
(2004) 06 BOM CK 0098
In the Bombay High Court
Case No : Writ Petition No. 5247 of 1990

Engineering Workers Association

APPELLANT

Vs

J.D. Jamdar and Others

RESPONDENT

Date of Decision : 09-06-2004

Acts Referred:

Model Standing Orders — Order 32

Citation : (2005) 2 BomCR 479

Hon'ble Judges : Mhatre Nishita, J

Bench : Single Bench

Advocate : N.D. Buch and B.B. Dholakia, for the Appellant; S.K. Talsania and G.S. Shetty, instructed by Crawford Bayley and Co. for respondents 2 and 3, for the Respondent

Final Decision : Allowed

Judgement

Mhatre Nishita, J.—This petition challenges the order of the Industrial Court passed in a complaint filed under Items 5 and 9 of Schedule IV of the M.R.T.U. & P.U.L.P. Act. The Industrial Court has dismissed the complaint and has come to the conclusion that the petitioners were unable to prove that respondent Nos. 2 and 3 have committed unfair labour practice. The facts giving rise to the present petition are as follows :

The company that is respondent No. 2 was carrying on business of the Grease Division in Mumbai Steel Containers Ltd. and Industrial Containers Ltd. were merged with the respondent company in 1975. After merger, this was known as Container Division. Both the Container Division and the Grease Division were treated as separate entities by the respondent company. According to the respondent-company, after the merger the service conditions which prevailed in the erstwhile Steel Containers Ltd. applied to the Container Division. These conditions of service were stipulated in an agreement which had been entered into with their workers on 3-6-1964. Under this settlement, the retirement age of the workers was 58 years. Even after merger, the respondent company continued

to retire the workmen employed in the Container Division at the age of 58 years.

2. It appears that in 1977, a reference being Reference (IT) No. 304 of 1977 was made for adjudication of certain demands which had been raised by the workmen of the Grease Division. Most of the demands were settled and an award Parti has been made on 10-8-1979 in terms, of the settlement. The two demands which were not settled were adjudicated upon by the Industrial Tribunal. These demands pertained to bonus and the age of retirement. The Tribunal adjudicated these demands and by an award Part II dated 8-9-1980 held that the age of retirement should be 60 years.

3. A complaint was filed by the petitioner being Complaint (ULP) No. 914 of 1989 alleging that the respondent company had committed an unfair labour practice by retiring persons in the Container Division at the age of 58 years although there was an award of 1980 which prescribed the age of retirement as 60 years. It was also contended in the complaint that the Model Standing Orders which were applicable to the company stipulate that the age of retirement is 60 years and, therefore, the persons working in the Container Division ought to have been retired at the age of 60 years and not 58 years as was being done by the respondent-company in the Container Division.

4. In reply, the respondents submitted that a settlement dated 3-6-1964 which was entered into between the workmen of the erstwhile Steel Container Limited and their workmen prevailed over the Model Standing Orders and, therefore, 58 years was the appropriate retirement age. It was also submitted that the award in Reference (IT) No. 304 of 1977 pertained only to the demands raised of the employees of the Grease Division through their union which was a recognised union for that division; therefore, it covered the service conditions of the workmen of that division only.

5. Neither party led any evidence before the Industrial Court. The Industrial Court on the basis of the pleadings before it, came to the conclusion that the retirement age of 60 years applied only to the Grease Division since the award covered the workmen of that division and not of the container Division. It was also held that the Model Standing Orders permitted the employer and the employees to agree to the age of retirement which was less than 60 years and therefore, Item 9 of Schedule IV of the M.R.T.U. & P.U.L.P. Act was not breached. The Industrial Court was of the view that since the Grease Division was a separate division having separate terms and conditions, there could be no unfair labour practice under Item 5 of Schedule IV only because the persons in the container Division were retired at an earlier age. Accordingly, the complaint was dismissed.

6. On behalf of the petitioner, Ms. Buch, learned Advocate, submits that the Industrial Court is totally in error in coming to the conclusion that there is no unfair labour practice under Item 5 or 9 of Schedule IV of the M.R.T.U. & P.U.L.P. Act. She submits that when a reference is made for adjudication, the reference is

between the company and its workmen. There is no segregation of the divisions of any company and, according to her, the reference is made for adjudication in respect of all the workmen of the company. She, therefore, submits that the award made pursuant to such a reference would cover all the workers and not just those who were employed in the Grease Division.

7. On the other hand, Mr. Talsania, learned Counsel for respondent Nos. 2 and 3, submits that admittedly, the service conditions of the workmen employed in the two divisions were disparate and historically had remained different. According to him, the demands were raised by a recognised union which existed in the Grease Division and at no point of time did the petitioner union appear in the reference or at any stage that the workmen employed in the container Division would also be covered by the same set of demands made by the recognised union in the Grease Division. He, therefore, submits that the award will naturally be applicable only to the employees of the grease division and not the other employees.

8. The submission of Mr. Talsania appears to be correct. It was open for the petitioner Union to appear in the reference before the Tribunal and contend that the demands raised by the recognised union were also applicable to the workers in the container division. In all probability, the petitioner did not appear and contest the award because only a recognised union would have been heard before the Industrial Tribunal in a reference for general demands. Admittedly, the petitioner was not a recognised union in the grease division in which the Balmer Lawrie employees union had obtained recognition. Therefore, the award would be applicable only to the grease division which has always been treated as separate division from that of the container division. There is nothing on record to indicate that the other service conditions such as Dearness Allowance, hours of working, leave etc. were the same in both the divisions. Therefore, the submission of Ms. Buch that the award is applicable to the workmen of the container division cannot be accepted.

8. The next submission made by Ms. Buch was that the Model Standing Orders which were applicable to the respondent-company specify that the age of retirement should be 60 years and not any lower age. She submits that an agreement under which the age of retirement has been fixed at an age lower than 60 years cannot prevail over the Model Standing Orders. According the learned Advocate, the Model Standing Orders applicable to the workmen doing manual or technical work, which the workmen in the container division were performing stipulate Standing Order 32 that nothing would operate in derogation to the Model Standing Orders and, therefore, any settlement or agreement which was contrary to the Model Standing Orders cannot prevail. The learned Advocate relies on the judgments in *The Indian Tobacco Co. Ltd. Vs. The Industrial Court and others*, ; *Association of Maharashtra Education Service Class II Officers and Ors. v. State of Maharashtra and Ors.* 1990 Bom.C.R. 548 : 1989(II) C.L.R. 473; *Western India Match Company Ltd. Vs. Workmen*, and *Philipos Babu Vs. M/s.*

Bajaj Tempo Ltd. and Another, to submit that the age of retirement ought to be 60 years and when the Model Standing Orders specify this age, no workman could have been retired at the age other than 60 years. She submits that retiring a workman at the age of 58 years amounted to an unfair labour practice under Item 9 of Schedule IV of the M.R.T.U. & P.U.L.P. Act because the respondent company had committed a breach of the provisions of the law.

9. Mr. Talsania, on the other hand, submits that under the Standing Orders the employer and employees may fix the age of retirement at 60 years or any other age as is agreed upon by the parties. He submits that Clause 32 of the Model Standing Orders which stipulates that nothing which is in derogation of the Model Standing Orders would prevail and is applicable only where the Standing Orders make it mandatory that the employer must act in a particular manner or act within a stipulated time frame. According to the learned Counsel, the Model Standing Order 27 which deals with the age of retirement used the word "may" and not "shall" leaving it open to the discretion of the parties to fix the age of retirement at any age. Therefore, according to him, retiring the persons at the age 58 years did not amount to unfair labour practices. The learned Counsel submits that when there is a settlement between the parties under which the age of retirement has been fixed at 58 years, the discretion left to the parties under the Model Standing Orders has been exercised and both the parties have agreed at 58 years being the retirement age. He, therefore, urges that there is no case made out that an unfair labour practice has been committed. If at all, the workmen were aggrieved by the settlement, they ought to have either terminated the settlement or raised an industrial dispute regarding the age of retirement in order to have the age fixed by the Tribunal, according to the learned Counsel.

10. Before embarking on the submissions made by the learned Counsel for the parties, it would be advantageous to set out the provisions of the Model Standing Orders. Model Standing Order 27 as applicable to the manual and supervisory staff reads as under :

27. The age for retirement or superannuation of the workmen may be sixty years or such other age as may be agreed upon between the employer and the workmen by any agreement, settlement or award which may be binding on the employer and the workmen under any law for the time being in force.

Standing Order 32 reads as follows :

32. Nothing contained in these Standing Orders shall operate in derogation of any law for the time being in force or to the prejudice of any right under a contract of service, custom or usage or an agreement, settlement or award applicable to the establishment.

11. Similar Standing Orders are applicable to the workmen employed for clerical or supervisory work. The Standing Order 27, therefore, stipulates that the age of retirement should be 60 years or such other age as may be agreed upon

between the employer and the workmen by any agreement, settlement or award. If the submission of Mr. Talsania is correct that any age could have been the retirement age, there was no need for the legislature to stipulate the age of 60 years in the Standing Order 27. This has obviously been done in order to ensure that the retirement age of the workman is at least 60 years. Any settlement or agreement or award stipulating any age of retirement which is above the age of 60 years is permissible under the Standing Orders. Standing Order 32 makes it amply clear that the Standing Orders cannot operate in derogation of any law for the time being in force or to the prejudice of any right under the contract of service, custom or procedure or agreement, settlement or award. Therefore, if the contract of service under an agreement, settlement or award stipulates that the age of retirement should be something other than 60 years, the agreement is saved by this Standing Order which when read with Standing Order 27 lends credence to the submission of Ms. Buch. If the retirement age was not to be at least 60 years, there was no need for the legislature to mention this figure in Standing Order 27 and the Standing Order could have read as "the age of retirement or superannuation of the workmen may be such age as may be agreed upon between the employer and the workmen by any agreement, settlement or award". By stipulating the age as 60 years in the Standing Order, obviously the legislature meant that the minimum age of retirement would be 60 years.

12. In the case of Indian Tobacco Company Ltd. (supra), the learned Single Judge of this Court (H.D. Patel, J.) has held that the Standing Orders must prevail over the contract of employment except when the contract of employment offers better rights. This judgment deals with the Standing Order 4-A. While interpreting this Standing Order r/w Standing Order 32 of the Model Standing Orders, the learned Judge has held that the provisions contained in the Standing Orders should not operate to the prejudice of any right under the contract of service, custom or usage or agreement, settlement or award. The prohibition is hence cast against the operation of the Standing Orders only when better rights are acquired on an employee under the contract of service and are likely to be prejudiced. I am in respectful agreement with this view taken by the learned Single Judge. In the case of Philipos Babu (supra), another learned Single Judge of this Court (Srikrishna, J.) has taken a similar view after considering the judgments in the case of Indian Tobacco Co. Ltd. (supra). The learned Judge has held that the provisions of the Model Standing Order 4-A would override any provision to the contrary contained in the employment contract or certified Standing Orders existing on the day on which the Model Standing Order 4-A was brought into effect.

12-A. The Supreme Court in the case of Western India Match Company Ltd. (supra) has held that the terms of employment specified in the Standing Orders would prevail over the corresponding terms in a contract of service in existence at the time of enforcement of the Standing Orders. The Apex Court has held that if a prior agreement, inconsistent with the Standing Orders, will not survive, an

agreement posterior to and inconsistent with the Standing Orders should also not prevail. This judgment, therefore, leaves no room for doubt that the agreement of 1964 which fixes the age of retirement of the employees of the container division at 58 years cannot prevail and it is the Model Standing Orders which fix the age of 60 years which will override the agreement.

13. The judgment in case of .Association of Western India Match Company Ltd. (supra) is not very relevant to the case before me as this judgment merely takes into consideration what should be the retirement age for Government employees.

14. Having held that the retirement age as specified in Model Standing Orders is 60 years and that the Model Standing Orders would prevail over the agreement which fixes a lower age of retirement, it is axiomatic that by retiring the workmen at the age of 58 years, the respondent-company has committed an unfair labour practice under Item 9 of Schedule IV of the Act.

15. Petition is, therefore, allowed. Rule made absolute with no order as to costs.

16. Parties to act on an authenticated copy of this order.