(1978) 12 BOM CK 0007

Bombay High Court

Case No: Special Civil Application No. 1468 of 1973

The B.E.S.T. Workers'' Union		APPELLANT
	Vs	
P.B. Kerkar		RESPONDENT

Date of Decision: Dec. 16, 1978

Acts Referred:

- Bombay Industrial Relations Act, 1946 - Section 29, 3, 42, 43, 44
- Constitution of India, 1950 - Article 227
- Industrial Disputes Act, 1947 - Section 33C

Citation: (1980) 82 BOMLR 348 : (1979) MhLj 632 : (1978) MhLj 452

Hon'ble Judges: Shah, J; Pendse, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Shah, J.

The respondent No. 1 is the General Manager of the B.E.S.T. Undertaking owned by the Bombay Municipal Corporation and the petitioner is the trade union registered under the Indian Trade Unions Act. It is also registered as a representative of the employees for the transport industry for the local area of city of Bombay under the Bombay Industrial Relations Act (hereinafter referred to as the "Act"). For brevity''s sake the petitioner will hereinafter be called as "the Union" and respondent No. 1 as the "undertaking".

2. On August 15, 1970, the petitioner and respondent No. 1 entered into an agreement regarding certain demands of the workmen of the undertaking. The agreement, inter alia, provided for introduction of staff incentive bonus Scheme for transportation, engineering repairs and maintenance staff. Annexure C3(D) to the said agreement gave the particulars of the said staff to whom the incentive bonus scheme would be introduced. The present dispute relates to the employees who were working as instrument fitters. Annexure C3(1) includes the class of workmen

viz. the motor vehicle fitters as being entitled to the incentive bonus under the said scheme agreed to. It appears that one of the employees who according to the undertaking was in the category of instrument fitter but who claimed to be employees as motor vehicle fitter filed an application u/s 33C(2) of the Industrial Disputes Act claiming certain amount by way of incentive bonus under the said scheme covered by the agreement. This application was resisted by the undertaking contending inter alia that the said employee was in the category of an instrument fitter and could not claim incentive bonus on the basis that he would fall under the category of motor vehicle fitter.

3. The labour Court, however, granted the employee''s application on the ground that he falls within the category of motor vehicle fitter governed by the staff incentive bonus scheme under the agreement. The undertaking did not challenge this order of the labour Court in the higher Court. But instead filed a reference to the Industrial Court u/s 73A of the Bombay Industrial Relations Act for interpretation of agreement in respect of staff incentive bonus for transportation, engineering repairs and maintenance and also for a direction that the workmen falling within the category of instrument fitters were not covered under the scheme and were, therefore, not entitled to the incentive bonus. The main contention raised on behalf of the union was that the employer was not entitled to make an application u/s 73A of the Act in respect of the dispute which Ml in Item No. 5 of Schedule III viz. construction and interpretation of awards, agreements and settlements. Apart from raising this preliminary objection of the non-maintainability of the application of the kind filed by the undertaking u/s 73A of the Act, the application was also resisted on merits. In brief, the contention raised on merits was that the instruments fitters were nothing but motor vehicle fitters for the purposes of incentive bonus scheme under the agreement of 1970. They contended that the duties of fitters working in the instruments section were the same as those of a fitter working in the motor vehicle department who are repairing and maintaining the buses and as such they expressly fell within the category of motor vehicle fitters in annexure C3(D) to the agreement to whom incentive bonus scheme has been applied. By his Award dated January 24, 1973, the President of the Industrial Court accepted the interpretation put by the undertaking on the provisions of annexure C3(D)(a) and held that only five categories of employees enumerated in annexure C3(D) were intended to be covered by the scheme and that the refusal of the undertaking to extend benefit to instruments fitters was justified on the correct interpretation of the terms of the agreement. The Court rejected the preliminary objection raised by the union based on interpretation of Section 73A of the Act and held that the application for reference made by the undertaking was competent. This decision of the Industrial Court has been challenged by the union in this petition filed under Article 227 of the Constitution of India.

4. The only principle contention raised by Mr. Naik, the learned Counsel appearing for the union, is that the application for reference made by the undertaking u/s 73A

of the Act is misconceived and not maintainable in law. According to him, the rights of the employees and the employer are circumscribed by the provisions of Section 42 of the Act and it is only in cases where the employer can effect a change in respect of an industrial matter that he could get a right to approach the Court. According to him, after the agreement is effected, it is for the employer to put his own interpretation on the terms thereof and implement the same in the light of his own interpretation. There is no question of his raising a dispute by giving a notice to effect the change in the matter of interpretation or construction of the agreement as it is his right to interpret the agreement and enforce it. It is only the employee who may be aggrieved by such interpretation and implementation of the terms of the agreement and then Section 42(4) of the Act provides for a specific remedy to the employee or the union to raise a dispute after carrying out the formalities including giving of the notice of change and taking the matter to conciliation and in case the conciliator submits a failure report, the employee would be entitled to take legal action by raising a dispute before the proper forum. He submitted that Section 73A of the Act, by itself, does not confer any right on the parties and the sole right of the employer and the employees is u/s 42 of the Act and in absence of any provision u/s 42 of the Act which confers a right on the employer to serve a notice of change in respect of matters covered in items of Schedule III, he is not entitled to take recourse to Section 73A of the Act which is merely a procedural provision intended for the enforcement of rights emanating from the provisions of Section 42 of the Act, It was also the contention of the learned Counsel that having regard to the proviso to Section 73A of the Act, the pre-requisite for the maintainability of an application under that section is the possibility of conciliation proceedings which cannot take place in the present case -having regard to the provisions of Section 54 read with Section 42 of the Act because Section 54 of the Act which provides for machinery for starting conciliation proceedings can only be availed of in cases covered by Section 42 of the Act and not in any other cases.

5. The question which falls for our determination is the interpretation to be put on Section 73A of the Act in the light of the scheme of the Act and its other provisions. Section 73A of the Act provides :

Notwithstanding anything contained in this Act an employer or a registered union which is a representative of employees and which is also an approved union may refer any industrial dispute for arbitration to the Industrial Court:

Provided that no such dispute shall be referred to the Industrial Court,-

(i) after two months from the date of the completion of the proceedings before the Conciliator;

(ii) where the registered union or the employer, as the case may be, has offered in writing before the Conciliator to submit the dispute to arbitration under this Act and the employer or the union, as the case may be, has not agreed to do so;

(iii) unless the dispute is first submitted to the Conciliator and the conciliation proceedings are completed or the Conciliator certifies that the dispute is not capable of being settled by conciliation:

Provided further that no such dispute shall be referred to the Industrial Court where under any provision of this Act it is required to be referred to the Labour Court for its decision.

6. It would appear from the main provision apart from the proviso that any employer or a registered union which is a representative of employees and which is also an approved union can make a reference to the Industrial Court for arbitration. The reference, however, has obviously to be in respect of an industrial dispute. "Industrial dispute" is defined in Section 3(17) and according to the definition it means any dispute or difference between an employer and employee or between employers and employees or between employees and employees and which is connected with any industrial matter, "Industrial matter" is also defined in Section 3(18) of the Act and means any matter relating to employment, work, wages, hours of work, privileges, rights or duties of employers or employees, or the mode, terms and conditions of employment, and includes-

(a) all matters pertaining to the relationship between employers and employees, or to the dismissal or non-employment of any person;

(b) all matters pertaining to the demarcation of functions of any employees or classes of employees;

(c) all matters pertaining to any right or claim under or in respect of or concerning a registered agreement or a submission, settlement or award made under this Act;

(d) all questions of what is fair and right in relation to any industrial matter having regard to the interest of the person immediately concerned and of the community as a whole.

7. Having regard to the wide definition of the expression "industrial matter" it cannot be doubted that the construction and interpretation of the awards, agreements, and settlements which is in item No. 5 of Schedule III is a industrial matter. There is also a dispute or difference between the employer and the employees connected with this industrial matter in the present case and as such it would amount to an industrial dispute within the meaning of the definition. The dispute is also between the undertaking which is the employer in this case and the petitioner union which is admittedly a registered union and also a representative of the employees and is an approved union. Leaving aside the question of the impact of the two provisions on the main provision, it would at once be clear that all the conditions necessary for a valid reference for arbitration to the Industrial Court are satisfied. Then, there is also a non-obstante opening clause "notwithstanding anything contained in this Act" which clearly shows that the provision will have its

full sway notwithstanding anything contained in the other provisions of the Act. However, it must be noticed that the second proviso provides that no such dispute shall be referred to the Industrial Court where under any provision of this Act it is required to be referred to the labour Court for its decision. It would, therefore, be not permissible to refer the industrial dispute for arbitration to the Industrial Court where under any provision of the Act, it is required to be referred to the labour Court for its decision. One such provision which confers power on the labour Court is Section 78 of the Act. It enumerates the various disputes which the labour Court shall have power to decide. Sub-section (1)(iii) of Section 78 of the Act, inter alia, provides:

(1) A Labour Court shall have power to-

A. decide-

(iii) any change made by an employer or desired by an employee in respect of an in-industrial matter specified in Schedule III (except item (5) thereof) and matters arising out of such change.

8. As the industrial dispute, in our case, is covered by Item No. 5 of the industry-matters specified in Schedule III, the labour Court does not have the jurisdiction to decide the dispute. Therefore, the second proviso will not be attracted to the facts of this case. It is the first proviso which presents some difficulty. The wording of the first proviso is that no such dispute (i.e. dispute which is being referred to Industrial Court under the main provision) shall be referred to the Industrial Court,-

(i) after two months from the date of the completion of the proceedings before the Conciliator;

(ii) where the registered union or the employer, as the case may be, has offered in writing before the Conciliator to submit the dispute to arbitration under this Act and the employer or the union, as the case may be, has not agreed to do so;

(iii) unless the dispute is first submitted to the Conciliator and the conciliation proceedings are completed or the Conciliator certifies that the dispute is not capable of being settled by conciliation:

9. On the basis of this proviso, it has been emphasised by Mr. Naik that it clearly carves out from the main provision an exception and unless conciliation proceedings before a conciliator are possible by virtue of other provisions of the Act which make a provision for the machinery for conciliation proceedings, such ah industrial dispute cannot be referred to for arbitration to the Industrial Court. This submission is based on the provisions of Section 42 read with Section 54 of the Act.

10. Section 54 is contained in chap. X relating to the Conciliation proceedings. Sub-section (1) of Section 54 of the Act is as follows :

If any proposed change in respect of which notice is given u/s 42, or an intimation or special notice is given u/s 43 is objected to by the employer or the employee, as the case may be, the party who gave such notice, intimation or special notice shall, if he still desires that the change should be effected, forward to the Registrar, the Chief Conciliator and the Conciliator for the local area for the industry concerned a full statement of the case in the prescribed form within fifteen days from the date of service of such notice, intimation or special notice on the other party or within one week of the expiry of the period fixed by both the parties under Sub-section (?) of Section 44 for arriving at an agreement.

11. It is not necessary to refer to the other provisions which are in the nature of follow up provisions providing for machinery for conciliation proceedings by the conciliator till their termination, either in the settlement or a failure report. What is emphasised by the counsel is the fact that conciliation proceedings can only be started where a notice of change is given u/s 42 of the Act or an intimation of special notice given u/s 43 of the Act. Section 42 provides for the notice of change. Sub-section (1) thereof enables the employer to give a notice of the change whenever he intends a change in respect of an industrial matter specified in the schedule. The notice of such intention is to be given in the prescribed form to the representative of the employees and he is enjoined to send a copy of such notice to the Chief Conciliator, the Conciliator for industry concerned for the local area, the Registrar, the Labour Officer and such other person as may be prescribed. He is also enjoined to affix copies of such notice at a conspicuous place on the premises. It would appear that the right of the employer to give such a notice of change is confined to the industrial matters mentioned in Schedule II. There is no other provision in Section 42 or elsewhere in the Act which enables the employer to give a notice of change in respect of items mentioned in Schedule I or Schedule III with which we are concerned. Sub-section (2) of Section 42 of the Act gives a right to the employee who desires a change in respect of an industrial matter not specified in Schedule I or III to give a notice in the prescribed form to the employer and also requires him to forward the copy of the notice to the Chief Conciliator, the Conciliator and other officers as prescribed in the said section. Sub-Section (4) of Section 42 deals with the rights of the employee or the representative union to make an application to the labour Court or the Industrial Court as regards the changes desired by them. Under Sub-section (4) of Section 42 any employee or a representative union desiring a change in respect of (i) any order passed by the employer under standing orders, or (ii) any industrial matter arising out of the application or interpretation of standing orders, or (iii) an industrial matter specified in Schedule III, except item (5) thereof shall make an application to the labour Court and as respects change desired in any industrial matter specified in item (5) of the Schedule III to the Industrial Court. It would, therefore, appear that a forum has been afforded to the employee or the union as regards the item (5) of Schedule III with which we are concerned.

12. In view of the provisions of Section 42 of the Act, if the change is desired by the respective parties, the proceedings in conciliation have got to be resorted. It would, therefore, appear that so far as conciliation proceedings are concerned, the employer cannot take recourse thereto in respect of items in Schedule III or Schedule I and consequently he cannot take recourse to conciliation proceedings in respect of Item (5) in Schedule III viz. the interpretation of an agreement. Having regard to the scheme of the provisions relating to conciliation proceedings read with Section 42, it does appear that as far as the employer is concerned, proceedings in conciliation cannot be availed of by the employer in respect of Item (5) in Schedule III. It is on this premise that Mr. Naik contended before us that the first proviso to Section 73A clearly shows that the employer cannot make a reference in respect of industrial dispute covered by item No. (5) of Schedule III to the Industrial Court because according to him the scheme of the proviso shows that it is only in cases where the conciliation proceedings can be commenced that the application u/s 73A of the Act by the employer would be permissible. As regards the employee, he pointed out that it is not necessary for him to resort to the provisions of Section 73A of the Act because Sub-section (4) confers on him a right to approach the Industrial Court in that behalf. On a careful consideration of the entire provisions of Section 73A read-with the scheme of the Act, we are not impressed by the submission of Mr. Naik.

13. The preamble to the Act shows that the Act is intended to regulate the relations of employers and employees and to make a provision for settlement of industrial disputes. It cannot be gainsaid that the intention behind the Act is to promote harmonious relations between the employer and the employee and to promote settlements and also to provide machinery for settling the disputes. We find that the main provision of Section 73A of the Act is clear and unequivocal and brings within its sweep any industrial dispute which can be referred for arbitration to the Industrial Court. This aspect is emphasised also from the fact that such a reference can be made ''notwithstanding anything contained in the other provisions of the Act''. It is not disputed that Schedules I, II and III are not exhaustive of the industrial disputes or industrial matters. If the argument of the counsel based on the first proviso is to be accepted, it would mean that the employer would not be able to take the matter to conciliation and there would be a stalemate resulting in possible disharmony between the employer and the employees and also disruption of the working of the industry. In our view, it would be proper to interpret the proviso as merely a procedural provision and not a substantive provision which carves out certain items of industrial disputes from the main provision. It would be reasonable to construe the proviso to mean that wherever proceedings in conciliation are possible, i.e. a case which falls u/s 54 read with Section 42 of the Act, that a reference would not be permissible until the conditions contained in the three sub-clauses of the proviso are satisfied. To read the proviso as a substantive provision carving out certain types of disputes from the main provision would in our

view frustrate -the objects of the Act and also set at naught the effect of the non obstante clause in Section 73A. For instance, in the present case the employer will go on interpreting the agreement in his own way by denying the right, if any, to the employees in question to the incentive bonus and the employee or the union will go on taking the cause of each individual workman to the Industrial Court or to the Labour Court which means a protracted litigation not conducive to the maintenance of the industrial peace and harmony between the two sides. Moreover, if it was the intention to exclude such cases from the operation of the provisions of Section 73A of the Act, the proviso would have been worded in a different manner and the Legislature could have easily made its intention clear by simply providing that the provisions would apply only to cases where the proceedings in conciliation as contemplated by the provisions of Section 54 of the Act are possible. The construction sought to be put by Mr. Naik would in our view be destructive of the main provision of Section 73A of the Act and such a construction is also not possible unless we read into the proviso the words which are not there. It is not as it were that the proviso and the main provision cannot be construed in a harmonious manner. It is clear to us that the wording of the proviso clearly indicates that it merely enacts a procedure and being a procedural provision cannot affect the substantive rights of the employer to refer the industrial dispute contained in item No. (5) of Schedule III for arbitration to the Industrial Court. In our view as the conditions of Section 54 of the Act cannot be attracted where the employer wants to effect the changes in respect of matters covered by item (5) in Schedule III, the procedural part contained in the proviso would naturally not apply and it would be open to the employer to approach the Industrial Court for arbitration in the matter of industrial dispute that has arisen in this case.

14. In this connection, it must be noticed that in Sub-section (4) of Section 42 of the Act the words "except item (5) thereof" and "change desired in any industrial matter specified in item (5) of Schedule III, to the Industrial -Court" were inserted by an amendment in the year 1965. Similarly, the words "employer" were added by the same amending Act, viz. Mah. 22 of 1965 in Section 73A of the Act. Consistent with these amendments, in Section 78(1), item (iii), the words "except item (5) thereof" were added. Thus, before these amendments, the employee could make an application to the labour Court in respect of item (5) in Schedule III and by the amendment in Sub-section (4) of Section 42, the right was given to the employee to approach the Industrial Court in respect of the change desired by him in item (5) in Schedule III. By the inclusion of the word "employer" in Section 73A of the Act, he became entitled to refer any industrial dispute for arbitration to the Industrial Court and it has been made clear that this right is conferred on him irrespective of any other provisions. The wording of Section 73A is clearly wide and unequivocal and the right cannot be taken away by resorting to the procedural provision contained in the first proviso of that section. Even otherwise, it is difficult to see why if the dispute in the present case is an industrial dispute being provided in item (5) in Schedule III,

only the employee should be given a right to raise a dispute about the interpretation of the agreement when Section 73A in clear and unequivocal terms confers a right on the employer to refer any industrial dispute for arbitration to the Industrial Court. The interpretation that we are putting on Section 73A is also consistent with the intention and the objects of the Act.

15. It would be useful to refer to a decision of the division Bench of this Court in the case of Aruna Mills Ltd. v. Industrial Court, to which our attention has been invited by Mr. Singhvi, the learned Counsel appearing for the undertaking. That was a case prior to the amendments made by the amending Act 22 of 1965. In that case also the employer had made an application to the labour Court purporting to be an application under Sections 78 and 29 of the Act in which he asked for interpretation of the standardisation award and the agreement quae its applicability regarding certain class of employees. The union raised the contention that the application was not maintainable as the employer was not entitled to approach the labour Court u/s 78 of the Act. In that case also similar contentions were advanced on behalf of the union and these contentions were based on the provisions of Section 42(4) read with Section 54 of the Act. This Court held that Section 79 clearly conferred a right on the employer to approach the labour Court as the dispute had arisen regarding the interpretation of the provisions of the award or the agreement. This Court further observed (p. 209):

Another reason given by the Industrial Court in support of its view is that an employer can act upon his own interpretation of the award and leave it to the employee to approach the Labour Court. That is undoubtedly true. But if an employer acts on his own interpretation or makes a change, it might give rise to disputes and create discontent amongst the workers. In order to avoid this contingency, an employer may prefer to approach the Labour Court to get the dispute resolved rather than to act on his own interpretation. One of the objects of the Act, as stated in the preamble, is to make provision for the settlement of ''industrial disputes''. We must, therefore, interpret the provisions of the Act in a manner, which would promote its objects. It would certainly be more conducive to the maintenance of industrial peace if, in case there is a dispute as to the correct interpretation of an award, agreement or a settlement, the employer, before acting on his own interpretation, approaches the Labour Court and obtains a decision as to its correct interpretation.

In any case, Sub-section (1) of Section 79 clearly shows that the Legislature intended to give the right to approach the Labour Court to both the parties, i.e. the employer and employees.

In view of the amendment to Section 78 of the Act withdrawing item (5) Schedule III from the purview of the labour Court Section 79 would not be available to the employer, but at the same time Section 73A which over-rides all other provisions of the Act clearly provides for such a right on the employer. It is significant that the

amendments to all these sections viz. Sections 78 and 73A as well as Section 42(4) have been made by the said amending enactment and we see no reason to restrict the operation of Section 73A-as urged on behalf of the Union.

16. We, therefore, hold that the Industrial Court was right in rejecting the preliminary objection raised by the Union. The provisions of Section 73A enable the employer to make a reference to the Industrial Court for arbitration in respect of the dispute relating to item (5) in Schedule III of the Act viz. the construction and interpretation of an award, agreement or settlement.

17. So far as the merits of the case are concerned, Mr. Naik fairly conceded that the employees have not led evidence to show that the instruments fitters fall in the category of motor vehicle fitters. In the absence of any evidence led by the employees or the union and having regard to the clear distinction made between the instruments fitter and the motor vehicle fitters in the scheme, it would not be permissible for the instruments fitters to claim incentive bonus as provided in the scheme as the scheme has not been admittedly extended to instruments fitters as envisaged in the scheme.

18. In the result, the petition must fail and the rule is discharged. In the circumstances of the case, there shall be no order as to costs. Mr. Naik orally applies for leave to appeal to the Supreme Court. Leave refused.