aggrieved individual workman by means of the machinery provided under the Act for adjudication of his dispute. Such an individual dispute, for example, relating to the discharge or

dismissal of a single workman, however, became an industrial dispute only if a substantial body of workmen or a union of workmen espoused his cause. The trade union of workmen, therefore, comes to be recognised as a live instrument under the Act and has an active role to play in collective bargaining. Thus, so far as workmen are concerned, union is, almost, always involved in the dispute from the inception. Since the dispute, itself, in a large number of cases takes the character of industrial dispute from participatory involvement of the trade union, the Act confers an unbuttered right upon the workmen to be represented by a member of the Executive or by an office-bearer of a registered trade union. It is, therefore, in the very scheme of things that a workman's absolute right to be represented by an office-bearer of a registered trade union. It is, therefore, in the very scheme of things that a workman's absolute right to be represented by an office-bearer of the union is recognised under the Act. Indeed it would have been odd in the entire perspective of an industrial dispute and the objects and purposes of the Act not to give due recognition to the union. But for a provision like Section 36(1) of the Act, there may have been difficulty under the general law in the way of the office-bearers of the union representing workmen before the adjudicating authorities under the Act unless, perhaps, regulated by the procedure u/s 11 of the Act. To put the matter beyond controversy and absolute right is created in favour of the workmen u/s 36(1) in the matter of representation. Having made such a provision for the workmen's representation the employer is also placed at par with the workmen in similar terms under the Act and the employer may also be represented by an officer of the association of employers of which the employer is a member. The right is extended to representation by the office-bearers of the federation of the unions and by the officers of the federation of employers. The provisions of Sections 36(1) and 36(2) confer on the respective parties absolute rights of representation by persons respectively specified therein. The rights of representation u/s 36(1) and Section 36(2) are unconditional and are not subject to the conditions laid down u/s 36(4) of the Act. The said two sub-sections are independent and stand by themselves".

9. The Division Bench of this Court in *Engineering Mazdoor Sabha*, and the judgment of the Apex Court in *Paradip Port Trust*, came up for consideration before the learned single Judge of this Court in *MSCO (P) Ltd.* and, the learned single Judge held thus :

"Normally, any leave granted by a Court or a Tribunal would be in writing. Similarly, in ordinary cases, the consent of the other party would also be given in writing. But the question is whether from this does it follow that the consent of the other side or the leave of the Court must always be in writing. Sub-section (4) of Section 36 does not contain any such requirement, and, therefore, it cannot be held that an implied consent is negated by the statute".

"Such representation for a party can only be by a Vakalatnama on behalf of that party filed by that advocate in Court. Strangely enough, when we turn to the

affidavit in reply filed by the said Krishnan, we find in paragraph 6 of that affidavit that he has gone to the length of averring that on October 11, 1977, Pai was present in Court on behalf of the Petitioners, but had not disclosed that he was an advocate and that he had not filed on that day his Vakalatnama in the Labour Court, and that without filing his Vakalatnama on behalf of the Petitioners, the said Pai was present in Court and had made an endorsement to the effect that there was no objection to the adjournment being granted to respondent No. 2 and had signed the said endorsement. In making these statements on oath, what the said Krishnan has overlooked is that the consent which was endorsed by Mr. Pai at the foot of the said application is as the advocate for the petitioner company and which anybody could plainly read. He has also not denied in the said paragraph that it was the 2nd respondent union which approached Mr. Pai to obtain his consent for the adjournment. The said Krishnan could not be unaware of the position that no advocate would have authority to consent to an adjournment in a Court or a Tribunal unless he had filed in that Court or Tribunal his authority to represent his client which could only be by filing his Vakalatnama. The proceedings that have taken place subsequent to October 11, 1977, clearly show that after obtaining the consent of Mr. Pai as an advocate for the petitioners, and thereby obtaining from the Labour Court an adjournment of the hearing and time to file the statement of claim, the 2nd respondent union has turned round and dishonestly sought to object to Mr. Pai's appearance. These are tactics which no Court or Tribunal should ever continue. By approaching Mr. Pai and obtaining his consent as the advocate for the petitioner company, the 2nd respondent union and the 3rd respondent who is represented by it have both obtained the benefit of an adjournment and time for filing the statement of claim. They have led and induced the petitioners and Mr. Pai to believe that the 2nd respondent union had consented to the petitioners being represented by a legal practitioner. They have equally induced such a belief in the Labour Court, which in view of this consent on the part of the 2nd respondents permitting Mr. Pai to appear. Having done so, the respondents Nos. 2 and 3 only must be held to have given their consent to the appearance of Mr. Pai, but must be held to be estopped from contending that they had not given their consent or from objecting to the appearance of Mr. Pai on behalf of the petitioners. I, may point out that in the affidavit in rejoinder made by one Sudhir Shah, a Director of the petitioner company it is stated that the said Shah had personally taken inspection of the records of the Labour Court on December 2, 1981, and had himself seen that the Vakalatnama was filed on October 11, 1977, by Mr. Pai. Mr. Sawant, learned Advocate, for the petitioners had accompanied the said Shah and has made a statement at the Bar that he himself had personally seen and verified that the Vakalatnama of Mr. Pai was filed before the Labour Court on October 11, 1977. So much for the voracity of the said Krishnan when he says that when Mr. Pai gave his consent, he had not filed his Vakalatnama. Mr. Shetye, learned advocate, for respondents Nos. 2 and 3 strongly relied upon a decision of the Supreme Court in the case of Paradip Port Trust v. Their Workmen (supra). I fail to see what relevance that decision has to

the point which has arisen for determination before me. The question in that case was whether a practising lawyer who was also in the employ of a company as a legal consultant could appear for the company u/s 36(2) of the Industrial Disputes Act. It was also sought to be argued before the Supreme Court that u/s 30 of the Advocates Act, 1961, every advocate was "as of right" entitled to practice before all courts and before any Tribunal. The Supreme Court held that if a party desires to be represented by a legal practitioner in any proceeding under the Industrial Disputes Act, such party will have to obtain both the consent of the opposite party and the leave of the Tribunal. The Supreme Court has nowhere observed in that judgment how such consent is to be obtained or given. The question of consent being implied from the facts and circumstances of the case, was never before the Supreme Court. This decision, therefore, cannot in any way help respondents Nos. 2 and 3. Mr. Shetye next relied upon an unreported decision of my brother Shah in Miscellaneous Petition No. 2419 of 1979, M/s. KIV Group Industries v. H. H. Kantharia & Anr. decided on 14th/15th February, 1980. This decision, to my mind, does not also in any way help Respondents Nos. 2 and 3. It does not lay down that there cannot be an implied consent to the opposite side being represented by a legal practitioner. What was held in that case was that on the facts and circumstances of that case, implied consent could not be inferred. The facts in that case were that at the very outset when the statement of claim was lodged by the union, it had set out in writing in its covering letter its objection to the employer being represented by a legal practitioner. When the statement of claim was filed along with this covering letter, the employer had not even filed its appearance. The employer did not remain present in Court for several hearings until April 7, 1978. On that day, for the first time, an advocate appeared on behalf of the employer and filed his authority and the appearance was promptly objected to by one Krishnan who is the same Krishnan as in the present case. This objection was not decided by the Industrial Tribunal, but was allowed to remain pending, and accordingly when the matter appeared from time to time it was adjourned and the advocate in question continued to represent the employer. On the basis of this, it was sought to be urged that the Union had given its implied consent to the appearance of the said advocate. The learned Judge pointed out that on the contrary the Union had right from the very beginning before even the employer had appeared set out in writings its objection to the employer being represented by a legal practitioner, and that on the very first day that the employer sought to be represented by a legal practitioner, the Secretary of the Union had promptly objected, and that his objection had remained undecided. The said advocate was permitted to appear when the matter was being adjourned from time to time. Unlike the promptitude shown by it in the case before my brother Shah, here the 2nd respondent union on the very first occasion when the petitioners were represented by a legal practitioner approached that legal practitioner as an advocate for the petitioner, obtained his consent, to an adjournment as an advocate for the petitioner and secured time for themselves to file the statement of claim, and it was only when that statement of claim was ready and being sent for being filed that for the first

time they recorded their objection any advocate appearing for the petitioners".

10. Recently in Kamakshi R. Iyer (Mrs.) the Division Bench of this Court considered the issue of representation of legal practitioner before the Labour Court in a reference under the Industrial Disputes Act, 1947, and, after considering the judgment of the Apex Court in Paradip Port Trust, the Division Bench held thus :

"The parties, however, will have to confirm to the conditions laid down in Section 36(4) in the matter of representation by legal practitioners. Both the consent of the opposite party and the leave of the Tribunal will have to be secured to enable a party to seek representation before the Tribunal through a legal practitioner qua legal practitioner. This is the clear significance of Section 36(4) of the Act".

11. It would be seen that u/s 36(4) of the Industrial Disputes Act, 1947 before a party can claim right of appearance through an Advocate or legal practitioner, the two conditions must be fulfilled viz., (i) the consent of the opposite party and (ii) the leave of the concerned Labour Court or Tribunal. As has been held by the Division Bench in Kamakshi R. Iyer, based on the judgment of the Apex Court in Paradip Port Trust, that the consent of the opposite party and leave of the Tribunal are required to be secured to enable a party to seek representation before the Tribunal through a legal practitioner. Leave of the Court and the consent of the opposite party are ordinarily required to be in writing but an act of a Court or conduct of opposite party may provide sufficient clue to draw inference of implied consent. In this background of legal position, it would be advantageous to refer to Roznama of the case before the Tribunal on three dates of hearing viz., 8-2-1996, 22-2-1996 and 22-4-1996 which on translation in English read thus :

12. It would be seen that on the first date of hearing i.e. 8-2-1996 the employer was represented by Shri K. T. Rai, Advocate and he filed his Vakalatnama on its behalf. However, nobody was present on behalf of second party union nor there was any endorsement of leave by the Court. Obviously, therefore, in the absence of anybody representing the union question of any objection by the Union that day did not arise and no implied consent could be inferred. The next date fixed by the Tribunal was 22-2-1996. On that date the Presiding Officer was on leave though the 1st party was represented by Shri K. T. Rai, Advocate and the second party was represented by its representative. Since the Presiding Officer was on leave, there was no occasion for union to raise objection about appearance of Shri K. T. Rai, Advocate on behalf of employer and it is very difficult to infer implied consent on behalf of second party union. In the absence of the Presiding Officer, matter was adjourned to 22-4-1996 for filing written statement. On that day, the first party was represented by Shri K. T. Rai while the second party union was represented by Shri Desai and on that day the application was made by the Union objecting to the appearance of Shri K. T. Rai, Advocate on behalf of employer. That was the first available date when the union could have raised objection and it did raise objection regarding the appearance of Shri K. T. Rai on

behalf of the employer. Much emphasis was placed by Mr. Cama, the learned Senior Counsel that even though no effective hearing took place on 22-2-1996 yet the second party union was represented by the representative on that day and when Shri K. T. Rai, Advocate appeared on behalf of first party employer, the second party union ought to have registered its objection, and, since that objection was not registered on 22-2-1996, the implied consent of the second party union should be inferred as was held in Engineering Mazdoor Sabha, by Division Bench of this Court. I am afraid facts of the present case are quite different from the facts of the case which were present before the Division Bench in Engineering Mazdoor Sabha. In the case of Engineering Mazdoor Sabha on the first date i.e. 12th September, 1963. Shri Joshi appeared on behalf of union and prayed for adjournment and Shri Phadke appearing for employer had no objection to the matter being adjourned. Despite the appearance of Shri Phadke on behalf of employer on 12th September, 1963 no objection was raised by the union and matter was adjourned. In that fact situation the Division Bench held that though the union had not given express consent to the appearance of Shri Phadke the union must be held to have given its consent impliedly by not objecting to the appearance of Shri Phadke on 12th September, 1963 and, therefore, it was not open to the union to object his appearance. In this view of the matter the Division Bench did not find the case fit for interference by the High Court in the writ jurisdiction. In the present case as I have already pointed out that on the first date i.e., 8-2-1996 no body appeared on behalf of union and on second date of hearing on 22-2-1996, the Presiding Officer was on leave and on the third date i.e., 22-4-1996 the objection was raised by the union about the appearance of Shri K. T. Rai, on behalf of 1st party employer. The judgment of the learned single Judge in MSCO (P) Ltd. also has no application to the facts of the present case. It would be seen that in that case an application was made by the representative of the union which was not objected to by the other side but also in that case the union representative approached the Advocate of the employer company and obtained his consent in writing at the foot of the application for adjournment. Consent was given by Mr. Pai in that case in express terms as advocate on behalf of employer company. The learned single Judge observed that on the application of adjournment, the advocate appearing for the employer had endorsed that he had no objection to the adjournment. In that fact situation, the learned single Judge while relying upon the Division Bench judgment of this Court in Engineering Mazdoor Sabha, held that the objection of the union about representative of the employer company by the advocate was misconceived and would be deemed to have been impliedly consented. Both the judgments of this Court in Engineering Mazdoor Sabha and MSCO (P) Ltd. turn on their own facts. In the present case, in my view, the question of impliedly consent of the second party union cannot be inferred for the simple reason that on the first date of hearing i.e. on 8-2-1996 nobody was present on behalf of second party union and on the second date of hearing i.e. 22-2-1996 the Presiding Officer was on leave and on third date of hearing i.e., 22-4-1996, the objection was raised by the second party union for appearance of the first party

employer through the Advocate. The two pre-requisite conditions claiming right of appearance u/s 36(4) by the employer are not fulfilled at all.

13. The order passed by the Industrial Tribunal, therefore, appears to be in consonance with law warranting no interference by this Court in extraordinary jurisdiction.

14. Writ petition accordingly has no merit and is dismissed. Rule is discharged. No costs.

15. Petition dismissed.