(1998) 03 J&K CK 0020

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 749 of 1995, 480 of 1995, 439 of 1995, 481 of 1995

Salal Workers Union — APPELLANT

Vs

Union of India — RESPONDENT

Date of Decision : 25-03-1998

Acts Referred:
Industrial Employment (Standing Orders) Act, 1946 — Section 2(c)

Citation : (1998) KashLJ 428 : (1998) 2 SCT 370

Hon'ble Judges : T.S.Doabia, J

Bench : Single Bench

Advocate : Rakesh Sharma, R.Singh, K.Kaushik, J.P.Singh, H.L.Choudhary, Dipika Mahajan, D.C.Raina, A.K.Sawhney, Advocates appearing for the Parties

Judgement

1. Counsels heard.

2. Petitions admitted.

3. With the consent of the parties, these petitions are taken up for final disposal.

4. This plea of the respondentManagement in the matter of bringing about uniformity in the matter of age of retirement of employees working in all

the units the Statutes dealing with the Industrial Laws. Age of retirement has been brought down from 60 to 58 years. It is this aspect of the matter

which is being challenged by various unions of employees in the petitions enumerated in the schedule appended to this order.

5. Facts have been taken from writ petition No. 749 of 1995.

6. Salal Hydro Electric Project is one of the projects undertaken by the National Hydro Electric Power Corporation Limited in the State of Jammu

and Kashmir. This project sought modification of clause 24 of the certified standing orders. Under this clause the age of retirement was fixed at 60 years. At that particular point of time the workmen who came to look after the working, came from Government Department. As such they were

governed by the service rules as applicable to the employees of the Central Works Department. As the age of retirement of work charged

employees under the rules referred to above was fixed 60 years, the same provision was incorporated in the certified standing orders. Later on

difficulty was felt by the project authorities. The age of retirement in different projects was different. When an employee of one project was

transferred to another difficulty used to arise. In the same project workmen used to have different age of retirement depending upon the unit to

which a workman belonged. With a view to bring about an uniform policy with regard to age of retirement, the respondentmanagement sought

modification of certified standing orders. In particular modification was sought of clause 24. This clause dealt with age of retirement. The above

one line clause provided.

The workmen shall retire on attaining the age of 60 years.

7. This request of the management was accepted by the Certifying Officer namely the Regional labour Commissioner (Central) Hyderabad. An

appeal was preferred against the above decision. The appeal came to be dismissed. The order passed by the Appellate Authority on 31.05.1995

has been placed on record The original order appear at page 50 of the paper book and the appellate order appear at page 75 of the paper book.

Both are subject matter of challenge in this petition.

8. Before noticing the grounds of challenge some other facts are also noticed. The petition has been filed by the Union of employees and also by

the workmen who are directly affected by the change. It is stated that the project in question was being previously looked after by the Central

Government. It was on 15.05.1978, the project was taken over by the respondentCorporation. It is stated that there was an agreement between

the employees through their Unions and the Management. This agreement was to the effect that the existing terms and conditions of the Service

would remain unaltered. The employee working in the Government would be treated as on deputation. It is further stated that any employee who

wished repatriation to the parent department could to do so.

9. It is not in dispute that the provisions of Industrial Employment (Standing

Orders) Act 1945, (hereinafter referred to as Act of the 1946) are

applicable to the project in question. Reliance is being placed on the definition of the Workmen as contained in Section 2 of the Act of 1946. It is

stated that in terms of Act draft standing orders were prepared. These were certified on19.04.1984. The age of retirement so far as workmen are

concerned was fixed at 60 years. This decision was taken consciously. The fact that it took almost four years to prepare this standing orders is

being high lighted. Later on on 1st August 1985, the respondentManagement in terms of Section 10 of the Act OT 1946 took resort to

modification of clause 24 of the certified standing orders. This matter remained pending with the certifying Officer. A fresh draft of standing order

was submitted. This proposal was, however, withdrawn vide an annexure P/4. It is stated that once the exercise to seek modification resulted in

withdrawal of the prayer than the second attempt made by the corporation should and could not have been looked into. It is submitted that the

order passed by the certifying officer on 12.3.1993 by which clause No. 24 came to be modified is not in accordance with law. Reason advanced

is that once this exercise was undertaken and as this exercise could not be taken to its logical end, the second attempt made by the

respondentcorporation should have been rejected at the very threshold.

10. The record ground of challenge is as under

It is stated that the matter was referred to the certifying Officer notified under the Act of 1946. This officer was the Regional Labour Commissioner

at Chandigarh. Later on this officer came to the transferred to Hyderabad. Under these circumstances it is submitted that Regional Labour

Commissioner at Hyderabad could not act as certifying officer. The order passed by him is thus said to be totally without jurisdiction.

11. It is also stated that some of the registered employee unions were not associated. One such associated is said to be National Hydro Electric

Project, Corporation Chenab valley Projects Congress. It is further stated that a request was made to the respondents to furnish a Hindi version of

the proposed standing orders. As this was not done, there is violation of the principle of natural justice. It is stated that on account of non supply of

Hindi version there is virtual denial of opportunity to effectively defend the cause of workmen. It is also submitted that the age of retirement was fixed as per the mutual consent of the parties and there was no reasonable basis for reducing the age of retirement. The further plea is that

modification or reduction in the age of retirement was not covered by the items mentioned in the schedule 1 appended to the Act. ft is, therefore,

submitted that there is total lack of jurisdiction on the part of the Certifying Officer.

12. On merits it is stated that there was no logic or rationale in bringing about a change in the age. Reliance has also been placed on the Division

Bench Judgment of the High Court of Himachal Pradesh. In the above case Workmen's age of retirement was held to be 60 years. It is

accordingly submitted that the order passed by the Certifying Officer which order has been upheld by the Appellate Authority, deserves to be

quashed.

13. To sum up the arguments raised by the learned counsel for the petitioners are:

(i) That the certifying officer who certified the change was not competent to do so. As per the petitioners the matter was referred to the concerned

officer who was posted at Chandigarh. This officer was transferred to Hyderabad. On his transfer a fresh order appointing a Certifying Officer was

required to be made. This was not done. It is accordingly said that the Certifying Officer who passed the order at Hyderabad acted without

jurisdiction,

(ii) That the need to get the change effected was the difficulty felt by the Management in the matter of transferring workmen from one place to

another; as such this subject is not covered by the schedule, it is accordingly submitted that even if certifying officer was competent to act in the

matter, it acted beyond the parameter indicated in the schedule. This is because the matter to be dealt with under the schedule to the standing

orders, do not deal with the transfer matters,

(iii) That the Hindi version of the proposed standing orders was not made available.

(iv) The management having withdrawn the request earlier made could not make a second attempt.

(v) One of the unions was not served,

(vi) Social justice required retention of the age of retirement at 60 years.

14. Before noticing the various contentions which have been put across, it would be relevant to notice some statutory provisions also. Section 2(c)

of the Act of 1946 defines a Certifying Officer.

15. The term 'appropriate' Government stands defined in Section 2(b). Standing orders has been defined in Section 2(g).

16. The matters regarding which standing orders can be made have been indicated in the schedule. For facility of reference of Section 2(b) (c) (g)

is reproduced below:

(b) Appropriate Government means in respect of industrial establishment under the control of the Central Government or a Railway administration

or in a major port, mine or oilfield, the Central Government and in all other cases the State Government;

(c) Certifying Officer means a Labour Commissioner or a Regional Labour Commissioner and includes any other officer appointed by the

appropriate Government, by notification in the Official Gazette to perform all or any of the functions of a Certifying Officer under this Act;

(d) Standing orders means rules relating to matters set out in the schedule.

17. The question as to whether the officer who certified the orders lost the authority on his transfer from Chandigarh to Hyderabad is examined at

the first stage. The definition of certifying officer makes it apparent that a Certifying Officer means a Labour Commissioner or a Regional Labour

Commissioner and includes any other officer appointed by the appropriate Government by notification in the official gazette to perform all or any of

the functions of a Certifying Officer under this Act. This statutory provision does not advance the argument put across by the petitioners. 'Merely

because a Certifying Officer stands transferred from one place to another would not in any manner take away his jurisdiction to proceed further in

the matter. The Certifying Officer was appointed with the consent of the parties. There was no limitation on the exercise of his powers. No time

frame was set up. The place where he was posted did not determine his jurisdiction. Accordingly it can not be said that merely because the

Certifying Officer was transferred from Chandigarh to Hyderabad he ceased to have jurisdiction in the matter. It be further seen that no such

objections was taken as to the jurisdiction of the Certifying Officer either before the Certifying Officer or in the grounds of appeal. As such, this argument is found to be without merit and is rejected.

18. It be seen that the matters was considered on merits by the Appellate Authority. The Appellate Authority took note of the various contentions

put across by the Management and by the various unions and rightly came to the conclusion that the change in the service condition was rightly

done. The National Hydro Electric Corporation has its various projects in different states. The employees are liable to be transferred from one

project to another. In some projects the age of retirement was 60 years and in some there were 58 years. With a view to bring uniformity the

requisite decision was taken to seek amendment of the standing orders. After considering all the facts and circumstances the Certifying Officer

certified the change. The appellate authority rightly came to the conclusion that no ground has been made out for interference. It accordingly rightly

rejected the appeal.

19. The other argument which has been raised is that earlier change was sought by the management and later on the management withdrew its

request. It is accordingly, stated that the second application in this regard is not justified. I am of the opinion that there is no principle which debars

an employer to seek modification of the terms and conditions. At a particular point of time, the management may not feel the necessity to go ahead

with the change but at a later stage it may feel necessity to undertake the change. Therefore,

20. In Bum and Co. Ltd. Vs. Their Employees (1957) 1 LLJ 226 dealing with these questions, the Supreme Court of India, as generic proposition

stated that though Section 11 of the Code of Civil Procedure 1908 in terms is inapplicable to industrial adjudication, the principle underlying it

expressed in the maxim interest rein publican at sit finis lithium which is founded on sound public policy and is of universal application being a rule

dictated by wisdom which is for all time"" is applicable to the decisions of industrial adjudicators for good reasons. Speaking for the Court,

Venkatarama AiyerJ observed that:

It would be contrary to the well recognized principles that a decision once rendered by competent authority on a matter in issue between the

parties after a full enquiry should not be permitted to be repaginated.

It was further pointed out that: ""If an adjudication loses its force when it is repudiated under Section 19(6) and the whole controversy is at large,

then the result would be that far from reconciling themselves to the award and settling down to work it either party will treat it as a mere stage in

the prosecution of prolonged struggle and far from bringing industrial peace, the awards would turn out to be truces giving the parties breathing

time before resuming hostile action with renewed vigor.

21. In later cases namely: India General Navigation & Railway Co. Ltd. Vs. Their Workmen (1960)1 LLJ 561: Trichinopoly Mills Ltd. Vs.

National Cotton Textile Mills Workers Union (1960) 1 LLJ 46: Workmen of Ballmer Lawrie & Co Ltd Vs Ballmer Lawrie & Co Ltd. (1964) 1

LLJ: Shahdra (Delhi) Saharanpur Light Railway Co. Ltd. Vs. Shahdra Saharanpur Railway Workers Union (1969) 1 LLJ 734: Agra Electric

Supply Co. Ltd. Vs. Aladin (1969)11 LLJ 540: Workmen of Straw Board Manufacturing case 1974(1) LLJ 499, the Supreme Court of India

adopted this principle with respect to awards not based on prevailing circumstances. The principles that emerge out of the judicial dicta have been

stated with precision and clarity by a division Bench of the Calcutta High Court in Sankar Prasad Bannered Vs Central Government Labour Court

1975(1) LLJ 76 in the following words:

In case where the award is based on prevailing circumstances like termination of wage structure and the like on existing price index, with the

constant change of circumstances like spiraling of prices, the principles of resjudicata would be inappropriate and inapplicable.

22. In the present case the situation which existed jn 1984 was different from the one existing in the year 1993. Therefore, merely because the

earlier application was withdrawn would not lead to the conclusion that principles of res judicator would apply. Even otherwise there was no

decision on merits. The earlier application was merely withdrawn. Thus the plea that management cannot reagitate the matter once it has withdrawn

the earlier application is devoid of merit. Change of conditions and circumstances is a relevant factor in industrial adjudication.

23. The plea that one of the Unions was not reprehensive by now examined. Industrial law recognizes the principles of collective bargaining. The

element of collective bargaining is an essential feature of trade union movement. Collective bargaining agreement has been broadly defined as an agreement between a single employer and an association of employers on the one hand and a about union upon the other, which regulates the

terms and conditions of employment. The terms collective as applied to collective bargaining agreement will be seen to reflect the plurality not of

the employers who may be parties thereto but of the employees therein involved. Again the term collective bargaining is reserved to mean

bargaining between an employer or ground of employers and a bonfire labour Union. In the language of Ludwig Teller the collective bargaining

agreement bears in its many provisions the imprints of decades of activity contending for labour equality through recognition of the notions

underlying collective negotiations. Indeed in the collective bargaining agreement is to be found a culminating purpose of labour activity. Collective

bargaining being the order of the day in the democratic social welfare State legitimate trade union activities which must shun all kinds of physical

threats coercion or violence must march with a spirit of tolerance, understanding and grace in dealings on the part of the employer. Such activities

can flow in healthy channel only on mutual cooperation between the employer and the employee and cannot be considered as irksome by the

management in the best interests of its business. Dialogues with representatives of a union help striking a delicate balance in adjustments and

settlement of various contentious claims and issues. Thus even if one union was not present would not have any material bearing on the ultimate

decision. It is not the case of the petitioner that something which was to be projected remained unprotected. Thus this argument cannot be

accepted.

24. The argument that entire exercise has been taken because employees were being transferred from one unit to other and as subject of transfer is

not being covered by the items mentioned in the schedule, therefore, power could not be exercised be also examined. It be seen that the service

condition which has been changed pertains to age of retirement. This subject is covered by the matter which can be made subject matter of

standing orders. As a matter of fact, standing orders already dealt this aspect of the matter. The change was with regard to the age of retirement. It

would be stretching the language to a breaking point if one were to hold that the subject matter of change was transfer. Therefore, this argument again cannot be accepted. Again merely because Hindi version of clause 24 was not made available to some of the unions would not affect the

merits of the controversy. Thus I am of the view that:

(i) Regional Labour Commissioner at Hyderabad could act as certifying officer. He was appointed independently of his place of posting. Merely

because the Regional Labour Commissioner was transferred from Chandigarh to Hyderabad would be of no consequence.

(ii) Plea of resjudicata is not available to the petitioners.

(iii) As all the Unions were engaged in collective bargaining therefore, merely because some of the unions were not represented is totally

immaterial,

(iv) Age of retirement is covered by the schedule. Merely because this change was brought about as transfer of one employee to other unit was

leading to anomalous situation would not bring the subject in the purview of transfer. The subject still remains ""age of retirement"".

One aspect of the matter still requires to be gone into. What should be the position of these employees who have worked up to the age of sixty

years. In my opinion they would be entitled to the wages of the period. Somewhat similar position was considered in case reported as Nand

Kishore Nayak Versus State of Orissa and another, AIR 1991 Supreme Court 1724. The age of retirement was held to be sixty years. Some

employees who retired at the age of fifty eight years sought benefit of the judgement holding that the age of retirement was sixty years. Following

observation are relevant:

The appellant has claimed two reliefs. One for payment of salary for the two years period and second for reification of his pension. So far as the

first relief is concerned even from the order of the High Court which we have extracted above, it is obvious that salary was directed to be paid to

only those who had actually served and not to others. It is true that this observation was in respect of those who had served beyond their regular

superannuation period but the concept is clearly to pay for work actually done. Cases of the present type. where the employee accepted his

retirement at the age of 58 years and is now seeking the benefit of the High Court's order stand on a different footing from those who services

were wrongly terminated. In our view such employees would not be entitled to salary for the idle period but the relief for reification of pension by

extending the date of superannuation by two years can be granted to them. We, therefore direct the State Government to grant the benefit of the

judgment to all those employees including the appellant herein who would have otherwise retired at the age of 60 years on the interpretation placed

on the relevant provisions of the Act and the rules by the High Court. In the present case, we, therefore, direct the State Government to extend the

benefit of the judgment to the appellant, refax his date of superannuation, add two years to his qualifying service and refax his pension and grant the

same from the deemed date of superannuation. The arrears of pension should also be paid after prefixing the pension within a reasonable time not

exceeding three months.

25. In this case some employees have actually worked up to the age of sixty years. In some cases interim orders were issued. They would thus be

entitled to wages for the period they have actually worked. Again the judgment given by Himachal Pradesh High Court holding that age of

retirement is 60 years is not relevant to issue involved in this case. There standing orders were being interpreted. Here the question is as to whether

age of retirement has been lowered down in accordance with the provisions of 1946 Act. The conclusion arrived at is that this has been rightly

done. Those employees who have actually worked up to the age of sixty years would reap the benefit of the service rendered by them.

26. These petitions are otherwise found to be without merits and are dismissed.