

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

WRIT PETITION NO.6309 OF 2017

Sairam Natural Gas And Oil Corporation

And Another

... Petitioners

Versus

Maharashtra Employees Union

... Respondent

.....

Mr. Avinash K. Jalisatgi a/w Mr. Amol B. Desai I/b T.R. Yadav for the
Petitioners.

Mr. Arshad Shaikh I/b Mr. Prashant Goyal for Respondent.

....

CORAM : S.C.GUPTE, J.

DATE : 13 JUNE 2018

(Judgement) :

. Heard learned Counsel for the parties.

2 **Rule.**

3 Rule taken for up for hearing forthwith with consent of Counsel.

4 This petition challenges an order passed by the Industrial Court at Mubmai on a preliminary objection raised by the Petitioners herein (the Respondents to the complaint of unfair labour practice) concerning maintainability of the complaint.

5 The complaint of unfair labour practices was filed by the Respondent-union under Item Nos.1(a), (b) and 6 of Schedule II and Items

9 & 10 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1947 (“the Act”). The sum and substance of the complaint was that the persons named therein, who were employees of the Petitioners, were harassed by the latter. Along with the complaint, the Respondent filed an application for interim relief. The Petitioners raised preliminary objections to the complaint. It was the case of the Petitioners that the employees named in the complaint were not their employees, but of one Sheetal Pest Management Services, the labour contractor, who had been supplying manpower to the Petitioners with effect from 12 March 2010 in pursuance of a labour contract. The Petitioners produced documents before the Industrial Court in support of their case that the employees were engaged by Sheetal Pest Management Services and were not their employees. On the basis of these documents, the Industrial Court rejected the Respondent-union's application for interim relief but strangely appears to have framed a preliminary issue of existence or otherwise of employer-employee relationship between the Petitioners and the employees named in the complaint. The Industrial Court even allowed the parties to lead evidence on this issue and finally, in its impugned order, held that the evidence produced before it showed that fifteen employees named in the complaint were in fact direct employees of the Petitioners and the complainant-union had discharged its burden to establish the relationship of employer and employee between the parties. After holding this particular issue in the affirmative, the Industrial Court proceeded to partly allow the complaint of the Respondent-union declaring commission of unfair labour practice under Item 9 of Schedule IV of the Act by the Petitioners as proved. This order is challenged in the present petition.

6 Mr. Shaikh, learned Counsel for the Respondent-union, relies upon the decision of the Supreme Court in the case of **Cipla Ltd Vs. Maharashtra Genral Kamgar Union**¹. The Supreme Court in **Cipla's** case held that the Industrial Court had no jurisdiction under MRTU & PULP Act to consider whether or not the workmen, alleged to be contract workers, were infact direct workmen of the principal employer. To decide this it must be first held that the contract between the principal employer and contractor was a camouflage or sham contract. This involves repudiation of the contract with one (i.e. the ostensible employer) and establishment of a legal relationship with another (i.e. the true employer). Such exercise would not fall within the scope of either Section 28 or Section 7 of MRTU & PULP Act. The Court held that the proceedings under MRTU & PULP Act being summary in nature and giving drastic remedies to the parties concerned, elaborate consideration of any question as to the relationship of employer-employee between the parties cannot be gone into in such proceedings. The Court, however, kept one window upon. Wherever at any time the employee concerned was indisputably an employee of the establishment and subsequently it was disputed, such question, the Court held, would be an incidental question arising under Section 32 of the Act. If, on the other hand, the establishment had never recognized the workman concerned as its employee, the Court constituted under Section 28 of the Act would not have jurisdiction to entertain the complaint unless the relationship of employer-employee is first determined in proceedings under the Industrial Disputes Act. Mr. Shaikh places strong reliance on the permissibility of deciding the question of existence of a relationship as an incidental issue. Learned Counsel also relies in this behalf on the

1 2001 I CLR 754

judgment of a Division Bench of this Court in the case of **Hindustan Coca Cola Bottling S/W Pvt. Ltd. Vs. Bhartiya Kamgar Sena**.² Learned Counsel submits that in a case, where it can be demonstrated before the Court that at one point of time there was a subsisting contract of employment between the employer and employee concerned and the relationship has come to be disputed only subsequently, such question is an incidental question arising under Section 32 of the Act. Learned Counsel submits that unlike in the case of **Cipla Ltd** or in the case of **Hindustan Coca Cola Bottling**, in the present case, the union had not come to the Court with a case that the employees, whose cause it was espousing, though shown to be contract labour, were infact direct employees of the principal employer and that the contract under which they were purportedly engaged was sham or bogus. Learned Counsel submits that the union went to the Court with a specific case that there was a relationship of employer and employee between the parties and that the dispute had been raised only by the petitioner-establishment and this incidental question could well be decided by the Industrial Court. I am afraid, that is not a correct reading of the judgment of the Supreme Court in case of **Cipla Ltd** or of our Court in the case of **Hindustan Coca Cola Bottling**. No doubt, in **Cipla Ltd.**, the respondent union went to the Court under Section 28 of the Act alleging that the appellant company had been engaging workmen but on paper they were shown as 'contract workers' working for contractor; the contractor was a mere name-lender, and it was the appellant company who was the real employer of the workmen, whereas the appellant company contended that the concerned employees were not its employees but real, as opposed to mere ostensible, employees

2 2001 III CLR 1025

of the contractor. But it is not that wherever the complainant employees go before the court alleging employer-employee relationship between them and the respondent employer and the relationship is disputed by the latter, the question of existence of such relationship becomes an incidental question. The whole point in issue is whether there is an undisputed or indisputable employer-employee relationship. If there is no undisputed or indisputable employer-employee relationship, the Court cannot assume jurisdiction to entertain the complaint after making an inquiry into the question of existence or otherwise of the relationship of employer and employee. If the Court is not satisfied that there is an undisputed or indisputable employer-employee relationship, there is no occasion to frame an issue on such relationship and allow the parties to lead evidence and then decide the point on such evidence. It is immaterial on whose pleadings such issue or dispute arises. It may arise purely on the pleadings of the employer opposing the complaint. The employees may assert the relationship and the employer may deny it. The Court has to look at the material placed before it and see if it is satisfied that there is in fact no dispute as to the relationship. This would be so if the dispute raised by the employer is merely nominal or for the sake of raising a dispute so as to oust the jurisdiction of the Court. If, on the other hand, it is not satisfied that it is so, and if it requires a trial to decide the issue, it must stay its hands and require the parties to have the status of their relationship determined first under the Industrial Disputes Act.

7 The reference to the 'incidental question' in **Cipla Ltd** is in the context of an original undisputed or indisputable relationship of employer-employee between the parties which is only subsequently disputed by the

employer. That would be merely incidental to the complaint, for such subsequent dispute itself may be part of the grievance; it may be part of, or a prelude to, or an outcome of, the unfair labour practice complained of. The Court established under Section 28 of MRTU & PULP Act can certainly go into such incidental question. What is, however, important to remember is that there must still be an undisputed or indisputable relationship of employer-employee between the parties to begin with.

8 The Industrial Court, in the present case, does not come to the conclusion that there was any undisputed or indisputable employer-employee relationship. It does not find that originally there existed any such relationship between the parties and, as a matter of unfair labour practice or otherwise, only subsequently disputes were raised in that behalf by the Petitioner-employer. What the Industrial Court does in the present case is that it, firstly, notices when the interim application is moved by the Respondent-union in the complaint that the employees “have disputed the relationship of employer-employee”; that the employees listed in the complaint are, according to the employer, “employees of contractor and to that effect certain documents (such as, sic) copy of agreement of contract, attendance register and letter issued by the contractor to Makwana Engineering & Services, Chunabhatti, Sion, for giving training to concerned employees are on record”. It then applies the law of **Cipla Ltd** and holds that in view of the pronouncement in **Cipla**, there being a dispute regarding relationship of employer-employee, the “question of unfair labour practice cannot be inquired into at all”; or, in other words, *prima facie* “the complaint itself is not maintainable”. Yet, on the preliminary objections raised by the Petitioner, the Court firstly holds that an issue

could be framed on maintainability and jurisdiction and decided thereafter along with other issues. It then proceeds to frame an issue as to whether the complainant-union proved that the employees named in the complaint were employees of the respondent-establishment, allows the parties to lead evidence on it, and finally holds that the complainant union had discharged the burden of proving the employer-employee relationship between the parties. That was clearly impermissible. Even here, the conclusion that there was any pre-existing undisputed or indisputable employer-employee relationship and only subsequently such relationship was disputed by the employer, is conspicuous by its absence. The impugned orders, in other words, are in the teeth of the settled law on the point, and examine and decide without jurisdiction a “dispute” as to “whether there exists an employer-employee relationship between the parties before it.”

9 In the premises, the impugned orders deserve to be set aside. Accordingly, Rule is made absolute by quashing and setting aside the impugned orders of the Industrial Court dated 13 March 2012, 20 October 2012 and 5 April 2016 and allowing the preliminary objection of the Petitioners, holding that the Industrial Court had no jurisdiction to entertain the complaint.

10 Needless to add that this order does not anyway imply any finding on the part of this Court against subsistence of the relationship of employer and employee between the parties. That question is open and can be debated and established by the Respondent-union before any appropriate forum or Court.

(S.C. GUPTE, J.)