

(1955) 11 BOM CK 0003

In the Bombay High Court

Case No : Special Civil Application No. 1844 of 1955

Gajanan Mahadeo and Others

APPELLANT

Vs

David Mills Ltd. and Others

RESPONDENT

Date of Decision : 22-11-1955

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 106(1), 42(1)
Constitution of India, 1950 — Article 227

Citation : AIR 1957 Bom 50 : (1956) 58 BOMLR 320 : (1956) ILR (Bom) 494

Hon'ble Judges : Chagla, C.J.;Dixit, J

Bench : Division Bench

Advocate : M.P. Vyas, for the Appellant; R.J. Kolah and B. Narayanaswami, for the Respondent

Judgement

Chagla, C.J.—The petitioners are the employees of the first respondent Mills and they are employed in the Watch and Ward Department. They filed an application before the Labour Court that they were being paid dearness allowance on a certain basis from 1942 to 1951, that in 1951 the Mills suddenly reduced the dearness allowance paid to them without following the procedure laid down in Section 42(1) of the Bombay Industrial Relations Act, and, therefore, they were guilty of an illegal change and the relief they sought was that the Mills should be compelled to set aside this change and to pay the dearness allowance as before.

The Labour Court and the industrial Court accepted the contention of the petitioners and granted them the relief which they sought. The Labour Appellate Tribunal has reversed the decision of the two lower tribunals and the petitioners have come before us under Article 227 of the Constitution.

2. Now, what is urged by Mr. Vyas is that the only way in which a change could be made by the employer with regard to matters referred to in Schedule II of the Bombay Industrial Relations Act was by giving a notice of change as required by Section 42(1) and following the procedure laid down in the Act consequent upon giving such notice. Mr. Vyas says that admittedly the employer has not followed

this procedure and, therefore, the change made by him is 311 illegal change. An award was given with regard to the dispute between the Bombay Textile Mills and their employees and this award was given in 1947 and it is admitted by Mr. Vyas that the petitioners before us were affected by this award and their wages were fixed as standardized wages. The Industrial Tribunal left the question of dearness allowance open, but by a supplementary award they fixed the dearness allowance on a particular basis and it is also admitted by Mr. Vyas that the dearness allowance paid by the Mills after this award was given was more than what had been fixed by the award. The Labour Appellate Tribunal in coming to the conclusion that it did followed a decision of this Court reported in C.T. Daru and Others Vs. Manager, Ahmedabad Spinning and Manufacturing Co. Ltd., . In that case it was decided that if wages have been, standardized by an award of an Industrial Court, it is not open to the employer to pay more than the standardized wages. In that case a contention was urged on behalf of the workers that it was open to an employer to pay contractual wages which may be higher than the wages fixed under the award and if he wanted to reduce the contractual wages, he could only do so provided he followed the procedure laid down in Section 42(1). We rejected that contention and we pointed out that payment of wages higher than those fixed under the award would constitute an illegal change on the part of the employer and it would subject him to a penalty u/s 106(1). Mr. Vyas says that even though the payment of higher dearness allowance might subject the employer to a penalty, even so looking to the language of Section 42(1) it is incumbent "upon the employer in every case of a change to give notice as required by that sub-section. We may point out that the result of following the procedure laid down in Section 42(1) is that the employer cannot put into effect the change unless the whole procedure laid down in the Act has been complied with. If the notice is not accepted by the employee, there has got to be conciliation proceedings and other proceedings laid down in the Act and till these proceedings come to an end, the employer is not permitted by law to give effect to the change. In other words Mr. Vyas's contention comes to this that although what the employer was doing was illegal, although he was liable to penalty, still he must go on doing something which was illegal and comply with the procedure laid down in Section 42(1). -We are unable to accept that contention. We cannot possibly take the view that any party is entitled to compel the other party to do something which is illegal. If in making the change the employer stopped doing something which was illegal and started doing something which alone, he could do under the law, then no notice was required to be given by him u/s 42(1). Notice u/s 42(1) need only be given when what the employer is doing is in accordance with law and he wishes to bring about a change. Then his continuing to do what he was already doing till the procedure laid down in the Act is satisfied will not lead to any serious consequence as far as the employer is concerned. But to construe Section 42(1) as requiring the employer to continue to do something which is illegal till the procedure is complied with is to put an impossible construction on the rights of labour and the responsibility of the employer.

3. It is then urged by Mr. Vyas that what the employer was paying to the employee was not wages but a customary concession or privilege or something arising out of usage. Mr. Vyas says that the additional dearness allowance that was paid to the petitioners was in the nature of privilege and as it had been paid for a long period of time, it had acquired the characteristic of usage. He draws attention to Schedule II of the Act which makes a distinction between customary concession, privilege or change in usage and wages including the period and mode of payment. "Wages" has been defined by Section 3(39) and the definition is;

"Remuneration of all kinds capable of being expressed in terms of money and payable to an employee in respect of his employment or work done in such employment and includes any bonus allowances (including dearness allowance), reward or additional remuneration."

Therefore, expressly the statute has defined "wages" as to include dearness allowance and, therefore, when the award provided that particular wages and particular dearness allowance should be paid, it was really dealing with the question of wages as understood by the Act. Now, we will assume in favour of Mr. Vyas that dearness allowance also constituted privilege or customary concession or something arising out of usage. But even so, if the award fixed certain wages to be paid to the employees, then the employer cannot add to those wages on the ground that the addition constituted customary concession or privilege or something arising out of usage. The employee is not entitled to any customary concession or privilege or something arising out of usage which gives to him a higher wage than what is permissible under the award. It is also difficult to understand how an illegal payment can possibly constitute a privilege or a right arising out of usage. Mr. Vyas says that because the employer was paying this amount from 1942 onwards, the payment became a payment as a result of usage. Surely after 1947 the payment, as we have pointed out, was illegal and an employer by making an illegal payment cannot confer upon the employee the right to demand that payment as something in the nature of a privilege or something arising out of usage. Mr. Vyas rather naively suggests that if the employer could make this payment notwithstanding the award from 1947 to 1951 there was no reason why he should not have given a notice following the procedure and in the meanwhile go on making payment. Surely even an employer is entitled to say that "I think although I have committed breach of law in the past, I now want to become law abiding." According to Mr. Vyas, the Bombay Industrial Relations Act does not permit the employer to follow the law or to become law abiding in the case of payment of additional wages. In our opinion, the Labour Appellate Tribunal was right when it took the view that in view of our decision in *Daru v. Ahmedabad Spg. & Mfg. Co. Ltd. (A)*, the only conclusion it could come to was that no notice u/s 42(1) was required on the part of the employer and the employer was entitled to make a change in the payment of wages to his employees, if in doing so he was doing what the law required and changing something which the law permitted.

4. The result is that the petition fails. No order as to costs.
5. Petition dismissed.