

JPP

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION***

***WRIT PETITION NO. 6655 OF 2015
WITH
WRIT PETITION NO. 9534 OF 2015***

Lloyds Kamgar Sanghatana.

... Petitioner.

V/s.

Bharatiya Kamgar Karmachari
Mahasangh and Anr.

... Respondents.

Mr. Rahul Oak for the Petitioner in WP 6655/15.

Mr. A.V. Bukhari, Sr. Advocate a/w. A.K. Jalisatgi i/b. T.R. Yadav for
the Petitioner in WP 9534/15.

Mr. R.S. Pai a/w. G.S. Baj for Respondent 1 in both Petitions.

CORAM : N.M. JAMDAR, J.

DATE : 30 NOVEMBER, 2015.

P.C. :-

These two Petitions relate to the same parties arise from the same proceedings and by consent of parties taken up together for hearing.

2. In Writ Petition No. 6655 of 2015, the Petitioner Llyods Kamgar Sanghtana challenges the order passed by the Industrial Court, Thane dated 11 March 2015 rejecting the Application filed

by the Petitioner under Exhibit UA-13 for examination of witnesses as per the list annexed. In Writ Petition No. 9534 of 2015, the Petitioner – Llyods Kamgar Sanghtana challenges the order passed by the Industrial Court, Thane allowing the Application (MRTU) No. 7 of 2009 filed by the Respondent No.1 – Bharatiya Kamgar Karmachari Mahasangh and granting a recognition certificate under Section 12 of the M.R.T.U. & P.U.L.P Act, 1971.

3. The Respondent No.1 filed an Application under Section 11 of the Act in the Industrial Court, Thane praying for issuance of a certificate of recognition. Respondent No.1 is registered on 9 November 1989. According to the Respondent No.1, for the period of six months preceding the Applications i.e. October 2008 to March 2009, the Respondent No.1 had 93% of total number of employees in the undertaking as its members. The Respondent No.1 annexed the list of employees, the constitution of Respondent No.1, the relevant documents and also a list of undertakings for which it was a recognized union. The Application was filed on 23 April 2009. The Petitioner filed its say. The Petitioner contended that the Application of Respondent No.1 is not maintainable as the Respondent No.1 does not comply with mandatory requirements and does not have the required number of membership. It was contended that the Respondent No.1 does not hold elections and his office bearers are not elected and the averments made by the Respondent No.1 in its application were denied para-wise. The Petitioner also contended that the

Respondent No.1 had earlier filed application for recognition which was withdrawn and therefore, second application was not tenable.

4. The Respondent No.1 filed an application for appointment of the Investigating Officer for verification of membership. By order dated 9 March 2011, the Investigating Officer was appointed and he made the necessary verification and submitted a report on 26 July 2012. The Investigating Officer opined that the Respondent No.1 has 58.46% membership. The report of the Investigating Officer was taken on record by the Industrial Court. The Petitioner made an application for examination of 84 witnesses whose list was annexed at Exhibit 'A'. The Respondent No.1 has filed its say to the application and contested the application stating that such examination of witnesses is not permissible in law and also at the belated stage. The Industrial Court by order dated 11 March 2015, relying upon decisions in the cases of *Automobile Products of India Employees' Union v/s. Association of Engineering Workers, Bombay & Ors. [(1990) 1 CLR 344 (SC)]*, *Association of Engineering Workers v/s. Dockyard Labour Union, 1992 [(1992) 11 CLR 382 (Bom.H.C.)]* and *Association of Engineering Workers v/s. Automobile Products of India & Ors. [(1988) 1 CLR 418]*, held that such membership cannot be proved on the basis of affidavits and the application of the Petitioner at a belated stage cannot be granted. Accordingly, the same was rejected by order dated 11 March 2015.

5. Thereafter, the Industrial Court proceeded to hear the main application. The Industrial Court went through the report of the Investigating Officer and the material on record and came to the conclusion that the Respondent No.1 had made out its case that it has more than 30% membership and accordingly, by the impugned order issued certificate of recognition.

6. I have heard Mr. A.V. Bukhari, learned Senior Advocate for the Petitioner in Writ Petition No. 9534 of 2015 and Mr. Rahul Oak, learned Counsel for the Petitioner in Writ Petition No. 6655 of 2015 and Mr. R.S. Pai, learned Counsel for Respondent No.1 in both the matters.

7. Before the rival contentions are considered, two aspects of the matter need to be kept in forefront. Firstly, that the Petitioners have invoked writ jurisdiction which is equitable and writ is not to be issued to correct every error. There has to be perversity, gross illegality and failure of justice for invocation of this jurisdiction. Also generally a Writ Court will not enter into disputed questions of fact and count the membership of respective unions and the scope is limited to ascertain if there is any fundamental error. It is not possible in writ jurisdiction to evaluate merits of the evidence and to sit in Appeal over the report of the Investigating Officer and the decision of the Industrial Court.

8. The second aspect is that the Petitioner has not sought any declaration that they be given the certificate of recognition. The only stand taken by the Petitioner is that the Respondent No.1 should not be granted status of recognized union. The relevant period in the present case is October 2008 and March 2009 and admittedly the Petitioners – Union was formed in January 2009 and therefore, was in existence only for period of three months when an application was filed by the Respondent No.1 for recognition. Therefore, this is not a case where there is a contest between two unions for the purpose of issuance of certificate of recognition in their favour, nor it is the case where a certificate of recognition is sought to be cancelled and be conferred upon another union.

9. Mr. Bukhari, the learned Senior Counsel for the Petitioner submitted that the Industrial Court has not applied its mind to the issue and has only accepted the report of the Investigating Officer in toto. He submitted that the Investigating Officer who submitted the report was not appointed for the district Thane and an Investigating Officer for Mumbai Region has been directed by the Industrial Court as an incharge Investigating Officer and in absence of authorization by the State Government with due publication in the official gazette, said authority could not have been conferred upon the Investigating Officer. He submitted that the Investigating Officer did not carry out physical

verification of membership which is a mandatory requirement. Mr. Bukhari submitted that the records produced by the Respondent No.1 before the Investigating Officer were fabricated and that Respondent No.1 did not fulfill the statutory requirement.

10. Mr. Bukhari submitted that under Section 8 of the Act it is only the State Government who can appoint the Investigating Officers for such area as may be necessary and that too by a notification in the official gazette. He submitted that the Industrial Court has no power to direct the Investigating Officer who was not appointed in the area in question. Mr. Bukhari relied upon the order passed by the Division Bench of this Court in Writ Petition No. 143 of 2003 on 24 March 2003 and an interim order passed in Writ Petition No. 4900 of 2013 on 12 September 2013. He submitted that therefore, the appointment of the Investigating Officer being bad in law, his report could not have been relied upon.

11. Firstly, it is to be noted that this submission was not taken before the Industrial Court. This objection was also not taken before the Investigating Officer. Therefore, the Industrial Court had no occasion to deal with this submission. If the Petitioners had taken the objection before the Investigating Officer, he would have produced the authorization or had taken steps to get the position cleared. The Petitioners have waited till the

proceedings went against them and thereafter, in this Court for the first time this submission is being advanced. Even in the Writ Petition the contention that is taken is that the Industrial Court which passed the impugned order on its own gave charge to the Investigating Officer of Mumbai for the Thane area, which is illegal. The Respondent No.1 has filed a reply and has placed on record an administrative direction issued by the President of the Industrial Tribunal authorizing the concerned Investigating Officer. Investigating Officers work under supervision of the President. Therefore, the contention that the Industrial Court on its own authorized the Investigating Officer is entirely incorrect. The Petitioners have given no reason as to why it could not take this ground earlier and even when he took it in the present Petition, an incorrect position is asserted. Now, Mr. Bukhari contends that even the President of the Industrial Tribunal has no such power and that when the Investigating Officer carried out the enquiry, there was no such authorization. The Petitioners cannot be allowed to change and take up stand at will. The only attempt of the Petitioners appears to be to somehow stall grant of recognition to the Respondent No.1 while claiming no such recognition for itself. I am therefore not inclined to allow the Petitioners to take up this ground for the first time in writ jurisdiction.

12. Even otherwise, the contention taken in the Petition that the Industrial Court Judge has authorized the Investigating Officer on his own is entirely incorrect. The order passed by the

Industrial Court on 9 March 2011 only directs the Investigating Officer to make necessary verification, and it has been carried out by the incharge Investigating Officer under the administrative orders of the President of the Industrial Tribunal. There is no challenge to the order of the President of the Industrial Tribunal. That the Petitioner was not aware cannot be accepted as when the Petitioner took up the ground of appointment of the Investigating Officer for the first time in Writ Petition, it is presumed that they have done all the necessary enquiries. If the Respondent No.1 could produce this order, there is no reason why the Petitioner could not. The order passed by the President of the Industrial Tribunal therefore suppressed in the Writ Petition. Even otherwise the Petitioners have not been able to demonstrate any prejudice. The enquiry carried out by the Investigating Officer of Mumbai in Thane Region, in which the Petitioner participated without objection, cannot be termed as void and even assuming for sake of argument that there was no formal order by the State Government, it will not make the appointment void but irregular and had the Petitioner pointed out irregularity earlier it could have been easily cured. This contention is purely an afterthought cannot be permitted to take up this stand for the first time in this Petition.

13. Mr. Bukhari then submitted that the Investigating Officer has not carried out physical verification of the membership.

He submitted that it is a mandatory requirement under the Act to carry out physical verification of the membership when the issue of recognition of union is to be decided. He submitted that though the Petitioner was in existence for period of three months, majority of the employees had become its members. He submitted that the Investigating Officer did not carry out the exercise of evaluating the membership by physical verification. He and Mr. Oak contended that the order rejecting the prayer for examination of 84 witnesses is also illegal. Mr. Pai, learned Counsel for the Respondents submitted that the Industrial Court has properly followed the decision of the Apex Court and has rejected the application for examination of witnesses as such procedure is not known in law. Mr. Pai submitted that the Petitioner had no locus to participate in this enquiry in view of Section 12 of the Act.

14. Section 3(17) defines “Union” means a trade union of employees, registered under the Trade Unions Act, 1926. Section 3(13) states “recognized union” means a union which has been issued a certificate of recognition. Chapter III of the Act of 1971 deals with Recognition of an union. Sections 11 and 12 which are relevant for the present controversy read as under :-

“11. Application for recognition of union :-
(1) Any union which has for the whole of the period of six calendar months immediately preceding the calendar month in which it so applies under this Section a membership of not less

than thirty per cent of the total number of employees employed in any undertaking may apply in the prescribed form to the Industrial Court for being registered as a recognized union for such undertaking.

(2) Every such application shall be disposed of by the Industrial Court as far as possible within three months from the date of receipt of the application, where a group of concerns in any industry which is notified to be one undertaking for which recognition is applied for is situated in the same local area; and in any other case, within four months.

12. **Recognition of union :-** (1) On receipt of an application from a union for recognition under Section 11 and on payment of the prescribed fees, not exceeding rupees five the Industrial Court shall, if it finds the application on a preliminary scrutiny to be in order, cause notice to be displayed on the notice board of the undertaking, declaring its intention to consider the said application on the date specified in the notice, and calling upon the other union or unions, if any, having membership of employees in that undertaking and the employers and employees affected by the proposal to show cause, within a prescribed time, as to why recognition should not be granted to the applicant-union.

(2) If, after considering the objections, if any, that may be received under sub-section (1) from any other union or employers or employees, if any, and if after holding such enquiry in the matter as it deems fit, the Industrial Court comes to the conclusion that

the conditions requisite for registration specified in Section 11 are satisfied, and the applicant-union also complies with the conditions specified in Section 19 of this Act, the Industrial Court shall, subject to the provisions in Section 19 of this Act, the Industrial Court shall, subject to the provisions of this Section, grant recognition to the applicant-union under this Act, and issue a certificate of such recognition in such form as may be prescribed.

(3) If the Industrial Court comes to the conclusion, that any of the other unions has the largest membership of employees employed in the undertaking, and the said other union has notified to the Industrial Court its claim to be registered as a recognized union for such undertaking, and if it satisfies the conditions requisite for recognition specified in Section 11, and also complies with the conditions specified in Section 19 of this Act, the Industrial Court shall, subject to the provisions of this Section, grant such recognition to the other union, and issue a certificate of such recognition in such form as may be prescribed.

(4) There shall not, at any time, be more than one recognised union in respect of the same undertaking.

(5) The Industrial Court shall not recognise any union, if it is satisfied that the application for its recognition is not made bona fide in the interest of the employees, but is made in the interest of the employer, to the prejudice of the interest of the employees.

(6) The Industrial Court shall not recognise any union, if, at any time, within six months immediately preceding the date of the application for recognition, the union has instigated, aided or assisted the commencement or continuation of the strike which is deemed to be illegal under this Act.”

15. Chapter 3 of the Industrial Court Regulations, 1975 deals with powers, functions and duties of the Investigating Officers. Rule 67 empowers the Investigating Officer to call upon any trade union to produce register of members or such other documents as may be necessary for verification of membership.

16. In the present case the Investigating Officer issued notices to both the Petitioner as well as the Respondent No.1 to produce documents. Both the parties produced their respective documents. The Investigating Officer took note that the relevant period was October 2008 to March 2009. The Respondent No.1 produced documents such as the members' register, proceedings of the Annual General Meeting, pay-slips, pass-book, cash book, audit report and receipt books. The Investigating Officer examined the receipt books of the year 2008 from Serial Nos.11862 to 11873 and for the year 2009 from Serial Nos.50268 to 50378. He verified the names of the members, amount paid, date of the receipt and found that for the year 2008, 112 and for the year 2009, 111 members were registered. He found that requisite membership amount was recovered from the members.

He found that 35 were not members in the year 2009 and 34 were not members in the year 2008. He deducted 35 from 112 and out of remaining 77, disqualified 1 member and came to the conclusion that the Respondent No.1 had 76 members during the relevant period. The Petitioner produced its documents such as membership register, receipt books, minutes of meeting, bank pass-book, audit report, etc. Even though the Petitioner had not claimed that it should be granted certificate of recognition, the Investigating Officer examined the documents produced. The Investigating Officer found that the receipt books did not have any printed serial numbers when they were written by hand. In the receipt books he did not find categorization as to the period and the amount paid. He further found that for the year 2008 entrance fees not shown except a consolidated amount of Rs.70/- is given. The Investigating Officer further noted that the Petitioner was registered on 19 January 2009 and did not complete six months' period. On these two counts the contention of the Petitioner that the Respondent No.1 had no requisite membership but they had was negated. The Investigating Officer perused the other requirements such as holding of meetings, registration and recorded a factual finding that the Respondent No.1 has 58.46% membership.

17. In the application before the Industrial Court, the Respondent No.1 examined its witness who was cross-examined. The Petitioner also examined their witness who was cross-

examined. The parties tendered their pleadings and the Industrial Court heard objections of the Petitioner as regard the report of the Investigating Officer. The Industrial Court accepted report of the Investigating Officer and did not find any reason that his report should be discarded. The contention that the physical verification of membership by counting heads ought to be done as was held not a mandatory requirement. The Petitioner advanced contentions regarding the membership subscription of the Respondent No.1 and the Industrial Court found that factually there was no merit in the allegation. As far as the other requirement of law, the Industrial Court found that they were complied with by the Respondent No.1.

18. Mr. Bukhari reiterated the submissions advanced before the Industrial Court. He submitted that the Investigating Officer did not count heads and did not carry out physical verification and therefore, the report as well as the impugned order be quashed and set aside and the matter may be remanded back to the Industrial Court and fresh verification be carried out. He relied on the decision of the Division Bench of this Court in the case of *Bharatiya Kamgar Sena v/s. Vishwa Kalyan Kamgar Sanghatana* [2007 (3)BCR 892]. He submitted that physical verification is an integral part of the process of verification of membership and having not carried out the same, the order is bad in law on that count.

19. Such an absolute preposition of law cannot be accepted. Decision of the Division Bench has to be understood in the factual matrix of the case. In the matter before the Division Bench, an application was filed by the party for scrutinizing the membership by physical verification of members. The Industrial Court directed the Investigating Officer to carry out physical verification. This Order of directing physical verification was challenged by the Petitioner therein. It was contended that the provisions of the Act do not contemplate physical verification and also a secret ballot is also not permitted. The Division Bench took review of the earlier decisions including that of the Apex Court in the case of *Automobile Products of India Employees' Union v/s. Association of Engineering Workers, Bombay and Ors.* [(1990) II CLR SC (344)] and distinguished the same on the ground that the Apex Court was only concerned with ballot or any other method and held that physical verification was not alien to the Act. The Division Bench held that physical verification is a permissible mode. But from this conclusion an absolute preposition cannot be culled out that an exercise carried out by the Investigating Officer of assessing membership which is otherwise fair and correct will have to be set aside solely on the ground that he did not carry out physical verification. Whether the method adopted by the Investigating Officer for verification, it is fair, proper, transparent and within the parameters of the law would depend on facts and circumstances of each case. No decision is shown nor any position

of law is shown that the exercise carried out by the Investigating Officer by adopting methods permissible under law such as verification of receipts and documents which may be sufficient in a facts of a particular case needs to be set aside because physical verification was not carried out. In the facts of the present case, the report of the Investigating Officer and its acceptance by the Industrial Court cannot be set aside only on the ground that physical verification was not carried out. Further, it has to be also kept in mind that the Petitioner is not seeking recognition for itself.

20. In the case of *Automobile Products of India Employees' Union* (Supra), the Apex Court held that what is important is the existence of 30% of membership during the relevant period which is vouched by relevant documents and not by a vote on a particular date. It cannot be contended that the verification of receipt books and asserting membership on the basis of documentary evidence is not a permissible mode. Furthermore, most importantly the Petitioner did not make any application before the Investigating Officer to carry out physical verification and accepted the mode of document verification. Once that has gone against the Petitioner, subsequently physical verification is insisted upon. Nothing stopped the Petitioner from seeking a physical verification of membership. It may be that the physical verification of the membership is a desirable methodology but verification by documents is not an impermissible mode. The

Petitioner could have sought for physical verification as was done in the case before the Division Bench in the case of *Bharatiya Kamgar Sena* (supra). The Petitioner has not even sought a recognition for itself. Therefore, on this ground also the impugned order cannot be interfered with.

21. The learned Counsel for the Petitioner then submitted that the Petitioner ought to have been permitted to tender affidavits of 84 witnesses and the order impugned in Writ Petition No. 6655 of 2015 is bad in law. The Industrial Court followed the decision of the *Automobile Products of India Employees' Union* (supra) and came to the conclusion that after the Investigating Officer conducted verification and submitted the report, examination of 84 employees is not permissible as per the dicta of the Apex Court. The learned Counsel for the Respondents also relied upon the decision of the Division Bench of this Court in *Force Motors Limited v/s. Poona Employees Union and Ors. [(2009) III – LLJ – 455 (Bom)]*. In this decision the Division Bench did not approve all the methodology adopted by the Industrial Court of examining the affidavits of the workmen and based its conclusion upon the same. The Division Bench also relied upon the decision of *Automobile Products of India Employees' Union* (supra) and set aside the exercise of the Industrial Court based on the examination of affidavits. The Industrial Court has therefore rightly followed the law laid down by this Court and the Apex Court and has rejected the applications for examination of witnesses.

22. The learned Counsel for the Petitioner then attempted to urge that the documents produced by the Petitioner are forged. In the written statement/say a bald statement is made by the Petitioner that the documents are forged. The Investigating Officer has examined the receipt books produced by the Petitioner and found them to be in order, in fact he found that the Petitioner's receipt books did not have printed numbers but it was written by hand. Furthermore, these are factual aspects which have been considered first by the Investigating Officer and thereafter, by the Industrial Court and it is not possible to examine the same in Writ Jurisdiction.

23. While exercising Writ Jurisdiction, the prejudice from the impugned order also needs to be kept in mind. The entire attempt of the Petitioner is only to see that the Respondent No.1 does not get recognition. It has made no attempt to get recognition for itself which it could not have since it did not have requisite membership as it was not qualified at that time. The grant of certificate of registration is not permanent and it is always open to the Petitioner after a stipulated period to assert that it has the requisite strength of membership and seek registration for itself.

24. In the circumstances, I find that there is no error committed by the Industrial Court in granting registration

certificate to the Respondent No.1 and also in rejecting the application for examination of the witnesses. Both the Writ Petitions therefore cannot be entertained and are accordingly rejected.

(N.M. JAMDAR, J.)