

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.408 OF 2000 IN
WRIT PETITION NO.262 OF 2000

Mr.K.P.Anilkumar for the Appellant
Mr.K.S.Bapat a/w Mr.T.R.Yadav i/b Mr.A.H.Fatangare
for the respondent No.1

ORAL JUDGMENT: (PER A.S.OKA, J.)

2 The complaint was filed under Item Nos.1,
1(a), 1(b) of Schedule II and items 3, 5, 6 and 9 of
Scheduled IV of the Maharashtra Recognition of Trade
Unions and Prevention of Unfair Labour Practices

Act, 1971 (for short "the MRTU AND PULP ACT"). The complaint was filed on behalf of 7 employees of the first respondent-company making a grievance that the first respondent has indulged in unfair labour practices in relation to 7 employees. It is alleged in the complaint that the said 7 employees had worked for more than one year upto four years. It is alleged that the first respondent continues to employ the said employees. It is alleged that in order to deprive them of the status and benefits available to permanent employees, their employment is transferred only on paper to the fifth respondent in the complaint.

3 A reference has been made to earlier complaint filed by the Bombay Labour Union. It is pointed out that during the pendency of the said complaint, the said 7 employees joined the complainant Union. It is contended in the complaint that the said complaint was withdrawn on 11th August 1989. What transpired after the withdrawal of the complaint and the manner in which the said employees were harassed by the said company has been set out in the complaint. The first relief claimed in the complaint was for a declaration that the respondents have committed unfair labour practices under items 3, 5, 6 and 9 of Schedule IV of the MRTU & PULP Act. The second prayer was that the transfer of the said employees was illegal, malafide, unjustified and amounting to unfair labour practice. The third prayer was for a declaration that the said employees were permanent employees.

4 Various contentions were raised by way of written statements filed by the first to fourth respondents (the appellant company and its Officers). Evidence was adduced by the parties before the learned Member of the Industrial Court. By Judgment and Award dated 24th December 1999, the learned Member of the Industrial Court allowed the complaint and declared that the respondents have committed the unfair labour practices under items 3, 5, 6 and 9 of the Schedule IV of the MRTU & PULP Act and directed them to desist from continuing the same. A direction was issued to the first to fourth respondents to provide service conditions and benefits of permanent employees to the concerned Workmen taking into consideration their initial appointment in the employment. They were directed to pay the arrears of the wages/benefits within two months from the date of that order. It is this Judgment and Award which was challenged before the learned Single Judge in which impugned order dated 22nd March 2000 was passed. By the impugned order, the Writ Petition has been rejected.

5 The first submission canvassed by the learned counsel for the first respondent in the complaint in support of this Appeal is that admittedly there was no employer-employee relationship and hence, the Industrial Court had no jurisdiction to entertain the complaint under the MRTU & PULP Act. He invited our attention to the written statement filed by the first respondent-company to the complaint and

pointed out that the said contention was specifically raised. The second contention is that the first complaint filed on behalf of the said seven employees was unconditionally withdrawn and therefore, the present complaint was not maintainable. He urged that though this contention was specifically canvassed before the learned Single Judge, he declined to go into the same only on the ground that the plea of *res judicata* was not raised before the Industrial Court. Inviting our attention to the Judgment of the Industrial Court, he submitted that the issue of maintainability of the complaint being the issue no.1 was framed by the learned Member of the Industrial Court. He submitted that the issue of jurisdiction based on the dispute regarding the existence of employer-employee relationship was very much raised before the learned Single Judge as reflected from the Memorandum of the Writ Petition , but while defending the complaint, the said issue was not urged. He submitted that in the Appeal, the appellant is entitled to urge this question. He relied upon the three decisions of the Apex Court. The first one is in the case of Chittori Subbanna vs. Kudappa Subbanna and others¹. The second one is in the case of Jagmittar Sain Bhagat and others vs. Director, Health Services, Haryana and others² and the third one is decision in the case of Shrikant V. Gawas vs. Tulsiani Chambers Premises Co-operative Society Limited³. He submitted that in view of the said decisions, this Court is

1 AIR 1965 SCC 1325

2 (2013) 10 SCC 136

3 2007 III CLR 415

under an obligation to consider the issue of jurisdiction. Lastly, he submitted that there was no occasion to make an Award against the fifth respondent in the complaint who is the Contractor. The learned counsel for the complainant supported the impugned Judgments.

6 We have carefully considered the submissions. We have perused the impugned Judgment dated 22nd March 2000. In the impugned Judgment, the submissions made by the learned counsel for the first respondent-company (writ petitioner) - appellant have been set out by the learned Single Judge. Paragraph 2 shows that the first submission canvassed before the learned Single Judge was that the complaint ought to have been dismissed on the basis of the principles analogous to the principles of *res judicata*. The second contention canvassed was that merely because the complaint was filed by a different Union it does not mean that the same cannot be dismissed on the ground of *res judicata*. Paragraph 4 of the impugned Judgment and order shows that a vague submission was made that the findings of the Tribunal are perverse.

7 Thus, the careful perusal of the impugned Order shows that the issue of jurisdiction was not at all canvassed when the Writ Petition was heard before the learned Single Judge.

8 Even in the Memorandum of Appeal, it is not the case that the said submission was canvassed but was

not dealt with and considered. Even assuming that it was canvassed before the learned Single Judge, but the same was not even considered, in view of the well settled law, the remedy of the appellant was before the learned Single Judge by way of appropriate proceedings.

9 The complaint of the year 1989 was decided by the learned Member of the Industrial Court on 24th December 1999. Writ petition was filed in the year 2000. Perusal of the Judgment and Award of the learned Member of the Industrial Court shows that the issue of jurisdiction was not urged. However, the issue of employer-employee relationship was answered against the first to fourth respondents in the complaint. The present appeal was filed in the year 2000.

10 We have carefully perused the Memorandum of Appeal. We find that the issue of jurisdiction of the Industrial Court was not raised in any of the grounds pleaded in the Memorandum of Appeal. Even the first respondent in the complaint proceeded on the footing that there was an employer-employee relationship. As stated earlier, the contention regarding bar of *res judicata* was not raised before the Industrial Court. As stated above, the finding on the issue No.2 by the Industrial Court was not assailed before the learned Single Judge. The issue was regarding the existence of employer-employee relationship.

11 We have perused the decision of the Apex Court in the case of Shrikant V. Gawas (supra). This is not a case where before the learned Single Judge, the issue of jurisdiction was not canvassed. In the case of Chittoori Subbanna (supra), the Apex Court was dealing with Civil Appeal arising out of a Judgment and Order passed in the First Appeal by the High Court arising out of a Decree in the suit. There was a separate application made before the First Appellate Court for raising the said ground which was agitated before the Apex Court. In the case of Jagmittar Sain Bhagat and others (supra), the Apex Court has laid down the well settled law that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior Court. In the present case, before the learned Single Judge, the present appellant – first respondent in the complaint did not dispute the existence of employer-employee relationships by assailing the specific finding recorded by the Industrial Court. Therefore, issue of bar of jurisdiction did not arise before the learned Single Judge. Therefore, we have no hesitation to reject the first submission made by the learned counsel for the appellant.

12 As far as the second contention regarding bar of res-judicata is concerned, the learned Single Judge has elaborately dealt with the same. The learned Single Judge in paragraph 3 of his Judgment after perusal of both the complaints observed that

in the second complaint, the cause of action pleaded arose from 12th August 1989 onwards and cause of action pleaded in the earlier complaint arose on 20th December 1988. The learned Single Judge has referred to the averments made in the second complaint on which impugned Award was made wherein it was alleged that after withdrawal of the first complaint, the present appellant – first respondent in the complaint started harassing the concerned workers. Therefore, the cause of action subsequent to the withdrawal of the earlier complaint was pleaded in the said subsequent complaint. In paragraph 3, the learned Single Judge observed and according to us rightly, that the plea of res judicata was not agitated before the learned Member of the Industrial Court and therefore, it is unfair to pass an order of remand in the year 2000 in the complaint of the year 1989. In our view, the learned Judge has rightly rejected the prayer for remand the complaint for deciding the issue whether the second complaint was barred by the principles of res judicata. We agree with the said view. Apart from the fact that plea of res judicata was never raised before the Industrial Court, subsequent cause of action arising against the first respondent was pleaded in the second complaint.

13 As regards the last contention, we find from the operative part of the Judgment of the learned Member of the Industrial Court that effective directions have been issued only against the first to fourth respondents in the complaint. The first

respondent in the complaint is the present appellant and the second to fourth respondents in the complaint are the officers of the present appellant. Therefore, in our considered view, no fault can be found with the finding recorded by the learned Single Judge.

14 Accordingly, there is no merit in the Appeal and the same is accordingly dismissed with no order as to costs.

15 At this stage, the learned counsel for the appellant prays for continuation of interim relief operative in the Appeal. The said prayer is objected by the first respondent in the Appeal. If any interim relief is operative till today, the same shall continue to operate for a period of ten weeks from today.

(ANUJA PRABHUDESSAI,J.)

(A.S.OKA,J.)