

Bombay High Court

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The Century Textiles And ... vs State Of Maharashtra & Others on 10 February, 2000

Equivalent citations: 2000 (3) BomCR 461, (2000) IILLJ 815 Bom, 2001 (2) MhLj 775

Author: N Pandya

Bench: N Pandya, S R Desai

ORDER

N.J. Pandya, J.

1. Both these petitions arise out of the impugned action of the Board constituted under the Maharashtra Mathadi, Hamal and Other Manual Workers (Regulation of Employment and Welfare) Act, 1969 (hereinafter referred to as the said 'Act').

2. The Act contemplates constitution of a Board to manage the scheme which, in turn, was sanctioned by the State Government after, entering into a consultative exercise with Advisory Committee, as per section 14 of the said Act, as per also the Representation of the Employee/Employees and other persons connected with the field. About this aspect, there being no dispute, we are not entering into further details.

3. The petitioners herein are having a factory, dealing with essentially in the product of man-made fibres which is used in the production of man-made yarn, later on made into clothes. The factory itself is confined to what is known as manufacturing of fibres.

4. Fibre is sought to be covered under the provisions of the said Act and the scheme framed thereunder. The concerned Scheme is known as "Cloth Markets and Establishments Board (For Greater Bombay, Thane and Raigad Districts)". The scheme has been brought into force somewhere in the year 1971 and has been corrected from time to time. At the time of argument, the said scheme corrected upto December, 1989 was given to us, and was relied on by both the sides for the purposes of making their respective submissions.

5. So far as the bio-chemical products are concerned, reliance is placed by the respondents on a scheme relating to Grocery. In order to understand the aforesaid schemes, as well as their applicability, first we will turn to the relevant provisions of the Act.

6. The definition clause in section 2 sub-section (10) of the said Act, refers to the Scheme. The Scheme means a scheme made under this Act. The Scheme is made for the purpose of ensuring regular employment who are not given protection and the benefit of enactment. Definition of the word 'worker' is to be found in sub-section (12) of section 2 of the said Act which refers to the "Scheduled Employment". Clause 11 contains definition of "Unprotected worker" which means a manual worker who is engaged or to be engaged directly or through any agency to do manual work in any scheduled employment.

7. For the purpose of Scheduled Employment, one has to turn to its definition clause which reads as under :

"Scheduled Employment means any employment specified in the schedule hereto or any process or branch of work forming part of such, employment."

The employment once included in the schedule therefore not only covers the employment itself but also covers any process or branch of the work forming part of such employment. It is, therefore, widely worded for the purpose of the said Act.

8. When the petitioners were approached by the respondents under the provisions of the said Act calling upon them to get their contract workmen registered, under the Grocery Board, the dispute arose between them. The submissions made by the petitioners were turned down including the request of exemption of section 72 of the

said Act. The action on the part of the petitioners to claim exemption would not necessarily mean that they accept the applicability of the said Act and claim exemption.

9. However, while filing the petition, there are clear dispute as to the applicability of the Act itself. This applicability is disputed on two counts, (i) periodical extension of the provisions of the Act made applicable from time to time by the State Government, and (ii) according to the petitioners, it does not cover the area where the factory of the petitioners is situated. It is in Kalia Talk of Thane District. In other words, the applicability of the Act is disputed on the basis of territorial exclusion of the area from the purview of the Act till, by a specific notification, it is extended by the State Government under the provisions of the said Act.

10. As can be seen from sub-section (4-A) of section 1 of the said Act, the extension territorially in the part of the State of Maharashtra is also related to various employments which are set out in the schedule given at the end of the Act as per the provisions of section 2 sub-section (9). The parties before us have relied on the official publication of the State of Maharashtra of the said Act, which is modified upto 15th June, 1991. Sub-section (4-A) of section 1 of this publication indicates that the entire Thane District is covered in relation to the employment in cloth markets or shops in connection with loading, unloading, stacking, carrying, weighing, measuring or such other work including work preparatory or incidental to such operations. The submission, therefore, is that it applies only to the employment in cloth market or shop but not to the factory.

11. The respondents for this purpose is relying not only on Item No. 2 of the said schedule but also on Item No. 5 of the said schedule. Both items are reproduced as under :

"2. Employment in cloth and Cotton Markets or shops in connection with loading, unloading, stacking, carrying, weighing,. (measuring, filing, stitching, sorting, cleaning or such other work) including work preparatory or incidental to such operations.

5. Employment in markets, and factories and other establishments, in connection with loading, unloading, stacking, carrying, weighing, (measuring, filing, stitching, sorting, cleaning or such other work) including work preparatory or incidental to such operations carried on by workers not covered by any other entries in this schedule."

12. However, if the respondents want to rely on Item No. 5, as quoted above, of the said schedule, it being a separate and distinct employment sought to be covered in form of the residuary clause, it has to be notified under section 1 sub-section (4-A) of the said Act unless the said clause is made applicable to the territories specified in the table given below sub-section (4-A) of section 1 of the said Act. Obviously, there is no question of allowing the respondents to take advantage of residuary clause.

13. As if this is not enough, the machinery meant for implementation of a scheme, viz. the Board, is not shown to be the extended area till date. Later on, we will be referring to the judgments taking a view that the Act, Board and the Scheme, all three should be extended to make the employer to comply with various requirements of the Act as well as that of the scheme. This would take care of submissions made on behalf of the petitioners with regard to the disputes raised in the Writ Petition No. 1118 of 1988.

14. The dispute raised in Writ Petition No. 1117 of 1988 relates to the activities connected with the employment in Grocery Market or Shops. Employment in Grocery Market or Shops, in connection with aforesaid activities of loading, unloading etc. is made applicable to Thane and Kalyan Taluka of Thane District and Panvel Taluka of Kulaba, which is now Raigad District, with effect from 26th December, 1979. In the year 1987, a Notification came to be issued making it applicable to the entire Thane and Raigad Districts. However, this notification relates only to the employment in Grocery Market or Shop. This would, therefore, not cover the factories. An attempt of getting it covered by virtue of Item No. 5 of the Schedule, that has been quoted above, will fail again, because, this is not referred to anywhere in the notification. Earlier attempt in this regard has been made by the petitioners to come before this Court by way of Writ Petition No.

1310 of 1986. The Division Bench of Justices S.P. Bharucha and V.V. Vaze in the matter of The Century Spinning & Mfg. Co. Ltd. & others v. State of Maharashtra & others, had upheld the challenge on the point of the Act being not extended to the area at the relevant time and had allowed the petition not deciding the question as to whether the Act would cover what is referred to as protected workers or not.

15. The said earlier petition had raised three submissions referred to in paragraph 11 of the judgment. The judgment is reported in 1986 (II) C.L.R. page 401. Three submissions recorded in paragraph 11 are (i) whether the Act, the said Schemes and the Boards thereunder are not extended to the Thane area and, therefore, do not apply to the petitioners plants: (ii) that the petitioners workmen proposed to be covered under the said schemes are not unprotected workers, as defined by the Act, and (iii) that, in any event, the order rejecting the petitioners exemption application was not a speaking order.

16. When the occasion arose for the petitioners to file these two petitions again, further efforts were made by the petitioners to make out a case that the Act infact has been extended to the area and, therefore, various requirements had to be fulfilled by the petitioners. In this regard, in paragraph 5 of the petition (page 8 to 11), particularly in that very paragraph, at page 11, the correspondence made between the petitioners and the respondents are marked as B, C, D, E and F and, finally, in paragraph 6, it is said that the 2nd respondent is about to launch prosecution and hence the petition.

17. In either events, the question of protected workmen has been kept open and, therefore, when it raised in the present petition, the submission was made on behalf of both the sides that finding be given in that regard.

18. Before we proceed to do that, we deal with the said aspect in Writ Petition No. 1117 of 1988 with regard to the Grocery. Again the said 1987 Notification clearly shows that it applies to market and shops. There is no reference whatsoever to the factory. The said amended notification takes care of applying the provisions of the Act to the employer in cloth and godown markets in the entire District of Thane but then again there is no mention to Item No. 5 of the said Schedule which has been quoted above.

19. Now coming to the main contention of the protected workmen and unprotected workmen, we have a very elaborate judgment of Justice Rege given in Misc. Petition No. 150 of 1973 on 19th April, 1974. The Ld. Judge has, at very pains takingly, borne out the history of various efforts that had gone into for framing of the said Act which can be seen from the unreported judgment (at page 13), While accepting the fact that the said Act is a social labour legislation relating to a large class of manual workers viz. Mathadi, Hamal, etc. called unprotected workers employed under individual employers with varying terms and conditions, in shops and markets dealing with several commodities, the position was accepted that they are not covered under any of the existing labour legislations dealing with various benefits and rights of the workers. The Government was conscious of the fact that there are malpractices as to the working conditions of the workers, and has, therefore, appointed a Committee known as "Mathadi Labour Enquiry Committee for Greater Bombay" under the Chairmanship of one Shri Pawar. It was known as "Pawar Committee". Various suggestions were made by the said Committee. The State Government thereafter found that the Committee had restricted to the scope of dealing with working conditions of Mathadi workers only and, therefore, it appointed a Committee what is known as "The Lokhandi Jathe Kamgar Enquiry Committee under the Chairmanship of Shri Kalekar. Kalekar Committee also went into various aspects and came out with a scheme called "The Bombay Iron and Steel (Loading and Unloading) Labour (Regulations of Employment and Welfare) Scheme". Again the Government felt that the manual workers in other parts or in relation to other activities are left out and, therefore, third Committee was formed in the year 1965. It is known as Patil Committee. The outcome of this elaborate exercise was to enquire into the conditions of service of the manual workers in different employments. By this special enactment inspite of taking various labour legislations into consideration yet it was not able to fulfil the need of these workers and that is how the aforesaid Act came to be enacted. The purpose of the Act as set out is to regulate the employment of unprotected manual workers which reads as under.

1) To regulate the employment of unprotected manual workers;

- 2) To make provision for the terms and conditions of their employment;
- 3) To provide for health and safety measures when required;
- 4) To provide for their welfare;
- 5) To make provision for ensuring adequate supply to and full utilisation of such workers in such employments to prevent avoidable unemployment; and
- 6) For the said purposes to establish Boards.

20. The petitioners have also quoted Statements of Objects and Reasons as set out in the Government Gazettee. It was published in 1968 Maharashtra Government Gazettee Part V page 503 and it has been set out at pages 17 and 18 of the petition. It reads as under :

"In view of the peculiar nature of work, its variety, the precarious means of employment and the system of payment, and the particular vulnerability to exploitation of this class of labour, the Committee came to the conclusion that the application of the various labour laws to such workers was impracticable and regulation of their working and other conditions by introducing amendments to the labour laws was not possible."

21. The aforesaid purpose of the Act as set out in the judgment of Justice Rege, and Settlement (sic Statement) of Objections and Reasons when taken together, according to the petitioners, squarely indicate that these manual workers who are otherwise unprotected are to be protected and, therefore (sic under) the Act. The submission of the petitioners therefore is that the workers being unprotected are required to be fulfilled the condition of any of the employers to be brought within the purview of the scheme if at all the scheme is made applicable in the area.

22. The further submission is that merely because the workers are engaged in manual work as specified in the said Act viz. loading and unloading etc., they by itself would not have rendered unprotected. It can be demonstrated on the basis of the record that in fact they are protected.

23. In support of this submission, reference is made to the Division Bench of this Court in Writ Petition No. 119 of 1979. It is a Division Bench judgment rendered by Justice Deshpande and Mody on 16th January, 1980. It is an unreported decision. Referring to the Act, the Ld. Judges have, in the very first paragraph, noted the fact that it is for the purpose of regulating the employment of unprotected manual workers. Later on, upto paragraph 6, we have the history of the matter which had gone upto the Supreme Court and referred back etc. From paragraph 7 onwards, we find the submissions made at the bar being dealt with by the Ld. Judges. It is true that, by the said petition, one more attempt was made to challenge the vires of the Act. The vires was repeatedly accepted for the limited purpose and limited extent by the Ld. Single Judge Shri Rege. In his judgment referred to above as also in the other judgments which in turn are referred to in the present Division Bench which we are now considering.

24. The Ld. Judges have repealed all arguments and referring to one of the judgments of Justice Rege have categorically held that the challenge amended on the basis of Articles 19 and 31 of the Constitution of India is not available and, therefore, would fail. In paragraph 9 of the judgment, certain observations are made while deciding the aforesaid challenge. Particular disputed part of the observations is to be found in paragraph 9 which reads as under:

"9. It is pertinent to note that this Act does not deal with the employees engaged on monthly basis as the same are protected by Shops & Establishments Act and enactment. It is only the casual engaged workman that come within the purview of the Act."

25. Needless to say, the petitioners are heavily relying on these observations of the Division Bench. As against that, the respondents are equally vehemently submitting that, at best, these are the casual observations, and when the Court dealing with the writ petition with regard to the constitutional challenge has not called upon to decide the extent and scope of the applicability of the Act, these observations may not be said to be the decision needed on the point of applicability of the Act by the Division Bench with regard to what is sought to be made out a category of protected workmen.

26. For the time being, we leave aside this controversy, and try to resolve the dispute between the two sides as to the applicability of the Act which is on the basis of material produced on record as also residuary provisions. For this purpose, the petitioners are essentially relying on the material which they have produced along with the petition. It is an admitted position that the workers sought to be covered by the respondents are working in the factory of the petitioners and in each of the cases they are employed through contractors. Settlement of one contract and correspondence that proceeded to the conclusion of that contract are produced on record of the petition.

27. Exhibit-F, page 51, is a letter addressed by the petitioner company to M/s. A.K. Nandi, Contractor. It is replied by the said contractor, as per page 53, and would describe himself to be a Heavy Gang Contractor. The terms of the contract are at Exhibit-B, page 61. This is followed by Exhibit-G Memorandum of Settlement under section 2(P) read with 18(1) of the Industrial Disputes Act, 1947. The workers are represented by the Rayon Workers Union. There is a specific reference to the fact that the union has taken the case of the workmen employed by contractor for revision of wages, etc. In the said settlement, rates of wages are raised. The provision for E.S.I., P.F. and P.P. is also taken care of to be borne by both, the Principal Employer and the petitioner-company. The provision for holidays is also made at page 67, provisions of weekly off is also made. The said settlement is not made applicable to the workman employed through contractors for Khokha manufacturing.

28. In this background, submission made is that merely because there is an Act under which a scheme is framed and there is a Board to implement the same, the whole exercise in connection with the manual labours because they are not protected would not automatically apply to the manual workers employed by the employers like the petitioner company, which has all protection available to regime of the Industrial Disputes Act, 1947.

29. The petitioners contention would mean that though the Act may have applicable and the scheme having been extended with the Board which is also functioning in the area, it will be open for the employer to raise a plea that the workers employed by him are protected and, therefore, they should not be covered by this scheme. The Act, no doubt, is especially framed, as noted above, to provide protection as also to provide welfare and security of service to the workers who are doing manual work. In the Act also, almost all cases are referred to the unprotected workers. In this connection, a specific reference is made to section 3 which provides for scheme for ensuring regular employment of unprotected workers. Sub-section (1) of section 3 of the Act provides an adequate supply and full and proper utilization of unprotected workers in scheduled employments, the State Government may frame a Scheme. The Scheme shall in particular provide various aspects as set out in Clauses (a) to (1) of sub-section (2) of sections of the Act. In these various Clauses also, the workmen are always referred to as registered unprotected workers.

30. No doubt, there is section 5 in the said Act which contains the disputes regarding application of scheme. Whenever there is a question as to whether any Scheme applies to any Clause (sic Class) of unprotected workers or employers, the matter shall be referred to State Government and the decision of the State Government on the point shall be final. Again, it may be noted that there is a reference to the unprotected workers. The provisions with regard to the constitution of a board etc. need not be gone into for this purpose. Section 18 makes the provisions of the Workmen's Compensation Act, 1923, applicable to Mathadis workers who are registered as unprotected workers and so are the provisions of Payment of Wages Act, 1936 made applicable to the workers under section 19. Provisions of the Maternity Benefit Act, 1961 are made applicable

to the workers under section 20. But, with regard to this, there is a final notification in the official gazette duly published by the State Government. Section 21 further provides that nothing contained in this Act shall affect any rights or privileges, which any registered unprotected worker employed in any Scheduled Employment is entitled to, on the date on which the said Act comes into force, under any other law, custom or usage contract, applicable to such workers, if such rights or privileges are more favourable to him than those to which he would be entitled under this Act and the entire scheme. If this is happened, obviously the workers will not be entitled to receive any corresponding benefit under the provisions of the said Act and the Scheme. Section 22 provides for exemptions. There again exemption is in addition to the Scheduled Employment and in respect of class or classes of unprotected workers employed therein.

31. The entire Act, therefore, is not only designed to take care of unprotected workers but also throughout referred to workers as unprotected, for which, there is a definition Clause 2(11). It merely indicates that unprotected workers are manual workers who are engaged or to be engaged in any scheduled employment.

32. The submission made on behalf of the respondents, therefore, is that moment the work is found to be manually working in any Scheduled Employment to which the Act is extended, he is an unprotected worker. Once this situation arises, there is no alternative but to cover the employers and workers under the provisions of the Act, Scheme and the Board. The definition given as to the word "Worker" in Clause 2(12) of the said Act is meant to refer to those persons who are not employed by any employer or contractor, but working with the permission of, or under agreement with the employer or contractor but does not include the members of an employer's family, the workers covered by this definition are engaged or to be engaged directly or through any agency on wages or not, to do manual work in any Scheduled Employment.

33. In order to understand these two definitions, we may now refer to the judgment of the Ld. Single Judge given in Criminal Revision Application No. 160 of 1975. The Ld. Judge in that matter was dealing with a situation placed before the Court by the petitioner in relation to the Contract Labour (Regulation of Abolition) Act, 1970 referred to as the Central Act, and the provisions of the said Act which is the State Act. The said Act is referred to as the "State Act" in the course of his judgment, on criminal side, because, the trial Court had found the petitioners guilty under Clause 44 of the Scheme framed under the said Act and imposed the fine of Rs. 300/- each and, in default, to undergo Simple Imprisonment for two months each.

34. The point sought to be urged before the Court in criminal revision application, as a point of law, was that, once there is a central enactment holding the field, the State Act should not hold the field under the provisions of Article 254 of the Constitution of India. The Ld. Judge held that both the Acts are applicable and proceeded to consider the schemes lying thereunder and overall objections of framing of these two Acts. Paragraph 4 deals with the State Act. In paragraph 7, the Ld. Judge gives his finding to the effect that the State Act is not confined to contract labour in the specified employments. He had, on the other hand, noted that it relates to all manual labour, contract or otherwise, engaged in various employments given in the schedule. It is further noted by the Ld. Judge that the Act is meant to provide not only the employment but is designed to provide for all stages of such employment right from the recruitment upto the retirement or termination of the employment of such labour.

35. Precisely for this reason, it is urged on behalf of the petitioners that, if this aspect i.e. various stages of employment, is taken care of because of the protection given to the workers under various Government enactments, obviously, they cannot be termed as unprotected workers and therefore should be held to be outside the purview of the Act. On the basis of material produced before us, we have no hesitation in deciding the fact that the workers that are employed by the petitioners cannot be termed to be unprotected workers. In their reply, except for the denial that the respondents have not brought any material on record making the petitioners claim of protection having been effected in the manner stated above, an affidavit of Shri S.R. Thakur, who is inspector of Cloth Market Shops and Establishment (page 104 onwards) shows that after denying one after the other various contentions raised, in our opinion, it is of mere denials. If they wanted to raise contentions to counter the claim of the petitioners made in the petition, they ought to have produced

material in this regard. In the course of arguments that We have heard starting from yesterday, though various material and other statutory material were produced across the bar, as the arguments developed on both the sides with regard to the contentions raised in the petitions on the point of protection with regard to the workers, there is nothing produced before us by the other side.

36. The matter is of 1988 and we dispose it of today. During the pendency, if there are any events, which might have come to the notice of the respondents, which can be made use of to counter the petitioners claim of protection being given to the workers are apparently not collected and if collected, not produced before us.

37. In this background, we are coming to the conclusion that there cannot be said to be unprotected workers. The observation made in the judgment of the Division Bench, in paragraph 9, which we have quoted above, no doubt, described by the respondents is totally uncalled for to decide the issue before the Court. To that extent, they are right. The question was not directly involved. However, in order to understand the submissions made at the bar, and in order to decide the question raised before them, when the Ld. Judges are drawing strength of the position as viewed from the standpoint of protected workmen, obviously, this observation cannot be said to be totally irrelevant in the judgment. To that extent, in our opinion, it would be the special obiter occurred into the judgment. For this reason, we do not agree with the submissions made on behalf of the respondents. Relying on a decision in the case of Mohandas Issardas & others v. A.N. Sattanathan & others, reported in (sic) , where what is obiter is discussed and dwelt upon, in paragraph 6, the question is directly addressed to and has categorically held that an obiter dictum is an expression of opinion on a point which had some relations with the matter on hand, and every expression of opinion will not automatically become obiter dictum. No doubt, the said Bombay judgment is pertaining to the same observation made in the Supreme Court judgment which was sought to be pressed into service in support of a contention that it being an obiter dictum of the Supreme Court, it is binding and, therefore, the Court cannot go outside the judgment. It was a matter arising out of the Customs Act and the observations of the Supreme Court is quoted in paragraph 11 at page 118 of the report. While dealing with the matter of total jeopardy in relation to the adjudication done by the custom authority imposing penalty, the following observations were made in the said Supreme Court judgment. They are "..... Even though the customs officers are invested with the power of adjudging confiscation increased rates of duty or penalty, the highest penalty which can be inflicted in Rs. 1,000/-". This reason was put forward in the judgment in order to strengthen the conclusion that the customs authorities are not discharging judicial functions. These observations were therefore held by the Ld. Judges of this Court with utmost respect to be a casual observation.

38. In our opinion, the Division Bench judgment with which we are dealing was directly addressing itself to a challenge as to the constitutional validity with reference to Articles 19 and 31 of the Constitution of India and, in order to understand that, while repelling the same, the provisions of the Act when understood on the stand point of protected and unprotected workers cannot be said to be a casual observation at all.

39. However, the submission made in the aforesaid judgment of the Division Bench which refers to the manual workers engaged on monthly basis do not help the petitioners because in the scheme itself there is a reference to monthly workers and casual workers. However, this submission is totally out of hand, because, the scheme would come into existence provided the unprotected workers who, on being covered under the scheme, will be divided into manual workers or casual workers.

40. We, therefore, respectfully agree with the view expressed in the said judgment dated 16th January, 1980 in Writ Petition No. 119 to the effect that the Act does not deal with employees engaged on monthly basis as the same are protected under the Shops and Establishments Act and other enactments. We also agree with the view that it is only the casually engaged workmen who would come within the purview of the Act. The material produced on record clearly shows that they are protected workmen more particularly with reference to the said agreement under section 2(P) of the Industrial Disputes Act, 1947.

41. In the result, we hold that the Act does not apply to the petitioners on both counts viz. territorial aspect as also non covering of protected workmen. The petitions, therefore, stand allowed. Rule in both the petitions is made absolute accordingly.

42. Certified copy be expedited.

43. Petition allowed.