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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5337 OF 2016

Lok Kalyan Mazdoor Union

..Petitioner

vs.

M/s. Ultratech Cement Ltd.

& ors.

..Respondents

....

Shri Nitin A. Kulkarni for petitioner.

Shri K.S. Bapat I/b. Shri Sachin V. Masurkar for respondents.

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CORAM : M.S.KARNIK, J.

DATE : 26th APRIL, 2019

P.C. :

Rule. Rule is made returnable forthwith by consent of the parties.

2. By this Petition filed under Articles 226 and 227 of the Constitution of India, the petitioner challenges an order dated 20/2/2016 passed by the Labour Court, Solapur in Application (IDA) No. 30 of 2012.

3. The petitioner claims to be a recognised Union. The members of the petitioner- Union were working with respondent

No.1 – Cement Factory. It is the case of the petitioner – Union that the employees though are direct employees of respondent No. 1- Factory but they are engaged through contractors, who are respondent Nos. 2 to 8 herein. It is the contention of the petitioner – Union that the contract is sham and bogus and that they are direct employees of respondent No.1.

4. The claim of arrears of minimum wages was made and an application bearing No. 1 of 2012 was filed by petitioner – Union before the competent authority under the Payment of Wages Act, 1936 (hereinafter referred to as 'the Act of 1936' for short). Since the arrears for last 15 to 16 years were claimed, an application for condonation of delay was filed before the competent authority as provided under Section 15 of the Act of 1936. The application for condonation of delay was rejected by the Labour Court vide order dated 28/6/2012. However, the Labour Court has held that the claim for arrears for the year 2011 is within limitation. The claim prior to this period is rejected.

5. The petitioner therefore filed an application under Section 33-C (2) of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the Act of 1947' for short) before the Labour Court, Solapur for their claim in respect of arrears prior to 2011.

6. The said application was opposed by the respondents. Respondent No.1 filed an application below Exhibit-C-13 on which the Labour Court framed the preliminary issue as to whether it has jurisdiction to entertain the Application. The respondent Nos. 2,3,6 and 7 also filed an application below Exhibit-C-15 raising an objection to the maintainability of the application on two counts ; one that petitioner had already approached the authority under the Act of 1936 which claim was rejected and therefore the application under Section 33-C(2) of the Act of 1947 is barred by the principles of *res-judicata* and secondly there is dispute existing as regards employer-employee relationship which cannot be adjudicated in an application filed under Section 33-C(2) of the Act of 1947.

7. The Labour Court upheld this preliminary objection and held that the application is not maintainable on the grounds raised.

8. Learned Counsel Shri Kulkarni appearing on behalf of the petitioner submitted that the question of resjudicata will not arise in the present case. The remedy to the workmen provided under the Act of 1936 is a separate and independent remedy. The application of the petitioner for payment of wages is not rejected on merits by the authority under the Payment of Wages Act. It is only rejected on the ground of delay which was not condoned by the Labour Court. The petitioner therefore approached the Industrial Court under Section 33-C (2) of the Act of 1947. No limitation is prescribed for making an application under Section 33-C (2) of the Act of 1947. He relied upon the decision of the Division Bench of this Court in the case of **Union of India representing the Central Railway Administration vs. Samuel Peters and another** reported in **1975 II L.L.J. 185**, in support of his contention that the

rejection by the authority under the Act of 1936 on the ground of limitation is not a bar for initiating the proceedings under Section 33-C (2) of the Act of 1947. Learned Counsel would further submit that the Reference whether the members of the petitioner – Union are workmen of respondent No.1 and whether the contract is sham and bogus is already pending adjudication before the Industrial Court in a separate proceedings and now the matter is kept for argument on 30th April, 2019. He would submit that as the Reference was pending, the Labour Court in the interest of justice could have decided the application after the decision on the Reference. According to him, this course would have subserved the interest of justice in as much as in respect of a claim already belated, the petitioner would face hurdles of further delay if an application under Section 33-C (2) of the Act of 1947 were to be made after the decision on the Reference.

9. Learned Counsel Shri Bapat appearing on behalf of respondent No.1 would submit that the petitioner availed the

remedy under the Act of 1936. They also filed an application for condonation of delay which came to be rejected by a reasoned order. Having approached the authority under the Act of 1936, the petitioner could have filed an Appeal under Section 17 of the Act of 1936. They however filed an application under Section 33-C (2) of the Act of 1947. This according to Shri Bapat is impermissible as having adopted to recourse of a remedy under the Act of 1936, it is only that remedy which the petitioner should have taken to the logical end. It is next contended by Shri Bapat that there is a serious dispute about existence of relationship of employer-employee. As per the own showing of petitioner, dispute as to whether the members of petitioner – Union are direct employees of respondents has been referred for adjudication before the Industrial Court, which Reference is pending. In this view of the matter, according to him, it cannot be said that the order passed by the Labour Court that the application is not maintainable is unsustainable. Shri Bapat would rely upon the decisions of this Court in the cases **(i) Central Group and others v/s. Motiram S. Thakare [2006**

(1) Mh.L.J. 422 Bom. H.C. ; (ii) Getwell Board and Paper Pvt. Ltd vs. Fakruddin S. Lokhandwala and another [2007 (1) Mh.L.J. 246 Bom. H.C.] and (iii) Pascoal D'Souza vs. Bombay Municipal Corporation and another [1980 Mh.L.J. 416 Bom. H.C.] in support of his submission that the Labour Court would not be entitled to adjudicate on disputed questions of employer-employee relationship.

10. I have heard learned Counsel for the parties.

11. There is no dispute that petitioner had approached the Labour Court under the Act of 1936 in respect of the same claim the petitioner has made under Section 33-C (2) of the Act of 1947. The Labour Court rejected the application for condonation of delay made under the Act of 1936. It is thereafter that an application is filed by petitioner for recovery of the difference before the Labour Court under Section 33-C (2) of the Act of 1947. The issue is no more *res integra* in view of the decision of this Court in the case of **Union of India** (*supra*). The controversy in so far as this aspect is concerned stands

concluded and hence, the question of an application under Section 33-C (2) of the Act of 1947 barred by *res-judicata* does not arise. The finding of the Labour Court on this aspect is erroneous.

12. However, in so far as finding of the Labour Court that the Court has no jurisdiction to entertain the application as there is dispute about employer-employee relationship, I do find substance in the contention of Shri Bapat. The Reference (IT) No. 1/2013 for deciding the question whether the members of petitioner – Union are direct employees is pending.

13. Undisputedly the Reference (IT) No.1 of 2013 is heard and now it is placed for arguments on 29th/30th April, 2019. In ordinary course, upon sustaining the finding of the Labour Court on the issue of there being disputed relationship of employer-employee, it would have been appropriate to grant liberty to petitioner to file an application under Section 33-C (2) of the Act of 1947 after decision of the Reference as the Labour Court has done. However, in the peculiar facts of the present

case, having regard to the delay already occasioned in filing the application under Section 33-C(2) of the Act of 1947, instead of prejudicing the rights of the workmen further, as a fresh claim would then have to be considered also having regard to the further delay, in the interest of justice, the Labour Court could have awaited the decision on the Reference pending for adjudication on the issue of employer-employee relationship. The dispute which has been referred to the Industrial Court to adjudicate upon the existence of the employer-employee relationship between petitioner and respondent No.1 is now at the final stage of adjudication. This to my mind would cause no prejudice to the respondent No.1. If the Labour Court decides the Reference in favour of respondent No.1, then obviously the Application under Section 33-C (2) of the Act of 1947 would not be maintainable. But if the Labour Court decides the Reference in favour of the workmen then in that case for the workmen to again file a fresh application under Section 33-C(2) of the Act of 1947 would lead to complications which may not be in best interest of the workers. If the Labour Court decides the

Reference in favour of the workmen, then much prejudice and inconvenience would be caused to the workmen prejudicing their already belated claim on account of further delay. The Labour Court could have awaited the decision on the Reference and then proceeded to decide the application under Section 33-C (2) of the Act of 1947 in the peculiar facts of the case and in the interest of justice. I am therefore inclined to set aside the impugned order.

14. Shri Bapat has also raised an objection that the contractors who are party respondents have not appeared and in respect of some of the respondent – contractors, the present Petition is dismissed on account of failure on the part of the petitioner to serve notice. In my opinion, respondent No.1 also made an application below Exhibit-C-13 raising an objection for maintainability of the complaint. Therefore, the order in respect of the present Petition would obviously be restricted as regards respondent No.1 on account of failure on the part of petitioner to take steps against other respondents.

15. Hence the following order.

(i) The impugned order is quashed and set aside.

(ii) The application is remanded back to the Labour Court for considering the same afresh on merits and in accordance with law.

(iii) All contentions of the parties on merits are kept open including the objection of the respondents that petitioner's claim is belated.

(iv) The Labour Court to decide the application in accordance with law after the decision of Reference (IT) No. 1 of 2013.

16. Writ Petition is partly allowed.

17. Rule is partly made absolute with no order as to costs.

(M.S.KARNIK, J.)