Bombay High Court
Nagaraj Gowda And Ors. vs Tata Hydro Electric Power Supply ... on 25 June, 2003
Equivalent citations: 2004 (1) BomCR 201, 2003 (4) MhLj 619
Author: R Khandeparkar
Bench: R Khandeparkar
JUDGMENT R.M.S. Khandeparkar, J.

1. Heard the learned Advocates for the petitioners and the respondent No. 1. Perused the records.

2. The petitioners are challenging the judgment and order dated 27-1-2000, passed by the Industrial Court dismissing the Complaint (ULP) No.889 of 1994, filed by the petitioners, holding that the workers employed by the respondent No. 2 in the canteen in question are not the employees of the respondent No. 1 and, therefore, the complaint under Section 28 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, hereinafter called as "the said Act", was not maintainable.

3. While challenging the impugned judgment and order, the learned Advocate for the petitioners has submitted that the Court below has totally overlooked the fact that the respondent No. 1 was statutorily bound to have a canteen in the premises of the undertaking and accordingly had such canteen wherein the petitioners were continuously employed irrespective of change of the contractors from time to time, and therefore the respondent No. 1 is their employer within the meaning of the said expression under Section 3(14) of the Bombay Industrial Relations Act, 1946, hereinafter called as "the BIR Act", and thereby has acted illegally in dismissing the complaint. He has further submitted that in any case a canteen being a facility provided for the workmen employed in the undertaking of the respondent No. 1, it has to be considered as part of the undertaking and, therefore, the petitioners are the employees of the respondent No. 1 considering the definition of the said expression under Section 3(14) of the BIR Act. In spite of the fact that all the relevant statements disclosing jurisdictional facts in the complaint itself, the Industrial Court has illegally dismissed the complaint. Drawing attention to the decisions of the Apex Court in the matter of The Saraspur Mills Co. Ltd. v. Ramanlal Chimanlal and Ors., reported in 7975 Lab.I.C. 1040 and in the case of Basti Sugar Mills Ltd. v. Ram Ujagar and Ors., as well as the decision of the learned single Judge, as he then was, of this Court, in the matter of Dattatraya Kashinath and Ors. v. Chhatrapati Sahakari Sakhar Karkhana Ltd., Pune and Ors., reported in 1996 (2) LLJ 169 and in the matter of Sakhar Kamgar Union v. Shri Chhatrapati Rajaram Sahakari Sakhar Karkhana Ltd., and Anr., reported in 1996 (1) Mh.L.J. 556 = 1996 (2) LLJ 134, it is sought to be argued that the decisions of the Apex Court as well as of this Court on the issue of absence of jurisdiction to the Industrial Court to entertain the complaint under the said Act were not delivered in the matters arising under the BIR Act and therefore those decisions are clearly distinguishable and cannot be applied to the facts of the case in hand. On the other hand, the learned Advocate for the respondent No. 1 has submitted that the complaint filed by the petitioner did not disclose the statutory liability of the respondent No. 1 to have a canteen as being a part of its undertaking, except mere submission in that regard in the complaint. He has further submitted that Section 46 of the Factories Act, 1948 clearly requires the Government to issue a notification specifying the undertaking to require to have a canteen for the use of the workers and the Rules 79 to 85 of the Maharashtra Factories Rules, 1963 are

applicable in that regard and that Rule 79(1) clarifies the necessity of a notification which is required to be issued by the Government in order to attract the provisions of Section 46 in case of any particular undertaking. In the case in hand, according to the learned Advocate for the respondent No. 1, it is nobody's case that there has been any such notification issued and that therefore there is no statutory liability upon the respondent No. 1 to maintain a canteen for its workers. As regards the contention that irrespective of the statutory liability to maintain a canteen and that the canteen which has already been maintained, forms ordinarily a part of the undertaking, according to the learned Advocate, it is not only a disputed question of fact but there are neither any pleadings to that effect nor that was the case of the petitioners in the complaint and even assuming that it was the case of the petitioners, it was necessary for the petitioners to get the issue of existence of employer and employee relationship within the meaning of the relevant provisions of the BIR Act being established independently prior to approaching the Industrial Court under the provisions of the said Act, and admittedly there is no such adjudication in relation to such an issue. Reliance is sought to be placed in the decisions in the matters of Indian Petrochemicals Corporation Ltd. and Anr. v. Shramik Sena and Ors., reported in 1999 Lab. I.C. 3078, Hari Shankar Sharma and Ors. v. Artificial Limbs Manufacturing Corporation of India and Ors., reported in (1997) II CLR 631, Cipla Ltd. v. Maharashtra General Kamgar Union and Ors., reported in (2001) I CLR 754, Hindustan Coca Cola Bottling S/W Pvt. Ltd. v. Bhartiya Kamgar Sena and Ors., reported in 2002 (1) Mh.L.J. 559 = (2001) III CLR 1025, General Labour Union (Red Flag), Bombay v. Ahmedabad Mfg. & Calico Printing Co. Ltd. and Ors., reported in 1995 Supp (1) SCC 175.

4. It cannot be disputed that the issue as to the jurisdiction of the Industrial Court in the matter of complaint under the said Act is well-settled by a series of decisions of the Apex Court as well as by the decision of the Division Bench of this Court in Hindustan Coca Cola Bottling S/W Pvt. Ltd. v. Bhartiya Kamgar Sena and Ors. (supra). After taking note of its earlier decisions on the issue in question, it was clearly observed that:--

"In that case the learned Judge has not agreed with the view taken by Kochar, J. in the present case and held that in view of the decisions of the Supreme Court in Cipla Ltd. and Kalyani Steels Ltd., that only precondition to seek remedy under the MRTU & PULP Act is necessity of existence of employer-employee relationship between the parties and when its existence is not already established or is disputable, the party has to first seek relief under the Central Act, i.e. the Industrial Disputes Act or the Bombay Act, i.e. the Bombay Industrial Relations Act, and if successful therein to seek remedy under the said Act thereafter. We are in agreement with the observations of the learned single Judge but with a rider that in cases where the employer-employee relationship was recognised at some stage and thereafter it was disputed, the Industrial Court has jurisdiction to decide this issue as an incidental issue under Section 32 of the MRTU & PULP Act."

While approving the decision in Indian Seamless Metal Tubes Ltd. v. Sunil Rambhau Iwale, reported in 2002 (4) Mh.L.J. 151 = 2002 Lab.I.C. 1662, the Division Bench has specifically expressed full agreement with the views expressed by me in the said decision to the effect that:--

"Once it is clear that the jurisdiction of the Industrial Court depends upon the fact of existence of employer-employee relationship between the parties which is a jurisdictional fact, which should

exist to enable the Industrial Court to assume jurisdiction to entertain the complaint under the said Act, in the absence of the same, any attempt on the part of the Industrial Court to adjudicate upon the issue of such relationship would amount to mistake of fact in relation to jurisdiction."

5. The issue as to the jurisdiction of the Industrial Court or the Labour Court to entertain a complaint under the said Act has been conclusively decided by the above referred decisions irrespective of the fact whether the employer- employee relationship arises either in terms of the provisions of the Industrial Disputes Act, 1947 or the BIR Act. What is necessary to give jurisdiction to the Labour Court or the Industrial Court to entertain a complaint under the said Act is the existence of such employer-employee relationship, to be disclosed from the contents of the complaint filed by the complainant. Undoubtedly, the contents must be corroborated by necessary materials on record, more particularly when there is scope to dispute the claim of existence of such relationship. Once the complaint fails to disclose the necessary jurisdictional fact i.e., the existence of the employer-employee relationship between the parties, the question of the Labour Court or the Industrial Court going into the issue as regards such a relationship does not arise. It is immaterial whether the relationship of employee- employer is claimed in accordance with the provisions of the Industrial Disputes Act or pursuant to the provisions of the BIR Act. What is essential is that the complaint itself should disclose all the facts which can reveal the existence of such a relationship between the parties.

6. The contention that since the decisions in Cipla Ltd. v. Maharashtra General Kamgar Union and Ors. (supra) and Vividh Kamgar Sabha v. Kalyani Steels Ltd. and Anr., reported in 2001 AIR SCW 170 = 2001 Lab.I.C. 499 and Indian Seamless Metal Tubes Limited and Hindustan Coca Cola Bottling S/W Pvt. Ltd., by this Court are in respect of the relationship arising under the Industrial Disputes Act and not under the BIR Act and, therefore, the said decisions can be distinguished and cannot be applied to the case in hand is devoid of substance. As already observed above, it is not mere reference to the provisions of law which would suffice to disclose the employer-employee relationship, but it is necessary that the jurisdictional fact should exist on the face of the record to enable the Industrial Court or the Labour Court to entertain a complaint under the said Act. The facts pleaded should reveal the existence of the relationship of the employer-employee, irrespective of the claim being either under the BIR Act or not or under the said Act. Being so, irrespective of the fact that the decisions are in relation to the claim of existence of relationship in terms of the Industrial Disputes Act, the same would also apply with equal force to the matters where the claim of relationship is in accordance with the provisions of law contained in the BIR Act.

7. As regards the contention that the complaint discloses the necessary facts pertaining to the statutory liability of the respondent No. 1 to have a canteen as part of the undertaking, bare reading of the complaint, and more particularly para Nos. 3(b) and 3(c) reveal that the contention of the petitioners to the effect that the petitioners were continuously working in the canteen in question irrespective of change in the contractors for all those years and that the respondent No. 1 was legally bound to maintain a canteen for the benefit of its employees in terms of Section 46 of the Factories Act, 1948. If one considers these facts vis-a-vis the definition clause of the employer to be found in Section 3(14) of the BIR Act, it would at once reveal that there is nothing disclosed therein which can reveal that the canteen, wherein the petitioners were employed, formed "ordinarily part of the

undertaking" of the respondent No. 1. Section 46 of the Factories Act, 1948 provides that the State Government may make rules requiring that any specified factory wherein more than 250 workers are ordinarily employed, a canteen or canteens shall be provided and maintained by the occupier for the use of the workers. Undisputedly, the State Government has framed the Maharashtra Factories Rules, 1963 in terms of the provisions of the said Act and the Rule 79(1) thereof provides that the occupier of every factory wherein more than 250 workers are ordinarily employed and which is specified by the State Government by a notification in that behalf shall provide, in or near the factory, an adequate canteen according to the standards prescribed in the Rules, It is neither the case of the petitioners that the factory of the respondent No. 1 has either been specified by the State Government in terms of Section 46 of the Factories Act, 1948 r/w Rule 79 of the Maharashtra Factories Rules, 1963, that there is any notification, either pleaded or placed on record in that regard, either before the Industrial Court along with the complaint or in this Court along with the present petition. Being so, the question of holding the respondent No. 1 to be statutorily liable to have a canteen for the use of the workers does not arise, and in the absence of the pleadings and materials in support of the basic facts which are necessary to disclose the statutory liability of the respondent No. 1 to have a canteen for the use of the workers in terms of Section 46 of the Factories Act, 1948 read with Rule 79 of the Maharashtra Factories Rules, 1963, it cannot be said that the respondent No. 1 was legally bound to maintain a canteen for the benefit of its employees. Mere submissions in that regard, without factual foundation in support thereof in the complaint itself are not sufficient to disclose the existence of the employer-employee relationship between the parties so as to give jurisdiction to the Industrial Court to entertain the complaint under Section 28 of the said Act.

8. In the case of The Saraspur Mills Co. Ltd. v. Ramanlal Chimanlal and Ors. (supra), the Apex Court while dealing with the question as to whether the canteen workers employed by the co-operative society could be treated as employees of the Saraspur Mills Company within the meaning of the provisions of the BIR Act, held that since under the Factories Act it was the duty of the appellant to run and maintain the canteen for the use of its employees, the ratio of the decision of the High Court in the matter of The Ahmedabad Manufacturing and Calico Printing Company Ltd. (Calico Mills) and Ors. v. Their Workmen (supra) was applicable and the ratio of the said decision was to the effect that the workers in order to come within the definition of the 'employee' need not necessarily be directly connected with the manufacture of textile fabrics. What is pertinent to note about this decision is that while considering the point as to whether on proper construction of the amended Clauses (13) and (14) of Section 3 of the BIR Act, the workers employed in the canteen which was run by the co- operative society could be held to be employees of the Saraspur Mills Company, the Apex Court had taken note of the fact that there was statutory obligation under Section 46 of the Factories Act under which the Saraspur Mills Company was bound to maintain the canteen for its workers. Obviously, there was no dispute in the said case that under Section 46 of the Factories Act, the Saraspur Mills Company was duty bound to maintain the canteen for its workers. Being so, it is not the case where there was absence of notification in terms of the rules framed under Section 46 by the concerned State Government or that the Saraspur Mills Company was not specified undertaking in terms of the provisions of Section 46 of the Factories Act, 1948. In those circumstances, there being statutory obligation under the Factories Act, 1948 to maintain a canteen, it was held that the employees of the society, employed in the canteen run for the benefit of the

workers were the employees of the Saraspur Mills Company. This decision rather than being of any assistance to the petitioners, it clearly supports the case of the respondent No. 1 that in the absence of statutory obligation to maintain a canteen, the question of the contractor's employees being held to be employees of the company in terms of Section 3(14) of the BIR Act does not arise.

9. The ratio of the decision in Dattatraya Kashinath and Ors. v. Chhatrapati Sahakari Sakhar Karkhana Ltd., Pune and Ors. (supra) as well as in Sakhar Kamgar Union v. Shri Chhatrapati Rajaram Sahakari Sakhar Karkhana Ltd., and Anr. (supra) can be ascertained from the contents of para 9 and 6 of the respective decisions. In para 9 of the decision in Dattatraya Kashinath and Ors., it was held that a conjoint reading of Section 3(13)(a) with Section 3(14)(e) leads to the conclusion that, where an employer of an industry covered by the provisions of the BIR Act, in the course of or for the purpose of conducting the undertaking, contracts with any person for the execution by or under the contractor of the whole or any part of any work which ordinarily part of the undertaking, the owner of such undertaking would be the 'employer and the person employed by the contractor to do such work would be the employee'. In Sakhar Kamgar Union's case, in para 6 thereof, it was held that a combined reading of these definitions suggests that in an undertaking covered by the BIR Act, if any work which is ordinarily part of the undertaking has been entrusted to a contractor for execution by or under him and, for executing such work, the contractor engages contract labour, then notwithstanding the fact that there is no relationship of employer and employee between the principal employer and the contractor's workmen, for the purpose of the BIR Act, such contractors workmen are deemed to be employees within the meaning of Section 3(13) of the Act. Both these decisions disclose that in order to establish the relationship of employer- employee between the undertaking or the company and the contractor's workmen, what is absolutely necessary is that "any work which is ordinarily part of the undertaking" has to be entrusted by the contractor to his workmen for execution thereof. Though it is sought to be contended that the canteen is otherwise ordinarily a part of the undertaking of the respondent No. 1, no factual foundation has been laid in that regard either in the complaint or in the evidence. Being so, the decisions in the cases of Dattatraya Kashinath and others as well as in Sakhar Kamgar Union, which are squarely on the basis of "the work being ordinarily part of the undertaking" in relation to the work which was entrusted to the workmen of the contractor, can be of no assistance to the petitioners to contend that in the facts and circumstances in which they were employed by the contractor for the canteen in question would lead to the conclusion that they are also the employees of the respondent No. 1 within the meaning of the provision of law contained in Section 3(14) of the BIR Act. Being so, both the decisions are of no assistance to the petitioners in any manner in the matter in hand.

10. As regards the decision of the Apex Court in Basti Sugar Mills Ltd. v. Ram Ujagar and Ors. (supra), undoubtedly it was held therein that on the facts of the case the relationship of the employer and the employee was being disclosed. The said decision can be of no help for consideration in the matter in issue as it does not deal with the point of jurisdiction of the Court to entertain the complaint.

11. The decision in General Labour Union (Red Flag) Bombay v. Ahmedabad Mfg. & Calico Printing Co. Ltd. and Ors. (supra) though it is an order and not a judgment, it clearly holds down that "The workmen have first to establish that they are the workmen of the respondent-company before they

can file any complaint under the said Act". Bearing in mind the decisions of the Apex Court in the matters of Cipla Ltd., and Vividh Kamgar Sabha as well as of the Division Bench of this Court in Hindustan Coca Cola Bottling S/W Pvt. Ltd., certainly the contention of the learned Advocate for the petitioners that the decision in General Labour Unions case is merely an order and therefore is not binding, or that it does not lay down any binding precedent as such, does not arise for consideration in the matter.

12. As rightly submitted by the learned Advocate for the respondent No. 1, the decision of the Allahabad High Court in Hari Shankar Sharma and Ors. v. Artificial Limbs Manufacturing Corporation of India and Ors. (supra) also clearly supports the contention on behalf of the respondent No. 1. Therein, taking note of the provisions of Section 46, it was clearly ruled that in order to fulfil the requirement of Section 46(1) not only must be ordinarily more than two hundred and fifty workers employed, but the additional requirement is that the factory must be a specified factory, and that it is not that every factory which employees 250 workers or more is required to maintain canteen but only such factories which are specified by the State Government.

13. As regards the decision in Indian Petrochemicals Corporation Ltd. and Anr. v. Shramik Sena and Ors. (supra), it was undoubtedly held therein that the workmen of a statutory canteen would be the workmen established for the purpose of the Factories Act only and not for any other purposes. Irrespective of the same, it is also to be noted that in the said case the Apex Court had taken note of the fact that prior to the institution of the proceedings which were the subject-matter of the decision of the Apex Court, there were proceedings between the parties thereto and therein the Industrial Court had held that the workmen were entitled for continuity in service in the same canteen irrespective of the change of the contractor, and the said decision was never challenged by the Corporation. On the contrary, it was revealed that that those workmen had contended before the Industrial Court that the management was indulging in unfair labour practice and in fact they were employed by the company. They had specifically contended that they were entitled to continue in the employment of the company irrespective of the change in the contractor. The Industrial Court had accepted their contention as against the plea put forth by the management therein. The employer did not think it proper to challenge the said decision of the Industrial Court, and consequently it became final. The same clearly suggested that the management had accepted the fact that the respondent-workmen were permanent employees of the management's canteen. This was a very significant fact which apparently established the relationship of employer-employee between the parties. In those facts and circumstances, therefore, it was apparently clear that the respondents therein were the employees of the management. That is not the case in the matter in hand.

14. Being so, the findings arrived at regarding absence of jurisdiction to entertain the complaint under the said Act against the respondent No. 1 at the instance of the petitioners cannot be found fault with. They are clearly borne out from the records. The complaint does not disclose the necessary jurisdictional facts to enable the Industrial Court to entertain the complaint against the respondent No. 1 under the said Act.

15. In the result, therefore, there is no case made out for interference in the impugned order and hence the petition fails and is hereby dismissed. The rule is discharged with no order as to costs.