

(2018) 05 BOM CK 0043

In the Bombay High Court

Case No : WRIT PETITION NO.3643 OF 2004

NILKANTH RAMCHANDRA SONWANE

APPELLANT

Vs

EXECUTIVE ENGINEER, MINOR IRR. SUB. DIV. A'NAGAR S.

RESPONDENT

Date of Decision : 09-05-2018

Acts Referred:

Industrial Disputes Act, 1947 — Section 9A

Citation : (2018) 05 BOM CK 0043

Hon'ble Judges : RAVINDRA V. GHUGE,

Bench : Single Bench

Advocate : S.V.Dixit, L.V.Sangit, P.V.Barde, T.K.Prabhakaran

Final Decision : Dismissed

Judgement

/* Style Definitions */ table.MsoNormalTable {mso-style-name:"Table Normal"; mso-tstyle-rowband-size:0; mso-tstyle-colband-size:0; mso-style-noshow:yes; mso-style-priority:99; mso-style-parent:""; mso-padding-alt:0in 5.4pt 0in 5.4pt; mso-para-margin-top:0in; mso-para-margin-right:0in; mso-para-margin-bottom:8.0pt; mso-para-margin-left:0in; line-height:106%; mso-pagination:widow-orphan; font-size:10.0pt; font-family:"Times New Roman",serif;}

RAVINDRA V. GHUGE, J.

1.The petitioner/bank is aggrieved by the judgment and order dated 16/10/2003 delivered by the Industrial Court, Ahmednagar, by which, complaint

(ULP) No. 301/1993 filed by the respondent has been allowed. The respondent had put forth two claims. One is against her transfer and second is

with regard to an additional increment for improving her educational qualifications while in service. Admittedly, the respondent gave up her challenge

to the transfer and prosecuted her claim for additional increment.

2.This Court, by order dated 28/01/2005, has admitted the petition and Rule on interim relief was issued. Subsequently, by order dated 01/03/2005,

Ad interim relief in terms of prayer clause B was granted and the impugned judgment of the Industrial Court was stayed.

3.The learned advocate for the respondent informs that the respondent/original complainant has retired on 01/07/2006 and she has been paid her entire

retiral benefits as were admissible. If she succeeds in this petition, the pensionary benefits are likely improve and she would be entitled for arrears of one increment.

4.I have heard the learned advocates for the respective sides at length.

5.The submissions of the petitioner can be summarized as under :

(a)The claim for one special increment for improving educational qualifications while being in service, is nowhere provided for in the service rules of the bank.

(b)There is no agreement between the Management and the Union which incorporates any such condition.

(c)There are no pleadings by the respondent in the complaint as regards a right to earn such an increment.

(d)If no unfair labour practice is committed, the Industrial Court would have no jurisdiction.

(e)There was no evidence of implementation of a scheme of granting special increment for improving educational qualifications.

(f)Items 5, 9 and 10 of the Schedule IV of the MRTU and PULP Act, 1971 are not attracted in this case.

6.The submissions of the learned advocate for the respondent/original complainant can be summarised as under :

(A) The respondent joined service as a clerk with the petitioner in 1981.

(B)In 1992 she graduated and obtained the graduation degree while being in service.

(C)It is specifically pleaded in paragraph No.3 (e) of the complaint that there was a custom in the petitioner bank to grant a special increment to those workers/employees who improve their qualifications while being in service.

(D)The respondent acquired employment when she had completed her

Matriculation and she improved her qualifications by passing her graduation while being in service.

(E)The list of similarly situated employees, who were granted special increments for acquiring the qualifications of graduates, was a part of the complaint in the form of AnnexureÂ?D.

(F)The respondent led evidence and proved her case before the Industrial Court.

(G)The petitioner/Management suppressed the documents with regard to those employees, who were granted special increments mentioned in AnnexureÂ?D and did not bring their documents on record.

(H)The petitioner/Management chose to remain silent on the pleadings of the respondent and did not lead oral evidence in support of their contentions before the Industrial Court.

(I) Reliance is placed on the judgment of this Court in the matter of

(1)Premier Automobiles Limited Vs. EngineeringMajdoor Sabha and others, (1982), Volume 2 LLJ 73,

(2)P.A.C. Rego Dias Vs. Madura Coats Limited and others (1995) Volume 3 LLJ 79.

(3)Tata Tea Ltd. (Bombay) Employees' Union Vs. TataTea Ltd. and anr. 2007 (6) ALL MR 166 and,

(4)Municipal Corporation of Greater Mumbai Vs. BestWorkers' Union, 2008(5) Bom.C.R. 478.

7.I find from the record that a specific pleading has been put forth by the respondent in paragraph No. 3 (e) contending that a special increment was

granted to those workers who improve their educational qualifications and who have become graduates, while being in service. The names of such

workmen, who were granted such increments, were mentioned in Annexure 'D' and these names have been noted by the Industrial Court in paragraph

No.10 of its judgment. As such, there is a specific pleading on record and the said pleading was supported by the evidence of the respondent who

examined herself.

8.The petitioner had avoided to bring forth the service books of all those employees, whose names were mentioned in Annexure D to the complaint.

The petitioner has simply indulged in denial of the contentions of the respondent. If no such special increments were granted to those employees

indicated by the respondent, the petitioner could have produced their service books and could have led evidence to prove that they were never granted

such increments. In fact, the petitioner did not choose to step into the witness box and did not lead any evidence.

9. In the above factual background, the issue that needs consideration is, whether, the grant of special increment could be said to be a

custom/practice/usage. It appears on the basis of evidence that the petitioner did have such a practice of granting special increments. The petitioner

is a bank and appears to have extended special increments in order to encourage its employees to improve their qualifications which would always be

to the advantage of the petitioner bank. If by improving the qualifications, the performance of an employee was to improve, the petitioner bank

appears to have resorted to the policy of encouraging such employees by extending one special increment.

10. In the Premier Automobile Limited Case (supra), this Court has concluded that a custom or practice can be an "implied term of an agreement".

Item 9 of Schedule IV of the 1971 Act would indicate that violation of a settlement or agreement or award would amount to unfair labour practice on

the part of the Management. It would be apposite to reproduce the observations of this Court in paragraph Nos. 17 and 18 of the Premier Automobile

Case (supra) hereunder : "17. Now, it has not been disputed that between August, 1967 and August, 1970 the employees, who claimed to be bound

by the 1966 agreement, were in fact paid incentive payment in excess of 91%. These payments were made on 8 occasions. It appears that the second

complaint specifically was intended to complain of the failure of the employer to make such payment after 1970. I have reproduced earlier the

material portion of the complaint in which an express agreement was pleaded and even an individual agreement was pleaded. Both these cases have

now been given up in this court because Mr. Damania has fairly stated that there is no express term in the agreement of 1966 and the 1966 agreement

was obviously not an individual agreement. Having found that the case made in the complaint about an express agreement or an individual agreement

entitling the employees to claim payment over 91% even under the 1966 agreement was difficult to canvass, an ingenious argument was resorted to by

Mr. Damania that having regard to the fact that payment was made on 8 occasions, the payment in excess of 91% of incentive wages must be taken

to be a term implied in the agreement of 1966. The argument appears to be based partly on the concept of an "implied term of an agreement" and a Division Bench decision of this Court in Premier Automobiles Ltd., Bombay v. Engineering Mazdoor Sabha, Bombay [Miscellaneous Petition No. 1 of 1975 with Special Civil Application No. 9 of 1976], which is reported in 1976 Industrial Court Reporter at page 206. The question involved in that case was whether the provisions in the Certified Standing Orders could be considered as a part of the agreement relating to conditions of service for the purpose of item No. 9 in Schedule IV of the Act. The employer had resorted to a lay-off in terms of a settlement between the management and the recognised union. The Engineering Mazdoor Sabha, that is, the respondent in the present petition, which was not a party to the settlement, made a complaint under the Act to the Industrial Court that the employer was guilty of indulging in unfair labour practices because the Certified Standing Orders required that a lay-off should not be ordered by the employer without giving 7 days' notice and the lay-off could not be for a period exceeding 6 days in any month. The argument on behalf of the employer was that the word "agreement" in item 9 in Schedule IV of the Act would take in only the express terms of an agreement and the Standing Orders could not be equated with an agreement which could only be the product of the voluntary and free consent of the two parties to the agreement. A Division Bench of this court gave a wide meaning to the word "agreement" in Item 9 and held that the word "agreement" could also include terms of service agreement, express or implied. Holding that the Standing Orders were expressly made a part and parcel of the service contract between the management and the employees, the Division Bench of Schedule IV cannot but include every clause of the Standing Orders. Having made these observations, the Division Bench further observed as follows. "In this context the following passage from page 12 of Sutton and Shannon on Contracts, Sixth Edition is illuminating and can conveniently be quoted : "Nevertheless although such contracts are 'more like by-laws than a contract' there is no doubt that this set of rules contains the contract between the members.' In the same way, the worker enters into a contract of employment the terms of which are often derived not from any individual bargain between him and his employer, but (expressly or implication) from the collective agreement between his trade union and the employers. In this way, the collective

machinery remedies an inequality of bargaining power between the parties to the individual contract of employment." Even if one were to construe the word "agreement" by reference to the context the same conclusion would follow. Clause 9, of Schedule IV of the Act speaks of "failure to" implement award, "settlement or agreement". It is well settled that words take their colour from that which precedes and follows. Award after all is the compulsive adjudication of dispute by the authority constituted under the Industrial Disputes Act, and becomes binding on the employer and employees by force of the said statute and not due to any consent. As against this, free consent is the source of authority of the settlement. The word "agreement" seems to have been used in a broad sense to include the terms of service agreements express or implied. Standing orders cannot be excluded from the word "agreement" merely because part thereof has the imprint of the statutory compulsion as is the case with the "award" with which the word is bracketed. Element of compulsion is present in some measure or the other both in the award and the agreement. Intention appears to ensure the maintenance of status quo with regard to whether its basis is the law or the contract, and discourage any attempt to disturb or impair it by treating it as unfair labour practice". Relying on these observations Mr. Damania has contended that the word "agreement" in Item 9 of Schedule IV of the Act will also take in an implied term of service and that in the instant case, in view of the fact that the payments on 8 occasions were made in excess of 91%, it must be taken to be established that there was an implied terms that employees would get additional incentive wages if production exceeded 1250 units even under the agreement of 1966. 18. It is not necessary for the purpose of this case to discuss the effect of the Division Bench decision referred to above which holds that the terms of the Standing Orders should be treated as implied terms of a service agreement as the Standing Orders were a part of the conditions of service of the employee, because even if we proceed on the footing that the word "agreement" has been used in a wider sense in cl. 9, as held by the Division Bench, the question which will still have to be decided is whether the right to receive incentive wages in excess of 91% can really be considered as part of conditions of service and covered by the agreement of 1966. In the Division Bench case, there was no dispute that the clauses of the Standing Orders constituted conditions of service of the employees. The question in this

petition is slightly different. The question is whether any term can be said to be implied in the agreement of 1966 and whether on the facts of the present case, there was an implied term in the agreement which enabled the employees to ask for incentive payment beyond 91%. We are dealing with an agreement which is a consensual document arrived at between the two parties to the document. We must, therefore, first find out the nature of the terms which can be implied in such an agreement and in that context, it is worthwhile referring to certain observations from Halsbury's Laws of England, Volume 8, 3rd Edition, in paragraphs 212 to 214. In paragraph 212, it is observed as follows : ""Implications of terms. In construing a contract, a term or condition not expressly stated may under certain circumstances, be implied by the Court, if it is clear from the nature of the transaction or from something actually found in the document that the contracting parties must have intended such a term or condition to be a part of the agreement between them. Such an implication must in all cases be founded on the presumed intention of the parties and upon reason, and will only be made when it is necessary in order to give the transaction that efficacy that both parties must have intended it to have, and to prevent such a failure of consideration as could not have been within the contemplation of the parties. In every case the question whether an implication ought or ought not to be made will depend on the particular facts; consequently it is neither possible nor desirable to lay down any hard and fast rules on the subject, and it must be remembered that the construction of one contract will afford but little guidance for the construction of another unless the facts and surrounding circumstances are practically identical"". Further pointing out that if there was any reasonable doubt whether the parties did intend to enter into such a contract as is sought to be enforced, the learned authors have pointed out that the document should be looked at and all the surrounding circumstances considered and if the document is silent and there is no bad faith on the part of the alleged promisor, the Court ought to be extremely careful before it implies any term. It was then observed. ""It is not enough to say that it would be reasonable to make a particular implication, for a stipulation ought not to be imported into a written contract unless on considering the whole matter in a reasonable manner it is clear that the parties must have intended that there should be the suggested stipulation. If the contract is effective without the suggested term and is capable of being

fulfilled as it stands, generally speaking an implication ought not to be made."" These then are the tests for determining whether a term is implied in an agreement. A term cannot be held to be implied in an agreement merely because the Court thinks that it will be reasonable to imply such a term but what has to be found out when determining a question whether a particular term is implied or not is whether the parties intended that term should be a part of the contract. It is well established that the making of a contract between the parties is now the exclusive jurisdiction only of an Industrial Tribunal in matters of industrial adjudication and unless such powers are specifically granted, no new contracts can be made between the parties by any Court, Thus when it is canvassed that a particular term is implied, one has to look to the intention of the parties and this intention has to be determined with reference to the point of time when the agreement is entered into because it is an agreement which is made at a particular time which is to be construed in order to find out whether at the time when the contract was made a particular term was contemplated by the parties and it was such that it must be taken as implied for a proper working of the contract. The Court will not imply a term unless it is compelled to do so in order to give effect to the intention of the parties which must be gathered from the written terms of the agreement reduced to writing??.

11. In *Madura Coats Limited Case* (supra), this Court dealt with Item 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 and concluded that if the claimant could prove with oral and documentary evidence that there was such a practice prevailing for a long time in the company, it would crystallise into an implied term of the service conditions. A violation of such implied condition would amount to ULP under Item 9 of Schedule IV of the Act. It was also concluded that since a declaration of ULP would entail penal consequences, any ULP alleged before the Court will have to be proved by evidence and only after the Court is convinced of an ULP, such a declaration could be made against an employer or the union as the case may be.

12. In *Tata Tea Limited* (supra), this Court concluded that any benefit which was being granted to the employees as a part of the service conditions applicable to them, cannot be unilaterally withdrawn and any such withdrawal without compliance of Section 9A of the Industrial Disputes Act,

1947, renders such withdrawal illegal.

13. In *Municipal Corporation of Greater Mumbai (supra)*, this Court relied upon *Premier Automobile (supra)* and *Tata Tea Limited (supra)* and

concluded that a longstanding practice would ripen into an implied agreement and breach of such an agreement would attract the rigours of Section

9A as any deviation from such practice or alteration in such practice without issuing a notice of change under Section 9A of the Industrial

Disputes Act, would be unsustainable.

14. The petitioner contends that those candidates, who the respondent claims to have been granted increments, were not granted increments for

improving their qualifications. So also, the Recruitment Rules were subsequently altered and only graduates were being recruited by the petitioners.

This submissions were not proved by recording oral and documentary evidence before the Industrial Court. A mere denial of an assertion, without

evidence, would not take the case of the petitioner any further.

15. The Honourable Apex Court, in the matter of *Sayed Yakoob Vs. K.S. Radhakrishnan*, AIR 1964 SC 477 and *Surya Dev Rai Vs. Ramchander Rai*,

AIR 2003 SC 3044, has laid down the law that this Court, while exercising its supervisory jurisdiction or the writ of certiorari can interfere with the

impugned judgment, only if it appears to be perverse, erroneous and is likely to cause grave injustice.

16. In the instant case, the Industrial Court has concluded on the basis of documentary evidence and in view of the fact that the petitioner neither led

oral evidence nor did it fairly place on record the service books of those employees, who were said to have been granted special increments, that the

respondent had proved that she was entitled for such an increment. She was in employment when such increments were being extended to other

employees for improving their qualifications. In this backdrop, I do not find that the impugned judgment would be termed as being perverse or

erroneous.

17. Thus, this petition being devoid of merits, stands dismissed. Rule is discharged.