
(2014) 04 BOM CK 0230
In the Bombay High Court
Case No : Writ Petition No. 760 of 2013

Sirsat Lodge

APPELLANT

Vs

Mashnu Gawade

RESPONDENT

Date of Decision : 24-04-2014

Acts Referred:

Constitution of India, 1950 — Article 227

Industrial Disputes Act, 1947 — Section 17-B, 33-C, 33-C(1), 33-C(2), 39

Citation : (2015) 5 ABR 152 : (2014) 4 ALLMR 686 : (2015) 146 FLR 769 :
(2014) 143 FLR 811 : (2015) LabIC 3631 : (2014) 3 LLN 644 : (2015) LLR 708 :
(2014) 6 MhLj 263

Hon'ble Judges : S.B. Shukre, J

Bench : Single Bench

Advocate : L.J. Deva, Advocate for the Appellant; Gaurish Agni, Advocate for the Respondent

Final Decision : Dismissed

Judgement

S.B. Shukre, J.—This Writ Petition is preferred against the order dated 12.11.2013 in CLE/(REC-17)/2011 by Commissioner, Labour and Employment, Panaji ("the Commissioner" for short) holding that respondent cannot be retired at the age of 60 years and is entitled to receive wages, including back wages as claimed by him. The respondent was in the employment of the petitioner as helper. His services were terminated by the petitioner on 1.6.1989. The respondent raised an industrial dispute calling termination of his service as illegal. The dispute was referred to Industrial Tribunal. An award of reinstatement with 60% back wages was passed by the Industrial Tribunal on 1.10.1999. It was challenged by the petitioner in Writ Petition No. 246/2000. During the pendency of the said Writ Petition, the respondent filed an application u/s 17-B of the Industrial Disputes Act, 1947 ("the ID Act" for short). It was allowed by the High Court by an order passed on 20.9.2001.

2. Thereafter, Writ Petition No. 246/2000 was disposed of by the High Court on

5.5.2011. While disposing of Writ Petition, the award dated 1.10.1999 was modified by the High Court. It was declared that the respondent was entitled to 40% back wages instead of 60% as awarded by the Tribunal. The High Court, however, did not interfere with the other reliefs granted by the award of the Industrial Tribunal. The respondent, after disposal of the Writ Petition No. 246/2000, filed another application being MCA No. 325/2009, stating that the petitioner had stopped paying him wages from 20.3.2006 on the ground that the respondent had completed age of 60 years and was superannuated w.e.f. 21.1.2004 and thus claiming payment of wages w.e.f. 20.3.2006 at the rates stated therein. The application was disposed of by the High Court on the ground that it did not survive after disposal of the Writ Petition No. 246/2000.

3. Thereafter, respondent sent a notice dated 27.6.2011 to the petitioner demanding wages of Rs. 3,10,525/- as per award dated 1.10.1999, as modified by the High Court in Writ Petition No. 246/2000. The petitioner gave reply to the notice and refused to pay wages as claimed in the notice on the ground that the respondent had attained superannuation on 21.1.2004.

4. The respondent then filed an application u/s 33-C of the ID Act before the Commissioner for issuance of recovery certificate for Rs. 3,10,525/-. The Commissioner without hearing any parties in the matter issued a recovery certificate on 9.11.2011 to the Collector North Goa, District, on the basis of which, Mamlatdar of Bardez initiated recovery proceedings. The petitioner challenged the same by filing another Writ Petition being Writ Petition No. 291/2013. While disposing of the Writ Petition on 4.09.2013, this Court held that even though there was no dispute about entitlement of the respondent to back wages up to age of 60 years, the Commissioner should consider the matter on merits of the case and decide as to whether or not the respondent was entitled to the back wages beyond the age of 60 years. This Court also directed the Commissioner to pass a reasoned order.

5. After hearing the parties, the Commissioner by his order dated 12.11.2013, held that the respondent could not be retired at the age of 60 years and was entitled to continue in service till he was medically and mentally fit to work and was also entitled to the amount as claimed by him in his application, after deducting the amount of Rs. 65,730/- paid on 7.10.2013. The Commissioner also granted interest at the rate of 12% from the date of the application till the date of actual payment. Being aggrieved by the said order, the petitioner is before this Court in the present Writ Petition.

6. I have heard learned counsel for the petitioner and learned counsel for the respondent. With their assistance, I have carefully gone through the impugned order and paper-book of the petition.

7. Now, the only point that arises for my determination is:--

Whether the findings recorded by the Commissioner, Labour and Employment, Panaji that there is no retirement age for the respondent fixed by his employer,

and the respondent cannot be deemed to have retired at the age of 60, is perverse and without jurisdiction?

8. Shri Deva, learned counsel for the petitioner has contended that by recording a finding that the respondent cannot be retired at the age of 60 years and he is entitled to continue in service till he is medically and mentally fit to work, the Commissioner has acted without jurisdiction in the matter. He submits that this issue is one of a substantial question of law and, therefore, cannot be adjudicated upon in a jurisdiction which is in its nature executory. Learned Commissioner has decided an application filed u/s 33-C(1) of the ID Act which confers power upon the Commissioner to only issue a recovery certificate after being satisfied that any money is due to a workman from an employer under settlement or an award and this Section does not permit the Commissioner to decide any substantial question of law as for example, whether a workman can be retired on reaching superannuation at the age of 60 years or not. He submits that this jurisdiction could have been exercised only by a Constitutional Court. He also submits that it is not open to the Commissioner to say that he has been conferred with jurisdiction to decide this question by the High Court, as vesting of jurisdiction is regulated by statutory provisions.

9. Learned Counsel for the respondent has submitted that the order passed by this Court on 4.9.2013 in the Writ Petition No. 291/2013 has not been challenged by the petitioner and the petitioner has chosen to submit himself to the jurisdiction of the Commissioner in deciding the question relating to the age of retirement of the respondent and therefore, now it would not be open to him to challenge the jurisdiction of Commissioner. He further submits that even otherwise while exercising jurisdiction u/s 33-C(1), the appropriate Government has to record a satisfaction that money is due to a workman from an employer under an award or settlement and for recording it, the appropriate government in a given case, may also have to decide the question as to whether the workman has retired or remains in service according to conditions of service and therefore, any decision thereupon would be a part of the satisfaction required to be recorded by the appropriate Government u/s 33-C(1) of the ID Act.

10. In order to appreciate the rival arguments, it would be necessary to refer to the provision of Section 33-C(1) of ID Act. It lays down that where any money is due to a workman from an employer under a settlement or an award or under the provisions of Chapter V-A or Chapter V-B, the workman or any other person authorised by him, may make an application to the appropriate Government for the recovery of money due to him. This application can be in addition to any other mode of recovery that may be available to the workman under the law. Upon such an application being made, the appropriate Government has to issue a certificate to the Collector for the recovery of money so due to the workman, if it is satisfied that the money is due under the settlement or an award or under the provisions of Chapter V-A or Chapter V-B.

11. It is clear from the provision of Section 33-C(1) that for issuance of a

recovery certificate, satisfaction of the appropriate Government that money is due to the workman, under an award or settlement, is important. This would mean that the Labour Court would have to ascertain the amount of money due to the workman which is already pre-determined or which can be arrived at by some arithmetical calculations or simpliciter verification. This would also involve the process of ascertaining the period for which the money is so due to the workman and if a question arises as to whether such money can be paid beyond a certain age, same would also have to be determined by referring to the conditions of service and applicable statutory provisions by the concerned authority. Any such determination would be only incidental to and part of recording of satisfaction by the Labour Court as contemplated u/s 33-C(1) of ID Act.

12. In the instant case, admittedly, no letter of appointment in writing has been issued by the petitioner to the respondent. It is also an admitted fact that no retirement age of the respondent has been fixed by the petitioner. It is further an admitted position that there are no model standing orders framed under Industrial Employment (Standing Orders) Act, 1946 as applicable to the establishment of the petitioner. No documents have also been admittedly produced by the petitioner in support of his submission that the retirement age of the respondent is 60 years. With such record staring in the face, the petitioner, on the ground that respondent having attained 60 years of age on 21.1.2004 retired from service, stopped payment of all money determined under the award passed by Industrial Tribunal dated 1.10.1999, as confirmed with some modification by the High Court as per its order of 5.5.2011 in Writ Petition No. 246/2000. Neither the award nor the High Court order fixed any age of retirement nor limited the period up to which the amount under the award would be payable to the workman. Therefore, it became necessary for the Commissioner to satisfy himself as to whether or not any money was due by the petitioner to the respondent for the period which pertained to the period from 21.1.2004 the date on which respondent attained the age of 60 years and onwards.

13. In this background, the Commissioner could not have recorded a satisfaction, if any money was due to the respondent, unless he decided the question as to whether or not, the money was due and continued to be due and payable even after attaining the age of 60 years. While deciding this question, if any finding is recorded that the respondent cannot be retired at 60 years of age, it is a finding which facilitates recording of satisfaction contemplated u/s 33-C(1) of the ID Act and cannot be seen to be an adjudication upon any substantial question of law. Recording of such a finding, not being an adjudication based upon weighing of evidence and interpretation of law, is permissible u/s 33-C(1) of the ID Act, if it is necessary for reaching the satisfaction contemplated under it. It is to be noted that the Commissioner was not deciding a disputed question such as what should be the age of retirement of the respondent in an industry like that of the petitioner or whether the respondent should have been retired at 60 years of

age, when the letter of appointment or conditions of service or statutory provisions provided otherwise. The Commissioner was also not deciding upon the retirement trends prevailing in similar industry in this region of the country. These issues fall within the domain of substantial questions of law, but the Commissioner had nothing to do with them. He was only concerned with the computation of the money due to the respondent under the award and the period for which the money found to be so due to him would be liable to be paid by the petitioner when no retirement age was fixed for the respondent. This is what the Commissioner has done in this case.

14. Even the order passed by this Court on 4.9.2013 in Writ Petition No. 491 2013, if read, in its entirety, would show that it does not confer any jurisdiction upon the Labour Court to decide any substantial question of law. Since the recovery certificate issued by the Commissioner on 9.11.2011 for the amount of Rs. 3,10,525/- covered a period beyond the age of 60 years and as no reasons were stated for determining the amount payable beyond that period, this Court thought it fit that the Commissioner ought to have passed a reasoned order containing, may be, bare minimum reasons. In other words, this Court required the Commissioner to spell out the reasons, in case he came to a conclusion that he was entitled to back wages beyond the age of 60 years, and nothing more. Such a direction can never be said to be conferring a jurisdiction to decide a substantial question of law. Therefore, I find no merit in the argument of the learned counsel for the petitioner and find substance in the argument of learned counsel for the respondent canvassed in this behalf and, accordingly, I am of the view that the findings recorded by the Commissioner are not without jurisdiction and were well within the scope and ambit of the power u/s 33-C(1) of the ID Act.

15. The second argument of the learned counsel for the petitioner is that the question for payment of money after the attainment age of 60 years involved a question as to what amount of the money was due and therefore, power to decide the question was vested in the Labour Court exercising jurisdiction u/s 33-C(2) of the ID Act. I do not think that this argument can be dealt with in any other way than the way the Commissioner dealt with it when it was canvassed before him and has been appropriately dealt with by him. The Commissioner by relying upon the cases of *M/s. Fabril Gasosa Vs. Labour Commissioner* and others, and *Punjab National Bank Limited Vs. K. L. Kharbanda*, found that the amount of back wages payable to the respondent was only based upon arithmetical calculations and therefore the question what amount was due could be decided by him u/s 33-C(1) of the ID Act. This conclusion having been made by following well settled law that where the amount due to the workman is a per-determined or ascertained sum of money or is arrived at by arithmetical calculations or on simple verification and the only inquiry to be made is whether it is due to the workman or not, sub-section 1 of section 33-C comes into play. I find no perversity in the said conclusion of the Commissioner.

16. Learned Counsel for the petitioner has submitted, as seen from the written

notes of arguments, that as Labour Department website itself lists the authority of the Labour Commissioner as conciliation officer, it can be taken for granted that Labour Commissioner's powers are limited only to conducting conciliation proceedings and that Labour Commissioner by holding that the respondent is entitled to employment beyond 60 years of age has exceeded his powers. I have already discussed in detail as to how the finding recorded in this case by the Commissioner is well within the powers conferred upon him u/s 33-C(1) of the ID Act and, therefore, I find no substance in the said argument.

17. Learned counsel for the petitioner has further submitted that model standing orders framed under the Industrial Employment (Standing Orders) Act, 1946 are applicable to the establishment of the petitioner and they provide that where there is no age for retirement agreed between the employer and the workman or specified in the statement of award, retirement on superannuation shall be upon completion of 58 years of age by workman. These standing orders are applicable only when there are 20 or more employees engaged in industry and that being admittedly not the position in the present case, the age of retirement prescribed in the standing orders would be of no relevancy for determining the age of retirement of the respondent.

18. Learned counsel for the petitioner has further submitted that the Commissioner has wrongly relied upon some cases to reach wrong conclusions. These cases, according to him, are:--

1. Workmen of Kettlewell Bullen and Co., Ltd. v. Kettlewell Bullen and Co. Ltd., 1964 (2) LLJ 146.

2. Universal Transport Co., Mumbai v. Siraj Kadarbhai China and another, 2005 III CLR 912 : [2006 (1) ALL MR 476].

3. M.K. Mulki Vs. Kemen Pvt. Ltd. and Another,

He submits that these cases do not lay down any rule of universal application and render case specific decisions. He submits that it was not the case of the respondent that he had been discriminated against by the petitioner by retiring him on reaching the age of 60 years.

19. Learned counsel for the respondent, on the other hand, submits that a careful perusal of these cases would show that they certainly lay down a principle of law that where no age of superannuation is fixed by the employer and where there is no evidence on record showing that 60 years is the retirement age nor any Rule applicable to the industry prescribing the age of retirement as 60 years, workman is entitled to continue in service till he is physically and mentally fit.

20. Upon careful perusal of these cases, I find that the cases in fact lay down a rule of universal application which can be followed in appropriate cases. The ratio of these cases is that when the retirement age is not fixed by the employer and where there is neither any evidence showing any agreed age of retirement nor any statutory provision prescribing the age of retirement for the workman, the

workman would be entitled to continue in service till he is physically and mentally fit. The facts of the present case disclose that there was no agreed age of retirement and no statutory provision prescribing 60 years as the age of retirement for the establishment of the petitioner and therefore. I find that the Commissioner has committed no error of law in following the ratio of these cases in arriving at his conclusion that respondent was entitled to continue till he was physically and mentally fit to work.

21. Learned counsel for the petitioner has further argued that it is necessary to fix the age of superannuation of not only the respondent but also the workmen engaged by the petitioner as it cannot be countenanced that a workman would be entitled to render service for an indefinite period irrespective of his mental and physical capacity to give desired output in his employment. He submits that by considering the trends in the similar and comparable industries and other factors such as, nature of the employment, conditions of service work, nature of duties, availability of service benefits, business carried on, increase in longevity , position in other countries and so on the Hon''ble Apex Court in the cases of Guest, Keen, Williams Private Ltd. Vs. P.J. Sterling and Others, and G.M. Talang and Others Vs. Shaw Wallace and CO. and Another, had fixed the age of retirement of employees at 60 even though the standing orders or agreement between the company and the employees were not applicable to the employees. He therefore, submits that it would be just and proper for this Court as well to determine the age of retirement of the employees engaged by the petitioner including the respondent, which is all the more necessary to maintain efficiency, speed of service and fulfillment of the need for jobs felt by the younger generations. Learned counsel for the respondent submits that this is a Writ Petition filed under Article 227 of the Constitution of India challenging the legality and correctness of the order passed by the Commissioner in exercise of his powers u/s 33-C(1) and therefore, the scope of the petition cannot be expanded by initiating a roving inquiry into the aspect of general age of retirement of workman.

22. There is merit in the argument of the learned counsel for the respondent. This being a petition under Article 227 of the Constitution of India, the scope of the petition cannot be enlarged so as to examine the general question as to what should be the age of retirement for the workman engaged in an industry or establishment like that of the petitioner. Therefore, argument made in this regard by the learned counsel for the petitioner is rejected.

23. Lastly, the learned counsel for the petitioner has submitted that the provisions of Goa, Daman and Diu, Shops and Establishment Act, 1973 ("Shops Act" for short) are not applicable to the petitioner and therefore, there was no reason for the Commissioner to have observed that there is no provision even under the Shops Act, which prescribes no age of retirement. He further submits that even if it is assumed that this Act is applicable, still the action of the petitioner in declaring the respondent as having retired on attaining the age of

retirement on 21.1.2004, can be justified by applying the analogy of Section 39 sub-section (3) of the Shops Act. He submits that if any employee who has completed the age of 60 years can give up his employment under this Section, the employer can also terminate his service on attaining the age of 60 years.

24. I am afraid, the argument cannot be accepted. Section 39(3) gives an option to the employee only and not the employer. This is crystal clear on a plain reading of the section. So, what is clear on a plain reading cannot be confounded by reading into the Section what is not there. Right of employer to retire his employee is regulated by conditions of service, agreements, and statutory provisions. It is not a matter to be decided by drawing an analogy.

25. In the result, I find that order impugned herein is neither unreasonable nor arbitrary and it is also not an order which is without jurisdiction or in excess of power of the Commissioner u/s 33-C(1) of the ID, Act. The point is answered accordingly. There is no merit in this petition and it deserves to be dismissed.

26. Petition stands dismissed.

27. In the circumstances, of the case, parties to bear their own costs.

28. Rule is discharged. At the request of the learned counsel for the respondent:--

(a) Leave is granted to the respondent to withdraw the amount of Rs. 25,000/- deposited in this Court by the petitioner in Writ Petition No. 246/2000, together with accrued interest, if any.

(b) The execution proceedings pending before the Mamlatdar be concluded in accordance with law, within two months.