IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1155 OF 2008

Dilip B. Lavana
Motilal Nagar, Chawl No.141,
Goregaon (West), Room No.1125,
Mumbai-400 062, now at
C/O. I.L. Parmar, 207/B, Shriji
Apartment, Cabin Road,
Bhayender (East), Div-Thane ....Petitioner

V/s.

1. The Tata Power Co. Ltd
(formerly known as Tata
Hydro Electric Power Supply
Company Ltd.,)34, Sant Tukaram
Road, Carnac Bunder,
Mumbai-400 062.

2. The State of Maharashtra,
(Through the Secretary,
Labour Department), having its
Office at Mantralaya,
Mumbai-400 032.

3. The Deputy Commissioner of Labour
(Conciliation), Commerce Centre,
Tardeo Road, Mumbai-400 34. ....Respondents

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Mr. N.M. Ganguli a/w. Ms. Karuna Yadav, Advocate for the petitioner in both the writ petitions.
Mr. K.M. Naik, Senior Counsel a/w. Mr. Sujeet P. Salkar, Advocate for respondent no.1
Mr. J.S. Saluja, Government Pleader, Advocate for respondent no.2 and respondent no.3.

CORAM :- SMT. R.P. SONDURBALDOTA, J.
DATED :- 8TH MAY, 2015.

<u>JUDGMENT</u> :

1 This petition filed under Article 226 of the Constitution of India challenges the order dated 8th February, 2006 passed by the Labour Court, Mumbai on the application at Exhibit-C-9 filed by respondent no.1, Employer. Respondents no.2 and 3 are the State of Maharashtra and Deputy Commissioner of Labour (Conciliation).

2 Respondent no.1 is a Company registered under the Indian Companies Act and is engaged in the business of generation, transmission and distribution of electricity. Respondent no.2 is the appropriate Government under Section

2(a)(ii) of the Industrial Disputes Act and the State Government for the purposes of the Bombay Industrial Relations Act, 1946 ('BIR Act', for short). The petitioner was working with respondent no.1 as a Sweeper-cum-Sanitary Majdoor since 7th November, 1989. He was served with charge-sheet dated 19th April, 1994 alleging that he had overstayed the leave sanctioned to him for the period 21st March, 1994 to 26th March, 1994 and had reported for duty only on 4th April, 1994, the explanation for which was found unsatisfactory. Therefore, there was misconduct on the part of the petitioner under Clauses- 32(vi) and 32(vii) of the Certified Standing Orders. The petitioner filed his reply to the charge-sheet contending that he had to remain away on account of his mother's illness. Thereafter, due enquiry was held against him and he was dismissed from service on 21st July, 1994. The petitioner approached the office of Commissioner of Labour (Conciliation) against his dismissal from service. On failure of conciliation proceedings, respondent no.3 made reference of the dispute for adjudication of the Labour Court under Section 10(1)(C) read with Section 12(5) and Section 39 of the Industrial Disputes Act being Reference (IDA)No. 323 of 1999.

3 During the pendency of the reference, on 21/10/2005 respondent no.1 filed the application at Ex. 'C-9' challenging jurisdiction of the Labour Court on the ground the

reference as made was not maintainable. It contended that the petitioner and respondent no.1 are governed by the provisions of the BIR Act which is a complete Code in itself for resolving any dispute between the employer and employee. Further dismissal of the petition was after holding domestic enquiry as per the certified standing orders applicable to the parties. Therefore it was necessary for the petitioner to take appropriate steps under BIR Act to challenge his termination from service and the reference made under the Industrial Disputes Act was not maintainable.

4 The Labour Court, thereupon framed preliminary issue of maintainability of reference and decided the same by the impugned order dated 8/2/2006. On perusal of the Certified Standing Orders, it held that the petitioner and respondent no.1 are governed under the provisions of the BIR Act which provides for a specific remedy to challenge the action of the employer. Since the petitioner had not taken recourse to that remedy, the Reference filed was not maintainable and hence dismissed the reference.

5 Mr. Ganguly, the learned Advocate for the petitioner, however, submits that the Labour Court, after framing of issue of maintainability of the reference, ought to have given opportunity to the petitioner to lead evidence

thereon. According to him, the question of jurisdiction of the Court is a mixed question of law and facts and therefore, it could not have been decided without evidence. His second submission is that the Labour Court ought to have decided all the issues arising in the proceedings including the preliminary issue at one time and not decided the preliminary issue separately. His third technical submission is that once a Reference was made to it, it was incumbent upon the Labour Court to adjudicate the dispute in terms of the Reference and not traverse beyond the terms of reference. As regards the merits of the objection, he submitted that the provisions of Industrial Disputes Act ('IDA Act', for short) are not excluded from application to the industries to which the BIR Act is applicable.

6 As regards the first three objections to the impugned order, in my opinion there can be no substance therein. Considering the nature of the preliminary issue, it is obvious that there was no scope for leading oral evidence on the issue. Further since the issue of maintainability as raised went to the root of the matter affecting the very jurisdiction of Labour Court to entertain the reference, the Labour Court was right in deciding it separately as a preliminary issue. Also deciding that issue would not amount to the Labour Court traversing the terms of reference, since decision on the

question of maintenability of the reference would be the part of the reference, itself.

7 This brings us to the main question arising in the petition for consideration of the Court i.e. maintainability of the reference made under IDA Act at the instance of the petitioner when he is unquestionably governed under the BIR Act which provides for specific remedy to challenge the action of the employer.

8 The records and proceedings show that by the Government Resolution dated 14th September, 1959, in exercise of the powers conferred by sub-section 4 of Section 2 of the BIR Act, the Government of Bombay directed that on and from 15th October, 1999 all the provisions of the BIR Act shall apply to the industry engaged in the generation and supply of electrical energy in the local area of Greater Bombay. The Certified Standing Orders has been settled by the Commissioner of Labour under Section 35(2) of the BIR Act for the employees of the respondent Company. The Standing Orders have later been modified and the same came into force on 25th January, 1991. There are in all 38 orders in it. Standing Order no.2 states that, the Standing Orders shall apply to all employees of the respondent-company employed to do manual and electrical work in the respondent, company

in Greater Bombay. The further orders provides for supply of tickets to the employees, display of notice of period and hours of work, the provision of notices of holidays, the provision of proof of age of each of the employees, provision of supply of appointment orders to every employee, the provisions of maintenance and salary register, separate register for allowances, provision for unclaimed wage, shift, provision for presence of employees at work place, leave, search of employees, provision in the event of fire, breakdown of machinery etc. steps of management in the event of strike and closure, modes of termination of services of employees, meaning of misconduct, punishment in case of misconduct etc are provided for in the Standing Orders. Thus, the Standing Orders provide for every aspect of the employment of the employees. As such the service conditions of the employees of the respondent-company are governed by B.I.R. Act.

9 Mr. Ganguli submits that the Labour Court failed to appreciate that the provisions of Industrial Disputes Act are not excluded from application of the industries to which B.I.R. Act is applicable. Consequently, according to him, the remedy adopted by the petitioner to challenge his termination from service was a correct remedy. He submits that the reliance by the Labour Court on two decisions i.e. the decision in <u>Hindustan Lever Limited vs. Ashok Vishnu Kate & Anr.,</u>

reported in 1995 II, C.L.R., page 823 and in Divisional Controller, M.S.R.T.C., Bhandara vs. Gulab Tanbaji Bhandarkar, reported in 1998 (1), Maharashtra L.J., 818 was misplaced and that the Labour Court has misconstrued the ratio in the two decisions. Mr. Naik, the learned Senior Counsel on the other hand submits that with the settlement of Certified Standing Orders by the Commissioner of Labour, all the service conditions of the employees of the respondent-company including termination of services and the challenge to that termination are governed by the B.I.R. Act and there is no scope for adoption of remedy provided under the Industrial Disputes Act. He submits that the provisions of the Special Act i.e. B.I.R. Act will override the provisions of the General Act i.e. the Industrial Disputes Act ("the ID Act" for short).

10 Mr. Ganguli sought to draw distinction between the BIR and the ID Act by referring to it's various provisions to argue that there is inconsistency between the two statutes. He points out that for certain remedies, there is a time limit prescribed under the BIR Act, whereas under the ID Act, there is no time restriction. He then refers to Article 254 of the Constitution of India to submit that in view of the inconsistency, the ID Act which is a Central Act must prevail over the BIR Act, which is a legislation by State. He relies upon decisions of the Apex Court in Central Bank of India vs.

State of Kerala and Others, reported in 2009 (2), Supreme Court. Page 529 and M. Karunnannidhi vs. Union of India, reported in L 979, 3 SCC page 431 on the tests for finding repugnancy. There can be no dispute about the propositions laid in the decisions cited. The question however is whether there is any scope for application of Article 254 of the Constitution of India.

11 Mr. Ganguli next makes submissions on the approach to be adopted by the court while considering applications under the social welfare legislations. Relying upon the decision in Harjinder Singh vs. Punjab State Warehousing Corporation, reported in 2010 II, LLJ, 277 (SC) of the Apex Court, he argues that while exercising jurisdiction under Article 226 and/or 227 of the Constitution, the High Courts are duty bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the preamble of the Constitution. For the same proposition, he refers to the decision in KCP Employees Union vs. K.C.P. Ltd., reported in 1978, I LLJ, page 322., wherein in the Apex Court has observed that in industrial Law, interpreted and applied in the perspective of Part IV of the Constitution, the benefit of reasonable doubt on law and facts, if there be such doubt,

must go to the weaker section, labour. There can be no dispute about these propositions also.

12 As regards the argument of the overriding effect of the ID Act, it would be sufficient to take note of the provisions in the Industrial Disputes (Amendment And Miscellaneous Provisions) Act, 1956. It provides that if immediately before commencement of the ID Act, there has been in force in any State, any Provincial Act or State Act relating to the settlement or adjudication of the disputes, the operation of such an Act, in that State in relation to matter covered by ID Act shall not be affected. This position has been confirmed by the Apex Court in it's decision in Uttar Pradesh State Sugar Corporation Limited Vs. Om Prakash Upadhyay, wherein the Apex Court was considering Uttar Pradesh Industrial Disputes Act, 1947 qua I.D. Act. With reference to the amending Act, the Apex Court observed :

> "7 Section 1(2) of the Central Act provides that "the Act extends to whole of India" and this Sub-sec. was substituted for the original Sub-sec (2) by the Industrial Disputes (Amendment and Miscellaneous Provisions) Act 1956 (36 of 1956) with effect from 29 August, 1956. Under that Act, Section 31 which came into force from 7 October, 1956) has been introduced which reads as follows.
>
> "31. Act not to override State laws--
>
> 1 If immediately before the

> commencement of this Act, there is in force in any State and Provincial Act or State Act relating to the settlement or adjudication of disputes, the operation of such an Act in that State in relation to matters covered by that Act shall not be affected by the Industrial Disputes Act, 1947, as amended by this Act.
>
> 2 For the removal to doubts, it is hereby declared that nothing in this section shall be deemed to preclude the Central Government or the National Tribunal from exercising any powers conferred on it by the Industrial Disputes Act, 1947, as amended by this Act".
>
> 8 Sub-section (1) of the said section makes it clear that the operation of the State Act will not be affected by the Central Act. With this legislative history of the law, we think the High Court is justified in its view."

Mr. Naik, also demonstrates that the BIR Act is a complete code in itself which makes sufficient provisions for redressal of wrongs at Sections 78 to 85.

13 Mr. Ganguli, however, refers to the decision of Division Bench of our High Court in <u>G.K. Iypunni vs. R.N. Kulkarni and Ors., reported in A.I.R. 1964, Bombay, page 188</u> to submit that the remedy provided under the BIR Act is not adequate and therefore the petitioner can avail of the provisions under the ID Act. In the proceedings before the

Division Bench, an application filed by the petitioner under Section 33 C(2) of the ID Act was filed for implementation of an award made under Bombay Industrial Relations Act, 1946. The Labour Court dismissed the application holding that it had no jurisdiction to entertain the application. The Division Bench noted that Section 79(3) BIR Act provides a remedy with a limitation that the application must be made within three months of the concerned employee having last approached the employer under Section 42. It opined that the remedy provided was not adequate for computation of the benefits to which he was entitled under the award. Section 33 C(2) of the ID Act having wider of application, it would be legitimate to say that an employee is entitled to claim relief under that section in respect of a benefit under a contract or any standing order and if these are included within its ambit, there is no reason why a benefit under an award made under BIR Act should not be within it. According to it, there being no restrictive words and the language being wide enough, there is no difficulty in regarding the remedy under Section 33C (2) as an alternative remedy to the one that may have been provided by the Statute under which the award is rendered. It, therefore, held that the provision of Section 33C (2) of the ID Act does not in any manner encroach upon the BIR Act. Both provisions can exist side by side without affecting the other.

14 Mr. Naik, the learned Senior Counsel submits per contra that identical situation had arisen in case of Payment of Gratuity Act before the Apex Court in the case of State of Punjab vs. Labour Court, Jullundur and Others, reported in 1979 F.J.R. Volume 55, SC, page 470. The Apex Court was required to consider applicability of the Payment of Gratuity Act and the remedies provided thereunder to the applications filed by the employee under Section 33-C (2) of the Industrial Disputes Act. It held that the Payment of Gratuity Act enacts a complete code containing detailed provisions covering all the essential features of a scheme for payment of gratuity. Therefore, it must be held that the Parliament intended that proceedings for payment of gratuity due under the Payment of Gratuity Act must be taken under that Act and not under any other. Consequently, an application filed by the employee under Section 33-C(2) of the Industrial Disputes Act was not maintainable and the Labour Court had no jurisdiction to entertain such an application.

15 The second decision cited by Mr. Naik on the same question is the decision in LIC of India vs. D.J. Bahadur, reported in 1980, LIC, 1218, SC. In this case, the Apex Court was considering a question as to whether the Industrial Disputes Act a General Legislation is pushed is out of it's province because of the Life Insurance Corporation Act, a

special legislation in relation to the Corporation employees. The Apex Court observed that in determining whether a statute is a special or a general one, the focus must be on the principal subject matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes, it may be special. As regards the two Acts before it, it held that vis-a-vis 'industrial disputes' at the termination of the settlement as between the workmen and the Corporation, the ID Act is a special legislation and the LIC Act a general legislation. Likewise when compensation on nationalisation is the question, the LIC Act is the special statute. On application of the generalia maxim as expounded by English text-books and decisions, it was held that the ID Act being special law, prevails over the LIC Act, which is but general law.

16 In view of this clear position in law as regards the special Law prevailing over the General Law and the specific provision in the Amending Act, it must be held that the Labour Court has correctly decided the preliminary issue and dismissed the reference as not maintainable. Hence, the petition is dismissed.

(Smt. R.P. SondurBaldota, J.)