
(2016) 06 BOM CK 0084

In the Bombay High Court

Case No : Writ Petition No. 5312 of 2012

M/s. Bennet Coleman & Co. Ltd.

APPELLANT

Vs

Mumbai Mazdoor Sabha

RESPONDENT

Date of Decision : 13-06-2016

Acts Referred:

Industrial Disputes Act, 1947 — Section 9A

Citation : (2016) 3 CLR 362 : (2016) 150 FLR 1022 : (2016) LabLR 905 :
(2016) 3 LLJ 330 : (2016) 3 LLN 57 : (2016) 4 MhLJ 811

Hon'ble Judges : S.C. Gupte, J.

Bench : Single Bench

Advocate : Mr. S.K. Talsania, Senior Advocate with Mr. V.P. Vaidya with Mr. Sagar Sheth, Advocates, for the Appellant; Mr. Arshad Shaikh I/b. Mr. Gautam Yadav Advocates, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Gupte, J. (Oral) - This petition, filed under Articles 226 and 227 of the Constitution of India, challenges an order passed by the Industrial Court, Mumbai, on a complaint filed by the Respondent Union, under Section 28 read with Item 5 of Schedule II and Items 9 and 10 of Schedule IV of the MRTU and PULP Act, 1971. In its impugned order, the Industrial Court upheld the Respondent's contention of unfair labour practise only under Item No.9 of Schedule IV and dismissed the complaint as regards Item 5 of Schedule II and Item 10 of Schedule IV. Accordingly, in this petition, we are concerned only with the acceptance of the complaint of unfair labour practise under Item 9 of Schedule IV.

2. The basis of the complaint of the Respondent union was a notice issued by the Petitioner proposing four measures with a view to "maintain proper discipline". The first three measures (Item Nos. 1 to 3) dealt with the matter of attendance (namely, debiting of "casual Leave" for three late reportings, "leave without pay" if the concerned employee had no casual leave to his credit, and forwarding of an

"outdoor duty slip" for approval for proceeding on outdoor duty). The fourth measure (Item No.4) provided for treatment of holidays, including the weekly holidays, falling within the period of leave, as follows :

"All holidays including the weekly holidays falling within the period of any kind of leave shall be treated as leave."

It was the case of the Respondent union that these four measures amounted to a change of service conditions and accordingly, required a notice of change within the meaning of Section 9A of the Industrial Disputes Act, 1947. Whilst the Industrial Court rejected the Respondent union's case that Item Nos. 1 to 3 of the notice amounted to a change of service conditions, it held that insofar as Item No. 4 was concerned, it was indeed a change in service conditions and required a notice of change in accordance with Section 9A.

This determination is challenged in the present petition.

3. Mr. Talsania, learned Senior counsel appearing for the Petitioner, urges the following points :

(i) In the first place, he submits that the service conditions themselves have to be, in the first place, found by the court in a reference under the Industrial Disputes Act and cannot be found for the first time by the Industrial Court considering a complaint under Section 28 read with Item 9 of Schedule IV of MRTU and PULP Act. He relies upon the judgment of the Supreme Court in the case of *Cipla Ltd. v. Maharashtra General Kamgar Union*, 2001 (3) SCC 101 in this behalf.

(ii) Secondly, it is submitted that standing orders are statutorily imposed service conditions and that an employer desiring to implement the standing orders cannot be said to effect any change in service conditions. He relies on the judgments of the Supreme Court in the cases of *Rajasthan State Road Transport Corporation v. Krishna Kant*, 1995 (5) SCC 75 and *Western India Match Co. Ltd. v. Workmen*, 1973 (2) LLN 357 (SC) : 1974 (3) SCC 330 in support.

(iii) Thirdly, it is submitted that standing orders supersede any contractual stipulation to be found in the contract of service between the employer and the employees.

4. Section 9A is in the following terms :

"9A. Notice of change.No employer, who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule, shall effect such change :

(a) without giving to the workmen likely to be affected by such change a notice in the prescribed manner of the nature of the change proposed to be effected; or

(b) within twenty-one days of giving such notice:

Provided that no notice shall be required for effecting any such change -

- (a) where the change is effected in pursuance of any settlement or award; or
- (b) where the workmen likely to be affected by the change are persons to whom the Fundamental and Supplementary Rules, Civil Services (Classification, Control and Appeal) Rules, Civil Services (Temporary Service) Rules, Revised Leave Rules, Civil Service Regulations, Civilians in Defence Services (Classification, Control and Appeal) Rules or the Indian Railway Establishment Code or any other rules or regulations that may be notified in this behalf by the appropriate Government in the Official Gazette, apply; or
- (c) where the change is effected due to updating or replacing of the existing machinery, computerisation or increase in the immovable property and increase in production and that :
 - (i) such change shall not affect the total wages of the workmen and their hours of work; and
 - (ii) the employer provides all the legitimate and required facilities such as training etc., to the workmen to acquire the skill of new job.

The Fourth Schedule of the Industrial Disputes Act, which provides for the conditions of service for the change in which a notice is required to be given under Section 9A, is as follows :

" The Fourth Schedule

(See section 9A)

Conditions Of Service For Change Of Which Notice Is To Be Given

1. Wages, including the period and mode of payment;
2. Contribution paid, or payable, by the employer to any provident fund or pension fund or for the benefit of the workmen under any law for the time being in force;
3. Compensatory and other allowances;
4. Hours of work and rest intervals;
5. Leave with wages and holidays;
6. Starting, alteration or discontinuance of shift working otherwise than in accordance with standing orders;
7. Classification by grades;
8. Withdrawal of any customary concession or privilege or change in usage;
9. Introduction of new rules of discipline, or alteration of existing rules, except in so far as they are provided in standing orders;
10. Rationalisation, standardisation or improvement of plant or technique which

is likely to lead to retrenchment of workmen;

11. Any increase or reduction (other than casual) in the number of persons employed or to be employed in any occupation or process or department or shift, not occasioned by circumstances over which the employer has no control."

The service conditions, with which we are concerned in the present case, are under Items 5 and 8 above. The standing orders applicable to the Petitioner, which were sanctioned in 1958, had the following relevant provision in respect of leave :

"All holidays including the weekly holidays falling within the period of any kind of leave shall be treated as leave."

5. It is not disputed that this particular standing order was not implemented at any time till the issuance of the circular referred to above. On the other hand, the "terms and conditions of service" issued by the Petitioner to its employees in the year 1966 had the following provision in respect of leave rules :

"6. Leave Rules:

All applications for leave must be made on the prescribed forms and leave will be granted subject to the exigencies of work.

Privilege leave will be allowed only after one year's service and applications must normally be sent at least a fortnight before the commencement of the leave period. Ordinarily privilege leave will not be granted for a period of less than 7 days at a time. While calculating privilege leave Sundays and holidays will be excluded.

Casual leave can be taken only in the year in which it accrued. Previous sanction must be obtained before this is enjoyed. Sundays and Holidays will not ordinarily be allowed to be prefixed or suffixed to casual leave. Casual leave will be noncumulative."

Thus, for nearly 44 years between 1958 and 2002, the applicable service conditions, insofar as leave was concerned, required exclusion of intervening Sundays and holidays whilst calculating privilege leave availed of by employees. In any event, this particular stipulation in "terms and conditions of service" can be termed as a customary concession or privilege or a matter of usage. The case of the Respondent union before the Industrial Court was that inasmuch as there is a change in the service condition, which is consistently followed for more than 44 years either as a matter of leave with wages and holidays or as a matter of customary concession or privilege or usage, and such change in service conditions is covered by Section 9A of the Industrial Disputes Act, 1947, it was obligatory on the part of the Respondent to give a notice of change as provided in that section.

6. The Industrial Court found that the Petitioner's witness had admitted in evidence that in spite of having a provision to the contrary in the standing

orders, so far holidays and nonworking days falling within the period of earned leave were not included in the leave and that the notice of 2 May 2002 did propose to include these holidays and nonworking days within the period of leave. The Industrial Court held that though the standing orders were certified in the year 1958, till the issuance of notice dated 2 May 2002, the relevant clause concerning leave in the standing orders was not implemented. The Industrial Court held that the change was introduced by the notice of 2 May 2002 as a change of service conditions within the meaning of Section 9A of the Industrial Disputes Act and since there was no notice of such change, the complainant union had proved an unfair labour practise falling under Item 9 of Schedule IV of the MRTU and PULP Act, 1971. Accordingly, the Industrial Court directed the Petitioners to desist from indulging in such unfair labour practise and discontinue the same forthwith. The Petitioner was prohibited from implementing Item No. 4 of the notice dated 2 May 2002 without issuing notice under, and complying with, Section 9A.

7. As held by our Court in *S.G. Chemicals and Dyes Trading Employees Union v. S.G. Chemicals and Dyes Trading Ltd.*, 1986 (1) LLN 986 (SC) : 1986 DGLS (Supreme Court) 478, noncompliance of any statutory provision must be regarded as a failure by the employer to implement an award, settlement or agreement. It is an implied condition of every agreement, including any settlement, that the parties thereto will act in conformity with law. Such provision need not be expressly stated in any contract. To the same effect are the observations of our court in the case of *Dalanvalan Imarat Bandhkam & Patbandhare Kamgar Union v. State of Maharashtra*, 1991 (4) Bom. C.R. 111. Our court was considering in that case a breach of Section 33(1)(a) of the Industrial Disputes Act, 1947 and held that such breach would lead to an unfair labour practise within the meaning of Item 9 of Schedule IV. Both Section 33(1)(a) and Section 9A of the Industrial Disputes Act deal with protection of conditions of service, the only difference being that Section 9A applies when there is no reference pending, whereas Section 33 applies when there is a reference pending. The decision, accordingly, applies with equal force to the facts of the present case. To put the controversy finally to rest, there is also a Division Bench judgment of our court in the case of *Hindustan Lever Ltd. v. Hindustan Lever Employees Union*, 2006 1 CLR 543 which deals with an illegal change of service conditions under Section 9A of the Industrial Disputes Act, 1947 itself. The Division Bench held that non-service of notice under Section 9A before effecting such change amounts to an unfair labour practise under Item 9 of Schedule IV of the MRTU and PULP Act, 1971. To the same effect, are the observations of our court in the case of *Mazgaon Dock Ltd. v. Ratnakar Sadashiv Vatare*, 1998 1 CLR 1071.

8. In the case in hand, all that we need to consider is whether or not there is a change in the service conditions within the meaning of the Fourth Schedule of the Industrial Disputes Act read with Section 9A thereof. The relevant stipulation in the "terms and conditions of service" cannot be termed as anything but a

service condition concerning leave. In any event, being a long standing practise of nearly 44 years, it can also be termed as a customary concession or privilege or usage. When there is any change in the relevant stipulation concerning leave with wages and holidays or when a customary concession, privilege or usage in respect of calculation of leave with wages and holidays is withdrawn, a change does take place in conditions of service within the meaning of Section 9A read with the Fourth Schedule of the Industrial Disputes Act, 1947.

9. When the Industrial Court considers a complaint under Section 28 read with Item 9 of Schedule IV of the MRTU and PULP Act, 1971 as to whether or not a change has occurred in service conditions within the meaning of Section 9A read with the Fourth schedule of the Industrial Disputes Act and whether non service of a notice under Section 9A accordingly amounts to an unfair labour practise within the meaning of Item 9 of Schedule IV of the MRTU and PULP Act, what the court considers is the very merits of the controversy brought before it, namely, whether or not there was a service condition as alleged within the meaning of Schedule IV and whether there is any change in it within the meaning of Section 9A. The court's consideration of these matters cannot be likened to the exercise of jurisdiction by the Labour or Industrial Court under Section 28 of the MRTU and PULP Act in the face of a contest concerning the existence of relationship of employer and employee between the parties. The existence of a relationship of employer and employee in the latter case is a jurisdictional fact. Only when such relationship exists, can the Labour or the Industrial Court, as the case may be, can assume jurisdiction to find an unfair labour practise under Section 28 of the MRTU and PULP Act. The case of Cipla Ltd. (supra) is on the footing that if employees are working under a contract covered by the Contract Labour (Regulation and Abolition) Act, then it is clear that the Labour Court or the Industrial Court cannot have jurisdiction to deal with the matter as it falls within the province of an appropriate Government to abolish the same. If a complaint is taken to the Labour Court that workmen were engaged by the company through a contractor and though that was the ostensible relationship, the true relationship between the company and the workman in question is that of master and servant, such complaint would clearly be beyond the jurisdiction of the Labour Court under Section 28 of the MRTU & PULP Act even if we consider the powers of the Labour Court under Section 32 of that Act. The Court held that the provisions of the Act are summary in nature and give drastic remedies to the parties concerned and that elaborate consideration in the complaint as to whether there is a relationship of employer and employee between the parties cannot be gone into by the court. If a dispute exists as to the very relationship of employer and employee, the Labour Court or Industrial Court under the MRTU and PULP Act is not an appropriate court to decide such question and the matter must go under a reference before the authorities under the Industrial Disputes Act. Such is not the matter with the case in hand. In the present case, whether there is a service condition regarding leave with wages and holidays which is altered or whether any customary concession or privilege is withdrawn or there is

any change in usage, are matters which reflect on the merits of the controversy. That is precisely what the Industrial Court has to decide when a complaint is taken before it that there is noncompliance of Section 9A read with the Fourth Schedule of the Industrial Disputes Act, and such noncompliance amounts to an unfair labour practise under Item 9 of Schedule IV of the MRTU and PULP Act. The judgment of Cipla Ltd. (supra) has, therefore, no application to such a case.

10. Insofar as the standing orders are concerned, no doubt it is true that the standing orders are statutorily imposed conditions of service and supersede any contract. But that only means that no one can contract out of the provisions of the standing orders in the sense that the beneficiaries of the standing orders are deprived of the benefits thereunder. Nothing prevents an employer from giving better conditions of service to his employees than what is statutorily imposed by the standing orders. It cannot be said that when a service condition offers a better condition of service concerning a particular matter, that condition must still yield to a standing order. Standing orders, as statutorily imposed service conditions which cannot be contracted out from, require that no employer offers service conditions to his employees adverse to the standing orders. The standing orders, as held by the Supreme Court in the case of Rajasthan State Road Transport Corporation (supra), cannot be elevated to the status of statutory provisions requiring compliance as a matter of law.

11. Mr. Talsania was at pains to point out that mere non-implementation of a statutorily imposed service condition, namely, standing order, does not amount to a service condition in itself. He submitted that after all, the relevant standing order was simply not implemented all this while, but in any event, if the employer now wants to implement such standing order, it does not amount to a change in service conditions. The argument is nothing but a feeble attempt at hair splitting. We are not concerned here merely with the case of non-implementation of a particular standing order but with a specific service condition forming part of the service contract, namely, that holidays and nonworking days within a period of leave shall be excluded for the purpose of calculation of leave. In nearly 44 years, the Petitioner company offered this service condition with respect to leave with wages and holidays to its employees. In any event, as I have pointed out above, this condition could certainly be termed as a customary concession or privilege or a matter of usage insofar as leave to be availed of by the employees is concerned. A concession or a privilege or a usage can also be a concession from the relevant standing order itself. Inasmuch as such customary concession or privilege is withdrawn or there is a change in usage, such withdrawal or change does call for a notice within the meaning of Section 9A read with the Fourth Schedule to the Industrial Disputes Act.

12. In any view of the matter, there is no infirmity in the impugned order of the Industrial Court. The petition has no merit. The petition is accordingly dismissed. There shall be no order as to costs.

13. On the application of Mr. Talsania, the stay granted by the Industrial Court of

the impugned order on 8 May 2012 and since continued by this Court in its order dated 18 June 2012, shall continue to operate for a period of six weeks from today.