

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

**WRIT PETITION NO. 9487 OF 2017**

Mr.Rajesh Shah

...Petitioner

Vs.

Their Workmen, United Workers Association & Ors.

...Respondents

Mr.S.K.Talsania, Senior Advocate with K.S. Bapat and Jayesh Desai I/b.  
Desai & Desai Associates for Petitioner.

Mr.J.B. Saha for Respondent No.1.

**CORAM : S.C. GUPTE, J.**

**DATE : 22 NOVEMBER 2018**

**JUDGEMENT :**

This petition challenges awards passed by the Industrial Tribunal at Mumbai in a reference made to it under the Industrial Disputes Act, 1947 ("Act"). The dispute concerns termination of services of workmen represented by the first Respondent union.

2           The Petitioner's case may be briefly stated as follows :

The Petitioner is a partner of M/s.Shah & Co., which is engaged in the business of importing, trading and polishing of raw and rough diamonds. Respondent No.3 is a contractor carrying on the business of polishing of raw diamonds on a piece rate basis. Respondent No.3 was doing the work of polishing of raw diamonds by engaging manpower for the firm of M/s.Shah & Co. He had hired out premises owned by the firm on a rental basis for doing this work. The workmen, with whom we are concerned in this petition, had been engaged by Respondent No.3. Their work was supervised and controlled by him; their wages were paid, and

other benefits such as ESI extended, by him. In other words, there was no employer-employee relationship between the firm and the workmen; the latter were all employees of Respondent No.3. On and from July 2009, with limited job work given by the firm of M/s.Shah & Co., Respondent No.3 carried on the assignment through a limited work force. The workmen, dissatisfied with the arrangement, approached the Industrial Court at Mumbai in a complaint of unfair labour practice (Complaint (ULP) No.126 of 2009) through their union, Rashtriya Kamgar Sena, and also individually to the Labour Court in a set of complaints (Complaint (ULP) Nos.209 to 220 of 2009). The complaints were against the Petitioner herein, Respondent No.3 herein and one Rajan Shah. (It is the case of the Petitioner that Rajan Shah had no connection whatsoever with either M/s.Shah & Co. or Respondent No.3.) Sometime later, during the pendency of these complaints, the workmen withdrew from the membership of Rashtriya Kamgar Sena, revoked the latter's authority to represent them in Complaint (ULP) No.126 of 2009 and formed Respondent No.1 union. The workmen thereafter withdrew even their individual complaints to the Labour Court and instead raised an industrial dispute in respect of the subject matter of the complaints through Respondent No.1, which resulted into the present reference (Reference (IT) No.24 of 2011). It was the case of the Respondent union in the reference that the eleven workmen represented by it were employees of M/s.Shah & Co. and their services were illegally terminated by the latter with effect from 1 April 2009. One workman deposed on behalf of the Respondent union, whilst a partner deposed on behalf of M/s.Shah & Co. By its judgment and award dated 5 March 2015, the Industrial Tribunal answered the reference in the affirmative and ordered reinstatement of all eleven workmen with full back wages and continuity of service. The

Petitioner thereupon approached this court by a writ petition (Writ Petition No.11333 of 2015). It was *inter alia* the case of the Petitioner in that writ petition that in view of the earlier complaints of the workmen, and their withdrawal, the reference before the Industrial Tribunal was barred by the rule of *res judicata* contained in Section 59 of the MRTU and PULP Act. This court, by consent of parties, remanded the matter on the issue of *res judicata* to the Industrial Tribunal. Upon remand, the Petitioner filed an application for amendment of his written statement in the reference with a view to bring on record various facts in support of his case on *res judicata*, such as the authority given by the workmen to their advocate for withdrawal of the original complaints, order of the Labour Court demonstrating its having cautioned the workmen about the consequences of such withdrawal, the workmen's response thereto seeking liberty to agitate their dispute before an appropriate forum and final order of the Labour Court permitting withdrawal without any such liberty. By its order dated 30 April 2016, the application was partly allowed, whilst rejecting some of the amendments proposed. Thereafter, by its impugned award dated 23 June 2016, the Tribunal rejected the Petitioner's case on the issue of *res judicata*. It maintained the original award dated 5 March 2015, directing the Petitioner to reinstate all eleven workmen simply by observing that the main issue had already been decided in the award and those findings were not set aside by this court whilst remanding the reference for consideration of the Petitioner's plea of *res judicata*. The Petitioner has now challenged the award in the present petition on the ground of the bar of *res judicata* under Section 59 as well as on merits. The Petitioner challenges the original award dated 5 March 2015, the order of the Industrial Tribunal dated 30 April 2016 passed on the Petitioner's amendment application and the rectified judgment and award dated 23 June 2016.

3           Before delving into the merits of the petition, one particular submission of the Respondent needs to be dealt with at the outset. Learned Counsel for the Respondent union submits that whilst remanding the matter on 28 March 2016 (by the order passed on Writ Petition No.11333 of 2015), the only issue which was left open for debate was the plea of *res judicata* raised by the Petitioner; all other issues were rejected by this court. I have perused the order of remand dated 28 March 2016 and heard learned Counsel on the submission. It is clear, to my mind, that the basis of remanding the matter was non-consideration of the plea of *res judicata* arising under Section 59 of the MRTU and PULP Act, 1971 by the Industrial Tribunal. There is nothing to suggest that the other grounds of challenge raised by the Petitioner herein in Writ Petition No.11333 of 2015 were rejected or even considered by the court, whilst passing the remand order. It is true that the remand itself was made in view of the particular challenge raised by the Petitioner concerning non-consideration of his plea of *res judicata* by the Industrial Tribunal, and to enable the Tribunal to rule on the plea, but that does not mean that all other challenges of the Petitioner were considered and negated by the court. The Tribunal has accordingly considered the plea of *res judicata* and maintained the original award (challenged in Writ Petition No.11333 of 2015) on the ground that the other issues, decided in the original award, do not merit any reconsideration. These issues now fall for consideration, since they are open to debate before this court and are required to be decided for the first time by this court. In the premises, I proceed to consider all the other objections of the Petitioner to the impugned award along with the issue of *res judicata*.

4           Coming first to the issue of *res judicata*, it is important to bear in mind that the complaints filed by individual workmen or, for that matter, by Rashtriya Kamgar Sena, were not effectively entertained by the Industrial Tribunal. Besides filing of the complaints, admittedly no effective steps were taken in the complaints. Before the complaints could be heard, the workmen withdrew their membership of Rashtriya Kamgar Sena and on advice that they actually needed to raise an industrial dispute in the facts of the case, withdrew even their individual complaints. A full bench of our court in **C.S. Dixit vs. Bajaj Tempo Ltd.**<sup>1</sup> has held that mere filing of a complaint under the MRTU and PULT Act, without anything done in the matter, would not attract the bar of Section 59; If before any effective steps are taken by the Industrial Court under the said Act, the matter is withdrawn, even then the bar under Section 59 would not apply. It is not the Petitioner's case that in fact effective steps were taken by the Industrial/Labour Court in the complaints filed by or on behalf of the workmen. The bar of Section 59, thus, is not attracted in the facts of the present case.

5           Coming now to the merits of the controversy, it must be noted at the outset that as a matter of law, the burden of proof as to the existence of relationship of employer and employee is always upon the person who sets up such plea. As affirmed by the Supreme Court in **Workmen of Nilgiri Co-operative Marketing Society Ltd. vs. State of Tamil Nadu**<sup>2</sup>, where a person asserts that he was or is a workman of the company and it is denied by the company, it is for him to prove the fact and not for the company to prove that he was not an employee of the company but of some other person. Secondly, again as observed by the Supreme Court in

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1   **2000 (86) FLR 491**

2   **(2004) 3 SCC 514**

**Nilgiri Society's** case, the question whether relationship between the parties in one of employer and employee is a pure question of fact. If so, the existence of the relationship will have to be proved by establishing the basic facts which satisfy the various tests such as organization test, control and supervision test, and other factors depending on special facts and circumstances of the case, as laid down by courts.

6           If we have regard to the evidence produced by the Respondent union, there is absolutely nothing which connects the workmen concerned to employment under the Petitioner or M/s.Shah & Company. Besides a bald statement by their sole witness that he was working with the firm of Rajesh Shah, there is nothing on record to suggest the relationship of employer and employee between him or other fellow workmen of his and the firm. There is no employment contract, no salary slip, no muster roll showing any of these workmen as employees of the firm. The only explanation for this circumstance, both in evidence and at the Bar during the hearing of the present petition, is that such type of documents are not issued as a matter of practice in the diamond polishing trade. That does not take the Respondent union's case any further. The documents brought on record by the Petitioner before the Industrial Tribunal, on the other hand, namely, the muster roll-cum-wage register, PF and ESI record showing contributions by Respondent No.3 for the concerned workmen, show Respondent No.3 to be the employer of the concerned workmen. The only circumstance to connect the workmen to the Petitioner and his firm is the place of their working. The place is owned by the firm of Shah & Company. There is an agreement of licence between the firm and Respondent No.3 by which the latter was allowed to use the premises for polishing of diamonds. The document produced in support of this licence is an agreement of 1

October 2008. Learned Counsel for the Respondent union contends that there was no licence before 1 October 2008. That is a bare submission across the bar and not a matter of evidence. There is, as we have noted above, no positive evidence produced by the union of any relationship of employer-employee between the workmen and the Petitioner or his firm; and on the other hand, such evidence as is produced by the Petitioner shows an existing relationship of employer and employee between the workmen concerned and Respondent No.3. Merely because that evidence contains a gap or does not go all the way to establish the relationship of employer and employee as between the workmen and Respondent No.3, assuming that to be so, it still cannot be said that the workmen have discharged their onus to show employee-employer relationship between themselves and the Petitioner or his firm. In a case where the Petitioner had not brought in any evidence, if the Respondent union anyway would have failed to establish the relationship of employer-employee as between him and its workmen members, that the Petitioner had not brought in full-proof evidence to show the contrary would hardly change the fate of the union's case.

7           The Industrial Tribunal appears to have approached the controversy of the employment status of the workmen as if the onus to disprove that status was on the alleged employer. Because no licence agreement in favour of Respondent No.3 for the period prior to 1 October 2008 was produced by the Petitioner, it disbelieved his case of existence of the relationship of employer and employee as between Respondent No.3 and the workmen. The Tribunal lost sight of the fact that there was no positive evidence to show that the workmen concerned were employees of the Petitioner or his firm and on the other hand, there was evidence to

show the contrary. Merely because the workmen worked at the premises owned by the Petitioner they could not be termed as his workmen in the face of this evidence. After all, in all cases of genuine contract labour, the workmen work at the putative principal employer's place; they do so as employees of a contractor who has a contract for service with the industrial establishment which owns the place. In the present case, the material on record shows that there was entrustment by the Petitioner of raw and rough diamonds to Respondent No.3 under documents known as 'Zangads', measuring their weight in carats, and payments were made to Respondent No.3 on a piece rate basis carat-wise for the polishing work done. That clearly shows a contract for service as between the Petitioner and Respondent No.3. The evidence on record not only establishes the status of Respondent No.3 as a contractor, but it also shows that the workmen were on the muster roll-cum-wage register of Respondent No.3; their wages were paid, work was supervised and benefits such as PF and ESI were extended to them by Respondent No.3. The Tribunal, in the premises, has completely misdirected itself in law and come to a finding which is wholly unsustainable, meriting interference in writ jurisdiction.

8                Rule is accordingly made absolute and the petition is allowed by quashing and setting aside the impugned awards and answering Reference (IT) No.24 of 2011 in the negative.

**(S.C. GUPTE, J.)**