
(2009) 01 BOM CK 0017

In the Bombay High Court

Case No : Appeal No. 226 of 2002 in Writ Petition No. 1279 of 1998

Tancom Electronics

APPELLANT

Vs

Bhartiya Kamgar Karmachari Mahasangh and Others

RESPONDENT

Date of Decision : 05-01-2009

Acts Referred:

Industrial Disputes (Amendment) Act, 1970 — Section 10
Industrial Disputes Act, 1947 — Section 10(1)

Citation : (2009) 4 BomCR 840 : (2010) 328 ITR 624 : (2009) 1 MPLJ 528 :
(2010) 187 TAXMAN 33

Hon'ble Judges : Sayed A.A., J;Deshmukh D.K., J

Bench : Division Bench

Advocate : J.P. Cama and Renuka Lele, instructed by Haresh Mehta and Co, for the Appellant;

Final Decision : Allowed

Judgement

Deshmukh D.K., J.—By this appeal, the appellants challenge the order dated 26th November, 2001 passed by the learned Single Judge in Writ Petition No. 1279 of 1998. The facts that are material and relevant for deciding this appeal are that the respondent - Union had filed the petition challenging the order dated 7th June, 1996 passed by the Industrial Court dismissing the complaint filed by the Union under the Maharashtra Recognition of Trade Union and Prevention of Unfair Labour Practices Act 1971. It was a case of the complainant - Union that in the year 1995 the respondent No. 1- present appellants engaged about 40 employees to work in Seepz Zone. In February 1995, the petitioner - Union informed the respondents that 37 out of 40 employees employed by them have enrolled themselves as members of the petitioner - Union. As the present appellants were not paying correct wages to the members of the petitioner - Union and were flouting the provisions of various labour statutes, therefore, the petitioner - Union filed the complaint being complaint (ULP) No. 215 of 1995. The complainant-Union inter alia complained in the complaint that the employees of the present appellants who were their members were at all times engaged by the

appellants and not through any contractor. This complaint was resisted on behalf of the present appellants. The existence of employee-employer relationship was disputed. On the basis of rival pleadings, three issues were framed by the Industrial Court. The Industrial Court held that the complaint itself was not maintainable. The Union filed writ petition before this Court challenging the order of the Industrial Court. The learned Single Judge, relying on the judgment of the Supreme Court in the case of Central Labour Union (Red Flag), Bombay v. Ahmedabad Manufacturing and Calico Printing Co. Ltd. and Ors. reported in 1993 DGLS (soft) 686 : 1995(2) S.C.C. 765, held that the complaint itself was not maintainable and therefore the learned Single Judge also held that the petition filed by the respondent -Union was liable to be rejected. However, the learned Single Judge directed the appropriate Government to make a reference under the Industrial Disputes Act 1947 and the terms of reference were also stated in the order. Paragraph 10 of the order of the learned Single Judge reads as under:

10. For the foregoing reasons, writ petition is dismissed with the following directions:

(1) The appropriate Government shall make a reference for adjudication within two months from today.

(2) The terms of reference shall be as follows:

(a) Whether the contract between respondent No. 1 - Tancom Electronics and the existing contractors is a sham and bogus one and is a camouflage to deprive the employees of benefits available to permanent workmen of Tancom Electronics?

(b) Whether the concerned employees whose names are shown in Annexure "A" to the complaint should be declared as permanent workmen of Tancom Electronics?

(c) What are the wages and consequential benefits to be paid to the concerned employees whose names are shown in Annexure A" to the complaint?

(3) The Industrial Tribunal shall determine the Reference as expeditiously as possible and in any event not later than 31 st December, 2002.

(4) The documents namely one original Muster Roll/Wage Register alongwith xerox copies thereof duly bounded and one office file (i.e. one office file and two bounded books) which are kept sealed and in the custody of the Prothonotary and Senior Master on 6th August, 1998 shall continue to remain in the custody of the Prothonotary and Senior Master till such time as they are required at the hearing of the Reference. As and when they are required, an application may be made by the concerned parties for appropriate orders in this behalf.

(5) No order as to costs.

2. The only complaint made by the learned Counsel appearing for appellants against the order impugned in the petition is that the learned Single Judge has no jurisdiction to make reference under the Industrial Disputes Act 1947. The

learned Counsel submits that though the learned Single Judge has issued direction to the Government to make reference in the entire judgment, there are no reasons given why the learned Single Judge directed the appropriate Government to make the reference. The learned Counsel points out that which is the appropriate Government is also not made clear. The learned Counsel, relying on the judgment of the Supreme Court in the case of Rashtriya Chemical and Fertilizers Ltd. and Another Vs. General Employees Association and Others, , contends that in a writ petition, High Court cannot issue a direction to the Government to make a reference unless the Government has an opportunity to apply its mind to the question whether a reference is to be made or not.

3. The respondents have been served, they have chosen not to appear. We have heard learned Counsel appearing for appellants and we have gone through the record. Perusal of the judgment of the learned Single Judge shows that the learned Single Judge has noted that she was considering only one question in the judgment viz. whether the complaint of the Union was maintainable before the Industrial Court?. In paragraph 4 of the judgment, she observes as under:

4. The short controversy before me is whether the complaint filed by the petitioner Union in the Industrial Court was maintainable in view of the judgments of the Supreme Court in Central Labour Union (Red Flag), Bombay v. Ahmedabad Manufacturing and Calico Printing Co. Ltd. and Ors. 1993 DGLS (soft) 686 : 1995(2) S.C.C. 765 , Vividh Kamgar Sabha Vs. Kalyani Steels Ltd. and Another, , and Cipla Ltd. Vs. Maharashtra General Kamgar Union and Others, , as also the judgments of the Division Bench of this Court in Hindustan Coca Cola Bottling S/W Pvt. Ltd. and Another Vs. Bhartiya Kamgar Sena and Others, , and in Maharashtra Suraksha Rakshak Aghadi v. Industrial Credit and Investment Corporation of India Ltd. and Ors. Appeal No. 949 of 2001 in Writ Petition No. 1993 of 2001.

4. The learned Single Judge has considered whether the complaint was maintainable in view of the judgment of the Supreme Court. We have not been able to find any reason given anywhere for issuing direction to the appropriate Government to make the reference. What is pertinent to be noted is that though a direction is issued to the Government to make reference, the appropriate Government is not even a party to the writ petition. We have perused the record. Perusal of the record shows that there was no prayer in writ petition seeking direction to make reference. We further find that the learned Counsel was justified in relying on the judgment of the Supreme Court in the case of Rashtriya Chemicals and Fertilizers Ltd In our opinion, the observations made by the Supreme Court in paragraphs 8 and 9 are relevant. Paragraphs 8 and 9 read as under:

8. It is now well settled that the High Courts will not straightaway direct the appropriate Government to refer the dispute. It is for the appropriate Government to apply its mind to relevant factors and satisfy itself as to the existence of a dispute before deciding to refer the dispute. We may refer to the

following observations of this Court in *Steel Authority of India Ltd. Vs. Union of India (UOI) and Others*, .

For the purpose of exercising jurisdiction u/s 10 of the 1970 Act, the appropriate Government is required to apply its mind. Its order may be an administrative one but the same would not be beyond the pale of judicial review. It must, therefore, apply its mind before making a reference on the basis of the materials placed before it by the workmen and/or management, as the case may be. While doing so, it may be inappropriate for the same authority on the basis of the materials that a notification u/s 10(1)(d) of the 1947 Act be issued, although it stands judicially determined that the workmen were employed by the contractor. The State exercises administrative power both in relation to abolition of contract labour in terms of Section 10 of the 1970 Act as also in relation to making a reference for industrial adjudication to a Labour Court or a Tribunal u/s 10(1)(d) of the 1947 Act. While issuing a notification under the 1970 Act, the State would have to proceed on the basis that the principal employer had appointed contractors and such appointments are valid in law, but while referring a dispute for industrial adjudication, validity of appointment of the contractor would itself be an issue as the State must *prima facie* satisfy itself that there exists a dispute as to whether the workmen are in fact not employed by the contractor but by the management. We are, therefore, with respect, unable to agree with the opinion of the High Court. We would, however, hasten to add that this judgment shall not come in the way of the appropriate Government to apply its mind for the purpose of issuance of a notification u/s 10 of the 1970 Act.

9. The exception to the above is, when the Court finds that the appropriate Government refused (*sic* refusal) to make a reference of a dispute, is unjustified. In such circumstances, the Court may direct the Government to make a reference *Sankari Cement Alai Thozhilalar Munnetra Sangam, Tamil Nadu Vs. Government of Tamil Nadu and Another*, , *V. Veerarajan and others Vs. Government of Tamil Nadu and others*, , and *Telco Convoy Drivers Mazdoor Sangh and Another Vs. State of Bihar and Others*, .

5. In the case of *Rashtriya Chemicals and Fertilizers Ltd.*, before the High Court, General Employees' Association had questioned legality of the Circular dated 8th November, 2000 issued by the Central Government conveying its decision refusing to abolish and prohibit contract labour in the civil works and carpentry establishment of *Rashtriya Chemicals and Fertilizers Ltd.* While disposing of the appeal, the High Court directed the appropriate Government to make reference to Industrial Tribunal and also specified what should be the terms of reference. In that situation, the Supreme Court makes its observations in its judgment in paragraphs 8 and 9 which are quoted above. In our opinion, the law laid down by the Supreme Court is fully applicable to the facts of this appeal.

6. Appeal deserves to be allowed. The order of the learned Single Judge directing the appropriate Government to make the reference is set aside. Appeal is disposed off with no order as to costs. Notice of motion No. 2862 of 2002 does

not survive for consideration and hence disposed off. Parties to act on the copy of this order duly authenticated by the Associate/Private Secretary of the Court. Certified copy is expedited.