(2012) 07 BOM CK 0229

In the Bombay High Court

Case No : Writ Petition No. 11183 of 2011 alongwith Writ Petition No. 183 of 2012

Palm Grove Beach Hotels Pvt. Ltd. APPELLANT

Vs

Mr. Michael Fernandes and Others
 Mr. Michael Fernandes and Others Vs Palm Grove Beach Hotels Pvt. Ltd., Bhartiya Kamgar Sena, Shri P.N. Thorat, Deputy Commissioner of Labour and Certifying Officer and Industrial Court and The Appellate Authority RESPONDENT

Date of Decision : 26-07-2012

Acts Referred:

Bombay Industrial Employment (Standing Orders) Rules, 1959 — Rule 13

Citation : (2013) 2 ABR 594 : (2012) 5 ALLMR 517 : (2013) 2 BomCR 366 : (2012) 114 BOMLR 2856

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : J.P. Cama, with Mr. Mayur Khandeparkar instructed by K.D. Abichandani in W.P. No. 11183/2011 and Mr. N.M. Ganguli in W.P. No. 183/2012, for the Appellant; J.P. Cama, with Mr. Mayur Khandeparkar instructed by y K.D. Abichandani for Respondent No. 1 in W.P. No. 183/2012, Mr. N.M. Ganguli for Respondent Nos. 1 to 5 in W.P. No.11183/2011 and Mr. K.S. Bapat instructed by y Mr. Avinash Fatangare for Respondent No. 6 in W.P. No. 11183/2011 and for Respondent No. 2 in W.P.No. 183/2012, for the Respondent

Judgement

Anoop V. Mohta, J.—Heard finally by consent of the parties. Both the parties have challenged order dated 8 December 2011 passed by the Industrial Court, Mumbai from their respective points of view. The operative part of the order is as under :

1 The Appeal is allowed as under :

(I) The Order passed by the Certifying Authority enhancing the age from 55 years to 68 years is confirmed, subject to modification that after completion of 55 years the employee shall submit every year medical fitness certificate as per the rules of the Company till he attains the age of 58 years.

2 Accordingly the appeal is disposed of.

3 Inform the authority concerned accordingly.

4 The R & P be sent back to the Commissioner of Labour, Mumbai.

5 The parties to the appeal shall bear their own costs.

2. The basic challenge of the Undertaking/Management is the order of enhancing the age from 55 to 58 years and related aspects. The employees in their separate Petition submitted to enhance 60 years as retirement age instead of 55.

3. The basic events are as under as per Writ Petition No.11183/2011:

On 15 March 1983, a Standing Order pertaining to the petitioner''s establishment Ramada Plaza Palm Grove certified by the Certifying Officer under the Industrial Employment (Standing Orders) Act, 1946 (The Standing Order Act).

4. On 30 June 2000, the Charter of Demands by the Union - taken into conciliation under the Industrial Disputes Act, 1947. The employer and the Union mutually agreed to amendment of earlier Standing Orders.

5. On 2 April, 2004 a Settlement took place between the employer and the Union. The retirement age of employees fixed at 55 years and the workmen who had attained the age of 55 years in the meanwhile were to retire on or before 30 June, 2004.

6. On 18 June 2004, a joint letter of the employer and the Union together with draft amendment submitted to the Certifying Authority. On 7 September 2004, a clause in respect of retirement modified in the Certified Standing Orders. Pursuant to the Settlement dated 2 April, 2004, the amendments to the Certified Standing Orders were carried out by the Order dated 7 September, 2004 and in the said amendment the age of retirement was incorporated as under : "All the workmen shall automatically retire from the services on attaining the age of 55 years or even earlier, in case he is declared physically or mentally unfit by the doctor/medical officer/civil surgeon nominated by the Employer".

7. On 4 July, 2007, as per 2(p) Settlement Clause 9, the retirement age of workmen agreed at 55 years and the Union and the Workmen agreed that they would not raise any fresh demands which would cause extra financial burden on the management during the operation of the settlement.

8. On 2 October, 2010, Michael Fernandes (Respondent No.1 herein), who had represented the Union in 2004, was due for retirement on attaining the age of 55 years. He along with other employees filed an Application dated 20 August 2010 for amendment/modification of Standing Orders seeking extension of retirement age to 60 years as per the Model Standing Orders.

9. On 19 October 2010, the Petitioner filed its detailed objections to the

Application for amendment.

10. On 1 June, 2011, by an Order the Deputy Commissioner of Labour and the Certifying Officer has raised the retirement age from 55 years to 58 years. On 3 June, 2011, an Appeal filed by the Petitioner against the same.

11. On 8 December, 2011, by an order of the Industrial Court, Maharashtra, Mumbai (Respondent No. 8 herein) in Appeal (IESO) No. 1/2011 filed by the Petitioner confirmed order dated 1 June 2011 passed by the Deputy Commissioner of Labour and Certifying Officer raising the age of retirement of employees from the existing 55 years to 58 years, subject to a modification that after 55 years, employees shall submit every year medical fitness certificate as per the rules of the Company till he attains the age of 58 years.

12. The matters arise out of the provisions of the Standing Orders Act read with Rule 13 of The Bombay Industrial Employment (Standing Orders)Rules, 1959 (for short, Bombay Rules of 1959). The Deputy Commissioner of Labour and the Certifying Officer, u/s 5 (2) read with Section 10 read with Amending Clause 23 of the Certifying Standing Orders applicable to the Company/Undertaking has passed the order dated 1 June 2011. The operative part is as under :

The Application dated 20.8.2010 filed by the employees of M/s.Palm Grove Beach Hotels Pvt. Ltd. in their unit hotel Ramada Plaza Palm Grove is hereby allowed and the Cause/Order 23 of the certified Standing Orders applicable to the workmen employed by Palm Grove Beach Hotels Pvt. Ltd., at their unit Hotel Ramada Plaza Palm Grove situated at Juhu Beach, Mumbai 400 049 to do manual clerical, technical and supervisory work are hereby modified as under :

"23 Age of Retirement :

All the workmen shall automatically retire from service on attaining the age of 58 (fifty eight) and the retirement benefits shall be paid in accordance with the rules, which shall be in force at the time of workman''s retirement

This modification to the Standing Orders shall have effect from the date of this order.

The same has been confirmed as recorded above.

13. Admittedly, the Standing Order of the Undertaking was certified on 15 March 1983. The same was modified on 7 September 2003 order. As per clause27 of the Standing Order, the age of retirement/su0perannuation is restricted to 55 which is extendable by one year upto 58 years, subject to physical fitness certified by the Civil Surgeon. Bhartiya Kamgar Sena is the recognized Union for the Undertaking. A settlement dated 18 December 1997 was signed which was operative from 1 July 1997 to 30 June 2000. Clause 12 fixed 55 years of age as retirement. The settlement expired on 30 June 2000. The fresh Charter of Demand dated 30 June 2000 for revised wage scale and other services were submitted. The terms could not be settled. The matter was therefore taken into

conciliation under the Industrial Disputes Act, 1947. After due deliberation, pending the settlement, through negotiation, signed the settlement dated 2 April 2004. Admittedly, the retirement age has been fixed as 55 years. It is specifically agreed that the workmen who had attained the age of 55 years, should retire from the services within the span of three months i.e. on or before 30 June 2004. The Certified Standing Order was accordingly amended by Order dated 7 September 2004 and the age of retirement has been incorporated accordingly.

14. The parties acted accordingly. However, subsequently the reduction of age of retirement was discussed and objected and submitted to again remodify the Certified Standing Orders and restore the provisions as per the Model Standing Orders. Therefore, an Application dated 2 October 2010 was filed on various grounds to retain the age of retirement upto 60 years. The same Application was opposed by the Undertaking by its reply dated 19 October 2010. The Application was filed by the five employees only and not by the Union. The objection was also raised about the maintainability of such Application in view of the Bombay Rules, 1959.

15. The decision so taken by the Undertaking in view of the long standing discussion with the Union and accordingly certified Standing Orders have been acted upon by all the parties for more than 27 years. The modification in the year 2004, as recorded above, was also a part of the settlement at the relevant time with clear understanding of law as well as facts and circumstances of the business and the requirement of both the parties. Mr. Michael Fernandes was also signatory being one of the representative of the Union in the year 2004. He is at present in the Union Committee. Any change/amendment, therefore, need to be subject to discussion and settlement by all the parties again and not at the instance of some employees. There are no substantial change of circumstances being such amendment at the instance of these five employees, who are about to retire. Admittedly, the Model Standing Order ceased to apply with effect from 15 March 1983 as Certified Standing Order have been brought into force. The settlement so arrived at by the parties at the relevant time just cannot be interfered with in such fashion by such method merely because the Union also filed their supporting pleadings and supported the cause as submitted by those employees. The objection admittedly was raised during the substance of the settlement which was in force till 31 March 2000. Once parties have settled the matter, based upon their demands and accordingly agreed and proceeded, now just cannot be permitted to move such Application without considering the purpose and object of settlement which they have accepted and acted upon since long. The legal procedure so prescribed is available for the parties to submit their demand again as done earlier.

16. The parties including the Union were aware of the provisions of the Act and the Rules and orders, including Model Standing Orders. They still agreed for 55 years of retirement age, though the provision was available in the Model Standing Orders of 60 years. There is no bar under any Act that the parties like

management/employer and employees cannot settle and/or can agree by specific agreement or settlement to restrict the age of retirement. Having once agreed and accepted that, now cannot be permitted to say that the whole action of the management and/or the settlement of restricting the age to 55 years is contrary to the Model Standing Order and/or any provisions of law. The contention of the employees and Union, therefore, is unacceptable. The parties are bound by their agreement and settlement. There is no conflict of whatsoever nature. [2011 II CLR 787 - Balmer Lawrie & Co. Ltd. vs. Engineering Workers Association]. They cannot now be permitted to say that any restricted of age than 60, as per the Model Sanding Order is bad in law specifically in such proceeding in such fashion by overlooking their own settlement, specifically when the number of employees including the Member of the Union have got the benefit of the settlement at the relevant time.

17. The Industrial Court, by the impugned order, in view of Section 6 of the Act, refused to interfere with the Order passed by the Deputy Commissioner of Labour, who has admittedly not considered and/or not given the reasons with regard to the maintainability and tenability and also the reason to overlook the settlement/Charter of Demand arrived at by the parties on 18 June 2004. The reason for granting such order enhancing the age from 55 to 58 years, based upon the surrounding circumstances and similarly situated Undertakings/ Companies, in my view, just cannot be the reason to overlook the specific agreement between the parties. Both the parties, subject to the settlement, may arrive at from terms and conditions. But to decide and direct and/or compel the Company/management to enhance the age, in such fashion, basically when such settlement was well within the purview of law and agreed and accepted by the parties at the relevant time till its expiry date. Now, admittedly, settlement period is expired on 31 March 2011.

18. Section 6 permits and provides, if case is made out, to interfere with the order passed by the Authority. There is no total bar. While maintaining the order, the learned Judge has given additional reasons referring to the expiry of the settlement stating it to be of no consequence, but overlooked the basic fact that when the Application was filed, the period was not expired. The Application, therefore, need to be adjudicated on the basis of averments so made on the date of filing of such Application for modification of the settlement terms that converted into the terms of agreed standing terms of the service conditions.

19. It is also necessary to note that the reasonable/fairness as contemplated u/s 4 of the Act of 1946 including the agreed terms between the parties. The party may, after expiry, renegotiate, but, in my view, cannot be decided in such fashion before expiry of the period and by overlooking the settled terms. It is not that the employer has submitted the Standing Order and the same was accepted. Here is the case, both the parties agreed and accordingly the retirement age was fixed along with other benefits. Both the Courts in the present matter failed to consider these aspects. The Authority has passed the order by overlooking the

agreed terms. Similarly situated circumstances may not always be criteria to enhance the retirement age. The employment conditions, undertaking, the nature of business and its requirement, financial capacity, restriction in age and such related aspects are matters which management can decide and then accordingly proceed to submit their proposal and/or service terms and conditions. Though it cannot be unilateral, but still it cannot be only from the point of view of employees. Therefore, having once agreed for particular terms, at the relevant time, there is no reason by this method, the Authority and/or the Court compel the management to enhance the age of retirement. The Apex Court in Barauni Refinery Pragatisheel Shramik Parishad Vs. Indian Oil Corporation Ltd., considering the provisions of the Act of 1946 and also the binding nature of settlement and or the same has effect of approved service conditions, the application to seek modification of such standing order for fixation of age of retirement, before expiry of the period, held to be impermissible. Once it is settled/agreed, any modification should be by further settlement. If not possible then the revocation of available remedy.

20. Such modification, in the present facts and circumstances, is impermissible. However, it is made clear that the parties can still settle the matter and apply for modification as it was done and certified accordingly on earlier occasion.

21. In view of the above, the grant of enhancement of age itself for the above reason is unsustainable. For the same reason, there is no question of accepting the case of employees to enhance the age upto 60 years as prayed. The Petition, therefore, so filed by the Employees is liable to be dismissed.

22. Considering above reasonings, I am inclined to set aside both the impugned orders dated 8 December 2011, passed by the Industrial Court, Mumbai and 1 June 2011 passed by the Deputy Commissioner and the Certifying officer. However, the liberty is granted to the parties to settle the matter and/or to take appropriate steps. Resultantly, the following order:-

ORDER

a) Both the orders dated 8 December 2011, passed by the Industrial Court, Mumbai and 1 June 2011 passed by the Deputy Commissioner and the Certifying officer, are quashed and set aside.

b) Writ petition No. 11183 of 2011 is allowed.

c) Writ Petition No. 183 of 2012 is dismissed.

d) Liberty is granted to the parties to settle the matter.

e) Liberty is also granted to take appropriate steps in accordance with law.

f) There shall be no order as to costs.

