

(1977) 07 BOM CK 0030

In the Bombay High Court

Case No : Special Civil Application No. 361 of 1972

The B.E.S.T. Workers" Union

APPELLANT

Vs

P.B. Kerkar

RESPONDENT

Date of Decision : 27-07-1977

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 27A, 32, 33, 33A, 38
Constitution of India, 1950 — Article 227

Citation : (1979) 81 BOMLR 202 : (1978) MhLj 452

Hon'ble Judges : Jahagirdar, J; Chandurkar, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Chandurkar, J.—This petition under Article 227 of the Constitution of India is filed by the B.E.S.T. Workers" Union (hereinafter referred to as "the Union") challenging the order of the President of the Industrial Court who had set aside the order of the Labour Court holding that the respondent B.E.S.T. Undertaking (hereinafter referred to as "the Undertaking") had made an illegal change and the application of the union came to be rejected on the ground that the necessary parties were not joined.

2. The Undertaking had created two posts of statistical officer and survey officer in the grade of Rs. 325 to Rs. 630 and appointed two traffic supervisors M. N. Palvankar and S. P. Orpe to these posts respectively by promotion. The union filed an application, being Application No. 378 of 1969 for a declaration that the Undertaking had committed an illegal change, but as a result of those proceedings, the posts were discontinued from October 1, 1969 because even according to the Undertaking, the posts were temporarily created. However, the Undertaking granted a lump sum of Rs. 75 to each of the above two employees and the Union again filed an application u/s 78 read with Section 42(4) of the Bombay Industrial Relations Act, 1946 (hereinafter referred to as "the Act"), for a declaration that the Undertaking by sanctioning and granting an allowance of

Rs. 75 per month to the two officers without giving the prescribed notice had committed an illegal change.

3. Admittedly, the compensatory allowance of Rs. 75 was granted to each of the above two officers without giving any notice of change. The Labour Court took the view that this amounted to a change and fell under item No. 9 of Schedule II of the Act. It further took the view that the appointment of the two above mentioned employees in the statistical section increased the number of persons employed in that section and thus was an illegal change covered by item No. 2. The contention that the change was covered by item No. 4 of Schedule II was, however, negatived. The Undertaking was directed to withdraw the change within one month from the date of the order of the Labour Court. The Undertaking filed an appeal before the Industrial Court. The Industrial Court did not go into the legality or otherwise of the action taken by the Undertaking, but it took the view that the order of the Labour Court suffered from an inherent defect inasmuch as though the order affected the two employees concerned, none of them was given an opportunity to be heard and the order was passed in their absence. The Industrial Court took the view that the finding that the two employees were not eligible to payment of such allowance could not be recorded without notice to the persons concerned and in their absence. The Industrial Court further observed that no useful purpose would be served by remanding the matter because the stand taken by the union was that the two persons concerned were not required to be impleaded. Having thus found that the two employees were not only proper parties but necessary parties, the order of the Labour Court was set aside and the application of the union came to be rejected. The union has now filed this petition challenging the order of the Industrial Court.

4. Mr. Naik who appeared on behalf of the union has vehemently contended that the proceeding was started by the representative union and having regard to the provisions of Section 33 of the Act, it was only the representative union who was entitled to appear on behalf of the employees concerned and it was futile, therefore, to add individual employees as parties to the application u/s 78 of the Act.

5. Mr. Singhavi who appeared for the Undertaking contended that the question as to whether the person was a necessary party or not did not depend on as to who would be entitled to appear or represent that party and the fact that the party was entitled to be represented by the representative union, as contended by Mr. Naik, itself presupposes that an employee was entitled to be a party to the proceeding. According to Mr. Singhavi, the question as to whether the two employees, if they were so joined as parties to the application u/s 38, would have been entitled to appear in the proceedings or whether they would be prevented from appearing because the representative union was already in the picture in the proceedings was not a question which was relevant at the present stage because the Industrial Court has rejected the application on the ground that the necessary parties are not on record.

6. Now, there are certain provisions in the Act which regulate the representation of the employees in proceedings under the Act and there is an absolute bar created u/s 27A that no employee shall be allowed to appear or act in any proceeding under the Act except through the representative of employees, but this is subject to the provisions in Sections 32, 33 and 33A. Section 27A which is really the substantive provision prohibiting an employee from appearing or acting in any proceeding under the Act except through the representative of employees, subject, of course, to the provisions of Sections 32, 33 and 33A, uses the words "to appear or act". Now, normally appearance in a tribunal or a Court is on behalf of a party to a proceeding and so also a party to a proceeding acts in a proceeding when it takes part in the proceedings. He can also appear or act through somebody else. Section 27A, therefore, does not deal with the question as to who is a necessary party but in a sense presupposes that an employee is a party to a proceeding, but that subject to the provisions of Sections 32, 33 and 33A he shall not appear or act in any proceeding except through a representative of employees who, so far as the present dispute is concerned, is undoubtedly the representative union, namely, the petitioner. Section 32 of the Act again deals only with appearance in a proceeding and that section reads as follows:

A Conciliator, a Board, an Arbitrator, a Wage Board, a Labour Court and the Industrial Court may, if he or it considers it expedient for the ends of justice, permit an individual, whether an employee or not, to appear in any proceeding before him or it:

Provided that, subject to the provisions of section 33A1, no such individual shall be permitted to appear in any proceedings (not being a proceeding before a Labour Court or the Industrial Court in which the legality or propriety of an order of dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee is under consideration) in which a Representative Union has appeared as the representative of employees.

Section 32 thus provides that it is for the appropriate Tribunal mentioned therein to permit an individual, whether he is an employee or not, to appear in any proceeding before him or it. The proviso again takes away the right which is given to an individual under the main part of Section 32 subject to the permission granted by the Tribunals named therein in a case where a representative union has appeared as a representative of employees except in a proceeding before the Labour Court or the Industrial Court in which the legality or propriety of an order of dismissal, discharge, removal, retrenchment, termination, of service or suspension of an employee is under consideration. Another exception to the proviso is the provision in Section 33A which refers to appearance in a proceeding in which there is a dispute between employees and employees. Then comes Section 33 which reads as follows:

Notwithstanding anything contained in any other provision of this Act an employee or a representative union shall be entitled to appear through any person,

(a) in all proceedings before the Industrial Court;

(aa) in all proceedings before a wage board;

(b) in proceedings before a Labour Court for deciding whether a strike, lock-out, closure or stoppage or change or an order passed by an employer under the standing orders is illegal;

(c) in such other proceedings as the Industrial Court may, on application made in that behalf, permit:

Provided that a legal practitioner shall not be permitted under clause (c) to appear in any proceeding under this Act except before a Labour Court as provided in section 83A or the Industrial Court:

Provided further that, subject to the provisions of section 33A", no employee shall be entitled to appear through any person in any proceeding under this Act (not being a proceeding before a Labour Court or the Industrial Court in which the legality or propriety of an order of dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee is under consideration) in which a Representative Union has appeared as the representative of employees.

Provided also that save as aforesaid, any person (other than the Representative Union or legal practitioner) shall not be permitted to appear on behalf of an employee in any proceeding before any Court under "this Act, save with the permission of the Court.

Mr. Naik relies on the second proviso read with the opening words of Section 33. Here again Section 33 begins with a non obstante clause and it provides that an employee or a representative union would be entitled to appear through any person in the proceedings named in Clauses (a), (aa), (b) and (c). The second proviso again cuts down the right which is given to an employee u/s 33 because it provides that in a case other than the one contemplated by Section 33A, which is not relevant for the present purpose, no employee shall be entitled to appear through any person in any proceedings under this Act in which a representative union has appeared as the representative of employees, but this does not apply to a proceeding before a Labour Court or an Industrial Court in which the legality or propriety of an order of dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee is under consideration. Relying on this provision it is vehemently contended by Mr. Naik that a representative of employees is alone entitled to appear in any proceedings under the Act and since the present proceeding which is for a declaration of a change as illegal is covered by Clause (b) of Section 33, the representative of employees will be entitled to appear for the two employees in respect of whom the change is sought to be adjudged as illegal. It is further vehemently contended that the present dispute is not one between the union and the two employees who are being given a compensatory allowance of Rs. 75 per month but that a dispute is

essentially between the union and the Undertaking because it is the action of the Undertaking which is being challenged as amounting to illegal change.

8. Now, it is apparent on a reading of Section 33 that it merely deals with appearance for an employee. There is no warrant for the proposition that an employee need not be made a party to a proceeding merely because a representative union has commenced the proceeding and u/s 33 except in the proceedings described in the second proviso, once the representative union has appeared in the proceedings, no employee shall be entitled to appear. Indeed, in our view, even, Section 33 presupposes that an employee is a party to a proceeding because it is only then that a question of an employee appearing through any other person can arise. Sections 27A, 32, 33A, therefore, regulate matter relating to appearance for an employee and they can have no impact on the question as to whether a particular employee is a necessary party or not. It is difficult to accept the contention of the learned counsel for the union that the essential dispute is essentially one between the union and the employer and that it is not a dispute between the union and the two employees concerned. It is no doubt true that the union is challenging the right of the employer to make payment of compensation allowance to the two employees concerned without giving a notice of change. To that extent there can be no dispute that the controversy is essentially between the union and the employer, but it is difficult to lose sight of the fact that any decision on this question is bound to adversely affect the right of the two employees to draw the compensation allowance. Indeed the very effect of the order of the Labour Court is that the compensation allowance being paid to the two employees will stand withdrawn. There can be, therefore, no dispute that any decision on the application made by the union was likely to affect adversely the rights of the two employees. If this was so, then it is difficult to appreciate why the very basic and essential requirement that a person who is going to be adversely affected should be made a party to the proceeding and should be heard should not be complied with. The question whether he is entitled to appear and be heard in person or whether it is the representative union, who claims to be entitled to appear on his behalf, who should be heard is really a further question which would arise only if the two employees concerned are parties to the petition. The question as to whether the union in its capacity as a representative union would be entitled to appear on behalf of the two employees in this proceeding which is commenced by the representative union itself is a question which really does not fall for consideration in the present case because the Industrial Court has set aside the order of the Labour Court on the short ground that the two employees who would be adversely affected by the declaration of the change as illegal have not been made parties to the petition. We do not find any error in that part of the order of the Industrial Court and the order of the Industrial Court must, therefore, be confirmed.

9. Mr. Singhavi appearing on behalf of the Undertaking has taken a preliminary objection that the present proceedings under Article 227 of the Constitution and the procedure with regard to these proceedings are not regulated by the

provisions of the Bombay Industrial Relations Act, and inasmuch as certain rights which have vested in the two employees by the dismissal of the application of the union by the order of the Industrial Court were likely to" be affected if that order of the Industrial Court was set aside, then even in this Court the two employees were necessary parties to the petition.

10. In our view, even this contention of Mr. Singhavi must be upheld. Admittedly the proceedings in this application under Article 227 are not governed by the provisions in the Act. The representative capacity of the union is restricted even u/s 33 of the Act to the proceedings under the Act. That representative capacity cannot, therefore, travel beyond the stage at which the proceedings under the Act stood terminated and those proceedings stood terminated by the order of the Industrial Court. Any decision on the question as to whether the order of the Industrial Court should be set aside or not was clearly going to affect the right of the two employees to receive Rs, 75 per month. They were, therefore, entitled to show that there was no illegality .in the order of the Industrial Court or that the alleged change as a result of which they were getting additional allowance of Rs. 75 was not illegal but was perfectly legal and valid. They we're, therefore, clearly necessary parties even to the present petition. On that ground also, the petition is liable to be rejected.

11. In the result, the petition fails and is dismissed. However, in the circumstances of the case, we make no order as to costs.