

Urmila Ingale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8384 OF 2018

WITH

WRIT PETITION NO. 8385 OF 2018

WITH

WRIT PETITION NO. 8386 OF 2018

The BEST Worker's Union

.. Petitioner

Vs.

The Municipal Corporation of
Greater Mumbai and ors.

.. Respondents

ALONG WITH

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO. 2229 OF 2018

ALONG WITH

NOTICE OF MOTION NO. 95 OF 2019

ALONG WITH

WRIT PETITION (L) NO. 2287 OF 2018

WITH

NOTICE OF MOTION NO. 94 OF 2019

ALONG WITH

WRIT PETITION (L) NO. 2288 OF 2018

WITH

NOTICE OF MOTION NO. 92 OF 2019

ALONG WITH

WRIT PETITION (L) NO. 2289 OF 2018

WITH

NOTICE OF MOTION NO. 93 OF 2019

Brihan Mumbai Electric Supply
and Transport Undertaking (BEST)

.. Petitioner

Vs.

The BEST Workers Union and ors.

.. Respondents

Senior Counsel Mr. Darius Khambata a/w. Mr.S. D. Shetty, Mr.Vishal Talsania & Mr.Arsh Misra i/b. M. V. Kini & Co **for Petitioners** in Writ Petition No. 2229 of 2018, Writ Petition lodging No. 2287 of 2018, Writ Petition lodging No. 2288 of 2018 & Writ Petition lodging No. 2289 of 2018 and **for Applicants** in Notice of Motion No. 95 of 2019, Notice of Motion No. 94 of 2019, Notice of Motion No. 92 of 2019, Notice of Motion No. 93 of 2019 and **for Respondent** No. 2, 4 & 5 in Writ Petition No. 8384 of 2018 , Writ Petition No. 8385 of 2018, Writ Petition No. 8386 of 2018.

Ms.Neeta Karnik **for Petitioners** in Writ Petition No. 8384 of 2018 , Writ Petition No. 8385 of 2018 & Writ Petition No. 8386 of 2018, **for Respondent No. 1** in Writ Petition lodging No. 2229 of 2018, Writ Petition lodging No. 2287 of 2018 Writ Petition lodging No. 2288 of 2018 & Writ Petition lodging No. 2289 of 2018 and **for Applicants** in Notice of Motion No. 95 of 2019, Notice of Motion No. 94 of 2019, Notice of Motion No. 92 of 2019, Notice of Motion No. 93 of 2019.

Ms.Pooja Yadav for **Respondent No. 2 to 5** in Writ Petition lodging No. 2229 of 2018, Writ Petition lodging No. 2287 of 2018 Writ Petition lodging No. 2288 of 2018 & Writ Petition lodging No. 2289 of 2018 and **for Applicants** in Notice of Motion No. 95 of 2019, Notice of Motion No. 94 of 2019, Notice

of Motion No. 92 of 2019 & Notice of Motion No. 93 of 2019.

Mr.Vinod Mahadik for **Respondents 1 & 3** in Writ Petition No. 8384 of 2018 , Writ Petition No. 8385 of 2018 & Writ Petition No. 8386 of 2018.

CORAM : M.S.KARNIK, J.
DATE : 15th MARCH, 2019

P.C. :

. The present Notice of Motion is taken out by the Brihan Mumbai Electric Supply and Transport Undertaking (hereinafter referred to as 'BEST' for short) who are original petitioners in Writ Petition No. 2229 of 2018. The said Notice of Motion is for vacating the stay granted by this Court on an earlier occasion. Respondent No.1 is BEST Workers Union (hereinafter referred to as 'Union' for short). The dispute is between the petitioners i.e. 'BEST' and respondent No.1 –'Union'. For the sake of convenience, I would refer the parties as BEST and Union. During the course of the hearing of this Notice of Motion, the main Petitions were taken up for hearing by consent of parties. Hence, Rule in all Writ Petitions except Writ

Petition(L) No. 2289 of 2018. The respondents waive service. By consent, Rule made returnable forthwith and heard finally. The order in these Petitions would cover Writ Petition (L) No. 2289 of 2018. Hence, the same is disposed of on the same terms.

2. The BEST filed Writ Petition (L) No. 2229 of 2018 being aggrieved by the common order dated 05/05/2018 passed by the Member, Industrial Court, Mumbai below Exhibit U-2 in Complaint ULP No. 26 of 2018, Complaint (ULP) No. 58 of 2018, Complaint (ULP) No. 80 of 2018 and Complaint (ULP) No. 158 of 2018 which Complainant ULPs were filed by the Union. The operative part of the order passed by the Member, Industrial Court below Exhibit No. U-2 against which the BEST is aggrieved reads thus :

1) All the Applications below Exhibit U-2 in the Complaint (ULP) Nos. 26/2018, 58/2018, 80/2018 and 158/2018 are partly allowed.

2) Prima facie it is held and declared that the Respondent No.2 BEST Undertaking indulged into unfair labour practices under Item 5 of Schedule II and Items 9 and 10 of Schedule IV of the MRTU &

PULP Act, 1971.

3) The Respondent No.2 BEST Undertaking is hereby directed, pending all the Complaints, shall hire non-electrical buses from Contractors M/s.Antony Garages Pvt.Ltd. and Kripa Services Pvt. Ltd. without drivers and maintenance staff and shall maintain ratio @ 2.5 per bus including the hired buses from contractors.

4) Further the Respondent No.2 BEST Undertaking is hereby directed pending all the Complaints shall hire electrical buses from Gold Stone Infra-tech Ltd and M.P. Enterprises and Associates Ltd., alongwith 1.5 manpower for each bus including the driver and maintenance staff.

5) So far as freezing of dearness allowance, leave travel allowance and encashment of leave is concerned, these items already are subjudice, therefore, no any Order passed in respect of these items by way of interim relief application.

6) So far as other allowances and benefits or subsidies as the case may be as per Resolution No. 225 passed by BEST Committee are concerned, the Respondents shall kept in under suspension till the disposal of present Complaints.

7) Ad-interim Order below Exh.C-2 passed in Complaint (ULP) No. 62/2018 on 14/02/2018 that “the Complainant Undertaking also is directed not to execute proposed change dated 19/12/2017 and/or approved change in the meeting dated 12/02/2018” is hereby vacated giving permission to execute by following above directions.

8) Further the Respondent BEST Undertaking during the pendency of present Complaints, shall maintain ratio of 2.5 man power in respect of non-electrical buses and 1 man power ratio in respect of electric buses.

9) Above directions and interim orders shall be applicable till the disposal of Main Complaints.”

3. In the Notice of Motion, BEST is seeking the following reliefs.

“(a) that the Hon'ble Court be pleased to vacate the interim order dated 25/09/2018 passed by the Hon'ble Court in Writ Petition (St.) 2229 of 2018 and connected Writ Petitions.

(b) in the alternative to prayer (a) the Hon'ble Court be pleased to modify the order dated 25/09/2018 to enable the Petitioner to avail of the subsidy/incentive granted in the development of Heavy Industries in the sum of Rs.54,87,31,000/- (which lapses on 31.03.2019) with respect to hiring of 80 electric buses.

(c) that this Hon'ble court be pleased to modify the interim order dated 25/09/2018 passed by this Honorable court to the extent of allowing the Petitioner to avail wet lease of 450 Non-Electric buses alongwith Driver and Maintenance Staff @ 2.5 manpower ratio.”

4. Since the BEST is seeking modification of the interim order dated 25/09/2018 passed by this Court, it would be material to quote the order which reads thus :

“The order dated 5th May 2018 as far as the directions for hiring buses is given to the Corporation is stayed. The Corporation shall not issue fresh Work Orders to the contractors. In the eventuality that the Work Orders are already issued in view of the directions of the Industrial Court, the same shall not be acted upon only until further orders.

2. Stand over to 16th October 2018 at 3.00 pm.”

5. Even the Union being aggrieved by order passed by the Industrial Court filed WP/8384/2018, WP/8385/2018, WP/8386/2018. Apart from WPL/2229/2018, even BEST filed WPL/2287/2018, WPL/2288/2018, WPL/2289/2018, as well, challenging the common order. Briefly stated the facts arising in this case are thus :

6. The Union is functioning under the Maharashtra Industrial Relations Act, 1946 (hereinafter referred to as 'Act' for short) and functioning in the Transport Industry and Common

Administrative Department of the BEST undertaking. The Municipal Corporation of Greater Mumbai provides public transport and supply electricity to the citizens of Greater Mumbai. The BEST is a part and parcel of the Corporation. The dispute essentially arose when BEST took a decision to hire 530 buses (450 non electric & 80 electric buses) from certain contractors along with drivers and maintenance staff. According to the Union, this decision of the BEST to hire buses with drivers and maintenance staff is illegal as the said decision is taken without giving a notice of change as required under section 42 of the said 'Act'. According to the BEST, the Central Government has granted financial assistance in the form of incentives/subsidy to the extent of 60% of the price of buses to be purchased on wet lease basis to the tune of approximately Rs. 54,87,31,000/- (Rupees Fifty Four Crores Eighty Seven Lakhs Thirty One Thousand only) for procurement of 80 electric buses under Faster Adoption & Manufacturing of Electric Vehicles Scheme ('FAME' for short) of the Government of India. Learned Senior Counsel Shri Khambata appearing on behalf of the BEST

pointed out that if the procurement of the electric buses is not done by 31/03/2019, then, BEST is likely to be deprived of utilizing the benefits under the scheme and the BEST will be unable to draw these amounts. He submits that BEST would be deprived of the opportunity to procure 80 electric buses which would be against public interest. Smt. Karnik learned Counsel appearing on behalf of the Union has strong objection to this stand of the BEST.

7. Learned Senior Counsel Shri Khambata stated that he would presently restrict himself only for vacating the stay granted by this Court for wet leasing 80 electric buses. He makes a request for modification / vacation of the stay granted by this Court in public interest and also considering the precarious financial condition of BEST. According to him it would be in the interest of all concerned if they are permitted to wet lease 80 electric buses. He submits that this Court by the interim order has restrained hiring of buses both electric as well as non electric. His insistence is therefore only for vacating the

stay so far as hiring/ wet lease of electric buses for the present.

8. Learned Senior Counsel Shri Khambata submitted that in the meeting convened by Government of India on 05/12/2018, the BEST was informed that the drawing of funds under the said scheme would have to be completed by 31/03/2019 after which the said scheme would be terminated. He submits that if the interim order granted by this Court is not vacated, the BEST will suffer financially. According to him, the BEST is already suffering heavy financial losses and therefore it is very necessary in the public interest that BEST avails benefits under the scheme. Learned Senior Counsel Shri Khambata submitted that in the process, BEST would ensure that no prejudice whatsoever will be caused to the existing members of the Union and the employees in as much as the BEST is prepared to furnish an undertaking that till the time the Complaints of unfair labour practices are finally decided by the Industrial Court, the existing workers will not be retrenched nor their service conditions will be changed. In his submission, in

view of this undertaking, as no prejudice would be caused to the members of the Union, then, there is no reason why the stay granted by this Court should continue to operate or at least modified to a limited extent as prayed.

9. Learned Senior Counsel Shri Khambata also invited my attention to section 42, Schedule II and definition of 'Industrial Matter' as contained in section 3(18) of the said Act. He would contend that when the existing service conditions of the workmen are not affected at all, then, the question of issuing a notice of change does not arise. He would submit that existing workers are well protected and therefore, when these workers are not being affected in any manner, insistence on the part of the Union to give a notice of change is unjustified.

10. Shri Khambata relied upon the decision of this Court in the case of **Co-operative Bank Employees' Union Vs. Yashwant Sahakari Bank Ltd. 1992 Mh.L.J 1696**. By referring to paragraphs 15 & 16, he would contend that in the present

facts, there was no need to give notice of change under section 42 of the Act by BEST. For, according to him, such a notice would be necessary only when such change is intended in any industrial matter enumerated in Schedule II of the said Act and unless such intended change is likely to adversely and prejudicially affect the employees. Shri Khambata would therefore urge that in view of undertaking which he has submitted, it cannot be said that the members of the Union are adversely or prejudicially affected by the intended change.

11. On the other hand, Smt. Karnik learned Counsel appearing on behalf of the Union submitted that there is no need to increase the already existing fleet by procuring electric buses on wet lease basis. According to her, even if it is really necessary, then the present staff could be utilised as it is competent and can easily be trained to drive electric buses as well as maintain it upon its procurement. She submits that for this reason there is no need to enter into such an agreement procuring buses from contractors along with drivers and

maintenance staff. She invited my attention to the affidavit to the Notice of Motion where BEST has set out the details of buses that are to be phased out in the next 4 years. According to her, the attempt on the part of the BEST is to systematically phase out the buses which will eventually lead to retrenchment of the existing workers. She apprehends that by doing so, the BEST will further enter contracts on wet lease basis in future. Learned Counsel invited my attention to the provisions of section 42 of the said Act, which provides for the procedure in case any employer intends to effect any change in respect of an industrial matter specified in Schedule II of the said Act. According to her, action on the part of the BEST in procuring electric buses on wet lease basis clearly falls under Item 4 of Schedule II. The relevant clauses of Schedule II reads thus :

“1. Reduction intended to be of permanent or semi-permanent character in the number post or of persons employed or to be employed in any occupation or process or department or departments or in a shift not due to force majeure.

2. Permanent or semi-permanent increase in the number of persons employed or to be employed in any occupation or process or department or departments.

3. Dismissal of any employee except as provided for in the standing orders applicable under this Act.
4. Rationalisation or other efficiency system of work, [whether by way of experiment or otherwise]”

She would further submit even Item 1 of Schedule II clearly provides for issuing notice of change whenever there is reduction intended to be of permanent or semi-permanent character in the number of posts or of persons employed or to be employed in any occupation or process or department or departments or in a shift not due to force majeure. She would thus submit that hiring of buses on contract basis along with drivers & maintenance staff, in effect, are matters which clearly fall within the sweep of industrial matters as defined under section 3(18) of the said Act as also Item 4 of Schedule II. For all these reasons, she would submit that the mandatory provisions of section 42 of the said Act are to be complied with by giving notice of change before the Corporation can proceed with hiring buses on contract basis.

12. Smt.Karnik further submits that even on the previous occasion when the question of hiring of buses came, the BEST had issued a notice of change. She would invite my attention to page 364 and page 367 of the paper-book. In these circumstances, according to her, the present matter is no different and therefore the action on the part of the BEST in not giving notice of change is unjustified. She would therefore submit that the Industrial Court was not justified in granting interim relief in terms of operative portion of clauses (2), (3) and (4). She would submit that on the face of it, in the facts of the present case, this is a fit case where it is apparent that unfair labour practice is committed by the BEST by not giving notice of change.

13. I have heard learned Counsel for the parties at length. Today, what is under challenge before me is an interim order passed by the Industrial Court during the pendency of the main Complaints. In view of the stand taken by Shri Khambata that he would be restricting himself for the present to vacate the

interim relief granted by this Court only as regards hiring of electric buses, in the light of the order I ultimately propose to pass, I need not address on the other clauses of the operative portion of the order passed by the industrial Court which are in any case not stayed by this Court.

14. The undertaking which is furnished by BEST is to the effect that during the pendency of the Complaints before the Industrial Court, the services of the existing employees will not be retrenched nor will there be any change in the service conditions of the employees. The main concern addressed by Shri Khambata is as regards funds which are to be made available by the Central Government to the tune of Rs. 54,87,31,000/- under the FAME scheme of the Government of India. From the document Exhibit 'C' which is annexed to the Notice of Motion which is in the nature of Minutes of Meeting dated 05/12/2018, it appears that the BEST was informed that drawing of the funds would have to be completed by 31/03/2019, after which the said scheme would be terminated.

According to learned Senior Counsel Shri Khambata, BEST is in financial crisis and is running losses. I find some substance in this contention of Shri Khambata. In any case, the services of the existing employees would be protected in view of the undertaking that is furnished by the BEST. In addition, imposing certain more conditions on BEST protecting the interest of employees before allowing BEST to proceed with the hiring of electric buses, in my opinion, would subserve the ends of justice.

15. It is not as if, the submission of Mrs. Karnik is lacking merit. Reading of section 42 of the Act along with Item Nos.1, 2 and 4 of Schedule-II and also considering the definition of “Industrial Matter” contained in section 3 (18) of the said Act reveals that there is much force in her submission. However, these are the matters on which the Industrial Court can always arrive at a decision on the basis of materials on record when the Complaints are decided finally. For all these reasons, I am inclined to modify the stay granted by this Court taking into

consideration the larger public interest inasmuch as there is every possibility of the BEST losing out on the substantial monetary benefits under the scheme. BEST is already facing heavy financial losses. Moreover, as the hiring of electric buses with drivers and the maintenance staff is on a contract basis, the duration of which is fixed, undoubtedly the feasibility of the wet lease and its viability will be tested in due course, after which the BEST would obviously take appropriate decision for its continuation or otherwise. The BEST is expected to maintain accounts in respect of the wet leasing of the electric buses as that would enable the BEST to consider the viability the project. The BEST can also consider engaging the existing staff to operate and maintain electric buses at an appropriate stage.

16. Till such time, it may not be in the interest of BEST as well as in public interest to restrain it from procuring electric buses on wet lease basis during the pendency of the Complaints. Having regard to Item 1 of Schedule II, a notice of change is required even when posts are to be reduced. During

the pendency of the Complaints, therefore, it is expected that the BEST should not reduce the number of sanctioned posts as I am inclined to direct the Industrial Court to decide the main Complaint (ULPs) itself as expeditiously as possible and in any case, within a period of 9 months from today. It would also be in the interest of justice and the workmen if the existing fleet of buses is not phased out unless required by law. I may hasten to add that stay granted by this Court as regards procurement of non electric buses will continue to operate during the pendency of the Complaints.

17. I make it clear that all these observations are towards making of this interim order during pendency of the Complaints. The Industrial Court will not be influenced by any of the observations made by me while deciding the Complaints, which it shall decide on its own merits and in accordance with law.

18. In this view of the matter and in view of the stand taken by the learned Senior Counsel Shri Khambata, in my

opinion, the following order would meet the ends of justice.

ORDER

(i) The BEST is permitted to procure on wet lease basis 80 electric buses in terms of prayer clause (b) of the Notice of Motion which reads thus :

“(b) in the alternative to prayer (a) the Hon'ble Court be pleased to modify the order dated 25/09/2018 to enable the Petitioner to avail of the subsidy/incentive granted in the development of Heavy Industries in the sum of Rs.54,87,31,000/- (which lapses on 31.03.2019) with respect to hiring of 80 electric buses.”

(ii) The undertaking of BEST to this Court at Exhibit X-1 collectively that they will not retrench the existing employees and/or effect any change in the service conditions of existing employees is accepted.

(iii) The stay granted by this Court to clause (3) of the operative order of the Industrial Court to continue till disposal of the Complaints.

(iv) During the pendency of the Complaint (ULPs) before the Industrial Court, the BEST will not reduce the sanctioned posts and that it shall not phase out the existing buses unless required by law.

(v) The Industrial Court to decide the Complaint (ULP) No. 26 of 2018, Complaint (ULP) No. 58 of 2018, Complaint (ULP) No. 80 of 2018 and Complaint (ULP) No. 158 of 2018 as expeditiously as possible and in any case, within a period of 9 months from today.

(vi) It is clarified that this order is passed as an interim measure till the decision of the Complaints which is obviously subject to the final order as may be passed by the Industrial Court.

(vii) The Industrial Court to decide the Complaint on its own merits without being influenced by any of the observations made by me in this order.

(viii) All the rights and contentions of the respective parties are kept open.

(ix) The parties have assured to co-operate with the Industrial Court for expeditious disposal of the Complaint (ULPs).

19. Subject to what is stated hereinbefore, rest of the directions of the Industrial Court to operate during the pendency of the Complaints.

20. All the Notice of Motions are disposed of as nothing survives for consideration.

21. Rule is partly made absolute in the Petitions in the above terms.

(M.S.KARNIK, J.)