

(1989) 11 BOM CK 0038
In the Bombay High Court
Case No : Writ Petition No. 1835 of 1989

Tata Textile Mills (U.C.) and Others

APPELLANT

Vs

Munnal Nanhoo Yadav and Others

RESPONDENT

Date of Decision : 22-11-1989

Acts Referred:

Citation : (1990) 60 FLR 244 : (1994) 3 LLJ 476

Hon'ble Judges : S.K. Desai, J; M.P. Kenia, J

Bench : Division Bench

Advocate : B.N. Shrikrishna and M.H. Doshi, for the Appellant; N.D. Buch and H.D. Buch for R1, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Desai, J.—By consent of Advocates, the matter is taken on Board for hearing. The Advocate for Respondent No. 1 waives service.

2. In this matter we had given certain directions in the Appeals from interim orders and in pursuance of those directions, necessary order has been obtained from Hon"ble the Chief Justice and then Writ Petition referred to a Division Bench. It is now taken up for hearing since in our opinion if we give judgment in the Writ Petition, that will serve the requirements of the parties as also dispose of the Appeals automatically. Once the Writ Petition is disposed of, the Appeal (viz. Appeal No. 1282 of 1989) will not survive and the same can be disposed of by an appropriate order to that effect.

3. It is unnecessary to set out the facts in detail in the Writ Petition and it is sufficient to deal with the law point which arises. However, the law point arises in the following back-ground.

4. The petitioners before us are a silk cotton textile undertaking taken over by the Government of India in 1983 and thereafter placed under the management and control of the National Textile Corporation (South Maharashtra) Limited. Respondent No. 1 to the writ petition was an employee working as a "doffer

jobber" in the Spinning Department of the petitioners. The petition raises the question of interpretation and application of Standing Order 20-A of the Standing Orders for Operative which Standing Order is to be found in Chapter XIV at page 172 of the Handbook of Service Conditions of Operatives and Clerks in the Bombay Cotton Textile Industry issued by the Mill-owners" Association, Bombay, in October 1980. The 1st respondent workman was employed by Tata Mills Ltd., from 1st November, 1950 and at the time of employment had given his year of birth to be 1929. In 1986 he sought to alter the same to 1932 but was not able to tender sufficient material or convincing explanation in support of the change sought and hence the purported change of the year of birth was not accepted by the petitioners who are the present employers. According to the petitioners the workman accordingly attained the age of 60 years on 1st January, 1989. On 15th December, 1988 he had been served with a notice intimating that he would stand superannuated with effect from 1st January, 1989.

5. After receipt of the said notice dated 15th December, 1988 the workman, i.e. Respondent No. 1, challenged the same under the provisions of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, by filing a complaint of unfair labour practice before the Industrial Court at Bombay. It was the contention of the workman and under the relevant Standing Order, viz. Standing Order 20-A, he had a right to continue in employment till the age of 63 if he remained efficient and therefore the purported superannuation was in violation of the said Standing Order. Hence, according to the workmen, an unfair labour practice had been perpetrated which was covered under Item 9 of Schedule IV to the aforesaid Act. The complaint was numbered as Complaint (ULP) No. 1520 of 1988. In the said complaint an application for interim relief was thereafter filed by the workman, which is Exhibit-B to the writ petition. On the said application the learned Member of the Industrial Court, viz. Respondent No. 2 herein, passed an order on 31st March, 1989, which is at Exhibit-"F" to the writ petition, upholding the contention of the workman for the interim relief sought. Accordingly he confirmed the ad interim Order dated 28th December, 1988, which is at Exhibit -"D" to the writ petition, it is this order on 31st March, 1989 that was challenged in the writ petition.

6. As stated earlier, the challenge turns on the proper interpretation and application of Standing Order 20-A and we shall immediately, therefore, advert to the same. The said Standing Order reads as under:-

"20-A. An operative shall retire from service on attaining the age of 60 years, but a male operative shall be retained : in service, if he continues to be efficient, upto the age of 63 years, provided that when retrenchment becomes necessary a person who has completed the age of 60 may be retired in preference to younger men".

7. Our attention was also drawn in this connection to the decision of a learned Single Judge of this Court given in writ petition No. 5844 of 1988 Maharashtra State Textile Corporation Limited v. Vasudev Vinayak Joshi and Anr. given on

13th September, 1989 in which the learned Single Judge (Mrs. Sujata Manohar, J) upheld the decision of the Industrial Court (given by the very same Member as before us viz. Respondent No. 2) which is to the very effect as given in the present matter viz., that the workman's contentions were required to be upheld. This decision has been reported in 1989 II C.L.R. 589.

8. Both the learned Member of the Industrial Court (viz., Respondent No. 2 herein) as well as the learned Single Judge of this Court (viz. Mrs. Sujata Manohar, J) have considered the historical genesis of the Standing Order. It may be mentioned that the Standing Order was formulated by the Industrial Court nearly fifty years ago, but before the same was framed, suggestions had been invited from the Mill-owners' Association, Bombay, On an application made u/s 38(2) of the Bombay Industrial Relations Act, 1946, the Mill-owners' Association, Bombay, had proposed adoption of the following Standing Orders:-

"For Clerks : Every employee shall retire from service on completion of 55 years of age. The management may, if the employee is found medically fit, at their discretion grant an extension of not more than one year at a time, provided that the total extension shall not exceed two years.

For Operative : Every male operative shall retire from service on completion of 55 years of age and every female operative on completion of 50 years of age. The management may, if the operative is found medically fit, at their discretion grant an extension of not more than one year at a time, provided that the total period of extension shall not exceed two years".

That was opposed by the Rashtriya Mill Mazdoor Sangh, the representative union and ultimately the modification introduced by the Industrial Court is as per the present Standing Order which has been earlier in para 6 of the Judgment. The difference in phraseology is so apparent and the effect, therefore, has to be accepted and must be accepted as interpreted by the Member of the Industrial Court (viz. Respondent No. 2 herein) and by the learned Single Judge (viz. Mrs. Sujata Manohar, J.) in Writ Petition No. 5844 of 1988.

What the Mill-owners' Association, Bombay, had proposed conferred a discretion on the management to extend the service of a particular operative on a simple consideration which was to be weighed by the employer. Of course, the evaluation had to be fair and honest. On reading the proposed Standing Order (as suggested by the Mill-owners' Association, Bombay), it could not be reasonably urged by the operatives, whether clerks or other workmen, that they had a right to be continued in service till the extended limit. The phraseology of the Standing Order as ultimately adopted is quite clear, since the word "shall" has been used as far as the extended age is concerned.

9. Let us now paraphrase the Standing Order as adopted by the Industrial Court. In the first place, it provides for an obligatory age of superannuation for an operative, which is fixed at 60 years. This is done by providing that an operative shall retire from service on attaining the age of 60 years. However, for a limited

class of operatives an extension is provided which, as the phraseology clearly suggests, is an obligatory extension, but provided two conditions are satisfied.

These conditions are that this extension is only available for a male operative and further only if such male operative has continued to be efficient. In other words, the extension upto the age of 63 years, i.e., beyond the age of 60 years, depends, in the first place, on the sex of the operative, and in the second place, his continued efficiency. Now the phrase "continues to be efficient" will also require interpretation, but we reserve it for a later para. We are in the present case concerned with what is the position when a male operative attains the age of 60 years, as the Respondent No. 1 employee is alleged to have attained on 1st January, 1989.

10. A bare reading of the Standing Order, in our opinion, clearly suggests that unless in the opinion of the employer, honestly and properly arrived at, the male operative has lost efficiency, he would have to be continued in service and if he retains efficiency, he will have to be continued to the outer extended limit viz., the age of 63 years. This is an obligation on the employer and a right of the employee, provided he continues to remain efficient until he reaches the outer limit.

11. These are the very aspect of the matter which have been noted by the learned Member of the Industrial Court (Respondent No. 2 before us) in the order assailed in the writ petition as also brought out and emphasised in the judgment of the learned Single Judge (Mrs. Sujata Manohar, J.) in Writ Petition No. 5844 of 1988 reported in 1989 II C.L.R. 589 to which we have adverted earlier. We are in full agreement with the approach as well as the conclusion of the Single Judge.

12. Mr. Shrikrishna on behalf of the petitioners had submitted that the learned Member of the Industrial Court (viz. Respondent No. 2 before us) as well as the learned Single Judge (viz. Mrs. Sujata Manohar, J.) were in error in not following the decision of the Supreme Court in Kailash Chandra Vs. Union of India (UOI), . The portion of the rulings in the above case on which reliance is placed is set out in paragraph 5 of this decision and may be extracted:-

"(5) Clause (a) (of Rule 2046(2) of the Railway Establishment Code) deals with railway ministerial servants other than those who entered Government service on or after April 1, 1938, or those in Government service on March 31, 1938, who did not hold a lien on a suspended lien on a permanent post on that date. The exact words of the rule are:

"A ministerial servant who is not governed by Sub-clause (b) may be required to retire at the age of 55 years but should ordinarily be retained in service if he continues to be efficient up to the age of 60 years. He must not be retained after that age except in very special circumstances which must be recorded in writing and with the sanction of the competent authority".

The Bench which decided the matter was of the opinion that the use of the word "ordinarily" made no difference to the correct interpretation of the Rule and set out the Rule excluding the word "ordinarily". This recast Rule is to be found on the very same page but is the right hand column and according to the Supreme Court, leaving out the word "ordinarily", the rule would read thus:-

"A ministerial servant who is not governed by Sub-clause (b) [of Rule 2046(2) of the Railway Establishment Code] may be required to retire at the age of 55 years but should be retained in service if he continues to be efficient up to the age of 60 years".

13. The rule was read by the Supreme Court not as one giving any right to the employee but giving an option to the employer, and in the opinion of the Court the proper interpretation was made clear and put beyond doubt by the use of the word "ordinarily", since "ordinarily" meant in a large majority of cases but not in all.

14. The phraseology employed in the said clause which dealt with railway servants : and which was being construed by the Supreme Court is totally different from Standing Order 20-A. In the first place, in the said clause, even the provision for retirement at the age of 55 years is cast not in obligatory language but in the much milder tone indicated by the use of the words "may be required to retire at the age of 55 years". The use of the words "may be" would suggest some sort of discretion and not an obligation. If, at all, the discretion intended is of the employer and this is put beyond doubt by the subsequent paragraph of the rule which clearly indicates that the discretion is that of the employer who should ordinarily retain the railway servant in service if he continues to be efficient upto the age of 60 years. In the Standing Order that we have before us we have no such indication of an option or discretion being conferred on the employer. An operative is to be superannuated at the age of 60 years. This is the normal rule admitting of no discretion on either side. However, if the operative is a male operative and is efficient when he crosses the said age, he would be continued in service as long as he continues to be efficient and if he continues to be efficient, he must be continued in service upto the age of 63 (sixty-three) years. The Supreme Court decision in Kailash Chandra's case (supra) deals with the phraseology of the rule which was being considered by the Supreme Court in that matter. The said rule is in totally different language as compared with the language of the Standing Order being considered by us.

15. Reliance was also sought to be placed on the decision of the Supreme Court in State Bank of Bikaner and Jaipur and others Vs. Jag Mohan Lal, . The rule being construed by the Court has been set out by Jaganatha Shetty, J., speaking for the Bench, in paragraph 2 of the decision. It need not be reproduced here. The language of the proviso (to the Note) under the said rule is quite clear and indicates unequivocally that the discretion was that of the competent authority i.e., the employer. The word "discretion" indeed has been used in the proviso and the element of discretion reiterated by the words "should extension be deemed

desirable in the interests of the Bank". This indicates clearly the purpose behind the extension. This case is also of no assistance to Mr. Shrikrishna.

16. In the result, as far as the interim order is concerned, and in the present matter even as the final orders to be passed on the complaint, we will have to uphold the interpretation put by the learned Member of the Industrial Court (Respondent No. 2 before us) on Standing Order 20-A and discharge the rule.

17. We may add, although it may not be strictly germane to the decision to be given, by way of an obiter, that we would read the Standing Order as providing for the operative remaining or continued being efficient. It would not be possible for the operative to contend that once he was efficient when he crossed the initial hurdle, viz., the ordinary age of superannuation, i.e. 60 years, he would automatically go to the extended age of superannuation, viz. 63 years, irrespective of his efficiency. During this period he has to continue to remain efficient.

18. However, a fair reading of the requirement, as we have explained it, would suggest that there should be only periodical evaluation and not a continued monitoring by the employer. Such evaluation can take place at the end of each chronological year, at which point of time the operative would have to be continued in service if he had continued to remain efficient, but the employer would be in a position to superannuate him if there is a marked fall in the efficiency of the operative.

19. We must further emphasise that the decisions having a bearing on the extended age of superannuation, viz., 63 years, on the ground of efficiency or the subsequent retention of efficiency have to be taken honestly and properly. We are not called upon in this decision to indicate what is encompassed is the phrase "efficient or continues to be efficient". That will have to be interpreted in an appropriate proceeding if any dispute arises hereafter. This disposes of the writ petition. We may record that it is not the case of the employer in case of this employee that there was any fall in the efficiency of the workman, viz., Respondent No. 1, and, therefore, the insistence of the employer that he retired by super-annuation on 1st January, 1989 would have to be held to be incorrect. The employer may have a right to review the case of this workman as we have suggested at the end of one year. However, as we have made clear, these observations are obiter, since they go beyond the requirement of the writ petition.

20. The rule, therefore, will stand discharged. Parties to bear their own costs of the writ petition.