
(2006) 03 BOM CK 0081

In the Bombay High Court

Case No : Writ Petition No. 5845 of 1999

Shekoba Auto Pvt. Ltd.

APPELLANT

Vs

B.D. Hajare and Others

RESPONDENT

Date of Decision : 03-03-2006

Acts Referred:

Industrial Disputes Act, 1947 — Section 25K, 25L
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 4, 5, 7

Citation : (2006) 5 BomCR 722 : (2006) 4 MhLj 43

Hon'ble Judges : P.V. Kakade, J

Bench : Single Bench

Advocate : J.P. Cama and C.U. Singh and K.S. Bapat, for the Appellant; Nayana Buch, Hitesh Buch and S.K. More for Respondent Nos. 1 to 21, 23 to 36 and 38 to 40 and Neel Helekar, for the Respondent

Final Decision : Allowed

Judgement

P.V. Kakade, J.—This petition is preferred by the petitioner impugning the order dated 29th September, 1999 passed by the Industrial Court, Pune, inter alia, holding that the petitioner had committed unfair labour practice under Item 9 of Schedule IV of the Maharashtra Recognition of Trade Union and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as the said "MRTU and PULP Act") while retrenching the respondent Nos. 1 to 40, who were the complainants, and directing the petitioner to continue them in service with further direction to pay each of them Rs. 1000/- as compensation and further sum of Rs. 1000/- by way of cost.

2. I have heard the learned Counsel for both the parties. Perused the record.

3. The petitioner is a company incorporated under the Companies Act, 1956. In or about 1972 a partnership firm by name Electro Components Company was formed which was engaged in the manufacture of capacitors for electronics and automobile industries. On 15-11-1978, the said "Electro Component Co."

discontinued its manufacturing of automobile ignition capacitors. The said line of manufacturing was taken over by its sister concern known as "Auto Components Company". 25 employees of the said Electro Components Company who were connected with the manufacturing of automobile ignition were given option to take employment with Auto Components Co. Some of the employees amongst respondent Nos. 1 to 40 were those 25 employees. All of them exercised their option and opted for working with the said Auto Components Co. The said Auto Component Co. thereafter incorporated into a private limited company and is known as "Shekoba Auto Pvt. Ltd." i.e. the petitioner herein. The petitioner since beginning was in the line of manufacturing of automobile ignition capacitors. In the meantime, the Electro Components Company continued to manufacture Electronic Capacitors and Wire Bound Resistors. In or about 1984 an existing company by name Neotroniks i.e. respondent No. 41 took over Electro Components Company. The said Neotroniks is in existence since 1964.

3A. The petitioner found that orders were not forthcoming and company was continuously suffering losses, the petitioner therefore decided to stop the manufacturing activities. It was also found that the product had become obsolete. The petitioner accordingly retrenched respondent Nos. 1 to 40 by paying their legal dues on 17-3-1999. It is the case of the petitioner that they had followed the procedure and made all the payments as contemplated under the Industrial Disputes Act, 1947.

4. The respondent Nos. 1 to 40 being aggrieved by the termination filed a complaint under Item 9 of Schedule IV of the MRTU and PULP Act, 1971. The said complaint was numbered as Complaint (ULP) No. 70 of 1999. It was the contention of the petitioner (sic : respondents) that the petitioner and the respondent No. 41 were functionally integrated and amongst both of them, they had employed more than 100 employees and therefore, the termination was violation of Chapter VB of the Industrial Disputes Act. The petitioner contested the complaints by written statement denying the allegations taken up by the respondents. It was the case of the petitioner that the petitioner as well as the respondent No. 41 was separate and distinct and there was therefore no question of functional integrity. The petitioner while replying the contentions raised in the complaint also pointed out that though one union by name Neotroniks and Shekoba Auto Pvt. Ltd. Kamgar Sangatana was operating in both the companies, they always raised separate charter demands for both the companies and always separate settlements were signed between the parties.

5. The respondent No. 41 also filed his written statement and pointed out its separate existence.

The respondents sought production of various documents including order book, which was allowed and evidence was led as many as 13 witnesses on behalf of the respondents. The petitioner examined its Director one Mr. Surendra Shenoy. The Industrial Court after hearing both the parties and on the basis of available evidence came to the conclusion that the petitioner has engaged in unfair labour

practice under Item 9 of Schedule IV of the MRTU and PULP Act. The Industrial Court has recorded the said finding based upon its conclusion that the petitioner and respondent No. 41 are functionally integrated. Hence, the present Petition.

6. The case sought to be made on behalf of the petitioner is to the effect that the Industrial Court does not have jurisdiction to entertain the complaint when the termination of service is under challenge and exclusive jurisdiction in this behalf is vested in the Labour Court. The order of the Industrial Court also challenged on the ground that there cannot be any question of clubbing together two different employers for the purpose of applying Sections 25K and 25L of the Industrial Disputes Act, 1947. The number of "workmen" is to be seen, and "workmen" can only be those employed by the employer who is closing down or retrenching workmen. Employees of an altogether different company can never be clubbed as they are not the "workmen" of the petitioner-company. It was further submitted that the findings recorded by the Industrial Court in respect of functional integrality between the petitioner and the respondent No. 41 are not erroneous but are also perverse as they are contrary to the record and therefore, the judgment is liable to be set aside. It was also contended on behalf of the petitioner that the Industrial Court having been appraised of the law on the said issue has completely misdirected itself while coming to the said conclusion.

On the other hand the learned Counsel for the respondents vehemently supported the judgment of the Industrial Court on all counts submitting that the petitioner and respondent No. 41, though under different options, are in fact same companies and therefore, the petition is sought to be dismissed.

7. In this regard, it is to be noted that the complaint has been filed by the respondent Nos. 1 to 40 under Item 9 of Schedule IV of the MRTU and PULP Act. u/s 4 of the Act, the Industrial Courts are established. u/s 5, the duties of the Industrial Courts are enumerated. As per provisions of Section 5(d) of the Act, it is the duty of the Industrial Court to decide complaints relating to unfair labour practices except unfair labour practice falling under Item 1 of Schedule IV. Section 7 of the Act, casts duty upon the Labour Court to decide complaints relating to unfair labour practices described in Item 1 of Schedule IV of the Act. Thus, it is clear that the cases of termination are to be tried by the Labour Court as contemplated u/s 7 of the Act. The Apex Court in the case of Lokmat Newspapers Pvt. Ltd. v. Shankarprasad 1999 (3) CLR 433 has laid down the preposition of law that the scope and ambit of Item 1 is extremely wide and also includes the cases of retrenchment. The said issue was also considered by our High Court in the case of Pepsi Co. India Holdings Pvt. Ltd. v. Noshir Elavia 2002 (1) CLR 953 wherein it was held that the cases of termination of service will have to be filed under Item 1 of Schedule IV and Item 9 cannot be invoked for the said purpose. The said issue was also again came up for consideration before the High Court in the case of Supertex (India) Corporation v. Radheshyam Pandey 2001(4) M.L.J. 706 : 2001(3) CLR 299 wherein it was held that the Industrial Court cannot deal with a complaint in respect of termination of services falling

under Item 1 of Schedule IV of the MRTU and PULP Act. For this purpose, we can also refer to judgment of our High Court in the case of Dilip Wawande v. Industrial Court, Nagpur 1995 (2) CLR 897 wherein it was held that jurisdiction to try the issue of termination is squarely with Labour Court as contemplated u/s 7 of the Act

8. It was sought to be contended on behalf of the respondent that the said issue was not taken up before the Industrial Court and therefore the said question cannot be decided at this juncture. However, it is to be noted that the said argument may not be good in view of the judgment of the Apex Court in the case of Chitturi Subbanna Vs. Kudapa Subbanna and Others, . It was held by the Apex Court that a pure question of law not depended upon the determination of any question of fact should be allowed to be raised even at the last stage. It is also needless to mention that the jurisdiction of the Court cannot be conferred by the conduct of the parties.

9. The next question which requires consideration is in respect of finding given by the Industrial Court in respect of functional integrality between the petitioner and the respondent No. 41. On perusal of the judgment of the lower Court, it is clear that the Industrial Court has held the issue against the petitioner on various counts including the fact that use of trade mark as "Borger" and "El-Ci-Ar" for the manufactured product, the Excise Certificate issued by the Excise Authority mentions that products manufactured are similar. Further it is held that sometimes the production of the respondent No. 41 was carried out by the employees of the petitioner and the business is of one or two families. It was further held that the partners of petitioner and respondent No. 41 are same. One time keeper is supervising the employees. The Management, Finance, Geographical Proximity, Unity of Ownership, Trade Mark, Work Force, were common for both petitioner and respondent No. 41. These were the pieces of evidence mainly the lower Court to decide the issue of functional integrality between the petitioner and the respondent No. 41.

However, on perusal of the entire record, it is seen that the inferences drawn by the lower Court appear to be contrary to the record and are also contrary to the law laid down by the Apex Court as well as this Court. It is pertinent to note that the documents produced before the Industrial Court as well as the evidence on record would clearly proved that Borger was the trade mark used by the petitioner whereas the El-Ci-Ar was the trade mark used by the respondent No. 41, which is quite clear from the brochures produced by the petitioner on record. For the said purpose we can also rely upon the evidence of Mr. Shenoy and in para 4 of his examination-in-chief he has stated in respect of the brand names of petitioner as well as respondent No. 41. This witness was appears to be extensively cross-examined, however, there was even no suggestion to that effect was given on behalf of the respondent Nos. 1 to 40.

10. The finding that the petitioner and the respondent No. 41 are manufacturing similar product which the Industrial Court has based upon the Excise Certificate

issued by the Excise Authorities is also appears to be contrary to the record. The Certificate issued by the concerned authorities shows that the petitioner were manufacturing plastic film capacitors whereas the respondent No. 41 manufactures wire wound resistors and plastic film capacitors. In any event the excise certificate is only for revenue purpose and has nothing to do with the specific types of capacitors or the end usage of the same. Whereas one company made capacitors for automobile ignitions, the other made them for the electrical/electronics industry. The witness Surendra Shenoy also explained the line of the production in his evidence. Moreover, even if it is assumed that the petitioner and the respondent No. 41 were manufacturing same and similar product, it would not mean that the petitioner and the respondent No. 41 were functionally integrated. In this regard reference must be made to the ruling of the Apex Court in the case of *Isha Steel Treatment, Bombay v. Association of Engineering Workers* reported in AIR 1997 SC1478 wherein the Apex Court was considering the factories which were barely 200 yards away from each other and were manufacturing the same products. The Apex Court after considering the entire case law on the issue, ultimately came to the conclusion that the two factories though were in the same line of business cannot be clubbed together. The issue is also considered by the Apex Court to the effect that both the units being controlled by the same employer and that the business of heat treatment processing was carried on in both the units and the Supreme Court had given importance to the fact that despite unit No. 1 is closed the unit No. 2 continue to operate.

11. It was vehemently urged by the learned Counsel for the respondents that there was common work force in both the companies. It appears from the judgment of the lower Court that it has weighed on the ground by the learned lower appellate Court judge that on few occasions the employees of the petitioner were asked to work with respondent No. 41. However, it appears that the Industrial Court has not correctly understood the context in which these employees (who were very few in numbers) were asked to work in the respondent No. 41 company. It is to be noted that the said employees were asked when there was no work available with the petitioner, however, they were always being treated as employees of the petitioner. It is to be noted that the witness examined on behalf of the respondent Nos. 1 to 40 have also not accepted that whenever work with the petitioner was not available only then and in that case the employees were asked to work with respondent No. 41.

In this connection reference may be made to the ruling of the Apex Court in the case of *Hindustan Steel Work Construction Co. Ltd. v. Hindustan Steel Construction Ltd. Employees Union* 1995 (1) CLR 598, wherein the Apex Court has considered the effect of transfer of employees from one establishment to another. It is held thus -

In case the construction company like the appellant which undertakes construction work wherever awarded does that work and winds up that

establishment there and particularly where the number of local persons have to be and are appointed for the purpose of particular work. Merely unity of ownership management and machinery are not of much significance. Having regard to the facts and circumstances of this case and the material on record the conclusion inevitable is that the units at Hyderabad were distinct.

Similar issue was also raised before this Court in the case of Association of Engineering Workers v. Sewree Iron and Steel Company Ltd. 1992 (2) CLR 629 wherein it was observed that "merely because the employees are transferred from one company to other or merely because the partners of two are common will not be sufficient to come to the conclusion that the test of functional integrality is satisfied".

The issue of functional integrality also came up for consideration before this Court in the case of Saurashtra Trust Karmachari Sangh v. State People (P), Ltd. 1995 (2) CLR 71. While considering the aspect of functional integrality this Court has observed that by looking into the entire case law then available on the said issue right from the case of Associated Cement Company's case reported in 1960 (1) L.L.J. 1 till the judgment of Hindustan Steel 1995 (1) CLR 598 and held thus:

The survey of precedent of Apex Court shows that although several tests were evolved in Associated Cement Company's case, the test of functional integrality and functional interdependency has emerged superior particularly in case involving retrenchment and closure.

It was further found therein that the interdependence is the superior test of functional integrality. The two companies, therefore, should be so integrated that one cannot survive without other. This issue has been time and again discussed by this Court as well as the Apex Court and inevitable conclusion as has been drawn to the effect that survival of one unit without another is important factor to decide the case of functional integrality. This view is also supported by the judgment of the Division Bench of this Court in the case of Yeshwant G. Chikhalikar v. Killics Nikson Ltd. 1999(2) CLR 390.

Therefore, taking into account the relevant circumstances revealed from the record and looking into the entire law established in this regard one can easily see that interdependency is the single most important and superior factor to consider the case of functional integrality. Therefore, while considering the facts of the present case, if we consider the evidence led by the parties in the matter, the fact that in spite of closure of the petitioner company, respondent No. 41 company has continued to operate is itself sufficient to hold that both the units are not at all interdependent and that there is any functional integrality between both the units. It is also to be noted that on behalf of the workers have nowhere stated that running of respondent No. 41 is crippled because of the closure of the petitioner company. If we considered the evidence of the witness examined on behalf of the petitioner, it is clear that he has stated in unequivocal terms

accepting that after the closure of the petitioner, respondent No. 1 was continues to operate. The Industrial Court has observed that the question of not surviving in absence of another in the case of closure of one establishment cannot be accepted as a superior test in this particular case. In this regard I must note that I prefer to disagree with this observation, especially when it is exactly contrary to the law laid down by this Court as well as the Apex Court.

12. Therefore, looking into the available evidence and consideration, coupled with the prevailing legal position, it must be noted that both the companies are separately incorporated and are not the unit of each other and it appears that the Industrial Court has lost sight of this factual aspect while considering the provisions of the Industrial Disputes Act, 1947 which does not contemplate two independent companies to be one industrial establishment or undertaking.

13. Therefore, having considered the entire scenario revealed from the record vis-a-vis the prevailing legal position, I have no doubt whatsoever that the following facts emerge; that both the companies are separately incorporated under the provisions of the Companies Act and that both the companies are assessed separately for the purpose of Income Tax, Sales Tax etc. Further, both the companies are having their different products. Also most importantly that the respondent No. 41 has survived despite closure of the petitioner-company. It must further be noted that the Union that was representing the employees was one Union in both the Companies, however, Union always raised separate demands of both the employers and there were always separate settlements signed. This aspect should indicate that the employees had for all practical purpose right from the beginning had accepted that both the companies were completely independent.

14. Therefore, for the reasons recorded, I hold that the order passed by the Industrial Court besides being without jurisdiction and is contrary to the material on record. The Industrial Court also appears to have misread the evidence and have not considered the evidence given in right perspective. Under the circumstances, the order of the Industrial Court is found to be erroneous, it is liable to be quashed and set aside.

15. In the result, the Rule is made absolute and petition is allowed in terms of prayer Clause (a) and stands disposed of with no order as to costs.

16. At this stage, the learned Counsel for the respondents made submission that the petitioner should not withdraw the deposited amount for some time. In view of the facts and circumstances, the petitioner shall not withdraw the amount for the period of four weeks.