

(2016) 09 BOM CK 0032

In the Bombay High Court

Case No : Writ Petition No. 2560 of 2007 with Notice of Motion No. 198 of 2009
with Notice of Motion No. 370 of 2014

Zulash Clearing & Shipping Agency

APPELLANT

Vs

Secretary, The Clearing and Forwarding Unprotected Dock
Labour Board

RESPONDENT

Date of Decision : 07-09-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 18, 2(p)
Maharashtra Mathadi, Hamal and other Manual Workers (Regulation of Employment
and Welfare) Act, 1969 — Section 13

Citation : (2016) 5 BCR 763 : (2017) 1 CLR 305 : (2016) 4 LLN 103

Hon'ble Judges : Anoop V. Mohta and G.S. Kulkarni, JJ.

Bench : Division Bench

Advocate : Mr. Yusuf Hussain, in person, for the Petitioner in both the matters;
Mr. Praful B. Shah i/b Mr. M.B. Kale, Advocates, for the Respondent No. 1 in both
matters

Final Decision : Disposed Off

Judgement

Anoop V. Mohta, J.—Rule, returnable forthwith.

2. The Petitioner's director/representative, being a senior citizen has obtained a certificate from the Office as per "Rules for presentation and conduct of proceedings in-person by the parties", to appear in person before the Court. On request, heard finally by the consent of the parties. As the facts and the law involved are common and interlinked, therefore, based upon the written and oral submission so made by the parties, this common Judgment.

3. The Petitioner, by Writ Petition No. 2560 of 2007 (the First), is challenging ex-parte Judgment and order, dated 6 July 2007 passed by Respondent No.1 (The Board), directing the Petitioner to deposit a sum of Rs.75,48,467.25/- as arrears of wages arising out of agreement dated 1 December 2001 signed by the

Petitioner with Respondent No.2 (The Union) in presence of an Officer of the Board. Another Writ Petition No. 526 of 2011 (The Second) is also filed challenging Order dated 31 July 2010, passed by the Board, maintaining the above demand/order, though holding that the Board has no such appellate power to interfere with the impugned order.

4. The Board is constituted under the Maharashtra Mathadi, Hamal and other Manual Workers (Regulation of Employment and Welfare) Act, 1969 ("Mathadi Act"). The Clearing and Forwarding Unprotected and other Manual Workers (Regulation of Employment and Welfare) Scheme, 1991 (the Scheme) is also framed for proper implementation of the Mathadi Act.

5. The Petitioner was registered as an employer with Respondent No.1 as provided under clause 14 of the Scheme. The Petitioner used to engage the registered workers for their work. The service conditions of the workers registered with the Board are determined by the Board in two ways. Firstly, by recognising the agreement signed by the Union, representing the registered workers of the Board. Secondly, under Clause 32 of the Scheme, the Board has powers to fix the service conditions of registered workers.

6. An earlier Agreement signed by the Union with Petitioner on 25 October 1996 expired on 1 August 1998. Thereafter, the Union submitted a fresh charter of demands claiming upward revision of service benefits on 11 June 1999 to the Employers with a copy thereof to the Board.

7. After a discussion, finally a settlement agreement (The Agreement) was signed under Section 2(p) of the Industrial Disputes Act, 1947 ("ID Act") on 1 December 2001 between the Union and other registered employers, including the Petitioner. The agreement was approved and recognised by the Board, since the terms and conditions therein were found to be fair, legal and reasonable. As per the agreement, the rate of piece rate wages was revised from Rs.9.10 per MT to Rs.12.30 per MT. The agreement provided for minimum guaranteed wages. The agreement was to be effective from 1 November 1998, but the revised wage was effective from 1 November 2001 to 31 December 2003. The arrears of the wages for the period between 1 November 1998 to 31 October 2001 were to be paid in lump sum, subject to mutual decision between employees" and the employer, before 31 December 2001. There was no mutual lump sum amount fixed/settled for the stated arrears. In fact, there was no final settlement took place before the time fixed. Such agreement itself has not attained finality, therefore, the basis of impugned orders and/or the ex parte fixation of amount is an issue in both these Petitions, apart from power of Board under Section 13 of the Mathadi Act.

8. The parties were bound by the terms of the agreement. The Petitioner started paying the enhanced, revised wages for piece rate with effect from 1 November 2001. There is no issue with regard to this payment. The real dispute has cropped up over the payment of arrears of the period from 1 November 1998 to

31 October 2001. The Union had demanded the payment of arrears at the revised rate. The Petitioner, however, did not respond to the demand of the Union. The Union made a grievance through a representation to the Board, the signing party to the settlement. The Board was aware that there was no final settlement took place for the arrears.

9. The Board had called upon the Petitioner to explain why the revised rate should not be made applicable for the period between 1 November 1998 to 31 October 2001 and the difference between the wages paid and wages payable on revised rate, should not be recovered from the Petitioner. Admittedly, the Petitioner could not attend the hearing. The dates on which the Petitioner was called upon to attend the hearing are set out in the impugned order dated 6 July 2007. The Board has passed impugned ex-parte order on 6 July 2007, against the Petitioner.

10. In the year 2007, the Petitioner thereafter filed an Application/Appeal for setting aside the impugned order before the Board. The Petitioner has also filed the writ Petition challenging impugned order. This Court, by order dated 22 July 2008 issued Rule and has also granted stay to the execution of the impugned order, subject to depositing the principal amount in this Court.

11. In the year 2008, the Petitioner filed Notice of Motion No. 342 of 2008 for recalling order dated 22 July 2008 passed by this Court, contending that order dated 22 July 2008 was not applicable to them. The Notice of Motion was disposed of and no modification granted. In the year 2009, the Petitioner filed another Notice of Motion No. 198 of 2009, seeking a clarification regarding order dated 22 July 2008 on the same grounds, which is pending. In the year 2010, the Petitioner filed third Notice of Motion No. 159 of 2010 for a clarification which was disposed of without any clarification. This Court, further directed the Board to dispose of the Appeal filed by the Petitioner, as expeditiously as possible, preferably within a period of three months from the communication of the order. On 31 July 2010, the Board has disposed of the Appeal filed by the Petitioner as directed by this Court. The Petitioner has filed the second writ petition challenging order dated 31 July 2010, passed by the Board.

12. This Court, granted Rule and tagged both the Writ Petitions together. This Court, further granted Ad-interim order in terms of prayer clause (b) of second Writ Petition. After hearing all the parties, this Court directed the Petitioner to deposit the principal amount within two weeks. The Petitioner, as noted in order dated 11 August 2011, has already deposited the principal amount.

13. During the pendency of the five Writ Petitions, which were clubbed together, the other Petitioners in four Petitions, except Petitioner, made negotiations with the workers, and settled their dispute. They deposited the amount with the Board based upon the consent terms and four Writ Petitions were disposed of accordingly. The Petitioner has in fact, moved Notice of Motion No.198 of 2009 to de-tag these Petitions, being distinguishable on facts and circumstances. The

same is pending.

14. In the year 2014, the Petitioner has filed Notice of Motion No. 370 of 2014, seeking a permission to withdraw the amount deposited (para 10 of affidavit in support dated 1 December 2014 of Notice of Motion) by the Petitioner on the same grounds and contentions, which were raised by the Petitioner in earlier three Notices of Motions. Respondent's affidavit that no deposit made is wrong and contrary to the record.

15. Both parties have made reference to -

a) Section 13 (1) of the Mathadi Act, reads as under: "13(1) The Board or such office as may be specified by it in this behalf may, by order, determined any sum due from any employer or worker under this Act or any scheme made thereunder, and for this purpose may conduct such inquiry as the Board or such officer may think to be necessary."

b) The object under Section 4(1) of The Clearing and Forwarding Unprotected and other Manual Workers (Regulation of Employment and Welfare) Scheme, 1991 is as under :

"2. Object and Application ? (1) Object ? the Object of the Scheme is to ensure an adequate supply and full proper utilisation of Unprotected Workers employed in the employment in docks in connection with loading unloading (including warai), sorting, segregating, cutting stitching, filling, packing marking, sealing, stacking, carrying, weighting, measuring or such other work including the work preparatory or incidental to such operations, but does not includes employment of Dock Workers with in meaning of the Dock Workers (Regulation of Employment) Act, 1948 for efficient performance of work and generally for making better provisions in the terms and conditions of employment of such workers and make provisions for their general welfare and safety."

c) Section 2(p) and 18 of the ID Act, reads thus:-

"2(p)."settlement" means a settlement arrived at in the course of conciliation proceeding and includes a written agreement between the employer and workmen arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by the parties thereto in such manner as may be prescribed and a copy thereof has been sent to *[an officer authorised in this behalf by] the appropriate Government and the conciliation officer;]"

"18. Persons on whom settlements and awards are binding.-

"(1) A settlement arrived at by agreement between the employer and workman otherwise than in the course of conciliation proceeding shall be binding on the parties to the agreement.

State Amendment Maharashtra.- (a) In section 18, in sub-section (1), insert the following proviso, namely:-

"Provided that, where there is a recognised union for any undertaking under any law for the time being in force, then such agreement (not being an agreement in respect of dismissal, discharge, removal, retrenchment, termination of service, or suspension of an employee) shall be arrived at between the employer, and the recognised union only; and such agreement shall be binding on all persons referred to in clause (c) and clause (d) of sub-section (3) of this section."

(2) Subject to the provisions of sub- section (3), an arbitration award] which has become enforceable shall be binding on the parties to the agreement who referred the dispute to arbitration.]

(3) A settlement arrived at in the course of conciliation proceedings under this Act or an arbitration award in a case where a notification has been issued under sub- section (3A) of section 10A]

State Amendment Maharashtra.

(b) In sub-section (3), after the word, figure and letter "section 10A", insert the words "or an arbitration award in a case where there is a recognised union for any undertaking under any law for the time being in force".

(Vide Maharashtra Act 1 of 1972, Section 20, Sch. I, item 4 (w.e.f 8-9-1975).

or an award of a Labour Court, Tribunal or National Tribunal] which has become enforceable] shall be binding on-- (a) all parties to the industrial dispute;

(b) all other parties summoned to appear in the proceedings as parties to the dispute, unless the Board, arbitrator,] Labour Court, Tribunal or National Tribunal], as the case may be, records the opinion that they were so summoned without proper cause;

(c) where a party referred to in clause (a) or clause (b) is an employer, his heirs, successors or assigns in respect of the establishment to which the dispute relates;

(d) where a party referred to in clause (a) or clause (b) is composed of workmen, all persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part."

16. The relevant clauses of agreement/settlement memorandum dated 1 December 2001, as relevant, are reproduced to understand the grievance of the Petitioner based on the law:-

"Memorandum of Settlement under Section 2(p) read with Section 18(1) of the Industrial Disputes Act, 1947.

PRESENT:

"Representing Employers:

Representing Workers:

1. Shri Dileep Patil ? Secretary

1 Shri Manohar Kotwal, Senior Vice-President.

M/s. Bombay Port Cargo Handling Kamgar Handling Sahakari Society Ltd.

2 Shri Yusuf Hussain, M/s. Zulash Clearing & Shipping Agency

2 Shri Suryakant Bagal, Secretary

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1 Minimum Guaranteed Wage: It is agreed that if the piece-rate earnings of a worker when he is on duty, are less than Rs.160/- for that shift, he will be paid Rs.160/- per shift by way of fall back wage.

2 Rate of Piece-rate: It is agreed that the rate per ton shall be revised to Rs.12.30 per MT.

5 Period of the Agreement :

This Agreement will be effective from 01.11.1998. Whereas actual wage revision will be effective from 01.11.2001 to 31.12.2003."

6 Payment of arrears:

The arrears arising out of this Agreement for the period from 1.11.1998 to 30.11.2001 will be paid in lump-sum to be decided mutually, before 31.12.2001."

17. The operative part of impugned order dated 6 July 2007 of the Board is as under:-

"From the statements made on behalf of the company, the contention that the said agreement is time barred is held a not acceptable. Further, it is proved that the company has committed unpardonable default in the matter of determining and paying the amount in spite of the workers and their Union making demands time and again. The documents produced by the workers and the records of the Union in that connection have been examined and a sum of Rs.30,62,507.00 is payable to the workers as on 31/12/2001. As per the decision at the meeting held on 5/3/2003 by the Union for determining the above amount, the amount of

difference was Rs.30,62,507.00. Since Messrs. Zulash Clearing & Shipping Agencies did not pay the said amount, it is held that the amount became due and payable on 5/3/2003, and it is ordered that as per the Union resolution, the said amount of Rs.30,62,507.00, together with penal compound interest at 21% thereon for 52 months from 5/3/2003 to 30/6/2007. (aggregating to) Rs.75,48,467.25 (Rupees seventy Five lakhs forty-eight thousand four hundred sixty seven and paise twenty-five only) be paid to the Union. The above amount shall be paid to the Union within 10 days from receipt of this order, failing which it is ordered that the said amount be recovered by the Office of the Collector as arrears of land revenue."

18. The extract of Board's Appeal Order dated 31 July 2010 reads as under:-

"There is no provision in Maharashtra Mathadi, Hamal & Other Labor Workers (Service Rules and Welfare) Act, 1969 under Section 13(1) to cancel the order. Therefore, demand made by M/s. Zulas Clearing & Shipping Agency regarding cancellation of the order dated 6.7.2007 is denied."

but still rejected the Appeal on merits, without assigning the reasons to the ground so raised in the Appeal of 2007 and letter/communication dated 12 July 2010 sent to the Board, Mumbai, which reads thus:-

(a) Whether the Board has jurisdiction to decide dispute pertaining to Memorandum of Settlement u/Sec 2(p) r/w 18(1) of the Industrial Disputes Act between the employer, worker and transport and dock worker union.

(b) Whether the Board can overlook the non compliance of provisions of Industrial Dispute Act u/Sec. 2(p) r/w Sec 18(1) and Rule 58 and the order passed by Gujarat High Court as cited herein above.

(c) Whether the Board can determine money payable u/Sec 13 of the Act when no quantum is fixed under the clause of the MOU dated 1st December 2001 and wherein Clause 6 only contemplates discussion for fixing the amount payable.

(d) Whether the ex-parte order dated 6 July 2007 correctly records that the Appellants were not present in the last 3 meetings."

19. The Petitioner's issues/grounds though specifically raised in the Appeal, as well as, the Applications so referred above, have not been considered and/or decided by the Board at any point of time. Even otherwise, it was necessary for the Board to decide the issues, as admittedly, the impugned order passed by the Board revolved around the settlement dated 1 December 2001, which was under Sections 2(p), 18 of the ID Act. Admittedly, there was no settled claim of arrears arising out of this agreement, for the period from 1 November 1998 to 30 November 2001. The Board, as well as, Union were fully aware of these clauses. There was no reason to insist for the adjudicated and/or decision by the Board, on such arrears of unsettled amount as the agreement was under ID Act. The specific provisions and the procedure so prescribed under the ID Act (Sections 2(p), 17(A) and 18) for all the purposes, ought to have been invoked even for

the execution of the settlement in question.

20. As noted and as averred and not controverted by the other side that as per Clause 6 of the settlement terms, the arrears claimed from 1 November 1998 to 31 November 2001, though agreed to be paid in lumpsum before 31 December 2001, never settled and/or decided. The effect of it is that the revised rate though agreed made effective from 1 November 2001 to 31 December 2003, but the arrears claimed though agreement was given effective date from 1 November 1998, could not be finalised mutually. The part of the agreement itself, therefore, was never acted upon and/or remained to be settled. This itself means, not applicable for arrears from 1 October 1998 till 30 November 2001. This agreed clause itself therefore, makes impermissible for any party, including the Board, who were aware of the clauses so referred above, for want of jurisdiction to decide the arrears claim based upon the settlement itself.

21. In the present case, as noted, the Petitioner was absent and impugned order dated 6 July 2007, was passed ex-parte. The same was maintained by the Board by observing that it has no jurisdiction on law, but on merit, rejected the claim/review/Appeal without deciding the specific grounds, including of the jurisdiction and authority so raised by the Petitioner.

22. Both the impugned orders, in view of above position of law and the record, for want of specific reasons including, not taking decision on jurisdictional aspects are in breach of provisions of law, apart from principle of natural justice.

23. The Board, in view of above, ought to have first decided on merits by giving full opportunity to the Petitioner, before passing the impugned order of imposing liability to the extent of Rs.75,48,467.25/-. No reason whatsoever, given about the effect of settlement under the ID Act and its enforceability under the Mathadi Act. The submission that the Special Act should prevail and/or the Mathadi Act should prevail over the provisions, including the schemes and therefore, the Board has jurisdiction to pass such order, contrary to the settlement against the Petitioner by imposing even penalty interest is unacceptable. Both the orders passed by the Authorities, have not dealt with this aspect of jurisdiction and their power, in spite of binding effect of settlement under Section 18 of the ID Act. The provisions are available under the ID Act for its execution.

24. The submission so made by the learned counsel appearing for the Respondents by filing affidavit and by giving justification referring to the Judgments Maharashtra Rajya Mathadi Transport and General Kamgar Union v. Grocery Markets & Shops Labour Board & Ors., 2006(9) LJSOFT (URC) 14 : 2006(9) Mah.L.J. 377 and Maharashtra General Kamgar Union v. Indian Gum Industrial Ltd. & Ors., 2000(10) L.J.SOFT 116 : 2000(4) Bom.C.R. 818 are of no assistance. Those judgments are distinguishable on the facts, as well as, on law. There was no such situation of execution by the Board of settlement by and between the parties under the ID Act and/or even of similar nature. The effect of Special Law prevailing over the General Law, as settled, needs no discussion. In

the present case, the admitted position of law and the agreement between the parties and for want of specific reasons by both the authorities while passing/imposing liability with penalty interest under the Mathadi Act, distinguishes the case in hand in every aspects.

25. We are also of the view and as contended by the Petitioner by filing the Application for recalling the first order of the year 2007, and by filing the Appeal, the Board has no jurisdiction to decide the disputes pertaining to the settlement between the Employer and the Transport and Dock Workers' Union. The non-compliance of the provisions of the ID Act and the Gujarat High Court Judgment so cited, ought to have been dealt with by the Authority. It is submitted that in the ex-parte order dated 6 July 2007, it is incorrectly recorded that the Petitioner was absent on last 3 meetings deliberately. An opportunity ought to have been given by the Board before passing such unilateral order. The Board, on application to set aside the ex parte order and/or Appeal, ought to have decided the specific issues first before re-imposing such liability. Both the orders, therefore, so passed are contrary to the provisions of law and unacceptable.

26. The issue, even if any, of payment of arrears for the period from 1 November 1998 to 31 October 2001, needs to be adjudicated in accordance with law, as the lump sum amount was never mutually agreed at that time. The liability of employer, therefore, be decided by the Competent Authority or even by the Board, if empowered by giving full opportunity, followed by the reasons on the issues so raised, within reasonable time in accordance with law.

27. In the present case, in pursuance to the orders passed by this Court, the Petitioner has deposited an amount of Rs.20,00,000/- (Rupees Twenty Lacs only), which is stated to be lying with this Registry. The submission that the Petitioner failed to deposit the amount along with other employers, in view of the orders passed by this Court and the reasons so recorded above, should not be the reason to retain this amount in the account. An appropriate order required to be passed on that count also. The Petitioner has taken out Notice of Motion No. 370 of 2014, for withdrawal of the amount by furnishing security to that extent. A Motion is also taken out for detagging the other Petitions. The statement is also made that all the other Petitions have been disposed of, as the parties have already settled the matters. That settlement, unless the Petitioner agreed, may not be the reason to reject the submission so made by the Petitioner. We have noted, as the case is made out and as both the orders are illegal and passed in breach of provisions of law and the principle of natural justice, we are inclined to set aside the same. However, the amount so deposited, is required to be secured, pending the final decision including by the Board.

28. As the Petitioner has made out the case and we are inclined to interfere with the matters, in our view, to meet the ends of justice and to consider the due payment of workers, if any, and to avoid further complications, if the order is passed against the Petitioner, we are inclined to permit the Petitioner to withdraw the amount with accrued interest, however, subject to furnishing the bank

guarantee as prayed for in the Notice of Motion. This Bank guarantee/Security will continue till the final decision of the Board, as directed and four weeks thereafter, if adverse order is passed against the Petitioner.

29. In the result, following order:-

ORDER

- a) Both impugned orders passed by the Board (Respondent No.1) dated 6 July 2007 and 31 July 2010, are quashed and set aside.
- b) The Board to re-hear the Petitioner, as early as possible, preferably within 8 weeks from today and pass reasoned order on all the contentions so raised, in accordance with law.
- c) The Petitioner is at liberty to file additional affidavit and/or documents, if any, in support of his case, before the Board within four weeks from the date of this order.
- d) The amount deposited in this Court of Rs.20,00,000/- (Rupees Twenty Lacs only) with accrued interest be retained till the final decision of the Board and four weeks further if adverse order is communicated to the Petitioner. Liberty is granted to the Petitioner to apply for withdrawal of the amount if the decision is in favour of the Petitioner. Liberty is also granted to the parties to apply for appropriate order, if necessary.
- e) Rule made absolute accordingly.
- f) In view of the disposal of both the Writ Petitions, nothing survive in the Notice of Motions and all the Notice of Motions are accordingly disposed of.
- g) There shall be no order as to costs.