(2001) 03 DEL CK 0037

In the Delhi High Court

Case No : CWP. No. 2841 of 1997

Shri Krishna Gopal Heda APPELLANT

Vs

M/s. Bharat Commerce and Industries Ltd. and Another RESPONDENT

Date of Decision : 28-03-2001

Acts Referred:

Citation : (2001) 91 DLT 1

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : Mr. D.K. Aggarwal and Mr. Ashok Sethi, for the Appellant; Mr. S. Mookher Jee and Mr. Y. Yadav, for the Respondent

Judgement

Vikramajit Sen, J.—In a nutshell, the grievance of the Petitioner is that he was wrongly and illegally superannuated by the Bharat Commerce and Industries Limited (Respondent No.1) on his having attained the age of 58 years. The Respondent No.1 has relied on its own Retirement Scheme, which, in their contention, fully authorises and justifies the Superannuating.

2. The Industrial Tribunal has by its impugned Award dated 31.5.1997 found against the Petitioner in the Reference which reads as follows:

"Whether the termination of services by way of retirement of Shri Krishna Gopal Heda is illegal and/or unjustified and if so, to what relief, is he entitled and what directions are necessary in this respect?"

3. Mr. D.K. Aggarwal, Learned Senior Counsel appearing for the Petitioner/ Workman has submitted firstly, that the wages of Workman were arbitrarily sealed at Rs.2500/- per month so as to keep him within the purview of the Payment of Gratuity Act, 1972, and with this mala fide intent he was separately granted an allowance of Rs.100/-. This admittedly occurred in October, 1988 at which time the Workman had been granted the said Allowance and the Workman had been granted the said Allowance and an increment of Rs.85/- thus bringing his wages to Rs.2500/- per month. It may be recalled that the Workman was

superannuated on 1.2.1989, that is after the short period of three months. Secondly, he has submitted that the Payment of Gratuity Act, 1972 was not applicable to the Workman and as there was no age of Superannuating/ retirement specified at the time of his appointment, he would be entitled to work as long as he desired or as his health permitted. Thirdly, it is his contention that the Respondent had adopted a discriminatory practice inasmuch as some employees were retired on attaining 58 years os age while others were retired on attaining the age of 62 years. Fourthly, the Respondent could not unilaterally impose the age of retirement of 58 years on the Workman by means of a Circular. Fifthly, it is alleged that the Workman was victimised because of his having leveled an accusation on the Company Secretary of the Respondents. The Tribunal has returned the finding against the Workman, in large measure, because of it having arrived at the conclusion that the malafides and victimisation on the part of the Respondents had not been made good. Mr. aggarwal''s submission is that even if this finding is to be accepted as correct, the Tribunal was still duty bound to also consider the four other contentions adumbrated above. Having not done so, the Award called for interference by this Court.

4. Mr. S. Mookherjee, Learned Counsel appearing for the Respondents, has argued that the actual intention of the Workman in this Writ Petition is to enlarge and extend the scope of the disputes between the parties beyond what was referred to the Tribunal for adjudication. He has contended that'' the assault of the Workman was based only on grounds of victimisation and malafides. He has submitted that before the Labour Court it was not in contention that the Workman should not have been retired at the age of 58 years. By way of substantiation of this contention, he has relied heavily on the submissions of the Workman before the Tribunal, which was then paraphrased by him in the following terms:--

"It is the common case of the parties and as was reiterated in the course of arguments also by the counsel for both sides that the age of retirement of these employees of the management whose basic salary did not exceed Rs.2500 was 58 years and 62 years in respect of those employees whose basic salary was more than Rs.2500. The Workman''s case is that at the time when he was retired by the management his basic salary was Rs. 2600, whereas the case of the management is that his basic salary at that time was Rs.2500."

5. Mr. Mookherjee, has further argued that the Respondent need not have granted any increment whatsoever in 1988 keeping in view the impending retirement of the Workman in February 1989, if their only intention was to keep the wages/salary below Rs.2500/- and thereby ensure the applicability of the Payment of Gratuity Act to the Workman. He has further contented that it was not the case of the Workman before the Industrial Tribunal that the Circular dated 13.9.1988 was not unilaterally imposable upon the Workman. At no stage, prior to the cessation of the Workman''s services by retirement, had this point

been articulated by the Workman. Once the services of the petitioner/workman had been terminated, the raising of the these arguments would tantamount to enabling a person to claim wages even though he did not work during this period. The Circular should have been assailed by some legal action initiated by the Workman. Had this point been raised prior to the retirement the Respondent/ Management would at least have ben able to consider this issue. It could have exercised the option of retaining the services of the Workman till he attained the age of 62 years. He also drew attention to paragraph (G) of the Preliminary Objection in the Counter Affidavit which according to him contain the vital admissions in the Workman''s Cross Examination on his part. These admissions have been quoted as follows:

"It is correct that the employees whose basic salary was Rs. 2500/- p.m. was to retire at the age of 58 years.

I am not in possession of any document to show that my salary was above Rs.2500/-.

I was not having nay graded pay scale.

The management used to give the increment to the employees at it''s discretion."

6. It was strongly contended Mr. Mookherjee that since the Workman was not in any graded pay scale the decision to grant an increment was entirely in the discretion of the management. It was his argument that maintaining two separate ages of retirement would not be discriminatory. He also relied on Section 9A of the Industrial Disputes Act to further his contention that if the conditions of service of the Workman had been altered to his detriment in terms of the Circular, he ought to have initiated appropriate proceedings forthwith. Finally, it was his contention that since the disputes were essentially in the nature of an alternation in the conditions of service, viz. age of retirement, the raising of such a dispute would mandatorily require an ''espousal''. Having been raised by a single Workman, such a grievance would not constitute an industrial dispute as envisaged by the Industrial Disputes Act.

7. In my opinion, Mr. Aggarwal''s submissions that if the Workman''s wages did not fall within the amounts envisaged under the Payment of Gratuity Act, and that if no age of retirement had been agreed upon between the parties, the employee was entitled to work at least till such time his health permitted, run counter to the view of the decision of a Division Bench of this Court in Mange Ram and Others Vs. National and Grindlays Bank Ltd., where the Bank had compulsorily retired the employee on his attaining the age of 61 years. The challenge of the employee was rejected in these terms:

"The learned counsel for the appellant (who has since died and is representatives) submits that the appellant was wrongly retired and he was entitled to serve till the age of 65 at least. In this connection, it may be said that many officials of the Bank had served to various ages, some even up to 70 years according to plaintiff. Admittedly, some had served beyond the age of 65. Learned counsel for the appellant contends that there is no age of retirement and the appellant was entitled to continue indefinitely at his own sweet will. We have carefully examined this submission. We find that no terms of service have been proved in this case. It appears that persons employed by the Bank retired at various ages. This makes us believe the Bank was retiring its officers at varying ages, and there was no fixed age of retirement. We cannot accept the contention that the appellant was entitled to serve the Bank at hi sown sweet will till whatever age he liked.

.....So, the plaintiff has failed to establish that he is entitled to the sum claimed as salary between the age of 61 and the age of 65. Learned counsel for the appellant contended that a person could not be retired if there was no term for retiring him. We cannot accept the proposition that a person who is employed must be allowed to serve till the end of his life, unless there is a specific term to the effect. The vary fact that this is a contract of employment means that this can be terminated unless there is some contract to the contrary. There may be a case in which a person is employed for his life''. Or, there may be a case in which a person is employed ''for his life''. Or, there may be a case where a person may be employed for a given number of years, say, 30. Or, there may be a fixed age of retirement.

Normally, if there is no term fixing the age of retirement or fixing the term of service, it would follow from the nature of the contract that it can be terminated at any time. It can either be terminated by dismissal or retirement, or by mere, termination of the contract of service. There is no statute which affects the terms of service under the contract of employment, which governs the plaintiff. His services could, Therefore, be ended by his retirement. We have not been pointed out any other contract or nay other term or service by which the plaintiff could claim that he is entitled to continue in service, till the age of 65. Reliance for this purpose is solely placed on the Pension Rules which themselves show that there are various ages of retirement for which various pensions are payable. In any event, the plaintiff has to fail on the main claim."

8. In Manage Ram''s case (supra) the Court had noticed the various employees were retired on their attaining different ages - that is - there was no uniform policy pertaining to the age of Superannuating/retirement. Regardless, it did not consider this practice/policy to be illegal and worthy of jural interference. The Hon''ble Supreme Court had almost at the same time specifically held in Tejinder Singh and Another Vs. Bharat Petroleum Corpn. Ltd. and Another, that "classification on reasonable differential is a well-known basis" and had held that different ages of retirement within the Company could be legitimately enforced. Attention must immediately be drawn to the decision of a larger Bench of the Apex Court in British Paints (India) Ltd. Vs. Its Workmen, where a slightly different opinion appears to have been taken.

9. In the present case, the Retirement Scheme of the Respondent Company

reads as follows:

"1. This Scheme shall be called as BCI Employees Retirement Scheme.

2. This scheme will be applicable to those permanent employees of the company who are not covered by the Payment of Gratuity Act 1972 and whose age of retirement is not otherwise determinable under any specific Law or contract.

3. An employee shall be retired on completion of the age of 62 years."

10. On 13.9.1988 the company published the Circular of which reference has already been made above, to the effect - "In view of the recent amendment in the Payment of Gratuity Act 1972 it is hereby clarified that although section 2(r)(ii) thereof has since been deleted yet the company will continue to adopt 58 years as Superannuating age as earlier stipulated there under in relation to those employees to whom the said Act will apply for all practical purposes."

11. The obvious question that arises is what does the Payment of Gratuity Act, 1972, prescribe. Initially this Act was made applicable to those employees who were receiving monthly salary not exceeding Rs.1,000/-, and this was raised to Rs.1,600/-. Consequent upon the passing of Act 22 of 1987, employees drawing a salary not exceeding Rs.2500/- per month came within the sweep of the statute and Therefore the retirement age was 58 years for the purposes of this Act. On the gaze ting of Act 34 of 1994, the Payment of Gratuity Act, 1972 was further amended and the ceiling of Rs. 2500/- was omitted, and this statue was made applicable to all employees. Since the relevant date in the present dispute is 1.2.1989, the 1994 Amendment has no application to the Petitioner. Hence is his salary did not exceed Rs.2500/- per month he would be governed by the Payment of Gratuity act, 1972. However, if the salary was over Rs.2500/- then, as per the Retirement Scheme of the Respondent Company, he would be retire able at the age of 62 years. From the summation of the rival cases made by the Industrial Tribunal at the beginning of the impugned Award, this was the only claim of the Petitioner. It was not that he was entitled to work till such time as he wanted, as has been now contended before me. The contention of Mr. Mookherjee that the Petitioner is attempting to change his stance is, Therefore, fully justified.

12. This brings me to the determination of the legality of the Circular dated 13.9.1998 which has already been reproduced verbatim above. It had been necessitated, quite obviously, consequent upon the deletion of Section 2(r) which had statutorily fixed the age of Superannuating at 58 years in respect of all employees not drawing salaries in excess of Rs. 2500/- per month. It was in this regard that reliance was placed by Mr. Aggarwal, Learned Senior Counsel for the Petitioner, on the observations in Guest, Keen, Williams Private Ltd. Vs. P.J. Sterling and Others, and paragraph 21 thereof, which reads as follows:

"That takes us to the question as the whether the fixing of the age of Superannuating of 55 in regard to the prior employees can be said to be reasonable and fair having regard to the fact that when they entered service there was no such limitation. The Labour Appellate Tribunal has held that it would both be unreasonable and unfair to introduce this condition in respect of these workmen. This view is supported by the decision of the Labour Appellate Tribunal in Jamadoba Colliery v. Nasiban 1955 Lab AC 582 (LATI - Cal_. In that case the respondent Nasiban had joined the services of the colliery before the rules of Superannuating were introduced; and when she was sought to be retired on the strength of the said rules the action of the employer was challenged before the industrial tribunal. The tribunal and the Labour Appellate Tribunal both held that the respondent having entered the service of the colliery before the new rules came into force could not be prejudicially affected by the conditions made there under when she did not exercise her option to be governed, by the said rules. In other words, the view taken by the tribunals was that in the case of prior employees an option should be given to them to be governed by the new orders or rules; and it is only if they exercise the said option that the new orders or rules should be made applicable to them."

13. I have been informed by Learned Counsel for the parties that at the time when the Petitioner entered the service of the Respondent Company there was no rule in existence similar to the impugned Circular. Only the Retirement. Policy was in existence. The contention that such a service condition could not be unilaterally imposed upon the employees is Therefore of great force, especially since it was sought to be made applicable on the Petitioner a few months prior to his Superannuating, leaving no scope for its challenge by the Petitioner. It will be recalled that he was superannuated on 1.2.1989 whilst the Circular was published on 13.9.1988. Section 2(r)(ii) was deleted only in 1984, that is at the fag end of the Petitioner''s career. The argument is well founded that the Circular was perforce expressive of a contract but which did not come into effect since it did not have even the tacit consent of the Petitioner.

14. Even so, I am unable to appreciate why the Circular should make any difference to the case. It should be recapitulated that no malafides or victimization could be attributed to the salary of the Petitioner remaining at Rs.2500/- per month, and that the policy the have different ages of Superannuating applicable to sundry sections of the staff is legally proper, and that the case of the Petitioner in the proceedings heretofore was only that he was entitled to remain in service till his attaining the age of 62 years (and not that he could serve for an indefinite period). Therefore the Petitioner was statutorily subject to Superannuating on reaching 58 years on the strength of the Retirement Scheme of the Respondent Company.

15. Section 2(r) of the Payment of Gratuity Act prior to its amendment by Act 25 of 1984, with effect from 1.7.1984, read as follows:

(r) "Superannuating" in relation to an employee means:

(i) the attainment by the employee of such age is fixed i the contract or conditions of service as the age on the attainment of which the employee shall vacate the vacate the employment; and

(ii) in any other case the attainment by the employee of the age of fifty-eight years."

16.The amendment, in addition to increasing the salary of persons entitled to the benefit of Gratuity from Rs. 1000/- to Rs. 1600/- per month also deleted sub clause (ii) above from the definition of the term Superannuating in the context of the payment of gratuity, which by virtue of Section 4 of the Act is payable to an employee on his Superannuating, or retirement or death etc. It ought not to be overlooked that it was only for this reason that the term required to be defined. There is no justification for applying the definition of Superannuating contained in the Payment of Gratuity Act ubiquitously to all cases where this question arises. In this view I have the support of H.S. Bedi, J. in the case of Gurdial Singh and another vs. Pepsu Road Transport Corporation and another, (1992) 2 CSJ 199. Significantly the Learned Judge also opined that an employee in entitled to continue in service uptil the age he remains physically fit; the age of Superannuating was however fixed at 58 years as contemplated by the Service Regulations framed subsequently. Similar observations had also been made by a Division Bench in Kashinath Sahoo vs. Orissa State Electricity Board, 1977 Lab.I.C. 336. This opinion has also been favored by a Division Bench of the Allahabad High Court in Abdul Rehman vs. National Textile Corporation Ltd. and others, 1989 (58) F.L.R. 462. In this case of the Court did not follow its previous decision rendered in Shri M/s Shree Baidyanath Ayurved Bhawan vs. Lalta Prasad and others 1979 (38) F.L.R 455 for the reason that the latter case had been decided on the basis of the unamended Section 2(r) of the Payment of Gratuity Act, 1972. It was a consequence of the deletion of sub clause (ii) that the Respondent felt the need to bring out the impugned Circular dated 13.9.1988. There is no Explanation why it took for the Management over four years to react. The Petitioner was employed on 7.3.1955 and received a monthly salary of Rs.2070/- in 1.1.1985, Rs. 2305/- on 1.1.1986 and Rs.2415/- on 1.1.1998. It was in 1988 that his salary was increased to Rs.2500/- with the Allowance of Rs.100/- which the Petitioner contends should be added to his salary; it should however be kept in mind that neither was the controversial Allowance given to him for the first time in 1988, nor was it given only to him and not to his similarly placed colleagues. Infact, it need not have been given at all. As already no victimisation or malafides can be attributed to the Respondent on this score. However, in my view, for too much significance has been given to the Superannuating age of 58 years contained in the Payment of Gratuity Act, which was deleted in 1984. The appropriate enquiry ought to be where there was any under standing or agreement, explicit or tacit, viz a viz the age of Superannuating/retirement between the Management and its employees. Since the Petitioner entered service almost eighteen years prior to the enactment of the Payment of Gratuity Act, 1972, obviously this would not govern the terms of his service, unless he had specifically agreed to its application in 1972 or at any point thereafter. This is palpably not the case since otherwise there would scarcely have been any need for the Circular.

17. The following observations made by the Supreme Court in the British Paints case (supra) have also been overlooked by Counsel for the parties, which are germane to the issue:

"We shall first consider the question of age of retirement. It may be mentioned that there was no retirement age in force in this company and so the position when the reference was made was that the age workmen could continue to work so long as they were physically or mentally fit. The workmen contended that the age of retirement both for the head office and factory workmen should be fixed at 60 years. The company, however, proposed that the age of retirement should be 55 years for all workmen. The tribunal as already indicated has fixed the age of retirement at 58 years for clerical and subordinate staff and 55 years for factory-workmen and has apparently relied on the decision of this Court in Workmen of Jessop and Co. Ltd. v. Jessop an Co. Ltd., Ltd 1964 1 LabLJ 451.

Now this is a case where there was no age of retirement before the reference was made and the workmen whether at the head office or at the factory were all entitled to work so long as they were physically or mentally fit. So far as the existing workmen are concerned, we think that the tribunal should have fixed the age of retirement at 60 years both for the factory-workmen as well as head office workmen. It is enough in this connection to refer to the decision of this Court if Guest, Keen, Williams Private Ltd. Vs. P.J. Sterling and Others, , where in a similar situation this Court fixed the age of retirement at 60 years in the case of existing workmen."

(underlining added)

18. After hearing the Learned Counsel for the parties I had favored the view of the Division Bench of this Court in the case of Mange Ram (supra) . If it is to be assumed, on first principles, that there is an age of Superannuating which would apply in every case, where no such age has been contractually agreed upon and it has also not been indicated by statute, should the Court not prescribe an age which would be enforced in all retirement/Superannuating cases. Would it not be logical and fair to adopt 58 years as this age, since there was evidently a general consensus in Parliament for it. Or on the contrary, on the deletion of the sub clause (ii) in Section 2(r) of the Payment of Gratuity Act, 1972, could it not be concluded that Parliament was of view that there was no upper limit in the age till which an employee could serve. My initial opinion that 58 years in an appropriate age of Superannuating in the absence of an agreement to the contrary must give way to the view expressed by the Hon''ble Supreme Court in British Paints case (supra). This ratio, applied to the facts of the present case, lead to the conclusion that the age of Superannuating to be applied to the Petitioner in 62 years. This for the reason the reason that it was the Petitioner''s case before the Labour Court/Industrial Tribunal that he was entitled to serve till

he attained the age of 62 years. Even if this was not so, the other contention of the Petitioner was that in adhering to different ages of Superannuating for the sundry employees, viz. 58 years and 62 years, the Respondent No.1 was pursuing an arbitrary and discriminatory policy, the Petitioner could at the most be entitled to the benefits attached to the latter age. This was also the age indicated in the alternative in the Retirement Policy of Respondent No. 1.

19. The objection that the Petitioner''s claim should not be considered in the absence of an espousal is of no merit since the termination of services on the grounds of his having reached 58 years would itself constitute an industrial dispute by virtue of Section 2A of the Industrial Disputes Act. All these questions should have been considered by the Industrial Tribunal in spite of it having concluded that there was no victimisation of the Petitioner. It is clear that the parties were also at issue on these points.

20. The impugned Award is quashed. The Petition is disposed off with the declaration that the Petitioner would have been entitled to continue in service, with all monetary benefits, till he attained the age of 62 years. However, the Court should not ignore the fact that these disputes had not been raised by the Petitioner prior to his Superannuating. He had already taken all his dues on his services being ''terminated''. He has admittedly not worked thereafter, for no culpable fault of Respondent No. 1 In my view, the ends of justice would be met if it is declared that he is entitled to salary and other benefits for a period of two years after the date on which he was compulsorily retired. I order accordingly.

21. The parties shall bear their respective costs.

