

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

WRIT PETITION NO.2886 OF 2022

Digitally
signed by
BALAJI
GOVINDRAO
PANCHAL
Date:
2023.10.20
19:52:31
+0530

Supriya Subhash Ghag

..Petitioner

Versus

Gumpro Drilling Fluids Pvt. Ltd. & Anr.

..Respondents

Ms. Rita Joshi a/w Swapnil Kamble i/by Ashok D. Shetty, for the
Petitioner.

Mr. S. C. Naidu a/w T. R. Yadav & Pradeep Kumar i/by C. R. Naidu
& Co., for the Respondent Nos.1 & 2.

CORAM : NITIN W. SAMBRE, J.

DATE : 25th NOVEMBER, 2022

P C.

1. This petition is by an employee questioning the order dated 19th March, 2020 passed by Industrial Court, Mumbai, whereby the revision of the respondents/employer came to be partly allowed with following order :-

“(i) Revision Application is partly allowed.

(ii) The impugned judgment and order passed by the Learned Judge, First Labour Court, Mumbai in Complaint (ULP) No.145 of 2016 dated 31/12/2019 is hereby quashed and set aside.

(iii) The matter is remanded back to the Learned Labour Court to decide afresh keeping in mind the facts as well as principles laid down by the Hon’ble Apex Court as well as Hon’ble Bombay High Court.”

2. The facts necessary for deciding the present petition are as under :-

The petitioner, original complainant alleged that she was working with the respondents/employer since 1997 on the post of cook on monthly salary of Rs.8500/-. Her services were terminated vide letter dated 3rd September, 2015.

3. Since the termination was simplicitor i.e. in absence of any show-cause notice, inquiry etc., alleging that the termination is in breach of provisions of law Complaint (UL) No.145 of 2016 was preferred before the Labour Court, Thane, alleging violation under Item 1(a), 1(b), 1(d) and 1(f) of Schedule IV of the Maharashtra Recognition of Trade Union & Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred as "MRTU & PULP Act"). According to the complainant, the respondent/employer is a company, who is in the business of petroleum industry and importing and exporting the petroleum products. It is claimed by the petitioner that on 24th March, 2015, while she was discharging her duties, she suddenly fell ill and was under treatment upto 29th July, 2015. According to her, on 16th July, 2015, the employer asked her to tender resignation, as the respondents had every intention to replace her services with a new person. The petitioner accordingly submitted a medical certificate in support of her ailment for remaining absent and in spite of which the respondents told the petitioner not to attend the duties and suggested that she should accept gratuity of

Rs.80,000/-. The petitioner thereafter approached the union, who took her grievance to the respondents/employer through letter dated 23rd July, 2015 with request to reinstate the petitioner in service.

4. As a sequel of aforesaid, since the termination order was issued to the petitioner, she preferred a complaint alleging non-compliance of Section 25(f) of ID Act and also violation of certain items as referred above of MRTU & PULP Act. Based on the aforesaid pleadings, the petitioner has prayed before the Labour Court to reinstate the complainant with continuity of service with full backwages with effect from 30th July, 2015 with declaration that the respondents/employer is engaged in unfair labour practice and conducted itself in contravention to the provisions of MRTU & PULP Act.

5. The respondents/employer through written statement Exh.C-2 strongly resisted the claim and denied employer – employee relationship. According to the respondent No.1, services of the petitioner were never utilized nor she was on the payroll. As such, it is claimed that the complaint is not maintainable. It is also claimed that the complaint suffers from mis-joinder of the necessary parties.

A specific contention is raised by the respondents that the complainant was employee of M/s. Hazrat and Company (Mypro Gums Division), who is not impleaded as party respondent.

According to the respondents, they have employed 45 employees whose records are properly maintained. It is also claimed that the canteen facility was never provided by the respondents to their employees.

6. In addition to above the contentions are, the petitioner used to come late on duty while she was in employment of M/s. Hazrat and Company as well as used to remain absent unauthorizedly. It is also claimed that the services of the petitioner are covered under the ESI Act and her name is shown as an employee of said M/s. Hazrat and Company since 18th April, 2010.

7. It is mentioned by the respondents that the petitioner can resume her services with fitness certificate from the doctor, who is on the ESI panel along with the written explanation for unauthorized absenteeism.

8. The Labour Court considering the rival claim framed issues at Exh.O-2 which reads thus :-

Sr. No.	ISSUES	FINDINGS
1)	Whether the complainant prove that the respondent no.1 and 2 have engaged in unfair labour practice under section 28 read with item 1(a), (b) & (f) of Sch. IV of MRTU & PULP Act, 1971 ?	...Affirmative

1(A)	Whether the complainant prove that employer-employee relationship between himself and respondents ?		...Affirmative
2)	Whether the termination of the service of the complainant is accordance with the provisions of law ?		...Negative
3)	Whether the complainant is entitled for the reinstatement with full back wages and continuity of service w.e.f. 30/07/2015 with all benefits ?		...Affirmative
4)	What order ?		...As per final order.

9. In support of the claim petitioner examined herself at Exh.U-8, whereas the respondents/ employer examined General Manager purchase and admin Shri. Ramanlal Jamnadas Udeshi at Exh.C-31. Both the parties have produced documentary evidence on record.

10. The Labour Court accordingly allowed the complaint vide order dated 31st December, 2019, which reads thus :-

- “1) The complaint is hereby allowed.
- 2) It is declared that the termination of the complainant dtd. 30.07.2015 is unfair labour practices under item Nos.1(a) and (b) of the schedule IV of MRTU & PULP Act, 1971.
- 3) The respondents are directed to reinstate the complainant with continuity of service with 50% back wages w.e.f. 30.07.2015.

4) The respondents issued termination order dtd. 03.09.2015 is quashed and set aside.

5) The Complaint disposed of accordingly.”

11. The respondents/employer feeling aggrieved preferred a revision, which is allowed vide impugned order dated 19th March, 2020. As such, this petition.

12. Counsel for the petitioner would urge that considering the claim put forth by the petitioner and stand of respondents in their written statement at Exh.C-2, the issue as regards employer – employee relationship and the unfair labour practice adopted by the respondents was duly proved and accepted by the Labour Court. In support of the said findings, Labour Court has specifically recorded positive finding that termination of service of the petitioner without conducting inquiry was on the ground of illegal absenteeism from duty. In such an eventuality, the respondents having not conducted inquiry, the order of the Labour Court ought not to have been interfered with. She would submit that considering the claim, the Labour Court ordered 50% of the backwages.

13. Learned counsel would further urge that perusal of the order impugned passed by the Industrial Court would reflect that the Industrial Court has committed an error by observing that the petitioner must first establish that she is a ‘workman’ before an appropriate forum. According to her, once the respondents

themselves have admitted the employer – employee relationship, the issue as regards calling upon the petitioner to prove/establish status as a ‘workman’ is an error apparent on the face of the record. According to her, findings on the functional integrality are based on the admissions given by the witness of the respondents and that being so, the Labour Court was justified in recording finding on the functional integrality against the respondents.

14. Apart from above her contentions are, the Revisional Court has exceeded its jurisdiction as it is not open for the Revisional Court to re-appreciate the evidence unless the error of law apparent on the face of record is demonstrated. In this background, it is claimed that the order impugned is not justified and is liable to be quashed and set aside.

15. Counsel for the petitioner so as to substantiate the aforesaid contentions has drawn support from the judgment of Apex Court in the matter of ***Sarva Shramik Sangh Vs. Indian Smelting & Refining Co. Ltd. & Ors.*** reported in ***(2003) 10 SCC 455***, so as to claim that in case if there does not exist a dispute about relationship of employer and employee, provisions of MRTU & PULP Act can very much be invoked and relief can be granted. A support is drawn from the observations made in paragraphs 24 and 25 of the said judgment, which reads thus :-

“24. The common thread passing through all these judgments is that the threshold question to be decided is

whether the industrial dispute could be raised for abolition of the contract labour system in view of the provisions of the Maharashtra Act. What happens to an employee engaged by the contractor if the contract made is abolished is not really involved in the dispute. There can be no quarrel with the proposition as contended by the appellants that the jurisdiction to decide a matter would essentially depend upon pleadings in the plaint. But in a case like the present one, where the fundamental fact decides the jurisdiction to entertain the complaint itself the position would be slightly different. In order to entertain a complaint under the Maharashtra Act it has to be established that the claimant was an employee of the employer against whom complaint is made, under the ID Act. When there is no dispute about such relationship, as noted in paragraph 9 of CILPA's case (supra) the Maharashtra Act would have full application. When that basic claim is disputed obviously the issue has to be adjudicated by the forum which is competent to adjudicate. The sine qua non for application of the concept of unfair labour practice is the existence of a direct relationship of employer and employee. Until that basic question is decided the forum recedes to the background in the sense that first that question has to be got separately adjudicated. Even if it is accepted for the sake of arguments that two forums are available, the Court certainly can say which is the more appropriate forum to effectively get it adjudicated and that is what has been precisely said in the three decisions. Once the existence of contractor is accepted, it leads to an inevitable conclusion that a relationship exists between the contractor and the complainant. According to them, the contract was a façade and sham one which has no real effectiveness. As rightly observed in CIPLA's case (supra), it is the relationship existing by contractual arrangement which is sought to be abandoned and negated and in its place the complainant's claim is to the effect that there was in reality a relationship between the employer and the complainant directly. It is the establishment of the existence

of such an arrangement which decides the jurisdiction. That being the position, CIPLA's case (supra) rightly held that an industrial dispute has to be raised before the Tribunal under the ID Act to have the issue relating to actual nature of employment sort out. That being the position, we find that there is no scope for re-considering CIPLA's case (supra), the view which really echoed the one taken about almost a decade back.

25. That apart, as held by a seven member Constitution Bench judgment of this Court in *Keshav Mills's case (supra)*, though this Court has inherent jurisdiction to reconsider and revise its earlier decisions, it would at the same time be reluctant to entertain such pleas unless it is satisfied that there are compelling and substantial reasons to do so and not undertake such an exercise merely for the asking or that the alternate view pressed on the subsequent occasion is more reasonable. For the reasons stated supra, we are of the view that the decision in CIPLA's case (supra) was taken not only in tune with the earlier decisions of this Court in *General Labour Union (Red Flag) Bombay's case (supra)* and *Vividh Kamgar Sabha's case (supra)* but quite in accordance with the subject of the enactment and the object which the legislature had in view and the purpose sought to be achieved by the Maharashtra Act and consequently, there is no scope or necessity to reconsider the question once over again by a larger Bench.”

16. Apart from above, on similar lines the reliance is also placed on the judgment of Supreme Court in the matter of ***Kanpur Electricity Supply Co. Ltd. Vs. Shamim Mirza*** decided on 7th November, 2008, so as to claim that the negative presumption against the petitioner cannot be drawn *qua* her status as a workman.

17. While countering aforesaid submissions, Mr. S. C. Naidu, learned counsel would strenuously urge that in exercise of powers under Article 227, this Court should be slow in causing interference in the impugned order of the Industrial Court.

18. Mr. S. C. Naidu by inviting attention of this court submits that the Labour Court has no authority to decide the employer employee relationship and the findings recorded by the Labour Court are without jurisdiction. So as to substantiate said contentions, Mr. S. C. Naidu has invited our attention to the judgment of Apex Court in the matter of ***Cipla Ltd. Vs. Maharashtra General Kamgar Union & Ors.*** reported in ***(2001) 3 SCC 101***. According to Mr. S. C. Naidu, there is genuine dispute as regards employer-employee relationship raised by the respondents and rightly so Industrial Court has recorded finding that the reference should have been made to record finding of employer-employee relationship to the competent authority. Mr. S. C. Naidu in addition to above would urge that the Industrial Court is justified in drawing support from the aforesaid judgment so as to record finding of remand. Mr. S. C. Naidu has also placed reliance on the judgment of Apex Court in the matter of ***Vividh Kamgar Vs. Kalyani Steels Ltd. & Ors. in Appeal (civil) 3375 of 1998 decided on 09.01.2001***, so as to substantiate the aforesaid contention. According to him, the Apex Court in the aforesaid judgment has ruled that if there exists a dispute as regards status of relationship of employer and employee then such dispute can be resolved only by raising dispute before the

appropriate forum and the Labour Court in such an eventuality lacks jurisdiction while exercising powers under the MRTU & PULP Act to record findings on the same. In addition Mr. S. C. Naidu has drawn support from the judgment of this Court in the matter of ***BASF Vs. Government of Maharashtra and Ors.*** reported in ***2014(6) Mh.L.J. 579***, particularly, paragraph 21 which reads thus :-

“21. We are, therefore, of the prima facie opinion, in the light of the above stated facts, that the issue of employer-employee relationship is involved in both of these U.L.P. and Reference proceedings. It is in these circumstances that we find that the U.L.P. Complaint needs to be decided expeditiously and as per the directions of the learned Single Judge of this court, prior to taking up the reference proceedings for hearing as it would lead to a judicial pronouncement on the issue of employer-employee relationship. This would be in aid of the reference proceedings thereafter.”

19. Apart from above, Mr. S. C. Naidu would urge that the onus to prove victimization is on the petitioner, but the petitioner has failed to establish the same.

20. In this background, Mr. S. C. Naidu would urge that the findings recorded by the Industrial Court are just and proper and that being so, the petition is liable to be dismissed.

21. This Court has considered the rival claims.

22. The petitioner vide complaint under Section 28 and 30

r/w item 1(a), 1(b), 1(d) & 1(f) of Schedule IV of MRTU & PULP Act has come out with a case that she is employee of the respondents, who are engaged in unfair labour practice with effect from 30th July, 2015. A specific statement is made that since 1997, the petitioner is working as a cook with the respondent/employer at the monthly salary of Rs.8500/- and her working hours were from 9:00 a.m. to 6:00 p.m. It is further pleaded by the complainant that on 24th March, 2015, she fell sick while discharging her duties and was under treatment upto 29th July, 2015. It is claimed that since the petitioner failed to submit her resignation as was demanded by the respondent/employer, her services came to be terminated without there being any show-cause notice or inquiry.

23. After her termination, she approached the Union through whom a demand was made to the respondent No.1/ employer seeking reinstatement with complete backwages and continuity of service vide demand dated 22nd August 2015.

24. In response to the claim made in the complaint, the respondent initially has stated that there is no employer-employee relationship between the petitioner and the respondent company. The respondent on the other hand is an employee of M/s. Hazrat and Company. The respondents further stated that they are in export and import business of petroleum products and the respondent No.2 is the chairman of the said company. The specific averments are made by respondent Nos.1 and 2 in their reply, which read thus :-

“5) The Respondent No.1 Company herein craves leave of this Hon’ble Court to set out correct and true facts to arrive at just and proper decision in the matter as under:-

a) The Respondent No.1 Company submits that it is falling under “Petroleum Industry” category and doing import and export business of petroleum products. The Respondents No.2 is the Chairman who is looking after the day to day affairs of the Company. It is submitted that M/s. Hazrat & Co. (Mypro Gums Division) is a separate entity and it is functioning in the same campus/premises where the Respondent No.1 Company is situated. The said M/s. Hazrat and Company (Mypro Gums Division) is registered as a separate unit and assessed independently.

b)

c) It is submitted that in fact the Complainant Smt. Supriya Subhash Ghag was initially engaged by M/s. Hazrat & Co. (Mypro Gums Division) on casual basis as a Pantry Assistant since 24th November, 1996. In the year 2002, the Complainant was taken on muster roll of that Company and wages were paid to her by the said M/s. Hazrat and Company (Mypro Gums Division) only. Thus, she was employee/workman of M/s. Hazrat and Company (Mypro Gums Division) and not of the Respondent No.1. Hence, the Complaint is untenable in law against present Respondents.

d) It is submitted that the Complainant was covered under the Employees Provident Fund Scheme 1952 and Employees’ Pension Scheme 1995 and her Account Number is MH/THN/12158/127. The Complainant was also member of ESIC Scheme and her Insurance Number is 3110130580. These documents clearly shows that she was an employee of M/s. Hazrat and Company (Mypro Gums Division).”

25. In spite of denial of employer and employee relationship, the respondent has tried to justify the termination as could be inferred from their pleadings in paragraph 6, which reads thus :-

“6) Without prejudice to the above, it submitted that after checking factual details from M/s. Hazrat and Company (Mypro Gums Division), the following reply is tendered.

a) It is submitted that during the tenure of her services with M/s. Hazrat and Company (Mypro Gums Division), the Complainant used to come late on duty as well as used to remain absent unauthorizedly without seeking prior sanction/permission of her superior authority. The Complainant was remaining absent on duty without sufficient cause or reasons. In the year 2012, the Complainant had been repeatedly coming late and habitually remained continuously absent from duty without any prior intimation. After couple of incidences of coming late and remaining absent unauthorizedly, the Complainant was issued with couple of warning letters. The Complainant was issued warning letters on 22nd July, 2012 and 15th October, 2014. After receipt of the said letters, the Complainant submitted her written apology to the said M/s. Hazrat and Company (Mypro Gums Division). These documentary proof would be produced at the time of hearing.

b)

c)

d) It is submitted that in the year 2015, the complainant had remained absent from 24th March 2015 and never reported for work. Subsequently M/s. Hazrat and Company (Mypro Gums Division) issued show cause notices to the Complainant on 20th July 2015 and 29th

July 2015 by registered Post A/D, and called upon the Complainant to show cause as to why suitable action ought not be taken against her. On receipt of the show cause notice dated 29th July 2015, the Complainant came to the office of the Respondents on 3rd August 2015 along with Written Application dated Nil and Fitness Medical Certificate of Om Sai Clinic dated 30th July, 2015 which was duly signed by Dr. Sachin Gaikwad who is not even MBBS Doctor and on panel of ESI Corporation. Hence, the said medical certificate was not accepted and the Complainant was called upon to submit the medical certificate of ESI empanelled doctor.

e)

f)

g)

h)

i) It is totally false and improper to say that the Respondent Company has terminated the services of the Complainant w.e.f. 30th July 2015 illegally much less orally. It is submitted that by remaining absent continuously for long period without sufficient grounds, by not examining before the ESI empaneled Doctor and obtaining Fitness certificate from him, the Complainant left employment at her own accord and violation. There does not arise any occasion for termination of services of the Complainant. Similarly, no termination is effected by M/s. Hazrat and Company (Mypro Gums Division) at any point of time. All allegations made in this behalf are concocted and created versions to suit the convenience of the Complainant. As such the question of attracting Items 1(a), 1(b), 1(d) and 1(f) of Schedule IV of the Act does not arise at all. The Respondents therefore emphatically deny that it has not engaged in or engaging in any unfair labour practice in any manner whatsoever under Items 1(a), 1(b), 1(d) and 1(f) of Schedule IV of the Act.

j) The Complainant is also not responding to the letters issued by the Respondent Company to resume on duty. It appears that the Complainant is not interested in work and therefore, she has left the Services of M/s. Hazrat and Company (Mypro Gums Division) at her own accord. It is totally false, improper and misconceived to allege that the Respondent have terminated her services w.e.f. 30th July 2015 as alleged. The Complainant be therefore put to the most strict proof thereof. The Respondents have strictly deny that they have terminated the services of the Complainant w.e.f. 30th July, 2015 much less as alleged.”

26. The petitioner thereafter filed her affidavit of examination-in-chief and she was subjected to cross examination. She has stated that she was initially appointed by M/s. Hazrat and Company, which was renamed as “M/s. Gumpro Drilling Fluids Pvt. Ltd. On behalf of the respondents, Mr. Sanjay Ganave, Manager H.R. and I.R. was examined. The evidence of the said witness was discarded by the respondents themselves and the affidavit of examination-in-chief of Ramanlal Udeshi, General Manager Purchase and Admin was placed on record.

27. The said witness was subjected to cross examination at Exh.C-31, wherein he has specifically stated that he is deposing on behalf of M/s. Gumpro Drilling Fluids Pvt. Ltd. He has admitted the fact about the petitioner working as a cook with M/s. Hazrat and Company. He has admitted a public document viz. communication issued to the government labour officer by M/s. Gumpro Drilling

Fluids Pvt. Ltd., wherein it is specifically mentioned that the petitioner is working with the said company. He has further admitted that M/s. Hazrat and Company is the sister concern of M/s. Gumpro Drilling Fluids Pvt. Ltd. He has also admitted that the correspondence was made by the petitioner with M/s. Gumpro Drilling Fluids Pvt. Ltd. He has also admitted that Exh.U-9 identity card was issued to the complainant by the respondent No.1 company. The said witness has further admitted that Exh.U-10, termination letter to the complainant was issued under his signature. He has also admitted that the petitioner was paid salary through the respondent company on behalf of M/s. Hazrat and Company. He has also admitted that the petitioner has produced fitness certificate on 30th July 2015. He has also admitted that M/s. Gumpro Drilling Fluids Pvt. Ltd. is sister concern of M/s. Hazrat and Company. He has stated that he is not aware about anything as regards termination/incident occurred in July 2015. In the backdrop of aforesaid evidence, the Labour Court has proceeded to record a finding of employer-employee relationship. The above admissions given by the witness of the respondents/employer, their act of contesting termination of the petitioner on merit, justifies the findings recorded by the Labour Court.

28. If we appreciate the law laid down by the Apex Court in the matter of *The Associated Cement Companies Ltd. Vs. Their Workmen* reported in *AIR 1960 SC 777*, the Apex Court has held that the test as regards functional integrality between the two

companies is the unity of finance, unity of employer, proprietorship and the unity of management.

29. The fact remains that in view of admissions given by the witness of the respondents, there was no dispute remained to be adjudicated as to the employer-employee relationship, particularly, having regard to the documentary evidence such as Exh.U-9 and Exh.U-10 viz. identity card and termination letter.

30. In the aforesaid background, if we appreciate the judgment relied on by counsel for the petitioner in the matter of *Sarva Shramik Sangh (cited supra)*, particularly, paragraphs 24 and 25, the Apex Court has held that in case of absence of dispute about the employer-employee relationship, applicability of MRTU & PULP Act cannot be doubted or disputed. The fact remains that from the evidence of the witness of the respondents, direct inference of employer-employee relationship can be drawn, particularly, claim was decided on merit. The observations which are referred to herein-above in the judgment of *Sarva Shramik Sangh (cited supra)* explains a view taken by the Apex Court in the matter of *Cipla Ltd. (cited supra)*. In this background, merely because respondent Nos.1 and 2 have come out with a denial of employer-employee relationship that by itself will not oust the jurisdiction of the Labour Court, particularly, when it can be inferred that denial of such relationship was only an empty formality. The evidence of the witness of the respondents in categorical terms has admitted about

not only functional integrality between M/s. Hazrat and Company and M/s. Gumpro Drilling Fluids pvt. Ltd. but also financial and management integrality. In this background, finding recorded by the Industrial Court that the order of Labour Court is without jurisdiction, as same goes contrary to the judgment of Apex Court in the matter of *Cipla Ltd. (cited supra)*, cannot be sustained.

31. Apart from above, while exercising revisional jurisdiction, the Industrial Court has lost sight of the admissions given by the witness of the respondents about existence of employer - employee relationship. Though Revisional Court is not supposed to appreciate the evidence but at least it is open for the Revisional Court to consider the undisputed facts and evidence on record.

32. Apart from above, it is an admitted position on record that the petitioner has put into more than 240 days of service with the respondents. The service of the petitioner was terminated without there being any show-cause notice nor an inquiry is held. In such an eventuality, it is to be inferred that the petitioner has discharged her burden by demonstrating the victimization at the hands of the respondents.

33. In the backdrop of aforesaid findings, it is to be observed that the Industrial Court has committed an error in recording finding of absence of employer-employee relationship. In such an eventuality, the reference made for recording findings on the said

issue to appropriate forum was incorrect. In this background, it cannot be said that the order of the Industrial Court impugned herein-above is sustainable in law. As such, the order impugned dated 19th March 2020 delivered in Revision Application (ULP) No.14 of 2020 (*M/s. Gumpro Drilling Fluids Pvt. Ltd. & Anr. Vs. Smt. Supriya Subhash Ghag*) in hereby quashed and set aside. As a sequel of above the order of the Labour Court stands restored.

34. The petition as the stands allowed in above terms.

[NITIN W. SAMBRE, J.]