
(2014) 10 BOM CK 0053

In the Bombay High Court

Case No : Writ Petition No. 4214 of 2013

Textile Kamgar Sanghatana

APPELLANT

Vs

Hon'ble Member

RESPONDENT

Date of Decision : 14-10-2014

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 2(33), 27A, 27A, 28, 28(4)

Citation : (2015) 145 FLR 635 : (2015) 1 LLN 317

Hon'ble Judges : A.S. Chandurkar, J

Bench : Single Bench

Advocate : D.C.R. Mishra, Advocate for the Appellant; R.B. Puranik and A.L. Palikundwar, Advocate for the Respondent

Judgement

A.S. Chandurkar, J.—Rule. Rule made returnable forthwith. Heard finally with the consent of learned counsel for the parties.

2. The challenge in the present Writ Petition is to the order dated 19.07.2013 passed below Exhs. 14, 17 and 20 in Reference (BIR) No. 5 of 2012 whereby all the aforesaid applications have been rejected.

3. The respondent no. 2 is an Industry wherein its employees have formed petitioner No. 1 -Trade Union registered under the provisions of Trade Union Act, 1926. The service conditions of the employees of the respondent no. 2 -Industry are governed by various agreements/settlements between the Industry and elected representatives of the employees. An earlier agreement dated 07.07.2009 was for the period from 01.11.2008 to 31.10.2011. After expiry of aforesaid agreement, in absence of any representative union, four elected representatives gave fresh charter of demands in terms of provisions of Section 42(2) of the Bombay Industrial Relations Act, 1946 (for short the said Act). As there was no agreement between the four elected representatives i.e. respondents 3(A) to 3(D) and the respondent no. 2 Industry, notice in Form -N under Section 45 of the said Act was given on 01.01.2012. Thereafter, conciliation proceedings were initiated in which the Joint Committee for

agreement intended to participate. On the same being objected by respondent no. 2 and respondent nos. 3(A) to 3(D), the Conciliation Officer did not permit participation of the said Joint Committee. As no settlement was possible in the conciliation proceedings, the Conciliation Officer submitted his failure report and hence by order dated 21.06.2012, the State Government referred the dispute under provisions of Section 73 of the said Act to the Industrial Court. The same was registered as B. I. R. No. 5 of 2012.

4. In aforesaid reference proceedings, four elected representatives being respondent Nos. 3(A) to 3(D) filed their statement of claim on 27.08.2012 in support of the notice of change. The respondent no. 2 filed its written statement on 30.12.2012 opposing said demands. In said reference proceedings, the petitioners filed application below Ex. 14 seeking permission to appear and act in said proceedings on behalf of majority of employees of the respondent no. 2 Industry. Reply to aforesaid application was filed by the respondent no. 2 vide Ex. 18 and by the four elected representatives vide Ex. 35. It appears that on 11.03.2013 there was an agreement between said four elected representatives and the respondent no. 2 and hence on 12.03.2013, a request was made to the Industrial Court for passing award in terms of said agreement. The petitioner no. 2(i) filed application below Ex. 17 opposing passing of any order of settlement in terms of agreement dated 11.03.2013. On 22.03.2013, an application vide Ex. 20 was filed by various employees seeking permission to participate in said proceedings and for opposing agreement dated 11.03.2013.

5. The learned Judge of the Industrial Court heard the applications below Exhs. 14, 17 and 20 and by order dated 19.07.2013 rejected all aforesaid applications holding that there was no legal right in the applicants therein to seek relief as sought in said applications. This order dated 19.07.2013 is impugned in the present Writ Petition.

6. Shri D. C. R. Mishra, learned counsel appearing for the petitioners submitted that in absence of any representative Union, five elected representatives in terms of provisions of Section 28 of the said Act, were representing the employees of the Industry. Four of the elected representatives i.e. respondent nos. 3(A) to 3(D) were on one side while the 5th elected representative i.e. petitioner no. 2(i) was on the other side. Said respondent nos. 3(A) to 3(D) were acting contrary to the interest of the employees and hence their actions were being opposed by petitioner no. 2(i). The learned counsel submitted that under the provisions of Section 27-A and 32 of the said Act, the petitioners had right to appear and act in the reference proceedings. It was submitted that as the respondent nos. 3(A) to 3(D) were not acting in the interest of the employees, an application seeking their recall had already been made in terms of provisions of Section 28(4) of the said Act. Relying upon the decision of the Supreme Court in *Shivanand Gaurishankar Baswanti Vs. Laxmi Vishnu Textile Mills and Others*, , it was submitted that in absence of a representative union, the petitioners had a right to appear in the reference proceedings. Reliance was also placed upon the

decision of learned Single Judge in Prabhakar Anandrao Dhote and others Vs. Presiding officer, Industrial Court, Maharashtra (Nagpur Bench), Nagpur reported in 1997 (1) Maharashtra Law Journal 345 to urge that the Industrial Court had ample power to permit any individual employee to appear in such proceedings. Reliance was also placed on the decision of Supreme Court in Santuram Khudai Vs. Kimatrai Printers and Processors Pvt. Ltd. and Others, in that regard. It was, therefore, submitted that the learned Member of the Industrial Court without considering the necessary aspects of the matter proceeded to reject the application made for permission to appear and act in the reference proceedings. He therefore submitted that the impugned order was required to be set aside.

7. On the other hand Shri R. B. Puranik, learned counsel appearing for respondent no. 2 -Industry submitted that Industrial Court had rightly rejected the aforesaid applications seeking permission to appear and act in the reference proceedings. Relying upon the scheme of the said Act, it was urged that in absence of any representative union, the five elected representatives in terms of provisions of Section 28 of the said Act were entitled to represent the employees. Under Section 29 of the said Act, any act or decision by the majority of such elected representatives was deemed to be act or decision of all persons so elected by them. He, therefore, submitted that as four elected representatives by majority had taken a particular stand, the same was binding and it was the decision of all the representatives of employees as per Section 29 of the said Act. It was further urged that there was material difference in the words "to appear" and "to act". It was submitted that the petitioner no. 2(i) could only act as representative of employees and he would be bound by the decision taken by majority of the representatives of employees. Under Section 32 of the said Act, there is only a right to appear in proceedings before the Industrial Court. To highlight the aforesaid difference, the learned counsel placed reliance upon the decision of learned Single Judge in A. S. Krishnamurthy and others Vs. Central India Spinning, Weaving And Manufacturing Co. Ltd. And others 2007 (2) Maharashtra Law Journal 503. It was, therefore, urged without prejudice that at the highest there could only be a right to appear and not a right to act. The decision of learned Single Judge in Usman Habib Vs. State of Bombay and Others, was also relied upon to urge that the right to give a notice of change under Section 42(2) of the said Act was not conferred upon an individual employee but it was conferred on the representative union. It was therefore urged that the Industrial Court after considering the relevant material found that there was no legal right in the petitioners to appear and act in the reference proceedings and hence there was no case made out for interfering with the impugned order.

8. In so far as respondent nos. 3(A) to 3(D) are concerned, their learned counsel reiterated the stand as was available on record of the Industrial Court. It is not in dispute that there was no representative union in existence as contemplated by Section 2(33) of the said Act in existence. It is further not in dispute that in terms of Section 28 of the said Act, five persons were elected as representatives

of the employees. Four of them i.e. respondent nos. 3(A) to 3(D) were on one side while the fifth representative - petitioner no. 2(i) was on the other side. The notice of change as contemplated by Section 42(2) of the said Act was submitted by respondent nos. 3(A) to 3(D) who constituted the majority. In the Conciliation Proceedings as no agreement could have arrived at, a failure report was submitted and thereafter the wage reference was referred by the State Government to the Industrial Court under Section 73 of the said Act.

9. The right to represent and appear on behalf of the employers and employees has been laid down in Chapter V of the said Act. Under Section 27A thereof, no employee is allowed to appear or act in any proceedings under the said Act except through the representative of the employees save as provided in Sections 32, 33 and 33A of the Act. Section 32 of said Act empowers the Industrial Court to permit an individual, whether an employee or not to appear in any proceedings before it. The proviso to said Section 32 is not attracted in the facts of the present case. In *Shivanand Gaurishankar* (supra), while considering the status and position of a representative union under the said Act, the Supreme Court referred to its earlier decisions in *Girija Shankar Kashi Ram Vs. Gujarat Spinning And Weaving Co. Ltd.* 1962 Supp (2) SCR 890 and *Santuram Khudai* (supra). In para 63, it quoted following observations from *Girija Shankar* (supra):

"The result therefore of taking Sections 27-A, 32 and 33 together is that Section 27-A first places a complete ban on the appearance of an employee in proceedings under the Act once it has commenced except through the representative of employees. But there are two exceptions to this ban contained in Sections 32 and 33. Section 32 is concerned with all proceedings before the authorities and gives power to the authorities under the Act to permit an employee himself to appear even though a representative of employees may have appeared but this permission cannot be granted where the representative union has appeared as a representative of employees. Section 33 which is the other exception allows an employee to appear through any person in certain proceedings only even though a representative of employees might have appeared; but here again it is subject to this that no one else, not even the employee who might have made the application, will have the right to appear if a representative union has put in appearance as the representative of employees. It is quite clear therefore that the scheme of the Act is that where a representative union appears in any proceeding under the Act, no one else can be allowed to appear not even the employee at whose instance the proceedings might have begun under Section 42(4). But where the appearance is by any representative of employees other than a representative union, authorities under Section 32 can permit the employee to appear himself in all proceedings before them and further the employee is entitled to appear by any person in certain proceedings specified in Section 33. But whenever the representative union has made an appearance, even the employee cannot appear in any proceeding under the Act and the representative must be confined only to the representative union. The complete ban therefore laid by Section 27-A on representation

otherwise than through a representative of employees remains complete where the representative of employees is the representative union that had appeared; but if the representative of employees that has appeared is other than the representative union then Sections 32 and 33 provide for exceptions with which we have already dealt."

10. In so far as the right to act is concerned, the same is available to the representative of employees and not to an individual employee. The scope of the words "to appear" and "to act" has been explained in the decision of this Court in *A. S. Krishnamurthy* (supra). It is, therefore, clear that when the representatives of employees exist, an individual employee does not get a right to act. A right to appear however has been permitted by provisions of Section 32 of the said Act subject to the Industrial Court considering the same to be expedient for the ends of justice. It is, therefore, for the Industrial Court to consider whether the request made for permission to appear is justified on the basis of grounds urged in that regard. In para 6 of the judgment in *A. S. Krishnamurthy* (supra) it has been observed thus:

"Thus, legislature has given primacy to Representative Union in the matter of both appearance and action in all proceedings (except Section 33A proceedings) before Industrial Court and only in limited circumstances an individual or employee can appear in such proceedings with the leave of Industrial Court, But even in these limited contingencies, individual or employee has not been given right "to act". First proviso to section 33 also states that legal practitioner is entitled to appear before Labour Court as provided in section 83A or before industrial Court. Last proviso thereto debars any person other than representative union or legal practitioner to appear on behalf of an employee except with permission of Court. This section 33 only stipulates the persons who can represent employee or representative union in matters in which such employee or representative union can appear. Employee or individual can be permitted to appear by Court or Authority but then the permission must be apparent and in view of the scheme of sections above must also demonstrate application of mind to relevant factors by such Authority or Court before granting such permission."

11. It is thus clear that as there is no representative union in existence, there is a limited scope for an employee only to appear in proceedings before the Industrial Court as contemplated by Section 32 of the said Act. Power in that regard has been granted to the Industrial Court and if it considers it expedient for the interests of justice, permission to appear can be granted to an employee in proceedings before it. To that extent, the submission made on behalf of respondent No. 2 that there is no right in an individual employee to act on behalf of employees deserves acceptance.

12. It will therefore be necessary to examine if the applications below Exhibits 14, 17 and 20 have been considered by the Industrial Court in the light of the aforesaid position of law. Perusal of the impugned order reveals that the learned

Member of the Industrial Court has referred to the provisions of Sections 27A, 28 and 29 to conclude that an employee had no vested right to appear or act in proceedings under the Act. The provisions of Section 32 of the said Act have not been taken into consideration at all while passing the impugned order. As held by this Court in A. S. Krishnamurthy (supra), there has to be application of mind to the relevant facts while considering the request to appear in proceedings before the concerned Court or Authority. There is a discretion vested in the Industrial Court while considering an application under Section 32 of the said Act as it has to consider if it is expedient for the ends of justice to permit an individual, whether an employee or not to appear in any proceedings before it. Said application of mind and exercise of discretion does not appear to have been exercised by the Industrial Court while deciding aforesaid applications. It is therefore a clear case of failure to exercise jurisdiction by the Industrial Court. Hence, a case for interference is made out.

13. In view of aforesaid, the following order is passed:

- a] The order dated 19.07.2013 passed by the Industrial Court, Nagpur below Exhibits 14, 17 and 20 in B.I.R. (Reference) No. 5 of 2012 is set aside.
- b] The Industrial Court is directed to decide aforesaid applications afresh in the light of the law laid down by the Supreme Court as well as the observations made herein above.
- c] It is clarified that this Court has not considered the merits of the applications below Exhibits 14, 17 and 20. The Industrial Court shall decide the same independently in accordance with law without being influenced in any manner with the observations made here in above.
- d] The Industrial Court shall decide aforesaid applications within a period of six weeks from the appearance of the parties before it. The parties shall appear before the Industrial Court on 03.11.2014 and abide by its directions.
- e] Rule made partly absolute in aforesaid terms with no order as to costs.