
(1996) 11 BOM CK 0019

In the Bombay High Court

Case No : Writ Petition No. 4652 of 1995

Sandoz (India) Ltd. and another

APPELLANT

Vs

Sandoz (India) Ltd. and another

RESPONDENT

Date of Decision : 28-11-1996

Acts Referred:

Citation : (1997) 3 LLJ 1250

Hon'ble Judges : B.N. Srikrishna, J

Bench : Single Bench

Advocate : C.U. Singh, instructed by M/s. Haresh Mehta and Co, for the Appellant; R.J. Kochar, for the Respondent

Judgement

1. By this writ petition under Article 226 of the Constitution of India the Petitioner has challenged an Award dated August 25, 1995 made by the Industrial Court, Thane, in Complaint (ULP) No. 829 of 1993 under the provisions of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as the Act).

2. The first Respondent joined the service of the First Petitioner (which shall hereafter be referred to as "the Petitioner") as a Male Operator Grade IV on November 2, 1961. At the time of joining service, he had declared that he was born in the year 1934 and accordingly the year of his birth was entered in his service record as 1934. Since the exact date of birth was not available, consistent with its practice, the Petitioner took the date of birth as June 30, 1934. Consequently, the First Respondent's date of birth was entered in the record as June 30, 1934. The First Respondent was confirmed in service on May 2, 1992 at which time he was enrolled as a Member of the Provident Fund Scheme under the provision of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. At that time he was required to give a declaration giving his personal particulars and the First Respondent declared his age to be 28 years as on November 1, 1962. The said declaration was made under the signature of the First Respondent and forwarded to the Regional

Provident Fund Commissioner, the Authority implementing the Employees' Provident Fund Scheme. The First Respondent also gave a similar declaration to the Authority under the Employees' State Insurance Act and declared his year of birth as 1934. Some time in the year 1967, the First Respondent got married and changed the nomination in the Provident Fund Records in favour of his wife. At that time also the First Respondent filled up an appropriate form in which he declared that his year of birth was 1934.

3. The workmen in the service of the Petitioner are governed by Settlements which prescribe the age of superannuation as 60 years. On the basis of the records maintained by the Petitioner Company, the First Respondent was due to retire from service on June 30, 1994. On November 6, 1990 the First Respondent addressed a letter to the Petitioner Company seeking a change in his date of birth recorded in the records of the Petitioner Company on the ground that his birth certificates had just become available from his Church, contending that his date of birth as recorded in the records of the Petitioner Company was incorrect. Along with his letter dated November 6, 1990, the First Respondent enclosed a xerox copy of the purported Certificate of Birth and Baptism dated May 25, 1989 in which it was stated that one John Valente, son of Xavier Valente, was born on February 6, 1936. In view of the discrepancy in the name, which the Petitioner Company did not consider having been satisfactorily explained, the Petitioner Company refused to accede to the request for change in the date of birth of the First Respondent. The Petitioner Company addressed a letter dated December 14, 1990 to the First Respondent and rejected the request made by the First Respondent that his date of birth be corrected to February 6, 1936 on the basis of the Certificate of Birth and Baptism issued by Our Lady of Rosary Church, Malvan. By the said letter the First Respondent was specifically informed that his date of birth June 30, 1934. As recorded in the Petitioner's record would remain unchanged.

4. Not satisfied with the decision of the Petitioner Company, the First Respondent reiterated his request by his letter dated December 6, 1993 addressed to the Plant Manager of the Petitioner. He enclosed along with his letter a purported School Leaving Certificate issued on November 30, 1959 by the Jivan Shikshan Vidya Mandir, Devbag, No. 1, Taluka Malvan, which showed that Jurav Shahu Daboskar, whose date of birth was July 15, 1936, who was a former student of F.G. School, Devbag No. 2 had joined the school on March 6, 1952 and left the school on April 30, 1954 and that the reason for leaving the school was "went for P.S.C. Examination". In view of this obvious discrepancy in the name, which did not tally with the record of the Petitioner, the First Respondent attempted to explain the discrepancy by producing a Gazette Notification dated September 12, 1991, page 1333, in which one Jurav Shahu Daboskar has declared that he would henceforth be known as John Xavier Fernandes. On the strength of the certificate issued by the Jivan Shikshan Vidya Mandir Devbag No. 1, Taluka Malvan, in the name of Jurav Shahu Daboskar and the Gazette declaration published in the Maharashtra Government Gazette dated September 12, 1991,

page 1333, the First Respondent contended that his real name was "Juvav Shahu Dabhokar" and that he had changed his name to "John Xavier Fernandes" as indicated in the Baptism Certificate. After carefully scrutinising the documents produced by the First Respondent and giving him a personal hearing, the Petitioner Company rejected the request made by the First Respondent on the ground that the documents produced by him were discrepant and did not tally with each other. By a letter dated November 26, 1993, the Petitioner Company conveyed the decision in the matter and the First Respondent came to be retired from service on June 30, 1994. The First Respondent once again addressed a letter dated December 6, 1993, in which he reiterated his request for change of the date of his birth in records, though in this letter he admitted that when he was initially recruited, he was not in possession of the birth certificate and was unable to show it to the Authority in the Company, but that he had orally given his date of birth as 1934. The First Respondent's request was rejected by the Petitioner's letter dated February 9, 1994.

5. The Petitioner then addressed letter dated December 13, 1993 to the Life Insurance Corporation of India requesting them to confirm the date of birth of the First Respondent admitted by the Life Insurance Corporation for the purpose of Life Insurance policies taken out by the First Respondent. By a letter dated December 23, 1993 addressed to the Second Petitioner, the Life Insurance Corporation confirmed the date of birth admitted under the policies mentioned in the letter as July 1, 1937. However, the Corporation stated that it was admitted on the basis of extract of previous policy No. 18153365, but regretted that they are unable to confirm the nature of proof of age submitted by the life assured. Upon a request made by the Petitioner, the Regional Provident Fund Commissioner addressed a letter to the Petitioner informing the Petitioner that the First Respondent's age at entry, at the time of becoming a Member of the Provident Fund as declared by him, was 28 years as on November 1, 1962.

6. In order to persuade the Petitioner that his date of birth was 1936 as contended by him, the First Respondent forwarded an extract from the Parochial Register of Gloria Church, Byculla, Bombay - 400 027 dated December 9, 1993. This Certified that one "Joao Tito Valente" also called "Fernandes son of Xavier Valente" (also called Fernandes), whose mother's name was Rosaria Britto, was married on December 30, 1967 to one Filament Fernandes. In Col. No. 6, the age of the bridegroom is shown as February 6, 1936. The First Respondent also forwarded to the Petitioner an extract from the Parochial Register of Rosary Church, Malvan, being the Certificate of Birth and Baptism of his brother Bernard Valente also called Fernandes, mother's name Rosaria Britto, who was Baptized on August 8, 1934 at Nesbag Chapel, Malvan. Even this certificate shows the date of birth of Bernard as June 11, 1934. Relying on the aforesaid two certificates, the First Respondent contended that "1936" should be accepted as the year of his birth, since his elder brother Bernard had been born in 1934. The Petitioner declined to accept the request made by the First Respondent and retired the First Respondent upon reaching the age of 60 years according to

Company's record.

7. The First Respondent moved a Complaint (ULP) No. 829 of 1993 invoking Items 9 and 10 of Schedule IV of the Act before the Industrial Court, Thane. The complaint was opposed by the Petitioner on various grounds including the Jurisdictional ground. The First Respondent examined himself and his brother Bernard before the Industrial Court. The Petitioner examined one Vilas Dhondu Nadkapni, Manager (Industrial Relations) in its support. The parties produced the relevant documents on which they based their respective dates. After appreciating the evidence on record, the Industrial Court rendered the Award dated August 25, 1995 holding that the complaint was maintainable that the First Respondent was entitled to be superannuated only on the basis of his date of birth being June 30, 1936 and that the Petitioner has engaged in an unfair labour practice under Item 9 of Schedule IV of the Act by superannuating the First Respondent with effect from June 30, 1994. The Industrial Court further directed that the Petitioner should cease and desist from the aforesaid unfair labour practice by reinstating the First Respondent in service with continuity from July 1, 1994 onwards till he attains the age of superannuation on the basis of his date of birth being February 6, 1936. The Industrial Court directed that the Petitioner shall pay full wages to the First Respondent for the period from July 1, 1994 till the date of resumption of service and shall continue to pay him his regular wages till the date of his retirement. Being aggrieved by the impugned order, the Petitioners are before this Court by the present writ petition.

8. Though the Petitioner had raised a jurisdictional issue before the Industrial Court, which was decided against it and though the said issue has been canvassed in this writ petition. Mr. Singh, learned counsel for the Petitioner, did not press the jurisdictional issue and stated that he would be able to demonstrate that the First Respondent had no case whatsoever on merits. I am, therefore, deciding the writ petition only on the merits of the case without entering into the contention as to jurisdiction.

9. Mr. Singh vehemently criticized the impugned order as being wholly perverse. He pointed out that the evidence given by the First Respondent in his own support was wholly contradictory and unbelievable. He pointed out that though the First Respondent, vide his letter dated December 6, 1993, clearly admitted that at the time of initial recruitment he had given his date of birth as 1934, the learned Judge of the Industrial Court has brushed his admission by the laconic observation :

"In my opinion, such a stray admission in correspondence cannot be taken as a proof of correct age of the complainant".

It is unfortunate that the learned Judge failed to notice that the admission was not pointed out as proof of the correct age of the First Respondent. But in order to prove the case of the Petitioner that at the initial stage of recruitment the First Respondent had only given his year of birth as 1934 and that he had falsely

stated in his oral testimony before the Industrial Court that at the time of initial recruitment he had given 1936 as his year of birth and that an Anglo Indian Lady recording the facts made a mistake in understanding Marathi language and had erroneously entered the year of birth as 1934. In my view, the above admission given by the First Respondent should have sufficiently alerted the Industrial Court not to swallow the yarn that the First Respondent was glibly spinning. The learned counsel for the Petitioner, has taken me through the entire evidence on record and the impugned order of the Industrial Court to drive home his point. It appears to me that at every stage the Industrial Court has completely ignored the evidence on record and given findings directly contrary to the evidence on record. The different documents which were produced by the First Respondent as proof of his date of birth were evidently and inherently inconsistent. There was discrepancy in the name, father's name and the surname and the date of birth. The explanation given to explain away these inconsistencies could hardly hold water. Nonetheless, the learned Judge of the Industrial Court has rendered a curious finding :

"I may say that the evidence of Mr. Bernard, fully corroborates with the evidence of the complainant on the point of complainant's date of birth as February 6. 1936 and also on the point of discrepancy in his real name and his father's name. He also clearly explained the discrepancy regarding the date and month of birth in the School Leaving Certificate, Ex. U-18"

To say the least, the explanation given by the First Respondent could have been accepted by none but an utterly ingenuous and gullible person, but not a Court of law. In the first place, Bernard was claimed by the First Respondent to be his elder brother. A reading of Bernard's evidence (paragraph 5) indicates that he was the eighth child of his parents out of twelve, that he had two sisters elder to him and still living and that the First Respondent, ninth child of the parents, was younger to him. This is contrary to First Respondent's own evidence that he was the sixth child out of all the children of his parents, that he has one brother and two sisters who were living, that his brother Bernard and Ms. Natalmoaric Rodrigues were the only living elders to him and further that one brother, Andrew, and one sister, Ms. Loona D' Souza, who were younger to him were also living. On this evidence it is clear that the only living children of the parents of the First Respondent were Bernard, First Respondent, Andrew and two sisters Ms. Natalmoaric Rodrigues and Ms. Loona D' Souza. If Bernard's evidence is true, then the two sisters were elder to Bernard, Bernard was the eighth child while the First Respondent was the ninth child. If the First Respondent's evidence is true, then Bernard and Ms. Natalmoaric Rodrigues were elders to the First Respondent, while Andrew and Ms. Loona D' Souza were younger to him. It is apparent that there is a glaring inconsistency here which should have precluded the learned Judge of the Industrial Court from accepting the story of the First Respondent that Bernard was his elder brother. In fact, reading the two testimonies together, it appears that probably Bernard was younger to the First Respondent and there was an attempt by the First Respondent to pass off the

birth certificate of Bernard as that of his own to gain advantage of two years" service. Another striking feature which seems to have escaped the notice of the learned Judge of the Industrial Court was that, in his entire testimony Bernard is silent about his own date of birth. Apart from the certificate of Baptism, Bernard has no other document to indicate his correct date of birth, though he had worked in M/s. Shapurji and Pallunji for about five years and then in M/s. Indian Rubber Regenerating Company Limited for twenty years. He also claimed ignorance of his own date of birth recorded under the Provident Fund Scheme, which was applicable to him. Strangely, though Bernard claimed to be the elder brother, he was unable to remember the exact date of birth of the First Respondent, nor was he able to tell the name of the school in which the First Respondent was admitted. Bernard admitted in his evidence that he had given his name as "Bernard Xavier Fernandes" to all his employers. Incidentally, the First Respondent also gave his name as "John Xavier Fernandes" when he joined service and at no point as of time, till the year 1991, disclosed that his name was "Juvav Shahu Daboskar" as alleged. The explanation given by Bernard for this discrepancy ought to have been summarily rejected by the learned Judge of the Industrial Court. But, instead of doing so, he accepted the same. These are some of the glaring aspects of the matter which show the findings to be perverse against the background of the evidence on record.

10. The learned Judge of the Industrial Court should have been on guard against accepting the testimony of the First Respondent in view of the fact that the First Respondent had conveniently given his year of birth as 1937 to the Insurance Corporation and as 1934 to the Provident Fund Record and the Employees' State Insurance Authority. Faced with these glaring discrepancies the learned Judge of the Industrial Court indulged in an act of strange judicial acrobatics. The learned Judge of the Industrial Court said that, if the First Respondent had declared 1937 as his year of birth in the Life Insurance Policies and 1937 in the Provident Fund Record then the arithmetical mean of 1937 and 1934 being 1936, which was nearer to the year 1937 as stated in the Life Insurance Policies and not the year 1934. 1936, ought to be taken as the correct year of birth. I confess, that this strange logic of the learned Judge of the Industrial Court completely perplexes me.

11. Another contention seriously urged by Mr. Singh, which appears to be supported by high authority, is that the First Respondent, who did nothing from 1961 to 1990 to have his date of birth corrected and woke up only when the date of retirement came nearer, should be given assistance by Courts. This submission of the learned counsel appears to be justified on judgments of Supreme Court. The Supreme Court has clearly laid down that any attempt made belatedly to rectify the entry in service record pertaining to date of birth must be dismissed without further ado. The learned Judge of the Industrial Court distinguished the authority on the ground that the said case pertains to a Government Servant and not to an industrial workman. The learned Judge of the Industrial Court came to the conclusion that, in the case of industrial workman, like the complainant, who

is not much educated, his initiative to get his date of birth corrected in his service record about four years prior to his impending retirement must be taken as an attempt made within reasonable time. The reasonableness of the time lag, obviously, has to be computed with reference to the date of the first record and not with respect to the date of retirement which the Industrial Court failed to notice.

12. Placing reliance on the judgments of the Supreme Court in *Union of India and others Vs. Kantilal Hematram Pandya, , Burn Standard Co. Ltd. and Others Vs. Dinabandhu Majumdar and Another, , Union of India Vs. Harnam Singh, Secretary and Commissioner, Home Department and others Vs. R. Kirubakaran*, and a judgment of this Court in *Bennett Coleman and Company Ltd. v. Durga Prasad Dube & Another*, 1995 2 CLR 878 the learned counsel for the Petitioner justifiably contended that the crystallized legal position is that a request for the rectification or alteration in the date of birth as entered in the service record of an employee should not be entertained, unless a clear cut case on the basis of material, which can be held to be conclusive in nature, was made out. Such a request should not be entertained merely because the employee concerned produced material which may render some plausibility to his claim. When an issue of this nature arises before the Court, the Court must be fully satisfied that the material produced by the concerned employee is of a conclusive nature, or to put it differently, it is irrefutable, from which the irresistible conclusion follows that the date of birth as recorded in the record of the Employer is erroneous. Mr. Singh rightly highlighted the observations of the Supreme Court in *State of Tamil Nadu v. T. V. Venugopalan* 1994 2 CLR 819 where the Supreme Court held that it is common phenomenon that just before superannuation an application would be made to the Tribunal or Court only to gain time to continue in service and the Tribunal or Courts are unfortunately unduly liberal in entertaining and following the Government employees or public employees to remain in office. I respectfully agree with the observations made by Brother Shah J. in *Bennet Coleman and Company Ltd. (Supra)* that in such matters freely and liberally entertaining the claim of the employees, merely based on social justice, would result, (a) continuation of the employee in service beyond the date of his superannuation computed according to the records for longer years without any justification whatsoever, (b) it could deprive others who are in the queue for getting employment/ promotion upon retirement of the existing employee and (c) it would give impetus and incentive to dishonest employees.

13. Mr. Singh finally cited the judgment of Supreme Court in *Union of India (UOI) Vs. Ram Suia Sharma*, to indicate the summary manner in which the Supreme Court dealt with such a claim.

14. Considered against the backdrop of the legal position, I am satisfied that the claim of the First Respondent was not only belated, but attempted to be bolstered by adducing fabricated documents in evidence and by testimony, whose veracity is very much in doubt. Despite these facts of the case, it is

unfortunate that the learned Judge of the Industrial Court very credulously accepted the case of the First Respondent and made the impugned Award. In my considered judgment the impugned order is not only perverse on facts, but also erroneous in law.

15. In the result, the writ petition is allowed. The impugned order of the Industrial Court dated August 25, 1995 made in Complaint (ULP) No. 829 of 1993 is hereby quashed and set aside. The complaint is dismissed.

16. Rule accordingly made absolute with no order as to costs.