

(2006) 12 BOM CK 0057

In the Bombay High Court

Case No : Letters Patent Appeal No. 134 of 1995 in Writ Petition No. 4234 of 1994

Shri Gangadhar Balgopal Nair

APPELLANT

Vs

Voltas Limited and Another

RESPONDENT

Date of Decision : 15-12-2006

Acts Referred:

Bombay Industrial Employment (Standing Orders) (Amendment) Act, 1958 — Section 2A, 2A(2)

Bombay Industrial Employment (Standing Orders) (Amendment) Rules, 1977 — Rule 4C

Industrial Employment (Standing Orders) Act, 1946 — Section 10, 15, 3, 3(1), 3(2)

Citation : (2007) 1 ALLMR 621 : (2007) 1 BomCR 1 : (2007) 112 FLR 1011 : (2007) 2 LLJ 655 : (2007) 1 MhLj 754 : (2008) 1 UPLBEC 51

Hon'ble Judges : V.M. Kanade, J;S.A. Bobde, J;R.M. Lodha, J

Bench : Full Bench

Advocate : N.M. Ganguli and Ritesh Kursumge, S.J. Deshmukh and N.M. Ganguli, Y.M. Pendse, Abhay Nevagi and Y.J. Paranjpe, Paras Kuhadinstructed by and Associates in C.A. No. 330/2006, for the Appellant; K.M. Naik, S.P. Salkar and R.N. Salgaokar, instructed by Salgaokar and Co., for the Respondent

Judgement

S.A. Bobde, J.—A Division Bench while hearing Letters Patent Appeal No. 134 of 1995 has referred the following questions for answer by a larger Bench:

Whether Model Standing Order 4-C as contained in the schedule I to the Bombay Industrial Employment (Standing Order) Rules 1959 ipso facto applies to a temporary workman in an Industrial Establishment without its incorporation into a pre-existing certified standing order.

2. The Division Bench was hearing the Letters Patent Appeal preferred by the appellant against the judgement of the learned single Judge who held that Model Standing Order 4C did not automatically apply to the industrial establishment of the respondent No. 1 without amendment of its certified standing orders. Therefore, the appellant-workman is not entitled to the status of a permanent

employee on completion of 240 days uninterrupted service. The Industrial Tribunal whose judgement was in question had held that the workman is entitled to such status of permanency because Clause 4C is inserted in the Model Standing Orders.

3. In brief, the dispute is as follows:

The appellant was employed as a workman in the industrial establishment of the respondent No. 1 which is engaged in the manufacturing of engineering goods. He challenged his termination under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, hereinafter referred to as the "MRTU & PULP Act, 1971", complaining of breach of item nos.5, 6, 9 and 10 of Schedule IV thereof. Inter alia, his contention was that he was entitled to the status of a permanent workman under Clause 4C of the model standing orders introduced by the Bombay Industrial Employment (Standing Orders) (Amendment) Rules, 1977. The respondent No. 1 resisted this claim on the ground that its own standing orders which were certified on 25.11.1966 did not contain any provision for confirmation of an employee as permanent upon completion of 240 days. The respondent No. 1's contention was that there is no provision in their certified standing orders akin or similar to Clause 4C of the model standing orders and, therefore, the appellant is not entitled to any relief. The Industrial Court held that Clause 4C of the model standing orders applies and the respondent-company ought to have made the appellant permanent by an order in writing. There was, therefore, breach of item No. 9 of Schedule IV of the MRTU & PULP Act. The appellant was, therefore, directed to be reinstated with back wages and all benefits with effect from 23.11.1987. A learned single Judge of this Court in a Writ Petition filed by the respondent-employer relying, inter alia, on the judgment of this Court in *May & Baker Ltd. v. Shri Kishore Jaikishandas Icchaporia* reported in 1991 2 LLN 879, held that Clause 4C of the model standing orders did not automatically apply to the establishment of the respondent No. 1 and, therefore, the appellant was not entitled to be made permanent.

4. It is necessary to refer to the provisions of the Industrial Employment (Standing Orders) Act, 1946 (Act 20 of 1946), hereinafter referred to as the "Act" and the Rules made thereunder to consider the question. The Act was enacted to define with sufficient precision certain conditions of employment in industrial establishments in the erstwhile State of Bombay. Two types of standing orders are contemplated by the Act; model standing orders prescribed u/s 15 and certified standing orders certified under the procedure prescribed under Sections 3 to 5. The power to prescribe model standing orders is conferred on the appropriate Government which may do so after previous publication by notification in the Official Gazette by way of Rules. Certified standing orders may come into existence upon the certification of the model standing orders by the Certifying Officer with or without amendments upon hearing the workmen or the employer u/s 5 with modifications, if any, by the appellate authority u/s 6. The

certified standing orders come into operation, by virtue of Section 7, 30 days after the Certifying Officer has certified draft amendments after making any modifications and after copies thereof are authenticated and sent to the employer and to the trade union or other prescribed representative of the workmen u/s 5.

5. Model standing orders apply in accordance with and by virtue of Section 2A to an industrial establishment. This section is introduced by Bombay Act 21 of 1958. That section reads as follows:

2A. Application of model standing orders to every industrial establishment.-(1) Where this Act applies to an industrial establishment, the model standing orders for every matter set out in the Schedule applicable to such establishment shall apply to such establishments from such date as the State Government may by notification in the official Gazette appoint in this behalf; Provided that nothing in this section shall be deemed to affect any Standing Orders which are finally certified under this Act and have come into operation under this Act in respect of any industrial establishment before the date of the coming into force of the Industrial Employment (Standing Orders) (Bombay Amendment) Act, 1957; (2) Notwithstanding anything contained in the proviso to Sub-section (1) model standing orders made in respect of additional matters included in the Schedule after the coming into force of the Act referred to in that proviso (being additional matters relating to probationers or badlis or temporary or casual workmen) shall unless such model standing orders are in the opinion of Certifying Officer less advantageous to them than to corresponding standing orders applicable to them under the said proviso also apply in relation to such workmen in the establishments referred to in the said proviso from such date as the State Government may, by notification in the Official Gazette, appoint in this behalf.

6. It is obvious from Sub-section (1) above that model standing orders apply when they are notified in the Official Gazette from such date as the State Government may appoint in this behalf. The proviso to Sub-section (1) protects or saves any standing orders which are finally certified under the Act before the date of coming into force of the Industrial Employment (Standing Orders) (Bombay Amendment) Act, 1957 which is 15.1.1959. Sub-section (2) makes model standing orders made in respect of additional matters included in the Schedule after coming into force of the Act applicable even where there are certified standing orders covered by the proviso to Sub-section (1) i.e. in operation before coming into force of the Industrial Employment (Standing Orders) (Bombay Amendment) Act, 1957, unless the Certifying Officer is of the opinion that the model standing orders are less advantageous to the workmen than the certified standing orders referred to in the proviso to Sub-section (1).

7. Sub-section (2) was introduced by the Industrial Employment (Standing Orders) Maharashtra Amendment Act, 1974 published in the Gazette on 21.11.1974. This amendment was brought into force on 2.10.1977. Item 10C was also introduced in the Schedule after item 10B by the same amending Act.

Item 10-C reads as follows:

10-C. Employment or re-employment of probationers or badlis or temporary or casual workmen, and their conditions of service.

In other words, by Sub-section (2) of Section 2A, model standing orders became applicable in respect of probationers or badlis or temporary or casual workmen even where there were certified standing orders under the proviso to Sub-section (1) unless model standing orders were considered less advantageous to the workmen by the Certifying Officer.

8. The effect of Section 2A is this. Model standing orders apply to an industrial establishment when made. However, where there are finally certified standing orders before the coming into force of the Industrial Employment (Standing Orders) (Bombay Amendment) Act, 1957, such certified standing orders are saved. Again if the model standing orders are made after coming into force of the Amendment Act of 1957 relating to probationers or badlis or temporary or casual workers, they also apply unless they are found by the Certifying Officer to be less advantageous than the certified standing orders referred to in the said proviso i.e. certified before the Amendment Act of 1957. Therefore, where in an industrial establishment, there are no standing orders finally certified before the Amendment Act of 1957, the model standing orders apply proprio vigore to such an industrial establishment.

9. In order to give effect to the introduction of item 10C by the Industrial Employment (Standing Orders) Maharashtra Amendment Act, 1974, the Government of Maharashtra framed rules called the Bombay Industrial Employment (Standing Orders) (Amendment) Rules, 1977 which were notified on 28.9.1977. These Rules amended Schedule I and provided for the definitions of "permanent workman", "casual workman", "uninterrupted service", etc., and provided for their conditions of service and their confirmation. These Rules introduced Clause 4C which reads as follows:

4C. A badli or temporary workman who has put in 190 days" uninterrupted service in the aggregate in any establishment of seasonal nature or 240 days" uninterrupted service in the aggregate in any other establishment, during a period of preceding twelve calendar months, shall be made permanent in that establishment by an order in writing signed by the Manager, or any person authorised in that behalf by the Manager, irrespective of whether or not his name is on the muster roll of the establishment throughout the period of the said twelve calendar months. Explanation.--For purposes of this clause any period of interrupted service, caused by cessation of work which is not due to any fault of the workman concerned, shall not be counted for the purpose of computing 190 days or 240 days or, as the case may be, for making a badli or temporary workman permanent.

10. It is under this Clause 4C that the appellant claims confirmation.

11. As observed above, the question is whether Clause 4C which amended the model standing orders applies to industrial establishment of the respondent No. 1 even though the establishment had its own standing orders certified on 25.11.1966, and which did not provide for confirmation. On a construction of Section 2A, we are of view that Clause 4C which became part of the model standing orders set out in the Schedule became applicable to the establishment of the respondent No. 1 by virtue of Sub-section (1). The certified standing orders of the respondent No. 1 were not saved by the proviso since they had not come into operation before coming into force of the Industrial Employment (Standing Orders) (Bombay Amendment) Act, 1957 i.e. 15th January, 1959. The standing orders were certified on 25.11.1966 i.e. after the Amendment Act of 1957 referred to in the proviso.

12. The question that arises is at what point of time the rule introduced in the model standing orders such as Clause 4C became incorporated in the model standing order. Section 2A provides that the model standing orders "shall apply to such establishments from such date as the State Government may by notification in the official Gazette appoint in this behalf". The learned Counsel for the respondent-employer contends that Clause 4C framed by the Bombay Industrial Employment (Standing Orders) (Amendment) Rules, 1977 has never been brought into force since the State Government has not issued any separate notification specifying the date from which it is made applicable. As a result, according to the learned Counsel for the respondent No. 1, the amendment to the rules which incorporated Clause 4C under the model standing orders has never been brought into force since 1977. Therefore, the appellant was not entitled to have his services made permanent. The learned Counsel for the appellant submits that the Bombay Industrial Employment (Standing Orders) (Amendment) Rules, 1977 brought Clause 4C into force upon publication of the rules in the Bombay Gazette on 28.9.1977. According to the learned Counsel for the appellant, it is not necessary to have a separate notification only for the purposes of specifying the date from which the model standing orders apply. In any case, it is submitted on behalf of the appellant that to hold that the Amendment Rules of 1977 incorporates Clause 4C and other clauses have never been brought into force would result in unsettling many rights of many workmen, to permanency, particularly since a period of almost 30 years has elapsed by now during which period countless workmen have been granted permanency on the basis that Clause 4C is in operation. Vexed as the question may be, we find that it is no more *res integra*, in view of the judgement of the Supreme Court in *Bajaj Auto Ltd. Vs. Bhojane Gopinath D. and Others*, . In para 10, the Supreme Court has observed that the Bombay Industrial Employment (Standing Order) (Amendment) Rules, 1977 which incorporated Clause 4C in the model standing orders were published on 28.9.1977 and came into force with immediate effect. The Supreme Court observed as follows:

10. It would be relevant to state that Item No. 10-C has been incorporated in the Schedule of 1946 Act by the State Legislature in the year 1974 with effect from

October 2, 1977 which enumerates matters to be provided in the model standing orders in relation to "employment or re-employment of probationers or badlis or temporary or casual workmen, and their conditions of service." By virtue of Bombay Industrial Employment (Standing Order) (Amendment) Rules, 1977, which were published in the Bombay Gazette on September 28, 1977 and came into force with immediate effect Rule 4-C was incorporated in the model standing orders which lays down that a temporary workman, who has put in 240 days uninterrupted service in the aggregate in any establishment during a period of preceding twelve calendar months, shall be made permanent in that establishment by order in writing signed by the manager or any person authorised in that behalf by the manager, irrespective of whether or not his name is on the muster roll of the establishment throughout the period of said twelve calendar months. Rule 4-C in the model standing orders has been incorporated relating to the matter set out in item No. 10-C of the Schedule, as such deletion of the said rule by the certifying officer, being in the teeth of legislative command incorporated in proviso to Section 3(1), was wholly without jurisdiction and would make the order of certifying officer to that effect null and void and liable to be disregarded as it is well settled that if an order is null and void, the same can be disregarded in collateral proceeding or otherwise.

In fact, in that case, the Supreme Court declared that the certified standing orders were void on the ground that while certifying the standing orders, Clause 4C incorporated in the model standing orders had been deleted. We must, therefore, conclude that Clause 4C was introduced in the model standing orders on 28.9.1977 and was made applicable to industrial establishments immediately except where the industrial establishment had certified standing orders prior to 15.1.1959 i.e. the coming into force of the Industrial Employment (Standing orders) (Bombay Amendment) Act, 1957.

13. It is necessary now to consider the correctness of the decision in *May & Baker Ltd. v. Shri Kishore Jaikishandas Ichchapor* 1991 II LLN 879 : 1991 Mh.L.J. 1070 of the Division Bench of this Court. In fact, the Division Bench which has made this reference found itself unable to agree with the said decision. In *May & Baker Ltd.*'s case, the workman claimed a higher subsistence allowance on the basis of a more beneficial provision contained in the model standing orders. The Division Bench in the case of *May & Baker Ltd.*, after referring to the provisions of Section 2A, Section 3 and other provisions concluded in para 7 as follows:

7. It is, in our view, clear from the provisions of the Act as aforementioned that the model standing orders are applicable only until such time as amendments thereto have been proposed and certified. Once the amendments have been certified, the certified standing orders operate. An amendment to the model standing orders cannot, therefore, have effect until and unless modification of the certified standing orders to bring them into line with the amended model standing orders is proposed and certified.

In view of the conclusion we have reached earlier, we find ourselves unable to agree with the broad statement of law that "an amendment to the model standing orders cannot, therefore, have effect until and unless modification of the certified standing orders to bring them into line with the amended model standing orders is proposed and certified". As we have observed, an amendment to the model standing orders would not apply only where the industrial establishment has standing orders which are finally certified before 15.1.1959 i.e. before coming into force of the Industrial Employment (Standing Orders) (Bombay Amendment) Act, 1957 in accordance with Section 2A. Where the standing orders are subsequent to 15.1.1959, the model standing orders would apply automatically without any amendment to the certified standing orders.

14. We also find ourselves unable to agree with the judgement of the Karnataka High Court in *M.C. Raju Vs. Executive Director*, cited before us, where that High Court observed:

It therefore follows that if the Model Standing orders are amended subsequent to the coming into operation of the first Standing Orders in respect of the particular establishment, the same do not automatically become applicable to the establishment concerned. Steps have to be taken to amend the existing Standing Orders in accordance with Section 10 of the Act. Until such steps are taken to amend the existing Standing Orders to bring them in conformity with the amended Model Standing Orders, the amended Model Standing Orders will not be applicable to the establishment.

15. We are, however, in agreement with the decision of the Allahabad High Court in *Artificial Limbs Manufacturers Corporation of India v. Som Pal Singh and Ors.* 1994 2 CLR 566, also cited before us, where the High Court has observed as follows:

13. The view expressed by the learned Single Judge as also in *M.C. Raju's* case (*supra*) cannot, with respect be accepted as being in consonance with the clear legislative intent, as it emerges from a plain reading of the provisions of the Act. The manifest legislative objective that stands out, being that all industrial establishments must have applicable to them, one or the other standing orders i.e. either the model standing orders or the certified standing orders. As pointed out earlier that there is the specific and mandatory requirement, as laid down in Sub-section 2 of Section 3, that provision must be made in the draft standing orders for every matter set out in the schedule and Section 4 fortifies this, by saying that the standing orders shall be certifiable only if provision is made therein for all matters set out in the schedule to the Act. This mandate can obviously be complied with only if the matters newly added to the schedule, too are applicable to industrial establishments, irrespective of the industrial establishment concerned having or not having certified standing orders.

16. In this view of the matter, we answer the question referred to us in the affirmative and hold that by virtue of Section 2A, model standing order Clause 4C

ipso facto applies to a temporary workman in an industrial establishment without its incorporation into a pre-existing certified standing order.