

(2013) 07 BOM CK 0072

In the Bombay High Court

Case No : Letters Patent Appeal No. 35 of 2009 in Writ Petition No. 446 of 2006

Indorama Synthetics India Limited

APPELLANT

Vs

Vijay and Others

RESPONDENT

Date of Decision : 12-07-2013

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 27, 42, 42(1), 46
Industrial Disputes Act, 1947 — Section 9A

Citation : (2014) 1 ALLMR 305 : (2013) 5 BomCR 767 : (2013) 139 FLR 142 :
(2013) 5 MhLj 139

Hon'ble Judges : P.N. Deshmukh, J;B.R. Gavai, J

Bench : Division Bench

Advocate : R.B. Puranik, for the Appellant; S.D. Thakur, counsel, for the Respondent

Final Decision : Disposed Off

Judgement

B.R. Gavai, J.—The present appeals take an exception to judgment and order passed by the learned Single Judge of this Court dated 20.11.2008, thereby allowing Writ Petition No. 1481 of 2006, dismissing Writ Petition No. 446 of 2006, thereby modifying judgment passed by the learned Industrial Court dated 10.10.2005 in Complaint (ULP) No. 245 of 2004. The facts, in brief, giving rise to the present appeals, are as under:

The appellant - employer, deals in manufacturing and sale of synthetics fibres and draws texturised yarn established by the respondents. The establishment of the appellant is situated at MIDC (Maharashtra Industrial Development Corporation) Area, Buritibori, Nagpur. The respondents are claiming to be elected representatives of the appellant - employer. The appellant and the respondents have entered into various settlements last one being dated 22.5.2002. That the employees of the appellant, who were working in the Quality Control Department, were transferred to the other departments. The respondents thereafter approached the learned Industrial Court with a grievance that by

transferring the employees from the Quality Control Department, the appellant has committed an illegal change, as notice of change u/s 42(1) of the Bombay Industrial Relations Act, 1946 (for short, "the BIR Act") was not given. It is further contended that this act of the appellant amounts to unfair labour practice under Item No. 9 of Schedule IV of The Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act, 1971. The learned Industrial Court vide judgment and order dated 10.10.2005 held that the transfer of 5 employees does not amount to unfair labour practice. However, it held that the order of transfer of 20 employees amounted to unfair labour practices.

2. Being aggrieved thereby, petition came to be filed by the employer - appellant being Writ Petition No. 446 of 2006. The respondents also filed another petition being Writ Petition No. 1481 of 2006 in respect of the findings of the learned Industrial Court, which were against them. Both these petitions were heard together. The learned Single Judge vide impugned order, allowed the petition filed by the respondent - employees and dismissed the petition filed by the present appellant - employer. The present appeals are filed by the appellant - employer challenging the judgment and order passed by the learned Single Judge in the aforesaid two writ petitions.

3. Shri R.B. Puranik, learned counsel appearing for the appellants, submits that in view of the judgment of the Apex Court in the case of Ashok K. Jha and Others Vs. Garden Silk Mills and Another, since the matter of transfer is covered by Item No. 2 of Schedule III of the BIR Act, it will not attract Item Nos. 1 and 2 of Schedule II and as such the notice u/s 42(1) of the BIR Act, was not necessary. The learned counsel further submits that none of the service conditions of the employees including their salaries, emoluments and other benefits have been changed and as such the impugned order is not sustainable. The learned counsel further submits that the learned Industrial Court as well as learned Single Judge have failed to take into consideration that Clause-7 of the Memorandum of Settlement only determines the components insofar as production departments are concerned. The learned counsel further submits that Clause-7 cannot be read in isolation but has to be read with Clause-27 of the said Memorandum of Settlement. The learned counsel submits that if the finding as recorded by the learned Industrial Court so also by the learned Single Judge is accepted, Clause - 21 will render redundant. The learned counsel further submits that now, except three employees, all other employees have accepted the promotional benefits given to them and even in respect of three employees which are left, the appellants are willing to give them the promotional benefits/grade.

4. As against this, Shri S.D. Thakur, learned counsel appearing for the respondents - employees, submits that in view of Clause-7 read with Annexures, the complement for Quality Control Department is fixed. The learned counsel submits that the same has to be maintained. The learned counsel further submits that so long as the settlement is in force, the employer is bound to maintain the number of employees fixed in the Quality Control Department. The learned

counsel submits that by impugned transfer, there has been permanent reduction in the component of Quality Control Department and as such there has been contravention of Sub-sections (3) and (5) of Section 46 of the BIR Act. The learned counsel further submits that if the employer wanted to effect a change, the same cannot be done without notice of change as contemplated u/s 42 of the BIR Act. The learned counsel relying on the judgment of the Division Bench of this Court in the case of Co-operative Bank Employees Union Vs. Yeshwant Sahakari Bank Ltd. and others, submits that the question of prejudice or otherwise to an employer is not relevant. It is submitted that if there is any change, in respect the question as to whether by virtue of said change prejudice is likely to adversely affect employees or not a connotation referred and that change cannot be affected unless there is notice as contemplated u/s 27 of the BIR Act. The learned counsel also relies upon the judgments of the Apex Court in the case of Tata Iron and Steel Co. Ltd. Vs. The Workmen and Others, and Life Insurance Corporation of India Vs. D.J. Bahadur and Others, in support of his submissions. The Apex Court in the case of Ashok K. Jha & others cited supra after analyzing Sections 42 and 46 and the Schedules thereto has observed thus:

26. The Division Bench of the High Court in this regard considered the matter thus:

...We do appreciate that transfer of the employees from one department to another, in absence of corresponding transfer, would necessarily result into reduction in manpower in one department and corresponding increase in the manpower in the other department. But, we are unable to agree that Item 1 of the Schedule II to the Act is intended to cover the cases like the one before us. Had that been the legislative intent the "assignment of work and the transfer of workers within the establishment" would not have been included in Schedule III to the act. If the reasoning of the Industrial Court were accepted, the above referred Item 2 in Schedule III to the Act would become nugatory. The cardinal principle of interpretation of statutes requires that the interpretation which would render a part of the legislative nugatory or otiose should be avoided. What is required is harmonization or conciliation amongst the two seemingly contradictory or repugnant provisions in an enactment. As the matter assignment of work and transfer of workers within the establishment" has been specifically included in Schedule III to the Act, it cannot be artificially brought under Item 1 of Schedule II by reference to the presumable consequences of such transfer or assignment of work.

27. We agree with the view of the High Court and for the reasons already indicated above, we answer question (1) in the negative.

5. We may state with the learned Single Judge did not have the benefit of the aforementioned judgment, when the matter was decided, inasmuch as the decision of the learned Single Judge is dated 20.11.2008 whereas the Apex Court has decided the case of Ashok K. Jha & others cited supra on 28.8.2009.

6. It can thus clearly be seen that in the case of Ashok K. Jha & others the Apex Court has clearly held that insofar as assignment of work or transfer of workers within the establishment is concerned, the subject is precisely and specifically covered in Item No. 2 of Schedule III. The Apex Court has further held that expression "assignment of work and transfer of workers within establishment" is plain and admits of no ambiguity. The Apex Court has held that assignment of work and transfer of all workers within the establishment would not attract Item Nos. 1 and 2 of Schedule II but would be covered by Item No. 2 of Schedule III, as there is a specific item in this regard. The Apex Court has held that the specific item would exclude the items of general character and, in that view of the matter, in the matters of transfer of workers within the establishment and assignment of work by the employer the same is governed by Schedule III.

7. The facts, in the case of Ashok K. Jha & others cited supra which is considered by the Apex Court so also in the present case, there is no change in the service conditions of the workers i.e. the workers are not only continued to enjoy same pay scales, rights and benefits flowing from service but, as a matter of fact, as has been stated on affidavit by the employer, they are also given better benefits than one which they were getting earlier. As a matter of fact, out of 25 employees now the question remains only of about 3 employees, inasmuch as rest of the employees have already accepted higher promotional benefits and grades. The Apex Court in the case of Ashok K. Jha & others has upheld the findings of the Gujarat High Court that the reasoning of the learned Industrial Court have accepted Item No. 2 of Schedule III of the BIR Act would become nugatory.

8. No doubt, the respondents may make an attempt to distinguish the aforesaid judgment of the Apex Court in view of paragraph No. 24 of the said judgment. It may be contended that in the case before the Apex Court, there was no evidence about the fixed number of workers in the Crimping Department and Twisting Department. However, they may contend in the present case that the component in the Quality Control Department is determined at 28.

9. For considering the said argument, it may be necessary to refer to Clauses-7 and 21 and Annexure-3 of the said Settlement. The translation of Clauses-7 and 21 reads thus:

7. Increase in the production being the base of this settlement, the number of workers to be engaged in Polyester, DTY, and Spun Yarn and in each shift, is given serially in Appendix 3, 4 and 5. (It is made clear that the workers of POY packing those will be sent to above said COMMON MULTISKILL POOL, are not included in numbers of workers in COMMON MULTISKILL POOL shown in Appendix 3). It is made clear that the services of COMMON MULTISKILL POOL workers can be utilized in case of absence/relieving and operation of new machineries and at appropriate work place as per the discretion of the Head of the Department. Both the parties again make it clear that the payment of Rs. 200/- out of Special Basic Pay payable from 01/05/2002 as described in

Appendix-1 will be payable to the workers only when the concerned workers will follow and achieve the production standard shown in Appendix 3, 4 and 5 annexed hereto.

21. The exchange of work and work place of the workers (Intra department and Inter department) will be made at the discretion of the Head of the Department and as per the requirement of the department. Redeployment of any of the worker can be made on similar trade/job in any department within the organization and in case the concerned worker refuse to move on to that work, it will be treated as misconduct under the standing orders applicable to the organization and action of deduction of wages and also necessary disciplinary action, will be taken against the said worker.

10. It can thus clearly be seen that though in Annexure-3 there is mention regarding Quality Control Department, there is no reference regarding the same in Clause-7. It can clearly be seen that Clause-7 specifically states that since the main purpose of the Settlement is increase in production, the component insofar as Polyester, DTY and Spurn Yarn and the number of workers in each of the shifts has been determined in Clauses-3, 4 and 5.

11. It can, thus, clearly be seen that Clause-7 only determines the component only insofar as Polyester, DTY and Spurn Yarn Department are concerned. There is no reference in Clause-7 to Quality Control Department. It can, thus, clearly be seen that the intention was to determine the components insofar as Polyester, DTY and Spurn Yarn are concerned, which are undisputedly department concerned with production. Perusal of Clause-21 would reveal that the Head of the Department, has been empowered to transfer the employees within the department or from one department to another department. If the contention of the respondents is to be accepted, then it would render Clause-21 of the Settlement as redundant. As has been held by the Gujarat High Court and which view has been accepted by the Apex Court in the case of Ashok K. Jha & others cited supra, an interpretation which would render part of the legislation nugatory or otiose should be avoided. By now, it is settled principle of law that the provisions of a statute cannot be read in isolation but have to be read in harmony with each other. As such Clause-7 of the Settlement cannot be read in isolation but has to be read in harmony with Clause-21. In any case, as has been held by the Apex Court that since the issue of assignment of work and transfer of workers within the establishment, is covered by Item No. 2 of Schedule III, notice of change as required u/s 42 would not be required.

12. Insofar as judgment of the Division Bench of this Court in the case of Co-operative Bank Employees" Union cited supra is concerned, no doubt that the Division Bench has held that where an employer intends any change in respect of an industrial matter specified in Schedule II of BIR Act, the question of prejudice to an employee is not relevant. However, it is to be noted that in the said case, the issue was determining to creation of a new post and designation thereof as a sub accountant. It can clearly be seen that the said issue is covered under

Schedule II and, therefore, the notice was required u/s 42. However, in the present case as has been held by the Apex Court issue is covered under Clause-2 of Schedule-III and as such no notice is necessary.

13. Insofar as the judgment of the Apex Court in the case of M/s. Tata Iron and Steel Co. Ltd. cited supra, the Apex Court was considering provisions of Section 9-A of the Industrial Disputes Act, 1947. The Apex Court considering the items in the schedule to the said Act, considered that change of weekly rest day from Sunday to Wednesday in the case of one colliery and to Thursday in the other collieries without notice u/s 9-A of the said Act was not admissible. It can be seen that in the said case the Apex Court found that change of weekly rest day would fall under Schedule IV and for effecting any change in items covered under Schedule IV notice was necessary u/s 9-A of the said Act. Such is not a case here. In the present case, as has been held by the Apex Court the matter is covered under Item No. 2 of Schedule III for which no notice is necessary. Insofar as judgment of the Apex Court in the case of Life Insurance Corporation of India cited supra the question before the Apex Court was as to whether between Industrial Disputes Act and the Life Insurance Corporation Act, what would prevail. It was held that regulation issued under Corporation Act would not prevail or supersede a contract between the parties resulting from the Settlement of 1972 arrived at under the Industrial Disputes Act. Such issue does not arise for consideration in the present appeals.

14. In that view of the matter, the appeals are allowed. The impugned judgment of the learned Single Judge is quashed and set aside.

15. Rule is made absolute in Writ Petition No. 446 of 2006 setting aside judgment and order passed by the learned Industrial Court in Complaint (ULP) No. 245 of 2004 to the effect it partly allows the complaint.

16. Rule is discharged in Writ Petition No. 1481 of 2006 by upholding the order passed by the learned Industrial Court to the extent it dismisses part of the complaint. In view of disposal of the Letters Patent Appeals, the Civil Applications are disposed of.