

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.2339 OF 2023

The Chief Executive Officer,
 Zilla Parishad, Ahmednagar
 District Ahmednagar
 and another

.... Petitioners

Versus

Sau. Shobha Sanjay Shete

.... Respondent

.....

Mr. Vivekanand V. Gujar, Advocate for the Petitioners

Mr. Parag V. Barde, Advocate for Respondent

.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 05th JUNE, 2023

ORDER :

1. By this petition, filed under Articles 226 and 227 of the Constitution of India, the petitioners take exception to the judgment and order dated 12/09/2022 passed by the Industrial Court, Ahmednagar in Complaint (ULP) No. 45 of 2017.

2. The respondent is working with the petitioner as Auxiliary Nurse Midwife since 1988 in the health services, and her husband is working in Civil Hospital, Ahmednagar as *Parichar*. Petitioner transferred the respondent alongwith other relevant employees on the basis of Government Resolution dated 15/05/2014, vide order dated 16/05/2017. By the

transfer order, the respondent was transferred from non-tribal to tribal area. The respondent challenged her transfer order by filing Complaint (ULP) No.45 of 2017 under Section 28(1) read with items 3, 5, 9 and 10 of Schedule-IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short, "M.R.T.U. and P.U.L.P. Act"). By way of *ad-interim* order dated 30/05/2017, the Industrial Court directed that the respondent should not be relieved. The petitioners were served on the same day, i.e. 30/05/2017, however, did not appear on 31/05/2017. The petitioners failed to appear for almost a period of one year. On 29/07/2017, the petitioners appeared and apply for adjournment for filing written statement. On 06/06/2018, the petitioners filed written statement cum say. The Industrial Court confirmed *ad-interim* relief by an order dated 21/08/2018. After recording evidence, the complaint was allowed by the Trial Court by order dated 12/09/2022. The said decision is impugned in the present petition.

3. Heard the learned advocate for the petitioners and the learned advocate for the respondent. Perused the writ petition memo, annexures thereto, impugned order and the citations relied upon by the learned advocate for the respondent.

4. Learned advocate for the petitioner assails the impugned order on the ground that the order passed by the Industrial Court is without jurisdiction. The respondent being Zilla Parishad employee had remedy of filing appeal before the Divisional Commissioner challenging her transfer order. The impugned judgment is therefore without jurisdiction and cannot be sustained. The respondent being regular employee of Zilla Parishad establishment, the Industrial Court had no jurisdiction under the M.R.T.U. and P.U.L.P. Act. The respondent is governed by the Rules framed by the State Government, and therefore, the respondent cannot be termed as workman, and her grievance in respect of transfer was not maintainable before the Industrial Court. According to him, transfer of the respondent was strictly as per seniority and as per the guidelines in Government Resolution dated 15/05/2014. Therefore, the Industrial Court erred in allowing the complaint filed by the respondent. The guidelines in the said Government Resolution are ignored by the Industrial Court while allowing the complaint.

5. Per contra, learned advocate for the respondent submits that there is no specific objection as to the jurisdiction of the Industrial Court in the written statement of the

petitioners, and therefore, in view of decision in ***N.M. Wadia Charitable Hospital and another Vs. Ashok Vyankatesh Apate and others, 2004 (6) Bom. C.R. 10***, the petitioners are not entitled to raise the said objection for the first time in this Court. He submits that since the respondent is working on the post of Auxiliary Nurse Midwife, she is covered by the definition of workman under the M.R.T.U. and P.U.L.P. Act. He submits that the respondent has rightly availed the remedy provided to her under the M.R.T.U. and P.U.L.P. Act. He submits that considering the provisions of the said Government Resolution, the Industrial Court was justified in allowing the complaint. He also submits that at the time of issuance of transfer order, the respondent had completed 53 years of age, and Government Resolution dated 15/05/2014 gives exemption to the employees, who have completed 53 years of age, from transfer. Lastly, he submits that the petitioner is due to retire in September, 2023 and considering this aspect also, the petition may not be entertained.

6. Admittedly, the respondent is working on the post of Auxiliary Nurse Midwife, and she is not exercising supervisory/managerial functions, and therefore, she falls within the definition of "workman" given under Section 2(s) of the

Industrial Disputes Act. The husband of respondent is working as Parichar at Civil Hospital, Ahmednagar. Though the averment is made by the petitioners that there is no employee-employer relationship between the petitioners and the respondent, the provisions of Industrial Disputes Act are not applicable to the respondent, and hence, the complaint is liable to be dismissed, however, there is no specific challenge as to the jurisdiction raised by the petitioners in the written statement, nor the petitioners have led any evidence to substantiate their challenge as to the jurisdiction.

7. In *N.M. Wadia Charitable Hospital* (supra), learned Single Judge of this Court while considering the case of Doctor, held:

"9. Therefore, the first issue before me is whether the Hospital can be permitted to raise the issue as to whether the Doctor is a "workman" or not as this stage in the writ petition for the first time.

10. There is no dispute that there is no pleading whatsoever in the written statement that the Doctor is no a workman or that the complaint was not maintainable because the Doctor was not a workman as defined under section 2(s) of the ID Act. A blade statement has been made in the written statement that the complaint is not maintainable and no further contention has been raised in this respect. Even in the revision application filed by the Hospital, no such contention has been raised in this respect. Even in the revision application filed by the Hospital, no such

contention has been raised. The question whether a person is a workman or not is a mixed question of law and fact. Unless, the facts are pleaded and proved in the Court, the Labour Court or the Industrial Court, as the case may be, will not be able to arrive at any conclusion as to whether a person is a workman. Whether on the facts on record, the person falls within the definition of "workman" would be a question of law. In my view, such a question cannot be permitted to be raised in the writ petition for the first time. The Supreme Court in the case of Shankar Chakravarti (supra) has observed thus:

"30. ... The Labour Court or Tribunal has to decide the lis between the parties on the evidence adduced before it. While it may not be hide bound by the rules prescribed in the Evidence Act it is nonetheless a quasi-judicial Tribunal proceeding to adjudicate upon a lis between the parties arrayed before it and must decide the matter on the evidence produced by the parties before it. It would not be open to it to decide the lis on any extraneous consideration. Justice, equity and good conscience will inform its adjudication. Therefore, the Labour Court or the Industrial Tribunal has all the trappings of a Court.

31. If such be the duties and functions of the Industrial Tribunal or the Labour Court, any party appearing before it must make claim or demur the claim of the other side and when there is a burden upon it to prove or establish the fact so as to invite a decision in its favour, it has to lead evidence. The quasi-judicial Tribunal is not required to advise the party either about its rights or what it should do or omit to do. Obligation to lead evidence to establish an allegation made by a party is on the party making the allegation. The test would be who would fail if no evidence is led. It must seek an opportunity to lead evidence. Allegation which is not pleaded, even if there is evidence in support of it, cannot be examined because the other side has not notice of it and if entertained it would

tantamount to granting an unfair advantage to the first mentioned party. We are not unmindful of the fact that pleadings before such bodies have not to be read strictly, but it is equally true that the pleadings must be such as to give sufficient notice to the other party of the case it is called upon to meet. This view expressed in (Tin Printers (Pvt.) Ltd. v. Industrial Tribunal) 1967(2) Lab. L.J. 677 (Punj), commends to us. The rules of fair play demand that where a party seeks to establish a contention which if proved would be sufficient to deny relief to the opposite side, such a contention has to be specifically pleaded and then proved. But if there is no pleading there is no question of proving something which is not pleaded. This is very elementary."

8. Applying the above observations to the facts of the present case, it needs to be held that the petitioners have not challenged the jurisdiction specifically before the Industrial Court, nor they led any evidence in that behalf.

9. There is merit in the submission of learned advocate for the respondent that the respondent has elected the remedy of filing complaint under M.R.T.U. and P.U.L.P. Act, rather than availing the remedy of appeal under the Zilla Parishad Act and Rules. It is settled legal position that when the litigant has two remedies available, he is entitled to select one remedy out of them.

10. In **Balasaheb Dagadu Yeole** (supra), learned Single Judge of this Court observed:

"33. The learned Full Bench of the Karnataka High Court in the matter of H.S.Rangaramu Vs. The Management of Karnataka State Road Transport Corporation [2002 (94) FLR 592], dealt with the issue of an alternate remedy being available and concluded that merely because a remedy in the form of an department appeal would not exclude the jurisdiction of the Court. The observations under paragraph Nos.20 and 21 read as under:-

"20. It is well-settled that exclusion of jurisdiction of the Courts established under the Act is not to be readily inferred and such exclusion must be either implicitly expressed or clearly implied. It is a principle by no means to be whittled down and mere fact that regulations provide for certain remedies, would not by itself necessarily exclude the jurisdiction of the Courts established under the Act. In the case of State of Uttar Pradesh and Ors. v. Dr. Vijay Anand Maharaj AIR 1965 SC 946: [1962] 45 ITR 414 (SC), the Supreme Court has observed as follows;

"The Industrial Disputes Act, 1947 also furnishes an example of an Act which creates new rights and obligations and provides machinery for adjudication of disputes pertaining to them. If an industrial dispute relates to the endorsement of a right or an obligation created under the Act then the only remedy available to the suitor is to get an adjudication under the Act".

36. In Writ Petition No.907 of 1989 (Venubai Umap Vs. The Principal, New English School and another) (unreported), the learned Division Bench at Aurangabad on 29.8.1989, adjudicated upon the challenge to an order passed by the Labour Court refusing to entertain the complaint of the petitioner therein, who was a non-teaching employee and was seeking reinstatement. He had approached the Labour Court by filing a complaint. The Labour Court refused to exercise jurisdiction. The learned Division Bench while deciding the said writ petition, held that as there was more than one forum available to the petitioner, it was open for him to select

his forum. The order passed by the Labour Court, holding that it had no jurisdiction was set aside and the complaint was directed to be decided on merits.

42. The learned Single Judge of this Court (Coram : F.I. Rebello, J.), in the case of People's Welfare Society and another Vs. Second Labour Court, Civil Lines, Nagpur and others [1998 (2) ALL MR 94], dealt with a similar controversy of a non-teaching employee of a college having approached the labour Court against his termination, which was entertained and the management/ education society approached this Court alleging that the Labour Court was excluded from exercising it's jurisdiction and the University Tribunal alone could decide the issue of proposed termination under Section 59 of the Universities Act, 1994. This Court concluded in paragraph Nos.8 and 9 as under :-

"8. The above authorities, however, do not answer the point raised in the present petition. What is in issue presently is whether the complaint of the Respondents Nos. 3 to 9 filed even before their services were terminated could have been heard and decided by the Tribunal constituted under section 59 of the Maharashtra Universities Act. None of the judgments cited in support under the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act lay down such a proposition. Even in the case of Maharashtra Shikshan Sanstha (supra) the complaint was filed after the services were terminated. The issue involved was whether interim relief could be granted in an appeal pending before it. The Division Bench was not seized with the issue nor has answered the issue whether the School Tribunal could entertain an appeal even before the services of an employee were terminated. The judgments cited, therefore, are of no assistance.

9. The employees involved in this petition are non-teaching employees. Such non-teaching employees could fall within the definition of workmen within the meaning of section 2(s) of the I.D. Act. Even in respect of the I.D. Act they could not have moved the courts under the said Act as section 59 of the Maharashtra Universities Act would then squarely cover the case of such individual employees in so far

as termination of their services are concerned as set out in section 59 of the Maharashtra Universities Act. However what is to be borne in mind is that the M.R.T.U. & P.U.L.P. Act for the first time by virtue of section 30(2) has conferred power on the courts constituted under the Act to prevent an employer from terminating the services of employees falling within the definition of section 2(s) of the I.D. Act. Such a remedy is not provided for either in the Maharashtra Universities Act or in the Industrial Disputes Act, 1947. The scheme of the I.D. Act and the M.R.T.U. & P.U.L.P. Act has been considered by the Apex Court in the case of Hindustan Lever Ltd. v. Ashok Vishnu Kate, reported in (1996) ILLJ 899 SC, wherein the Apex Court has held that (he M.R.T.U. & P.U.L.P. Act is supplemental Legislation to the I.D. Act. Section 30 of the M.R.T.U. & P.U.L.P. Act has for the first time given right in the form of remedy to a person who falls within the definition of section 2(s) of the Act to move the Court under the M.R.T.U. & P.U.L.P. Act to preempt his termination from service. Such a right is not traceable under section 59 of the Maharashtra Universities Act. On the contrary section 61 of the Maharashtra Universities Act it has been made clear that an appeal filed will have to be rejected if it does not come within the predicates of section 59 of the Maharashtra Universities Act. Thus clearly the Tribunal will have no jurisdiction to decide a case of threatened dismissal or termination. Even otherwise it can be seen that the jurisdiction under the M.R.T.U. & P.U.L.P. Act is not totally ousted. It is only in the matter of dismissal, removal or where services are otherwise terminated or where an employee reduced in rank would a remedy be available to an aggrieved employee. In other matters pertaining to his conditions of services the remedy is not available under section 59 of the Maharashtra Universities Act. Thus there is no total ouster of jurisdiction in so far as Maharashtra Universities Act is concerned. If that be so it is not difficult to hold that even a case of threatened dismissal would not fall under section 59 of the Maharashtra Universities Act as the words used are "who is dismissed or removed or whose services are otherwise terminated or who is reduced in rank". It is only after such an event has taken place as stated earlier that the right of Appeal is provided. In these circumstances I am of

the opinion that the jurisdiction of the Labour Court is not ousted and to that extent the contention on behalf of the petitioners has to be rejected."

43. It is thus held in relation to the Universities Act, 1994 that the non-teaching employee could fall under the definition of "workman" and the jurisdiction of the Labour Court / Tribunal is not totally ousted. It was also held that in so far as proposed termination is concerned, the College Tribunal under Section 59 would not consider the case of threatened termination or dismissal and hence, the jurisdiction of the Labour Court was not ousted.

11. In view of the aforesaid observations, the respondent was entitled to avail the remedy to approach the Industrial Court by filing the complaint under the M.R.T.U. and P.U.L.P. Act. The fact remains that the Zilla Parishad Act does not exclude or create a bar from availing remedy under the M.R.T.U. and P.U.L.P. Act.

12. There is no merit in the submissions of learned advocate for the petitioners that the Industrial Court has failed to apply the guidelines in the present case. Guideline No.3(kh) provides for exemption to the Zilla Parishad employees who have completed 53 years of age from transfer. Admittedly, respondent, when she was transferred by the impugned transfer order had completed 53 years of age. There is evidence on record to show that husband of the respondent who is working with the Zilla Parishad as *Parichar* at

Ahmednagar is suffering from renal disease and needs frequent treatment, and in view of the guidelines, the couple convenience is ignored in the case of respondent, the impugned transfer order is therefore rightly held to be contrary to the guidelines in Government Resolution dated 15/05/2014.

13. The Industrial Court has rightly appreciated the facts and the rulings cited before it. The impugned order is well reasoned order, which needs no interference in extraordinary writ jurisdiction. The fact remains that the respondent is due to retire in September, 2023, in that view of the matter also, this Court is not inclined to exercise extraordinary writ jurisdiction.

14. Writ Petition is dismissed. No costs.

[NITIN B. SURYAWANSHI]
JUDGE

S.P. Rane