

(2010) 03 KL CK 0003

In the High Court Of Kerala

Case No : W.A. No. 159 of 2010, 167 and 168 of 2010

Devaki M.

APPELLANT

Vs

B.P.L. Group of Companies

RESPONDENT

Date of Decision : 16-03-2010

Acts Referred:

Industrial Disputes Act, 1947 — Section 18, 19

Industrial Employment (Standing Orders) Act, 1946 — Section 10, 10(2), 3, 3(2), 4

Citation : (2010) 125 FLR 859 : (2010) 4 LLJ 508

Hon'ble Judges : P.N. Ravindran, J;K. Balakrishnan Nair, J

Bench : Division Bench

Advocate : V. Chitambaresh and A.R. Gangadas, for the Appellant; A.S. Brijesh, Benny Gervasis, E.K. Nandakumar, Benny, P. Thomas and T.C. Mohandas, for the Respondent

Final Decision : Dismissed

Judgement

K. Balakrishnan Nair, J.—Writ Appeal Nos. 159 and 168/2010 are filed against the judgment of the learned single Judge in W.P.(C) No. 24729/2006 dated November 24, 2009, quashing Exhibit P-10 order of the Certifying Officer under the Industrial Employment (Standing Orders) Act, to the extent it is challenged and Exhibit P-14 order of the Appellate Authority under the said Act. W.A. No. 167/2010 is filed against the order dated December 7, 2009 in R.P. No. 1188/2009 in W.P.(C) No. 24729/2006.

2. W.A. No. 168/2010 is treated as the main case, for the purpose of referring to the parties and exhibits. The brief facts of the case are the following: The first Respondent/writ Petitioner is the Managing Director of an industrial establishment, which is running three of its units at Palakkad. The age of superannuation of the employees of the said units, is 55 years. The service conditions of the workmen of the units are governed by the settlements entered into between the management and the workmen, from time to time. The age of superannuation of the employees is governed by the Certified Standing Orders,

Exhibit P-1, which was certified by the Certifying Officer, in 1968. Clause 48 of the said settlement, governs the age of retirement. The said clause reads as follows:

48. Every workman shall retire from service on attaining the age of fifty five. Extension, if any, not exceeding one year at a time but not exceeding three years in all, may be given at the discretion of the management.

3. Exhibit P-9 settlement between the management and the workmen concerning the terms of employment was concluded on February 15, 1999. The settlement was to remain in force from July 1, 1998 to June 30, 2002, that is, for a period of four years. The workmen, represented by their unions, filed charter of demands before the management, on the expiry of the said settlement, claiming revision of wages and other service benefits. They also demanded enhancement of retirement age from 55 to 58. While the negotiations were pending, the first Appellant preferred Exhibit P-5 application dated August 29, 2003 before the Certifying Officer u/s 10(2) of the Industrial Employment (Standing Orders) Act, 1946, praying for modification of Clause 48 of Exhibit P-1 and enhancement of age of superannuation to 58 years. Claiming the very same relief, Exhibit P-6 petition dated September 15, 2003, was filed by the second Appellant, before the said officer. The management filed an objection in those petitions, mainly contending that the products of the industrial units of the first Respondent at Palakkad were precision instruments and therefore, good health and good eyesight were essential for the workmen. The relevant portion of the said objection reads as follows:

It is submitted that the Petitioner has not made out any valid ground for modifying the standing orders, which has been in force for nearly 40 years. The retirement age of 55 was fixed taking into account the nature of the job performed by the workers. Being an industry engaged in the manufacture of precision electronic instruments, a high degree of skill and dexterity is required on the part of the workers. The job requires good eyesight, nimbleness of the fingers, good memory and speed. As one gets older, the above attributes begin to diminish and this affects the efficiency of the workers. It is submitted that any further enhancement in the age of retirement of the workers will adversely affect the quality and output of the products manufactured by the establishment.

4. The Certifying Officer considered the rival contentions and allowed the applications, by Exhibit P-10 order dated September 29, 2004.

3. The relevant portion of Exhibit P-10 order of the Certifying Officer reads as follows:

Point No. (1):

Among other things it is necessary to consider (1) whether the modification proposed is in conformity with the model standing orders issued by the Government and (2) whether this is fair and reasonable or not. Sub Clause 3 of

Clause 3(A) of the model standing orders relating to age of retirement of workmen is as follows:

The age of retirement or superannuation of the workmen shall be as may be agreed upon between the employer and the workmen under an agreement or as specified in a settlement or award which is binding on both the workman and the employer or where there is no such agreed age, retirement or superannuation shall be on completion of 58 years of age of the workman.

Admittedly there is no bilateral agreement or conciliation agreement or award which is binding on the workmen or employer of this establishment specifying the age of retirement in existence. The certified standing order now existing in the company is therefore not in conformity with the model standing order with regard to the age of retirement. Thus it is necessary to re-fix the age of retirement in conformity with the model standing order.

As a matter of fact, the retirement age of the workmen of the industrial workers is 58 years and some cases it is 60 years. Therefore the proposal for enhancement of the age of retirement cannot be said to be unfair or unreasonable. There is no dispute that all the workmen of the company are members of the EPF Scheme and they are entitled to pension under the said scheme only on attaining the age of 58 years. Therefore, if the workmen of the company are superannuated on attaining the age of 55 years they have to wait for another three years for getting pension.

In view of the above discussions I decide that the proposed modification of standing orders relating to the age of retirement is fair, reasonable and in conformity with the model standing orders. But the employer has pointed out that considering the peculiar nature of manufacturing process in the company the workmen above the age of 55 may not be capable of performing their duties in the expected manner owing to loss of eye vision and other physical incapacities. However, it is revealed that the employer is at present re-employing some workers on discretion after retirement on attaining the age of 55 and such workmen are allowed to continue in service till 58 years. This shows that the employer himself is indirectly admitting that some of the workmen are capable of performing the work beyond 55 years. At the same time the employer has every right to assess the physical capability of the workmen at any time for allowing them to continue in service. However I feel that considering the special nature of industry the retirement age is to be enhanced subject to medical fitness of the workmen. Therefore, I find that the proposal for modification of standing orders relating to the enhancement of age of retirement is certifiable with the above modification. Point No. 1 is decided as above.

(emphasis supplied)

5. The first Respondent appealed before the appellate authority under the Industrial Employment(Standing Orders) Act. The said authority, by Exhibit P-14 order dated August 23, 2006, dismissed the appeal. The relevant portion of the

said order reads as follows:

The appeal is directed against the aforesaid decision. The averment of the Appellant company is that enhancement of retirement age will affect efficiency. According to the Appellant company the amendment made applicable is unfair, unjust and unreasonable. Standing orders can be certified only if they are in conformity with the provisions of the Act. The Certifying Officer or appellate authority has to adjudicate upon the fairness or reasonableness of the provisions in it. Admittedly, here the matter relates to the retirement age in the company.

It is pertinent in this context to examine relevant clause relating to the age of retirement as per the model standing order.

Sub Clause (3) of Clause 3A. "The age of retirement or superannuation of workmen shall be as may be agreed upon between the employer and the workman under an agreement or as specified in a settlement or onward which is binding on both the workman and employer. Where there is no such agreed age, retirement or superannuation shall be on completion of 58 years of age by workman."

There is no mutual agreement here between the parties, as regards retirement age. No conciliation agreement has been arrived at on retirement age. There is no binding award too. No material evidence is adduced against the argument of the Respondent unions that in almost all industrial units in Palakkad and similar electronic manufacturing units near Palakkad and Ernakulam, the retirement age is 58 years. Age of 58 years now-a-days is not a crucial barrier to pass over. The retirement age of almost all industrial workers is 58 years. The Central Government as well as many of the State Governments had raised the retirement age from 55 to 58. The above practice will lead to a position that a person who reaches 58 years is proficient enough to discharge his duties properly and efficiently. More over this age limit of 58 is a period when an employee is faced with all the problems of his family life. The financial aspects etc. as pointed out by the Appellant company has not much relevance in the light of model standing orders and the above mentioned points.

It is my considered view that the age of 58 as fixed by certifying officer is quite reasonable and justifiable and in conformity with the provisions of the Act and does not require any change. The Appellant company failed to advance any tenable grounds to set aside the order of the Certifying Officer.

In the result the appeal fails. The order of the Deputy Labour Commissioner (CWC), Thrissur, the Certifying Officer under the Act is upheld.

(emphasis supplied)

6. Challenging Exhibits P-10 and P-14, the writ petition was filed by the management. Before the learned single Judge, it was contended that the authorities below proceeded on the footing that the Standing Orders should always be in accordance with the Model Standing Orders. The said assumption of

the authorities below was untenable, it was submitted. It was also contended that the Certifying Officer heard and decided the matter, when Exhibit P-9 settlement was in force. As per that settlement, all claims, including the claim for enhancement of retirement age, which were not specifically dealt with in the said settlement, were withdrawn. Therefore, the workmen were legally disabled from moving for enhancement of retirement age, in view of the provisions of Sections 18 and 19 of the Industrial Disputes Act, 1947. It was also contended that the units of the Company at Palakkad were in the red financially. Therefore, the first Respondent/writ Petitioner could not afford to allow the enhancement of retirement age. Further, it was pointed out that as per the terms of Exhibit P-1 Standing Orders, the employees of the units at Palakkad were liable to be transferred to the units of the Company elsewhere. That means, they can be transferred to the unit at Bangalore, where the retirement age is 55. The motion for enhancement of retirement age at Bangalore, though allowed by the Certifying Officer, was reversed by the statutory appellate authority, it was submitted. So, if an employee from Palakkad is transferred to Bangalore, it will give rise to an anomaly, in the matter of retirement age, it was further submitted. So, the first Respondent prayed for allowing the Writ Petition.

7. The Respondents 1 to 3 in the writ petition filed counter affidavits, resisting the prayers in the writ petition. The learned single Judge, after hearing both sides, allowed the writ petition, quashing Exhibit P-10 to the extent it was challenged, and Exhibit P-14. The aggrieved Unions attempted a Review Petition before the learned single Judge, which was dismissed by order dated December 7, 2009. Challenging the judgment in the writ petition, W.A. Nos. 159 and 168/2010 were filed and challenging the order in the Review Petition, W.A. No. 167/2010 was filed.

8. We heard Sri. T.C. Mohandas, learned Counsel who appeared for the Appellants in W.A. Nos. 167 and 168/2010 and Sri. A.R. Gangadas, learned Counsel who appeared for the Appellants in W.A. No. 159/2010. We also heard Sri. V. Chitambaresh, learned senior counsel appearing for the impleading Petitioner, who also supported the Appellants. In defence, we heard the learned Counsel for the management, who supported the judgment under appeal.

9. Going by the judgment under appeal, we notice that the learned single Judge interfered with the impugned orders, for the following reasons:

(1) Both the authorities proceeded on the footing that the Standing Orders of a Company should be in conformity with the Model Standing Orders.

(2) While considering the question of amendment to the Standing Orders, the authorities failed to advert to the principles laid down by the Apex Court in *Jeewanlal (1929) Ltd. Vs. The Workmen and Another*, .

(3) The employees of the Palakkad unit are transferable to Bangalore unit. If their retirement age is different, the same will create an anomalous situation.

(4) In view of the terms of Exhibit P-9 settlement, which were in force at the time of passing of the impugned orders, those orders should not have been passed.

10. We will deal with the above aspects, in the light of the materials on record. We notice that the original and appellate authorities have mentioned about the position of the Model Standing Orders, but they have not rested their decision on that point alone. That will be evident from the relevant portions of the orders of the Certifying Officer and the Appellate Authority, which we have already quoted. They have noted the enhancement of the retirement age in similar industries and Governments and also the practice of the management, allowing many employees to continue upto the age of 58 years. So, the authorities allowed the enhancement of retirement age not solely relying on Model Standing Orders. The finding to the contrary in the judgment under appeal is untenable.

11. The finding in the judgment under appeal that the Certifying Officer or the appellate authority did not consider the parameters laid down by the Apex Court in *Jeewanlal (1929) Ltd. v. Workmen* (supra) is also not tenable. The parameters stated to be laid down in this decision have been quoted in paragraph 7 of the judgment under appeal, which read as follows:

Like other conditions of service in a standing order, reasonableness and fairness of retirement age depends on many factors such as;

- (a) what is the nature of the work of the employees in the establishment?
- (b) what is the nature of the wage structure paid to them?
- (c) what are the retirement and other amenities available to them?
- (d) what are the climatic conditions of the region where the employees work?
- (e) what is the age of superannuation fixed in comparable industries in the same region?
- (f) What is the general practice prevailing in the industry in the past in the matter of retiring its employees?

(See *Jeewanlal 1929 Ltd. v. Workmen* (supra),) Except referring to the retirement age of workmen in two other establishments in the region, neither the certifying officer nor the appellate authority has undertaken the requisite exercise of considering these parameters while passing the impugned orders. In such circumstances, normally I should direct reinvestigation by the certifying officer after inspecting the conditions in the Petitioner's factory to come to a conclusion whether the age of superannuation should be left at 55 or whether it should be raised to 58 years. But two other circumstances would deter me from adopting that course.

12. We have gone through the judgment in *Jeewanlal 1929 Ltd. v. Workmen* (supra). We notice that the above mentioned parameters are not mentioned

anywhere in that decision. Further, as evident from the relevant portions of the original and appellate orders, which we have quoted earlier, it is clear that the appellate authority has adverted to the retirement age prevailing in the area and also in similar industries. Recently, we had occasion to consider a case, where prayer was made for the enhancement of the retirement age in a Government Company. Facts placed before us, obtained under the Right to Information Act, showed that in 58 public sector industries in Kerala, the retirement age is 58 years or more. The same is the case of most of the private sector industries also. So, the view taken by the authorities below that in similar industries, the age of retirement is 58, is absolutely correct. They have acted, taking into account parameters (e) and (f) mentioned above.

13. The finding in the judgment under appeal that different retirement ages in different units will create an anomalous situation, cannot be supported. The service conditions of the employees of the units in Palakkad and Bangalore are different. There is no material before us to show that they are treated as one unit. For example, if a vacancy of a worker in a higher grade arises in Palakkad unit, the workers in the immediate lower category in the said unit alone are considered for promotion. If Palakkad and Bangalore units are taken as a single unit for the purpose of appointment, retrenchment and promotion, the vacancies in Palakkad unit can be filled up, only after considering the claims of the employees of the Bangalore unit also. The management has no such case. The Standing Orders provide for transferring employees from one unit to another, in exigencies of service. Such transferees will be continued to be governed by the service conditions of the parent unit. Such transfers are effected in various industries, which are having units at different places, in the same State or in different States. So, the same is not a valid ground to interfere with the impugned orders.

14. We notice that the validity of Exhibit P-9 settlement expired on June 30, 2002. From the opening paragraph of Exhibit R-1(a), produced along with W.A. 167/2010, which was the settlement between the management and workmen, signed on June 3, 2004, it is clear that immediately before June 30, 2002 and on July 1, 2002, fresh charter of demands was issued by the workmen, claiming revision of wages and revision of other service benefits, which included enhancement of retirement age also. So, the settlement was terminated, as contemplated u/s 19 of the Industrial Disputes Act and fresh negotiations started. Therefore, the terms of Exhibit P-9 never stood in the way of the workmen to pursue their claim for enhancement of retirement age, which was raised in Exhibits P-5 and P-6 before the Certifying Officer. When the matter was pending before the Certifying Officer, the long term settlement between the management and the workmen was concluded on June 3, 2004 (Copy of the said settlement is available at pages 52 to 57 of the paper book of W.A. No. 167/2010). Clause 9 of the said settlement expressly kept open the claim of the workmen for enhancement of the retirement age. The same was evident from Clause 10 also. Those clauses read as follows:

9. The unions and workmen agree that this settlement rests all demands (except that relating to the increase in the retirement age) raised in the charter of demands or during discussions but not specifically referred to in this settlement, such demands shall be treated as having been dropped/not pressed and settled accordingly.

10. Subject to Clause 9 herein above mentioned, Unions and workmen agree that they shall not during the period of this settlement either individually or collectively or through their unions make any demand or raise dispute involving or resulting either directly or indirectly any financial liability to the company.

This settlement dated June 3, 2004, which contains the above clauses, allowed the workmen to pursue their claim for enhancement of retirement age, which was pending before the Certifying Officer.

15. u/s 10 of the Industrial Employment (Standing Orders) Act, either the management or the workman concerned, can move the Certifying Officer, for modification of the terms of the Certified Standing Orders. It is a statutory right of the workman and when such a motion is made, the Certifying Officer has got statutory duty to consider the same. Therefore, the existence of a condition in the Standing Orders for so many years, governing retirement age is no bar for raising a demand to change it, as it is a statutory right. That right has been exercised. Therefore, the Certifying Officer has rightly entertained that application. So, we find no merit in the view that since the condition regarding retirement age was in force for so many years, the workmen cannot object to it.

16. Incidentally, the learned Judge has accepted the contention of the management regarding the financial stringency. We are also not impressed by the plea of financial difficulty. It was not a contention taken before the Certifying Officer. There is also no material before us to show that the financial condition of the Company will be worsened by the enhancement of the retirement age. In this context, we notice that because of the financial difficulties, several establishments, including Government are trying to enhance the retirement age of their employees. Finally, we notice that if the health condition of an employee makes him unfit for continuance in the Company, the management is given authority to screen him out. The amended clause in Exhibit P-10 order reads as follows:

Every workman shall retire on attaining 58 years of age. But the management company can ensure the physical fitness of the employees who attains 55 years of age.

As noticed by us earlier, the only plea raised by the management before the Certifying Officer was concerning the poor health conditions of the employees, when they reach the age of 55. The above quoted amendment made in the impugned order, Exhibit P-10, would take care of the situation. If an employee is found medically unfit to handle precision equipments, the said clause empowers the management to retire him from service.

17. In this context, we would remind ourselves that this Court has no appellate power over the decisions of the lower statutory authorities. If their decisions are within jurisdiction, this Court has to keep its hands off. The basis of judicial review is the doctrine of ultra vires. The said principle has been adumbrated by Prof. H.W.R. WADE in the ADMINISTRATIVE LAW, in the following words:

The simple proposition that a public authority may not act outside its powers (ultra vires) might fitly be called the central principle of administrative law. The juristic basis of judicial review is the doctrine of ultra vires. To a large extent, the Courts have developed the subject by extending and refining this principle, which has many ramifications and which in some of its aspects attains a high degree of artificiality.

DE SMITH, WOOLF AND JOWELL, in JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, have stated:

In essence, the doctrine of ultra vires permits the Courts to strike down decisions made by bodies exercising public functions which they have no power to make. Acting ultra vires and acting without jurisdiction have essentially the same meaning, although in general the term "vires" has been employed when considering administrative decisions and subordinate legislative orders and "jurisdiction" when considering judicial decisions, or those having a judicial flavour.

But, a public authority having jurisdiction to do something, while doing that something, may step outside its jurisdiction and the same will render its decision ultra vires and therefore, it will become a nullity. In this context, it is apposite to quote a few words from the speech of LORD PEARCE in the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission* (1969) 2 AC 147. The relevant portion of the said speech reads as follows:

Lack of jurisdiction may arise in many ways. There may be an absence of those formalities or things which are conditions precedent to the Tribunal having any jurisdiction to embark on an inquiry. Or the Tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the Tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.

18. Going by the above principles, we notice that no ground has been made out to judicially review the impugned orders. Though those orders may lack precision like judicial orders, they adverted to all relevant matters, including the position in the Model Standing Orders. They only provide that all workmen, unless found ineligible on health ground, should be allowed to continue upto the age of 58 years. A plausible view on the materials available, has been taken by the

authorities in the impugned orders. The management does not have any case of procedural irregularity committed by the original or appellate authority. So, this Court not being constituted as an Appellate Authority, should not have interfered with the impugned orders. For the sake of completeness, we will now refer to the relevant provisions dealing with certification of standing orders. Section 3, which deals with the submission of draft standing orders for certification, reads as follows:

3. Submission of draft standing orders.-(J) Within six months from the date on which this Act becomes applicable to an industrial establishment, the employer shall submit to the Certifying Officer five copies of the draft standing orders proposed by him for adoption in this industrial establishment.

(2) Provision shall be made in such draft for every matter set out in the Schedule which may be applicable to the industrial establishment, and where model standing orders have been prescribed, shall be, so far as is practicable, in conformity with such model.

(3) The draft standing orders submitted under this Section shall be accompanied by a statement giving prescribed particulars of the workmen employed in the industrial establishment including the name of the trade union, if any, to which they belong.

(4) Subject to such conditions as may be prescribed, a group of employers in similar industrial establishments may submit a joint draft of standing orders under this Section.

Sub-section (2) of Section 3, inter alia, says that as far as practicable, the standing orders must be in conformity with the model standing orders. Section 4, which deals with certification of standing orders, reads as follows:

4. Condition for certification of standing orders - Standing orders shall be certifiable under this Act if-

(a) provision is made therein for every matter set out in the Schedule which is applicable to the industrial establishment, and

(b) the standing orders are otherwise in conformity with the provisions of this Act; and it shall be the function of the Certifying Officer or appellate authority to adjudicate upon the fairness or reasonableness of the provisions of any standing orders.

The Certifying Officer/Appellate Authority has to consider the fairness/reasonableness of the standing orders. By virtue of Clause (b) of Section 4 read with Sub-section (2) of Section 3, conformity as far as practicable with model standing orders, is a condition precedent for certification. If only it is impracticable, deviation from the model standing orders is permissible. See the Constitution Bench decision of the Honourable Supreme Court in *Rohtak Hissar District Electricity Supply Co. Ltd. Vs. State of Uttar Pradesh and Others*, wherein

GAJENDRAGADKAR, C.J., speaking for the Bench said at p. 338 of LLJ:

Then in regard to the conformity with the Model Standing Orders, the position is clear. Section 3(2) of the Act specifically requires that the Standing Orders shall be, as far as practicable, in conformity with the model. These words indicate that the appropriate authority may permit departure from the Model Standing Orders if it is satisfied that insistence upon which conformity may be impracticable. This fact also shows that in a given case, the appropriate authority may permit departure from the Model Standing Orders and may come to the conclusion that one or the other of the conditions included in the Model Standing Orders may not, for the time being, be included in the Standing Orders of any particular establishment (vide *The Associated Cement Co. Ltd. Vs. P.D. Vyas and Others*, .

Thus, though the standing orders need not always be in conformity with the model standing orders, as far as practicable, they shall be in conformity with them. So, the advertance made to this point by the authorities below cannot be described as ultra vires.

19. In view of the above position, we find that the impugned orders were interfered with, without any valid grounds. Accordingly, the writ appeal is allowed. The judgment under appeal is reversed and the Writ Petition is dismissed. The workmen, who are terminated from service, pursuant to the dismissal of the writ petition and who have not attained the age of 58, shall be reinstated forthwith. They shall be entitled to all service benefits, including continuity of service and back wages. If anyone has reached the age of 58, between the date of their termination, pursuant to the judgment under appeal and today, they shall be paid salary for the period, from the date of their termination, to the date of attaining the age of 58.