

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5019 OF 2016

M/s. Raymond Ltd.] Petitioner
Vs.
Dnyaneshwar Chaudhary & Ors.] Respondents

WITH

WRIT PETITION NO. 5976 OF 2016

M/s. Raymond Ltd.] Petitioner
Vs.
Rajesh Bhadange & Ors.] Respondents

WITH

WRIT PETITION NO. 5977 OF 2016

M/s. Raymond Ltd.] Petitioner
Vs.
Deepak Narayan Tamhankar & Ors.] Respondents

WITH

WRIT PETITION NO. 5978 OF 2016

M/s. Raymond Ltd.] Petitioner
Vs.
Pramod Bhise & Ors.] Respondents

WITH

WRIT PETITION NO. 5979 OF 2016

M/s. Raymond Ltd.] Petitioner
Vs.
Shivaji Jadhav & Ors.] Respondents

**WITH
WRIT PETITION NO. 6801 OF 2016**

M/s. Raymond Ltd.	]	Petitioner
Vs.		
Raghunath Lone & Ors.	]	Respondents

**WITH
WRIT PETITION NO. 6802 OF 2016**

M/s. Raymond Ltd.	]	Petitioner
Vs.		
Subhash Maghade & Ors.	]	Respondents

**WITH
WRIT PETITION NO. 10333 OF 2016**

M/s. Raymond Ltd.	]	Petitioner
Vs.		
Ashok Narayan Mohite	]	Respondent

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Mr. Sudhir Talsania, Senior Advocate i/b Mr. S.V. Paranjape, for petitioner in all Writ Petitions.

Mr. Yogendra Pendse, for respondents No. 1 to 8 in W.P. No. 5019 of 2016, for respondents No. 1 to 4 in W.P. No. 5976 of 2016, for respondents No. 1 to 3 in W.P. No. 5977 of 2016, for respondents No.1 to 3 in W.P. No. 5987 of 2016,for respondents No. 1 to 5 in W.P. No. 6801 of 2016, for respondents No.1 to 10 in W.P. No. 6802 of 2016 and respondent No.1 in W.P. No. 10333 of 2016.

Mr. Avinash Jalisatgi i/b Mr. T.R. Yadav for respondents No. 6 in W.P. No. 5976 of 2016, for respondent No. 12 in W.P. No. 5979 of 2016, for respondent No. 6 in W.P. No. 6801 of 2016 and respondent No. 11 in W.P. No. 6802 of 2016.

Mr. Shaikh Mohammed Aslam, for respondent No.4 in W.P. No. 5977 of 2016.....

**CORAM : R.G. KETKAR, J.
DATE : 17th JULY, 2017.**

P.C.

Heard Mr. Talsania, learned Senior Counsel for the petitioners, Mr. Pendse, learned Counsel for (i) respondents No. 1

to 8 in W.P. No. 5019 of 2016, (ii) respondents No. 1 to 4 in W.P. No. 5976 of 2016, (iii) respondents No. 1 to 3 in W.P. No. 5977 of 2016, (iv) respondents No. 1 to 3 in W.P. No. 5978 of 2016, (v) respondents No. 1 to 5 in W.P. No. 6801 of 2016, (vi) respondents No. 1 to 10 in W.P. No. 6802 of 2016 and (vii) respondent in W.P. No. 10333 of 2016, Mr. Jalisatgi, for (a) respondent No.6 in W.P. No. 5976 of 2016, (b) for respondent No. 12 in W.P. No. 5979 of 2016, (c) for respondent No. 6 in W.P. No. 6801 of 2016 and (d) for respondent No. 11 in W.P. No. 6802 of 2016 at length.

2. By these Petitions under Articles 226 and 227 of the Constitution of India, petitioner has challenged judgments and orders dated 14th December, 2015 passed by the learned Industrial Court, Thane [for short 'Tribunal'] in the Complaint instituted by respondents. By these orders, the Tribunal partly allowed the complaints and held that petitioner herein has engaged in unfair labour practices under Items No. 5 & 6 of Schedule IV of the Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act, 1971 [for short 'M.R.T.U & P.U.L.P. Act']. The Tribunal directed the petitioner to cease and desist from continuing the unfair labour practices. The petitioner was further directed to make the complainants permanent in service from the date of filing of complaint i.e on 6th July, 2010 and give them benefits of VRS as per agreement dated 22nd October, 2010 within a period of two months from the date of the order. Complaint against respondent No.3 before the Tribunal was dismissed.

3. As common questions of law and fact arise in these

Petitions and the complaints were disposed of by the common order, these Petitions can conveniently be disposed of by this common order. For appreciating the controversy raised in these Petitions, facts from Writ Petition No. 5019 of 2016 are taken into consideration.

4. Respondents No.1 to 8 hereinafter referred to as 'complainants' had instituted complaint u/s 28 read with Items 5, 6, 9 and 10 of Schedule IV of the Act against the petitioner, inter alia, praying for declaration that petitioner, its Factory Manager and 9th respondent, hereinafter referred to as 'respondents' have engaged in unfair labour practices as defined u/s 28 r/w Items No. 5,6,9 and 10 of the Act; directing the respondents to cease and desist from continuing the unfair labour practice; for mandatory order declaring that complainants are permanent employees of the first respondent/company from the date of their joining the Company and directing the respondents, their Directors, Managers, Officers and/or Agents to declare the complainants as permanent at least after completion of 240 days from their initial appointment and offer them all benefits including salaries like all other permanent employees of the first respondent/company. Complaints were instituted on 6th July, 2010. The petitioner herein who was respondent No.1 along with Factory Manager resisted the complaint by filing written statement. Initially, the complainants did not implead respondent No.9 in the complaint. By order dated 3rd May, 2012, respondent No.9 herein was impleaded as respondent No.3. Despite service, respondent No.9 herein did not appear before the Tribunal. Respondent No.9 did not file written statement and remained absent throughout the

proceedings.

5. On the basis of the pleadings of the parties, the Tribunal framed necessary issues. Parties adduced evidence. Complaints filed Pursis at Exhibit-U-14 on 17th November, 2014 to the effect that they adopt evidence led in Complaint (ULP) No. 178 of 2010. After considering the material on record, by the impugned order, the Tribunal partly allowed the complaints. It is against this order, respondents No.1 has instituted the present Petition.

6. In support of these Petitions, Mr. Talsania relied upon definition of 'Employee' in Section 3 (13) and of 'Employer' in Section 3 (14) of the Maharashtra Industrial Relations Act, [for short 'M.I.R Act'.] He invited my attention to the Full Bench decision of this Court in the case of **Tukaram Tanaji Mandhare and Anr. Vs. Raymond Wollen Mills Ltd. And Ors., 2006 I CLR 126** and in particular, paragraphs 2 and 19 thereof. In paragraph 2, Full Bench formulated questions that were referred to it. In particular, Question No.2 was:

“Whether a complaint filed under the MRTU and PULP Act by an employee as defined under section 3(13) of the Bombay Industrial Relations Act, is maintainable although no direct relationship of employer employee exists between him and the principal employer?

7. Mr. Talsania submitted that Question No.2 was formulated on the basis that there is no direct relationship of

'Master' and 'Servant' between the parties. In paragraph 19, Full Bench held that a person who is employed through a contractor who undertakes contracts for execution of any of the whole of the work or any part of the work which is ordinarily work of the undertaking governed by BIR Act is an employee within the meaning of section 3(5) of the M.R.T.U and P.U.L.P Act and a complaint of such an employee is maintainable though no direct relationship of employer-employee exists between him and the principal employer. He gave emphasis on the following words:

“However, if there is a dispute as to whether the contract workers were doing the work which forms part of the undertaking then the workers will have to get the dispute decided independently under the provisions of the BIR Act before approaching the Industrial Court under the MRTU and PULP Act”.

8. He further submitted that Full Bench decision was carried to the Apex Court in Civil Appeal No. 5077 of 2006. By order dated 9th March, 2011, the Apex Court, having regard to the fact that there is difference of opinion in some of the decisions and having regard to the importance of controversy involved and its application particularly in the State of Maharashtra, referred the matter to a larger Bench for a authoritative decision on the issues involved. He submitted that said reference is pending. He, therefore, submitted that present proceedings may be stayed till the reference is answered or in the alternative, impugned orders may be stayed.

9. He further submitted that in view of the decision of Full Bench of this Court and in particular paragraph 19 thereof, there is dispute as to whether the complainants were doing work which forms part of the undertaking and, therefore, they will have to get dispute decided independently under the provisions of the M.I.R Act before approaching the Industrial Court under the provisions of the M.R.T.U & P.U.L.P Act. Even on this count, the complaints are not maintainable. He submitted that Section 3(14) (e) of the M.I.R Act defines the expression 'employer' which includes where the owner of any undertaking in the course of or for the purpose of conducting the undertaking contracts with any person for the execution by or under the contractor of the whole or any part of work which is ordinarily part of the undertaking, the owner of the undertaking, complainants cannot claim to be employees of respondent No.1.

10. Mr. Talsania has invited my attention to paragraph 3(i) of the complaint where the complainant asserted that they are engaged in work of different jobs in Engineering Department and these jobs are of regular in nature but allegedly shown as engaged through the contractor. The first respondent/Company being covered by provisions of the Bombay Industrial Relations Act, even if it is presumed for the sake of argument, the complainants are engaged through the contractors, the complainants are the employees of first respondent Company alone and employer-employee relationship does exist between the first respondent Company and the Complainants. He also invited my attention to the written statement filed by respondents No.1 and 2 and in

particular, paragraphs 2, 4, 5 (i), (ii) and (iii). In paragraph 2, respondents No.1 and 2 contend that complaint is not maintainable as the complainants have never been in the employment of the respondent. The complainants were employees of the contractor named M/s. Perk Link Services. The said contractor had undertaken the job work of house keeping and has been getting the work done by employees employed by him namely the complainants. The said contractor has employed the said persons for that purpose. The contractor has been giving directions to the complainants to do the job work. The contractor used to submit the bills for the job work done for the particular month and the payment was made to him accordingly. The contractor receives the payment. It was for the contractor who pays the wages to his employees who are the complainants as per the terms agreed between them. At no time, respondent, or its officials gave any instructions to the complainants to do any job or paid them wages.

11. In paragraph 4, respondents No.1 and 2 contended that the complaints are barred by estoppel/waiver or principles analogous to estoppel/waiver in making the complaints. They have been in the employment of the contractor from the time the contractor has undertaken to do the job work of house keeping. In paragraph 11, respondents No.1 and 2 did not admit the allegations and claims made in para 3 sub para (i) to (vi). Respondents No.1 and 2 denied that the complainants are employed in the establishment of 1st respondent i.e Raymond Ltd Textile Division, Thane and are working in the company engaged in activities which are connected with and incidental to

manufacturing activities. It was further asserted that contract job work was given to M/s. Perk Link Services for house keeping who in turn had employed the complainants. It was denied that the contractor is given different jobs in maintenance department, shifting of machinery etc. It is denied that the contract job work of house keeping is of regular nature and is part of the main manufacturing activities of Raymond Ltd Textile Division. In sub paragraph (iii) of paragraph 11, respondents No.1 and 2 denied the contents of sub para (iii) paragraph 3 of the complaint. It was denied that complainants were exclusively working for the first respondent and their work is controlled and supervised by the first respondent. It was reiterated that contract job work of house keeping was given to M/s. Perk Link Services since several years.

12. Mr. Talsania also invited my attention to Provident Funds Slips which noted Account number MH/98125/138 of Jeetu Bhaghane and name of the third respondent M/s. Perk Link Services Ltd was recorded.

13. Mr. Talsania has taken me through Purshis dated 17th November, 2014 at Exhibit-U-14 filed by the complainants adopting the evidence led in Complaint [ULP] No. 178 of 2010 as also evidence of Mr. Vishnu Bahadur Singh, Sr. Manager (Engg & Commercial) of the first respondent at Exhibit C-1 and evidence of Sadashiv Tawade, Sr. Manager (Personnel) and Factory Manager of the first respondent. Mr. Talsania has taken me through the impugned order and in particular paragraphs 14 onwards. He submitted that the Tribunal has committed serious error in mixing

evidence adduced on behalf of the complaints in Complaint (ULP) No. 178 of 2010 with other complaints. He submitted that evidence of complainant in Complaint (ULP) No. 178 of 2010 is for himself alone and not for and on behalf of other complainants. After considering evidence of complainant in Complaint (ULP) No. 178 of 2010, the Tribunal jumped on the conclusions in holding that respondents No.1 and 2 have engaged in an unfair labour practice under Items No. 5 & 6 of Schedule IV of the Act. He submitted that on merits, the complainants have failed to prove that they were doing work which forms part of undertaking and the Tribunal committed error in entertaining and deciding complaint on merits. For all the reasons, he submitted that Petition requires consideration and impugned orders deserve to be set aside.

14. On the other hand, Mr. Pendse supported the impugned orders. He submitted that though respondent No.9/Contractor was impleaded subsequently, despite service no written statement was filed and no evidence was adduced. Respondent No.9 did not participate in the proceeding before the Tribunal. He submitted that no pay slips as also contract allegedly entered into between respondents No.1 and 2 on one hand and respondent No.9, on the other was produced on record. He submitted that on behalf of the complainants, Rajesh Manohar Bhadange [complainant in Complaint (ULP) No. 178 of 2010) was examined. Affidavit in lieu of examination-in-chief was filed on 9th December, 2013, his cross-examination was over on 10th April, 2014. Purshis at Exhibit-U-14 was filed on 17.11.2014 in Complaint (ULP) No. 178 of 2010

adopting that evidence in all other complaints. On behalf of respondents No.1 and 2, Affidavit of Vishnu Singh by way of examination-in-chief was filed on 8th January, 2015. His cross-examination was over on 27th February, 2015. Respondents No.1 and 2 examined Sadashiv Tawade Sr. Manager (Personnel) who filed affidavit by way of examination-in-chief on 27th March, 2015 and his cross-examination was over on 9th April, 2015. In short, he submitted that after closing evidence of the complainants, pursuant Exhibit-U-14 was filed on 17th November, 2014 and respondents No.1 and 2 adduced evidence thereafter. He, therefore, submitted that it is not open to respondents No.1 and 2 to contend that evidence of the complainant in Complaint (ULP) No. 178 of 2010 was only adduced for himself and not for and on behalf of other complainants.

15. Mr. Pendse invited my attention to the admissions given by Mr. Vishnu Singh in paragraphs 17 and 18 in cross-examination and admissions given by witness Sadashiv Tawade in his cross-examination as also findings recorded by the Tribunal in paragraphs No. 14, 15 and 16. He submitted that no case is made out for invocation of powers under Articles 226 and 227 of the Constitution of India.

16. Mr. Talsania submitted that hearing of these Petitions deserves to be deferred as reference made by the Apex Court to larger Bench is pending. He further submitted that as the reference is pending, impugned orders deserve to be stayed. I do not find any merit in this submission. In the case of **Ashok Sadarangani**

and another Vs. Union of India and others, (2012) 11 Supreme Court Cases 321, the Apex Court has observed thus:

“As was indicated in Harbhajan Singh v. State of Punjab, (2009) 13 SCC 608, the pendency of a reference to a larger Bench, does not mean that all other proceedings involving the same issue would remain stayed till a decision was rendered in the reference. The reference made in Gian Singh v. State of Punjab (2010) 15 SCC 118 need not, therefore, detain us. Till such time as the decisions cited at the Bar are not modified or altered in any way, they continue to hold the field”.

17. A perusal of the order dated 9th March, 2011 shows that Apex Court has referred the matter to larger Bench. However, it is material to note that Apex Court has not stayed effect and operation of the Full Bench Decision. As the decision of Full Bench is not altered or modified in any way, it certainly binds me.

18. Before I consider Full Bench Decision, it is necessary to consider provisions of the M.R.T.U & P.U.L.P Act as also provisions of M.I.R Act. It is not in dispute that the provisions of M.I.R Act are applicable to the petitioner, M/s. Raymonds Limited. Section 3(13) of the M.I.R Act defines the expression 'employee'. For the purpose of the present controversy, clause (a) of Section 3(13) which is relevant reads thus:

“employee” in relation to an industry to which the Bombay Act for the time being applies, means an employee as defined in clause (13) of section 3 of the Bombay Act; and in any other case, means a workman as defined in clause (s) of the Section 2 of the Central Act”.

Section 3 (14) (e) defines the expression 'employer'. In so far as the present controversy is concerned, Section 3 (14) (e) which is relevant reads thus.

a)....

b)....

c)....

d)...

Where the owner of any undertaking in the course of or for the purpose of conducting the undertaking contracts with any person for the execution by or under the contractor of the whole or any part of work which is ordinarily part of the undertaking, the owner of the undertaking”.

19. A perusal of the above extracted definitions clearly shows that a person employed by a contractor to do any work for him in execution of contract with employer within the meaning of clause (e) of Section 14 falls in the category of employee. Section 3(5) of the M.R.T.U & P.U.L.P Act defines the expression 'employee' to mean an employee as defined in clause (13) of Section 3 of the Bombay Act. In view thereof, even assuming that complainants were employed by respondent No.3/contractor, in view of the unambiguous language of Section 3 (5) of the M.R.T.U & P.U.L.P Act read with Section 3(13) and 3(14) (e) of the MIR Act, it has to be held that complainants are employees of the petitioner-Company and, therefore, complaints are maintainable.

20. In the case of **Tukaram** (supra), following questions were referred to the Full Bench. Para 2 reads thus:

(1) “Whether a person who is employed with a contractor

who undertakes contracts for the execution of any of the whole of the work or any part of the work which is ordinarily work of the undertaking is an employee within the meaning of section 3(5) of the MRTU and PULP Act?

- (2) Whether a complaint filed under the MRTU and PULP Act by an employee as defined under section 3(13) of the Bombay Industrial Regulations Act, is maintainable although no direct relationship of employer employee exists between him and the principal employer?
- (3) Whether a complaint filed under the MRTU and PULP Act by employees under section 3(13) of the BIR Act can be dismissed if the employer claims that they are not his direct employees but are employed through a contractor, in view of the judgments of the Cipla (supra), Kalyani Steels Ltd. (supra) and Sarva Shramik Sangh v. Indian Smelting and Refining Co. Ltd. (supra)?”

21. In paragraph 14, Full Bench observed thus:

“Therefore, both the provisions of the BIR Act and MRTU and PULP Act complement each other in respect of Industries to which the BIR Act has been made applicable in relation to the definition of employee contained in the BIR Act which has been incorporated in the MRTU and PULP Act in respect of the employees engaged in an industry governed by the provisions of the BIR Act. The term “employee” has been given an extended meaning by the BIR Act. An employee is not only a person who is employed by the employer or over whom the employer has control, but also certain type of persons having been

constituted, if one might put it so, statutory employees under the Act. It is not that every person employed by a contractor becomes an employee of the master, but only those persons who are employed by the contractor to do work for him in the execution of contract with an employer, which is mentioned in sub-clause (e) of clause (14), which defines “employer” and it is inclusive definition. If these two conditions are satisfied then any person employed by a contractor becomes employee of the owner of the undertaking and the complaint by such an employee under section 28 of the MRTU and PULP Act would be maintainable in law. However, if the complaint fails to disclose the jurisdictional fact that the “work being ordinarily part of the undertaking” in relation to the work which was entrusted to the workman of the contractor, the workman must first get established the employer-employee relationship by adopting appropriate proceedings before the appropriate forum under the BIR Act and it is only after status of the workman or employee is established in appropriate forum that a complaint would lie under the provisions of the MRTU and PULP Act”.

22. In view of the aforesaid discussion, I do not find any merit in the submission of Mr. Talsania that complaints are not maintainable as they are not employees of respondents No.1 and were employees of respondent No.9.

23. A perusal of the complaint and in particular paragraph 3(i) shows that complainants specifically asserted that they are engaged in work of different jobs in Engineering Department and these jobs are of regular in nature but allegedly shown as engaged through contractors. The petitioner has filed written statement. In paragraph 11, petitioner had dealt with assertions made in paragraph 3(i) of the complaint. Petitioner has denied allegations made therein. Petitioner further contended that it does not admit

the allegations made in paragraph (i) as the same are not true. It is, however, material to note that there is no specific denial of the allegations made in paragraph 3 (i) of the complaint.

24. With the assistance of learned Counsel appearing for the parties, I have perused the evidence adduced by the parties. Paragraphs 17 and 18 of cross-examination of the witness reads thus:

17. "Though the complainants have invoked the Items 9 and 10 of Schedule IV of the ULP Act and thereby alleged unfair labour practice on the part of the respondents, however, the complainants could not justify their claim even in the complaint nor by adducing oral evidence on record. No sufficient evidence has been brought before the Court about 240 days service of the complainants in each calendar year and even if it is inferred that, they have worked more than 240 days in every completed year, still could not justify before the Court about violation of the statutory provisions of law, more particularly, in the industry to which the provisions of law, more particularly, in the industry to which the provisions of BIR act is applicable and in absence of specific pleadings and evidence, it is very difficult to accept about unfair labour practice under Items 9 & 10 of Schedule IV of the ULP Act.

18. From the above discussion, it is clear that, though the complainants have failed to establish about unfair labour practice under Item 9 & 10 of Schedule IV of the ULP Act, however, it has been sufficiently established before the Court that, the respondents have engaged in an unfair labour practice under Item 5 & 6 of Schedule IV of the ULP Act. In short, the respondents have engaged in an unfair labour practice under Item 5 & 6 of Schedule IV of the ULP Act".

25. A perusal of cross-examination of Mr. Vishnu Singh, C.W. 1 examined by respondents No.1 and 2 and in particular paragraphs 17 and 18 thereof, leaves no room for doubt that complaints were working in the premises of the company. They were performing work in Engineering Department relating to textiles. It is the case of respondents No.1 and 2 that contract agreement was entered into with respondent No.3 for housekeeping. Having regard to the clearcut admissions given by this witness in paragraphs 17 and 18, I do not find that the Tribunal has committed any error in holding that respondents No.1 and 2 have committed unfair labour practices under Items 5 and 6 of the Schedule IV of the M.R.T.U & P.U.L.P Act.

26. The petitioner is not in a position to demonstrate that findings recorded by the Tribunal are contrary to the evidence on record or that they are not supported by evidence on record. In other words, petitioner has not demonstrated that findings recorded by Tribunal are perverse. Merely because on the basis of evidence on record, another view is possible that itself is not a ground for invocation of powers under Articles 226 and 227 of the Constitution of India.

27. In view thereof, I do not find that any case is made out for invocation of powers under Articles 226 of the Constitution of India. Petition fails and the same is dismissed.

[R.G. KETKAR, J.]