
(1977) 08 BOM CK 0040

In the Bombay High Court

Case No : Misc. Petition No. 279 of 1973

Mistry Lallubhoy and Co.

APPELLANT

Vs

Engineering and Metal Workers" Union and another

RESPONDENT

Date of Decision : 01-08-1977

Acts Referred:

Factories Act, 1948 — Section 52

Industrial Disputes Act, 1947 — Section 10(1)(d), 33, 9A

Citation : (1978) MhLj 480

Hon'ble Judges : S.K. Desai, J

Bench : Single Bench

Advocate : N.B. Shetye, L.V. Talaulikar, for the Appellant; N. G. Nair, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Desai, J.—A very small point arises in this petition in which the petitioners, who are a partnership firm carrying on business at Swadeshi Mills Compound, have impugned the decision of the Industrial Tribunal in reference (IT) No. 165 of 1971 given on 31st January 1973. This decision was given pursuant to a reference made by the Government of Maharashtra u/s 10 (1) (d) of the Industrial Disputes Act, 1947. The demand of the workmen which was referred for the consideration of the tribunal pertained to the demand for payment of wages for one day i.e. 24th November, 1970 and removal of the word "strike", which word had been designated on the attendance cards of the workmen by the employer, for the 22nd of November 1970. The only grievance Mr. Shetye has made about the said order pertains to the grant of payment of wages for the said day viz. 24th November 1970; he has no quarrel with the decision as regards the removal of the word "strike" from the attendance cards. According to him, these attendance cards were after the end of the month destroyed by the company and this remark would not therefore be in existence today and will not have been carried forward to any other card or register.

2. In order to see the correctness or otherwise of the decision of the Industrial Tribunal in upholding the workmen's claim for wages for this period, a few facts may be stated : In November 1970 the employees of the Maharashtra State Government were on strike. This strike was supported by certain political parties and trade union organisations, and in order to demonstrate such support a decision was taken to observe 24th November 1970 as a "Bandh" day. The employers, who are the petitioners before me, it appears, considering the inadvisability of working the factory on the day of the proposed "Bundh" decided to keep the factory working on 22nd November 1970 which was the normal weekly off day and to keep the same closed on the "Bandh" day i.e. 24th November 1970. According to the petitioners, on 20th November 1970 a notice was displayed on the notice board which stated that the workmen would be given 24th November 1970 as a weekly off day in lieu of 22nd November 1970 which would be treated as a working day. According to the petitioners, this decision had been taken to meet the exigencies of the situation, and a similar decision to change the weekly off day had been taken by a fairly large number of factories in the Bombay area who had decided to keep the factories closed on 24th November 1970 by declaring the same as a weekly off day and by substituting the normal weekly off day as a working day. It appears, however, that (presumably by reason of an understanding previously arrived at) none of the workmen of the petitioners reported for duty on 22nd November 1970. The petitioners thereupon marked the attendance cards of these workmen who had not reported for duty for that day as "Strike" to indicate that the workmen were on strike on that day according to the employers. The workmen claimed that they had reported for duty on 24th November 1970 inasmuch as the workmen had not agreed to the change of the weekly off day. According to the workmen, the decision of the employers in keeping the factory closed on 24th November 1970 was improper and not justified by law. According to the workmen, they had reported for duty on that day and it was the employers who did not offer or take work from them. In the circumstances it was claimed that the workers were entitled to be paid their wages for the said day. That was the first branch of their claim before the 2nd respondent to the petition.

3. The principal basis of the attack which has found favour with the 2nd respondent is that such change would offend against the provisions contained in section 9A of the Industrial Disputes Act and, therefore, the purported decision of the company to change the weekly off day from 22nd November 1970 to 24th November 1970 was illegal. If that was so, it would follow that the workmen were entitled not to attend the employer's factory on 22nd November 1970 and were similarly entitled to report for work on 24th November 1970; and if on the latter day work was not offered to them, they would be entitled to their wages for that day.

4. There was, it may be stated, an argument canvassed before the 2nd respondent based on the provisions of section 33 of the Industrial Disputes Act in view of the pendency of Reference (IT) No. 427 of 1970. This has been

considered and in my opinion rightly rejected by the 2nd respondent in para 5 of the impugned order. Such contention has not been pressed before me.

5. The short question is whether the action of the company in displaying the notice on the notice board changing the weekly off day from Sunday, 22nd November 1970, to 24th November 1970 was violative of the provisions contained in section 9A of the Industrial Disputes Act. It has to be noticed in the first instance that the action of the company was not violative of the provisions for weekly holidays to be found contained in section 52 of the Factories Act, 1948, and the change was effected in accordance with the procedure prescribed in that Act. Further, it would seem to appear from the evidence, which was recorded before the 2nd respondent Tribunal, that in the past also there had been instances of change in the weekly off days, though according to the workmen, it was contended that after the Union was formed such changes had taken place only with the concurrence of the Union. The position might be different if there was evidence on the record to show that the long standing practice of this company almost immutably and unalterably was to have a particular day as the weekly off day and that there had been no change in such practice except with the specific concurrence of the workmen. On the other hand, the evidence led on behalf of the workmen of one of their workers, Dagdu Tukaoam Gandhi, would seem to suggest that on several occasions there had been changes of similar nature effected in the past. This witness Dagdu Tukaram was the President of the factory committee of the Union. According to him, before the formation of the Union the workmen were required to work on Sundays in case any festival holiday was given previous to that Sunday. This had happened, according to him, on 8 or 10 Sundays in the year before the Union was formed. In cross-examination it was elicited from him that the Union had been formed in 1969. Thereafter it was obtained from him in such cross-examination that on certain days even in 1970 the workmen had worked on Sundays and the weekly off day was observed on some other day. He was initially reluctant to say so, but later on being shown the attendance register was required to admit the correct position. There is, however, an explanation offered by him viz. that the workers had not objected on those occasions and therefore could be taken to have impliedly consented to working on Sundays in order to enjoy the festival day.

6. The 2nd respondent based its decision on the decision of the Supreme Court in the case of Tata Iron and Steel Co. Ltd. Vs. The Workmen and Others, . It appears to me, however, that the position has become somewhat complicated by reason of what appears to me, at any rate, to be irreconcilable observations in certain decisions of the Supreme Court to which I will immediately advert.

7. The question of a change in the weekly off day came to be considered by a Bench of the Supreme Court consisting of Shelat and Bhargava JJ. in Workmen of Sur Iron and Steel Co. (P) Ltd. Vs. Sur Iron and Steel Co. (P) Ltd. and Another, . It appears from the recital of facts in the report that the concerned factory used

to observe every Sunday as a weekly off day. On 19th April 1962 a letter was received from the Calcutta Electric Supply Corporation conveying information that pursuant to certain restrictions imposed by the State Government on the use of electricity, supply of electricity on every Saturday was to be curtailed, so that there would be no electricity available for running the factory between 7.00 a.m. to 10.00 p.m. on Saturdays. In the letter it was suggested that the company should observe Saturday as the off day instead of Sunday. On receipt of this letter the company issued a notice on 20th April 1962 informing all the workmen that with effect from the next day i.e. 21st April 1962 Saturday instead of Sunday would be the off day in the factory until further orders. The notice was circulated amongst the workmen. The workmen did not attend the factory on Saturday, 21st April 1962. According to the notice, the next day i.e. 22nd April 1962 was a working day, but the workmen did not attend the factory. Some of them actually collected near the gate but refused to do any work, claiming that the factory should be closed on this day as before.

8. It was contended and which contention was inter alia required to be considered by the Supreme Court that the change in the weekly off day from Sunday to Saturday notified by the company by its notice dated 20th April 1962 offended the provisions of section 9A of the Industrial Disputes Act. This challenge appears to have been decisively rejected by Bhargava J. speaking for the Supreme Court in the following words:

"3. On these facts, the only point that was argued before us on behalf of the workmen was that the change in the weekly off day from Sunday to Saturday without complying with the requirements of section 9A of the Industrial Disputes Act (hereinafter referred to as "the Act") was illegal so that the workmen were within their rights in ignoring the notice and in insisting that they should not be made to work on Sunday, the 22nd April 1962. On the applicability of section 9A of the Act, the position can be examined in two alternative aspects. Section 9A applies to matters enumerated in the Fourth Schedule to the Act. There does not appear to be any specific entry in that Schedule which would cover a condition of service relating to weekly off-day....."

(para 3 on page 573 of the report).

It is true that in this very paragraph subsequently the alternative contention of the workmen viz. that such a change would be covered by Item No. 4 of the Fourth Schedule to the Industrial Disputes Act, 1947, has been considered and repelled on the basis of the exemption granted by the notification of the State Government. But this would not make the previous observations obiter.

9. The next decision ?and in my opinion one which is to a considerable extent in direct conflict with the decision in *Sur Iron & Steel Company's case*? is a decision of the Bench consisting of Vaidialingam and Dua JJ. in *M/s. Tata Iron & Steel Co. Ltd. v. Its Workmen*. The recital of facts in the above report indicates that the dispute between the company and the workmen of its six collieries pertained to

the change in the weekly day-off rest from Sunday to some other day. The company had in respect of one such colliery notified Wednesday as the weekly off-day and Sunday as a working day. On one of the days concerned the workmen had reported for work on Wednesday when the company refused to give them work on the ground that that was a weekly rest day. It was contended before the Supreme Court that the decision of the management in changing the weekly rest day from Sunday to some other day without carrying out the requirements of section 9A was contrary to law and, therefore, the workmen were not bound to accept such decision or act thereon. It appears that such contention was accepted by the Supreme Court and after considering the statutory provisions contained in section 9A and the three entries in the Fourth Schedule to the Act viz. Entries Nos. 4, 5 and 8 it was observed by Dua J. speaking for the Court as follows : ?

"12. We now come to the main contention. Section 9A which has already been reproduced, lays down that change in the conditions of service in respect of any matter specified in the Fourth Schedule shall not have effect unless a notice is given to the workmen likely to be affected by such change. The relevant entries of the Fourth Schedule have already been reproduced. It appears to us that entries dealing with "hours of work and rest intervals" and "leave with wages and holidays" are wide enough to cover the case of illegal strikes and rest days. Indeed, entry No. 8 dealing with "withdrawal of customary concession or privilege or change in usage" is also wide enough to take in its fold the change of weekly holidays from Sunday to some other day of the week, because it seems to us to be a plausible argument to urge that fixation of Sundays as weekly rest days is founded on usage and/or is treated as a customary privilege and any change in such weekly holidays would fall within the expressions "change in usage" or "customary privilege". " (para 12 at page 265).

10. It may be noted that the earlier decision in Sur Iron & Steel Company's case does not appear to have been brought to the notice of the later Bench in Tata Iron and Steel Company's case, and, therefore, the later Bench did not have the opportunity of either considering the observations made by Bhargava J. or dealing with them.

11. Both the above decisions of the Supreme Court were cited in a later decision viz. Assam Match Company Limited Vs. Bijoy Lal Sen and Others, . In the said case the company concerned had originally fixed a holiday on account of Kali Puja on Friday, 11th November 1966. Later on one of the two unions represented that the factory should be closed on 12th November 1966 instead of 11th November 1966 as notified by the company. On receipt of this letter the company put up a notice on the notice board on the very day of receiving the letter that in response to the request of the Sangh the factory would remain closed for Kali Puja on Saturday instead of Friday as was previously notified. It was specifically indicated in this notice that the factory would remain open on Friday, 11th November 1966, which day had been previously notified as a

holiday, and the previous notice was indicated as having been cancelled. Dealing with the argument based on the provisions contained in section 9A it was observed by Vaidialingam J. for himself and Grover J. as follows : ?

"8. Section 9A no doubt provides that the conditions of service of any workmen in respect of any matter specified in the Fourth Schedule cannot be changed without following the procedure indicated therein. If the alteration of the date of holiday amounts to a change in the conditions of service, it is needless to state that the appellant is bound to follow the procedure laid down in section 9A. Item 5 of the Fourth Schedule deals with "leave with wages and holiday". Therefore, prima facie, if a holiday has been fixed, the management may not have power to totally cancel the same or deprive the workmen of such a holiday without conformity to provisions of section 9A. In the notice published at the beginning of the year 1966, regarding the holidays for the said year, the appellant has no doubt stated that Friday, the 11th November, will be a holiday for Kali Puja. But there is a statement in this notice to the effect that "this list is subject to modification if thought necessary." Under paragraph 6 of the Company's certified Standing Orders, it is provided that "Notice specifying (a) the days observed by the factory as holidays, and (b) pay days, shall be posted as required by the Factory Act and the Payment of Wages Act respectively." There is no controversy that the list of holidays published at the beginning of the year 1966 as well as the circular dated November 5, 1966, are in conformity with this provision. Similarly the notice dated November 10, 1966, by the management regarding the 12th November being a holiday for Diwali acceding to the request of the workmen, must also be considered to satisfy the provisions of this clause in the Standing Order." (para 8 at page 2157). On the facts of that case it was concluded subsequently that the alteration of the day regarding Kali Puja holiday could not be considered to be an alteration in the conditions of service. This was obviously on two broad counts indicated in the judgment viz. (i) that the total number of holidays had remained the same and (ii) a large body of workmen had themselves sought the change. The Division Bench had occasion, as stated earlier, in the Assam Match Company's case to consider the earlier two decisions. While dealing with the Sur Iron and Steel Company's case it was observed that in that case the contention of the workmen pertaining to the change in the weekly off-day without complying with the requirements of section 9A had been repelled on two counts, the second of which was based on the exemption granted by the State Government as I have already noted earlier. It was then observed : "Therefore, it will be seen that this decision did not express any opinion on the question whether the alteration of the weekly off-day from Sunday to Saturday, amounts to a change in the conditions of service coming within section 9A. In fact the indications in the judgment are that such an alteration will not attract section 9A." (last part of para 10 at page 2158 of the report). Tata Iron and Steel Company's case was then discussed in the very next para (para 11 of the report). In considering the decision (Tata Iron and Steel Co.'s case) emphasis was laid in the Assam Match Company's case on the

special facts of that decision and this can be gathered from the following words:

".....From the facts of that case it is seen that Sunday had been a holiday in the factory concerned for a long number of year. The company, for the reasons stated in the judgment, cancelled this holiday and in turn gave a holiday in the mid-week without following the procedure u/s 9A. It was held in the particular circumstances of that case that the alteration amounts to a change in the conditions of service. It must be noted that the workmen have been having for a long number of years Sunday as a holiday and that may have become a condition of their service. A holiday on a Sunday can only be on that day and no other day of the week can be Sunday. On this basis the decision has been rendered holding that cancelling the holiday enjoyed on Sunday amounts,, in the circumstances, to a change in the conditions of service." (para 11 at page 2158) (Italics supplied)

12. In my opinion, there was a clear conflict in the approaches of the two benches in Sur Iron and Steel Company's case and in Tata Iron and Steel Company's case; and instead of resolving the conflict and laying down what would be the correct approach, the later decision in Assam Match Company's case has restricted itself to deciding the matter before the Court on the special facts of that dispute.

13. The principle enunciated in Tata Iron & Steel Company's case regarding the object behind section 9A was referred to by a larger Bench of the Supreme Court in The Management of Indian Oil Corporation Ltd. Vs. Its Workmen, . The observations to which my attention was drawn by Mr. Nair on behalf of the 1st respondent Union read as follows :

"10. On the other hand, Mr. Sen Gupta appearing for the respondents drew our attention to the decision of this Court in M/s. Tata Iron and Steel Company Ltd. v. The Workmen and others where this Court, while pointing out the object of section 9A, observed as follows:?

"The real object and purpose of enacting section 9A seems to be to afford an opportunity to the workmen to consider the effect of the proposed change and, if necessary, to present their point of view on the proposal. Such consultation further serves to stimulate a feeling of common joint interest in the management and the workmen in the industrial progress and increased productivity. This approach on the part of the industrial employer would reflect his harmonious and sympathetic co-operation in improving the status and dignity of the industrial employee in accordance with the egalitarian and progressive trend" of our industrial jurisprudence, which strives to treat the capital and labour as co-sharers and to break away from the tradition of labour's subservience to capital,"

The observations made by this Court lay down the real test as to the circumstances in which section 9A would apply. In the instant case, however, we are satisfied (1) that the grant of the compensatory allowance was an implied condition of service; and (2) and that by withdrawing this allowance the

employer sought to effect a change which adversely and materially effected the service conditions of the workmen. In these circumstances," therefore, section 9A of the Act was clearly applicable and the non-compliance with the provisions of this section would undoubtedly raise a serious dispute between the parties so as to give jurisdiction to the Tribunal to give the award. If the appellant wanted to withdraw the Assam Compensatory Allowance, it should have given notice to the workmen, negotiated the matter with them and arrived at some settlement instead of withdrawing the compensatory allowance overnight.'"

(Para 10 at 324-325). (Italics supplied.)

14. A proper scrutiny of the observations in para 10 of the above report in Indian Oil Corporation's case will only indicate the general principles which could be said to be the basis behind the provisions contained in section 9A. That does not solve our difficulty, which is whether the change in the weekly off day from day A to day B is such a change as would require the procedure provided for in section 9A to be complied with. In the Indian Oil Corporation's case emphasis was placed on the compensatory allowance being an implied condition of service, and it was observed that by withdrawing such allowance the employer had sought to effect a change which adversely and materially affected the service conditions of the workmen. These observations indicate that only a change which would affect the conditions of service and affect such conditions of service adversely and materially would certainly be a change for which the procedure enjoined by section 9A would be required to be complied with. From these observations it would not follow that each and every change affecting the working conditions would require the procedure enjoined by section 9A to be followed.

15. As regard section 9A, it is to be observed that one of the two requirements prescribed by the said section is the requirement of notice of 21 days. It is an admitted position in the instant case that the notice given was shorter than the prescribed period. It would follow therefore that if section 9A were to be applied, then the notice given by the employer would not be in accordance with the requirement of that section and, therefore, the change proposed by such notice would not have any legal effect.

16. This brings us again to the short question which we posed earlier in this judgment. Was the notice indicating change of the weekly off day a notice of a change in the conditions of service? For the purpose of furnishing an answer to this query, one is required to turn to the entries in the Fourth Schedule which prescribes the broad heads of the topics covered within the prescription of section 9A. Following the observations in the Tata Iron and Steel Company's case, we shall lavish attention for this limited purpose only on three of those entries viz. Entries 4, 5 and 8 of the Fourth Schedule and these three entries read as follows:?

"Entry 4?Hours of work and rest intervals;

Entry 5?Leave with wages and holidays; and

Entry 8?Withdrawal of any customary concession or privilege or change in usage."

17. I am inclined to dispose of this petition without being fettered or restricted in my judgment by any decision of the Supreme Court although there are three which have been indicated above, which may have some slight bearing. This approach has become necessary since in my opinion the decisions do not lay down any consistent principle of law. As accepted by me the proper conclusion to be arrived at would depend upon the facts of each case; and, therefore, a change which might bring in its wake the requirements of section 9A in one case would not necessarily bring about the same result in another situation.

18. To turn back again to the three entries, it is difficult on the facts of our case to bring the matter within Entry 4 or Entry 8. As far as Entry 4 viz. "hours of work and rest intervals" is concerned, it is to be realised that the provision for a weekly holiday is provided for by section 52 of the Factories Act, 1948. It is the admitted position that the change proposed by the employers in our case by a notice by which Sunday, which was the normal weekly off day, was made a working day and the "Bandh" day converted into a weekly off day, did not contravene the provisions of section 52. Thus, although there was some change in the weekly off day, it was not such a change, to restrict our consideration to the entry, as took away from the workmen any rest interval or increased their aggregate hours of work over a particular period. The case of Entry No. 8 can be disposed of quite summarily. There is no evidence that the practice of Sunday being the weekly off day was a matter of any customary concession or privilege or something conferred by usage. For such purposes some special evidence is required which is not to be found on the record. The only entry of the Fourth Schedule which may have some bearing on the question under consideration is Entry 5 which reads "Leave with wages and holidays".

19. Now as far as this Entry 5 is concerned, the word "holiday" in my opinion cannot be read in isolation and from the words preceding it; and, therefore, read as a whole, the entry would fairly suggest that the topic which will bring in its wake the procedure enjoined by section 9A is a change in the matter of leave and holidays and it must be a change which is of a nature which adversely affects the workmen's right as to leave and holidays. The short question is: If the weekly off-day is altered from one day to another day, does it adversely and materially affect any right of the workmen? Looked at from any reasonable manner and considered as an isolated change as an exception for one occasion only and not a permanent one, the proposed change cannot be considered to be such a change as would materially or adversely affect the workmen, which is one of the tests indicated in the Indian Oil Corporation's case.

20. There is nothing on the record which would suggest that the employees of this factory, considered as a separate unit or as part of the industry in a particular locality or region, had any vested right in enjoying Sunday as an off-day. The question, as indicated earlier, might have been different if there is a change proposed by the company to change the weekly off-day from Sunday to

any other day, not for one solitary occasion but prospectively for a longer period of time or permanently. Different consequences may follow such, a proposal and the approach may conceivably be different. This is not the case before us and we are, therefore, not required to consider whether such a proposal would render obligatory the procedure provided for section 9A.

21. In this view of the matter, in my opinion, the conclusions of the Industrial Tribunal, that the workers were justified in not reporting for duty on 22nd November 1970 and that the Company was not justified in not giving them work on Tuesday, 24th November 1970, are conclusions which cannot be sustained and are required to be quashed. It would follow then that the direction given to pay to the workmen of the company their wages for 24th November 1970 is also unsustainable. To the extent of the above conclusions and the direction for payment of one day's wages viz. the wages for 24th November 1970 only the Rule is made absolute in terms of prayer (a).

22. The parties, however, will bear their own costs of the petition.

23. It appears to me that there is some warrant for taking a sympathetic attitude towards the workmen of this company who could not have taken the decision on their own and, if at all, were motivated not by any sense of protest against the employers in particular but for only demonstrating some sense of sympathy for the striking employees of the Government of Maharashtra. In the view that I have taken, such change did not require the procedure enjoined by section 9A to be complied with. At the highest the workmen could be said to be not properly advised. Accordingly Mr. Shetye on being requested by the Court has agreed on behalf of the petitioners that 50% of the day's wages would be paid to such of the workmen (who would have been entitled to the benefit of the award) as are still in the employment of the petitioners, but that this would be done only in case an appeal is not filed challenging this decision. It is further stated that if the 1st respondent Union gives the necessary intimation that no appeal is being filed, such payment would be made by the petitioner company to such workmen within fifteen days of receipt of such intimation.