

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 1018 OF 2019

United Mine Workers Union

Through

Shri Puti Gaonkar (General Secretary)

Registered Address :

G5, Macedo Appts. Tisk,

Ponda Goa.

... Petitioner

Versus

1. Union of India,

Through Secretary,

(Ministry of Labour and Employment)

Shram Shakti Bhavan, Rafi Marg

New Delhi 110001

2. Rajaram Bandekar (Sirigao) Mines Pvt.Ltd.,

Through

Managing Director

601, Dr. Ozler Forum,

Near St. Andrew's Church, PO 31,

Vasco-da-Gama, Goa 403 802.

... Respondents

Mr. Shivraj Gaonkar, Advocate for the Petitioner.

Mr. G. K. Sardesai and Ms. M. Rao, Advocates for Respondent No.2.

None for Respondent No.1 though served.

Coram:- M. S. SONAK &

SMT. M. S. JAWALKAR, JJ.

Date:- 27th January, 2020

Oral Judgment (*Per M. S. Sonak, J*)

Heard Mr. Gaonkar, learned counsel for the Petitioner and Mr. G. Sardesai, learned counsel for Respondent No.2. Respondent No.1, though served neither present through any representative nor through their counsel.

2. On 9th December, 2019 itself, it was made clear that subject to constraints of time, this petition will be disposed of finally at the stage of admission.

3. Rule. Rule is made returnable forthwith at the request and with the consent of the learned counsel for the parties.

4. The challenge in this petition is to the communication dated 3rd September, 2019, by which the Respondent No.1, which is the appropriate Government, has declined to make a reference under Section 10 of the Industrial Disputes Act, 1947 (the said Act).

5. Mr. Gaonkar, learned counsel for the Petitioner submits that the appropriate Government has misconstrued the scope and import of its powers and has delved into the merits of the dispute in order to decline the reference. He submits that the appropriate

Government failed to appreciate the provisions in Chapter V-B of the said Act, have been conceived as a matter of public policy and therefore, concepts like estoppel by acquiescence will hardly apply. He points out that the circumstance that 28 out of 56 workmen may have accepted the retrenchment compensation is hardly a ground to deny an opportunity of adjudication before the Tribunal both to such workers as well as the remaining workers who have admittedly not accepted the retrenchment compensation or chosen to settle the dispute in the manner known to the Industrial Law. He submits that appropriate Government has taken into account irrelevant considerations and this is yet another ground for interference with the impugned communication. He relies on the decisions of the Hon'ble Apex Court in the case of ***Oswal Agro Furane Ltd. and another Vs Oswal Agro Furane Workers Union and others***¹ and ***Sarva Shramik Sangh Vs Indian Oil Corporation Limited and others***² in support of his contentions.

6. Mr. G. Sardesai, learned counsel for Respondent No.2 - Employer submits that this is a case where the appropriate Government has only considered the merits of the dispute on *prima facie* basis. He submits that this is very much permissible in terms of law laid down by the Hon'ble Apex Court in the case of ***Bombay Union of Journalists***

1(2005) 3 SCC 224

2(2009) 11 SCC 609

and others Vs State of Bombay and another³. He submits that in the present case though opportunity was afforded to the workmen/Union to produce a list of workmen, they failed to do so. Instead, the Management produced a list indicating that during 12 months preceding the date of retrenchment there were less than 100 workmen employed in the Mine. On the basis of the *prima facie* appreciation of such material, the appropriate Government was quite justified in concluding that the provisions in Chapter V-B of the said Act were not at all applicable to this matter. He submits that the circumstance that 28 workmen had accepted the retrenchment compensation without any demur is also a relevant circumstance which was quite rightly taken into consideration by the appropriate Government. He relies on the decisions of the Hon'ble Apex Court in the case of ***Secretary, Indian Tea Association Vs Ajit Kumar Barat and others***⁴ and ***Rahman Industries Private Limited Vs State of Uttar Pradesh and others***⁵ in support of his contentions.

7. The rival contentions now fall for our determination.

8. In this case, the impugned communication dated 3rd September, 2019 by which the appropriate Government has declined to

3(AIR 1964 SC 1617)

4(2000) 3 SCC 93

5(2016) 12 SCC 420

make a reference reads as follows :-

“Subject:- Industrial dispute between Goa Mine Workers' Union and the management of M/S Rajaram Bandekar (Sirigao) Mines Pvt. Ltd., over alleged illegal retrenchment of 55 workmen of Sirigao Mine-Report on failure of conciliation- regarding.

Sir,

I am directed to refer to the Failure of Conciliation Report No. RV-5(41)2018 dated 08.07.2019 from the RLC(C), Vasco-da-Gama received in this Ministry on 30.07.2019 on the above mentioned subject and to say that, prima facie, this Ministry does not consider this dispute fit for adjudication for the following reasons :

“The Union did not submit list of workmen and material evidence/documents in support of their claim. Further, the documents/records submitted by the management do indicate that less than 100 workmen are working in the establishment and therefore the Chapter V-B of ID Act, 1947 will not be applicable to above establishment. Moreover, 28 workmen have accepted the retrenchment and given declaration of no dispute regarding their retrenchment settlement. Hence, this case is not fit for adjudication.”

Yours faithfully,

Sd/-

(D. K. Himanshu)

Under Secretary to the GOI”

9. The Respondent No.1, who issued the impugned communication has not even bothered to file any affidavit in reply in response to this petition. In any case, even if any affidavit in reply were

to be filed, the Respondent No.1 would have to defend the impugned communication only on the basis of reasons reflected in the impugned communication dated 3rd September, 2019. Therefore, we agree that non filing of any affidavit on the part of the Respondent No.1 does not make any much deference to the adjudication of the issue raised in the present petition.

10. In *Sarva Shramik Sangh* (supra) the Hon'ble Apex Court after referring to and analysing several decisions of this very issue, including the decision in the case of *Bombay Union of Journalists* (supra) has concluded that the writ of mandamus would be issued to the appropriate Government to reconsider the refusal to make a reference, where (i) the refusal is on irrelevant, irrational or extraneous grounds; (ii) the refusal is a result of the appropriate Government examining the merits of the dispute and prejudging/adjudicating/determining the dispute; (iii) the refusal is mala fide or dishonest or actuated by malice; (iv) the refusal ignores the material available in the failure report of the Conciliation Officer or is not supported by any reason.

11. Accordingly, this petition will have to be decided on the touchstone of the principles laid down by the Hon'ble Supreme Court in *Sarva Shramik Sangh* (supra) particularly, since this decision, considers and explains the scope of the observations in *Bombay Union*

of Journalists (supra) upon which the reliance has been placed by Mr. Sardesai for Respondent No.2.

12. In any case, in *Bombay Union of Journalists* (supra), the Hon'ble Apex Court has held that whilst the appropriate Government is precluded from adjudicating on merits of the dispute which may have arisen between the parties, the appropriate Government may consider *prima facie* the merits of the dispute and take into account the other relevant considerations which would help it to decide whether making a reference would be expedient or not. The decision further proceeds to state in categorical terms that it is true that if the dispute in question raises questions of law, then, the appropriate Government should not purport to reach a final decision on the said questions of law because that would normally lie within the jurisdiction of the Industrial Tribunal. Similarly, on disputed questions of fact, the appropriate Government cannot purport to reach final conclusions, for that again would be the province of the Industrial Tribunal. The Hon'ble Apex Court proceeds to explain that if the claim made is patently frivolous or is clearly belated, the appropriate Government may refuse to make a reference. Likewise, if the impact of the claim on the general relations between the employer and the employees in the region is likely to be adverse, the appropriate Government may take that into account in deciding whether a reference should be made or not.

13. In the present case, the first reason which prompted the appropriate Government to decline a reference is that the Union/Workmen did not submit list of workmen and material evidence and documents in support of their claim. There is absolutely nothing on record to indicate that the appropriate Government had required the Petitioner to submit any material evidence or documents in support of their claim. The Petitioner, in their communications raising dispute had very clearly alleged that the Mines in which they were employed had almost 200 workmen on its rolls during the period of 12 months preceding the date of their retrenchment. In fact, it was their case that running of the Mines of the nature in which they were employed, requires a workforce of 200 employees. At the highest, therefore, this was a disputed question of fact, which, even going by the law laid down by the Hon'ble Apex Court in *Bombay Union of Journalists* (supra) upon which reliance was placed by Mr. Sardesai, could not have been adjudicated upon by the appropriate Government.

14. The disputes between the parties on facts, are normally required to be adjudicated by the adjudicating forums like Tribunal and Labour Courts constituted under the provisions of the said Act. The proper forum to produce the material evidence, which could then be tested by cross examination and evaluated would normally be the Tribunal and not the appropriate Government itself at the stage of

deciding whether it is expedient to make a reference or not.

15. The appropriate Government, in the present case, has proceeded on the basis as if, the position reflected in the documents produced by Respondent No.2 was undisputed. In doing so, the appropriate Government has virtually delved into the merits of the dispute and purported to adjudicate upon the disputed questions of fact, which function ordinarily lies within the province of Tribunal. Such approach on the part of the appropriate Government was not at all consistent with law laid down by the Hon'ble Apex Court in the case of *Bombay Union of Journalists* (supra) and *Sarva Shramik Sangh* (supra).

16. This is admittedly, not the case where the appropriate Government was of the opinion that the claim made by the workmen was patently frivolous or belated. This is also not a case where the appropriate Government was of the bonafide opinion that making of reference might adversely impact the general relations between the employer and the employees in the region. Rather, this is a case where the appropriate Government has delved into the merits of the matter and even purported to record final conclusion in relation to the disputed question of fact which arose in the context of strength of workforce at the Mines during the period of 12 months preceding the date of retrenchment of the workmen. The impugned communication,

according to us, is unsustainable on the basis of the law laid down by the Hon'ble Apex Court in the case of *Bombay Union of Journalists* (supra) and *Sarva Shramik Sangh* (supra).

17. The second reason cited by the appropriate Government is the alleged circumstance that 28 workmen had accepted the retrenchment compensation without any protest and even signed a declaration that they have no dispute regards their retrenchment. Now admittedly, the dispute has been raised on behalf of 56 workmen. Therefore, even assuming that 28 out of 56 workmen, really had no dispute regards their termination, that by itself, is no reason to deny adjudication to the balance 28 workmen who claim to be seriously aggrieved by what they choose to call, as their illegal retrenchment. Clearly, therefore, the appropriate Government has taken into account an irrelevant consideration to deny reference in the present case.

18. Besides, as is pointed out by the Hon'ble Apex Court in the case of *Oswal Agro Furane Ltd.* (supra), the provisions in Sections 25-N and 25-O of Chapter V-B of the said Act are imperative and have been conceived as a matter of public policy. Therefore, even a settlement between the employer and the employees, which runs contrary to the legislative scheme of these provisions is not acceptable. To such a situation, the principles of estoppel or acquiescence will really not apply.

The appropriate Government in the present case at the stage of considering whether it is expedient to make a reference or not has virtually purported to reach a final decision upon a question of law, even though, *Bombay Union of Journalists* (supra) clearly says that this is impermissible because such jurisdiction would normally vest with the Industrial Tribunal. Clearly therefore, this is a case where the impugned communication is in excess of jurisdiction vested in the Respondent No.1, in such matters.

19. On the imperative nature of the provisions of Chapter V-B of the said Act and the fact that such provisions have been conceived as a matter of public policy, this is what the Hon'ble Apex Court has observed in paragraphs 14 to 17 of the *Oswal Agro Furane Ltd.* (supra) :-

*“14. A bare perusal of the provisions contained in Sections 25-N and 25-O of the Act leaves no manner of doubt that the employer who intends to close down the undertaking and/or effect retrenchment of workmen working in such industrial establishment, is bound to apply for prior permission at least ninety days before the date on which the intended closure is to take place. They constitute conditions precedent for effecting a valid closure, whereas the provisions of Section 25-N of the Act provides for conditions precedent to retrenchment; Section 25-O speaks of procedure for closing down an undertaking. **Obtaining a prior permission from the appropriate Government, thus, must be held to be imperative in character.***

15. A settlement within the meaning of Section 2(p) read with sub-section (3) of Section 18 of the Act undoubtedly binds the workmen but the question which would arise is, would it mean that thereby the provisions contained in Sections 25-N and 25-O are not required to be complied with? The answer to the said question must be rendered in the negative. A settlement can be arrived at between the employer and workmen in case of an industrial dispute. An industrial dispute may arise as regard the validity of a retrenchment or a closure or otherwise. Such a settlement, however, as regards retrenchment or closure can be arrived at provided such retrenchment or closure has been effected in accordance with law. Requirements of issuance of a notice in terms of Sections 25-N and 25-O, as the case may be, and/or a decision thereupon by the appropriate Government are clearly suggestive of the fact that thereby a public policy has been laid down. The State Government before granting or refusing such permission is not only required to comply with the principles of natural justice by giving an opportunity of hearing both to the employer and the workmen but also is required to assign reasons in support thereof and is also required to pass an order having regard to the several factors laid down therein. One of the factors besides others which is required to be taken into consideration by the appropriate Government before grant or refusal of such permission is the interest of the workmen. The aforementioned provisions being imperative in character would prevail over the right of the parties to arrive at a settlement. Such a settlement must conform to the statutory conditions laying down a public policy. A contract which may otherwise be valid, however, must satisfy the tests of public policy

not only in terms of the aforementioned provisions but also in terms of Section 23 of the Indian Contract Act.

16. It is trite that having regard to the maxim "ex turpi causa non oritur actio", an agreement which opposes public policy as laid down in terms of Sections 25-N and 25-O of the Act would be void and of no effect. Parliament has acknowledged the governing factors of such public policy. Furthermore, the imperative character of the statutory requirements would also be borne out from the fact that in terms of sub-section (7) of Section 25- N and sub-section (6) of Section 25-O, a legal fiction has been created. The effect of such a legal fiction is now well-known. [See East End Dwellings Co. Ltd. V. Finsbury Borough Council [(1951) 2 All ER 587, Om Hemrajani vs. State of U.P. and Another (2005) 1 SCC 617 and M/s Maruti Udyog Ltd. vs. Ram Lal & Ors. 2005 (2) SCC 638].

17. The consequences flowing from such mandatory requirements as contained in Sections 25-N and 25-O must, therefore, be given full effect. The decision of this Court in P. Virudhachalam (supra) relied upon by Mr. Puri does not advance the case of the Appellant herein. In that case, this Court was concerned with a settlement arrived at in terms of Section 25-C of the Act. The validity of such a settlement was upheld in view of the first proviso to Section 25-C of the Act. Having regard to the provisions contained in the first proviso appended to Section 25-C of the Act, this Court observed that Section 25-J thereof would not come in the way of giving effect to such settlement. However, the provisions contained in Sections 25- N and 25-O do not contain any such provision in terms whereof the employer and employees can arrive at a

settlement.”

(Emphasis supplied)

20. The appropriate Government in the present case, has totally failed to take into consideration the legal position as explained by the Hon'ble Apex Court in the case of *Oswal Agro Furane Ltd.* (supra). The circumstance that 28 out of 56 workmen allegedly accepted the retrenchment compensation without any protest or issued a declaration that they were satisfied with the retrenchment compensation is really not a ground to decline reference, particularly when the allegations made on behalf of all the workmen is that there has been no compliance whatsoever of imperative provisions in Chapter V-B of the said Act.

21. If, on evidence, it is established that the Chapter V-B of the said Act was indeed applicable to the Mines in which the workmen were employed, then the effect of non compliance with the provisions of Sections 25-N and 25-O of the said Act, will have to be considered by the appropriate adjudicating forum. The opportunity to have such adjudication could therefore not have been denied by the appropriate Government, by taking into consideration such irrelevant circumstances or by ignoring the relevant circumstances. This is yet another reason which calls for interference with the impugned communication.

22. The facts in the case of *Secretary, Indian Tea Association*

(supra) were entirely different and the said decision is therefore distinguishable. In the said case, there were undisputed facts in the context of salary and certain service conditions of the Respondent who claimed to be a workman. In this fact situation, the Hon'ble Apex Court held that there was nothing wrong in the decision of the appropriate Government declining the reference.

23. The decision in *Rahman Industries Private Limited* (supra) speaks about the circumstances in which the Court can issue a peremptory direction to refer the dispute to adjudication. In the present case, the Petitioners have not applied for any peremptory direction for reference of the dispute to the adjudication. The Petitioners have only prayed for a writ of mandamus to direct the Respondent No.1 to reconsider its decision communicated through the impugned communication dated 3rd September, 2019 and to consider making an industrial reference under Section 10 of the said Act. Clearly, therefore, the principles in *Rahman Industries Private Limited* (supra) do not apply since the Petitioners, themselves do not seek a direct reference to the Industrial Tribunal.

24. For all the aforesaid reasons, we quash and set aside the impugned communication dated 3rd September, 2019 and direct the Respondent No.1 to reconsider the issue of making reference under

Section 10 of the said Act to the appropriate forum. We however, clarify that the observations made by us in this judgment are not the observations on merits and demerits of the dispute between the parties. Therefore, if ultimately, the reference is indeed made to the Tribunal, the Tribunal, should not be influenced by such observations in this judgment and order. The reference, if made, will have to be decided on its own merits and in accordance with law on the basis of evidence which the parties will tender before the Tribunal.

25. With the aforesaid clarification, we make the rule absolute in terms of prayer clause (A). We direct the appropriate Government to reconsider the matter in accordance with law and on its own merits as expeditiously as possible and in any case within a period of three months from the date the Petitioner places authenticated copy of this judgment and order before the Respondent No.1.

26. In the facts of the present case, there shall be no order as to costs.

27. All concerned to act on the basis of the authenticated copy of this order.

SMT. M. S. JAWALKAR, J.
at*

M. S. SONAK, J.