

(2006) 08 BOM CK 0074

In the Bombay High Court

Case No : Writ Petition No. 2366 of 2003

Voltas Employees Union

APPELLANT

Vs

Voltas Limited and Others

RESPONDENT

Date of Decision : 04-08-2006

Acts Referred:

Industrial Disputes Act, 1947 — Section 9A

Citation : (2006) 6 ALLMR 112 : (2006) 6 BomCR 110 : (2006) 111 FLR 1129

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : A.D. Shetty, for the Appellant; C.U. Singh, instructed by Salgaonkar and Co., for the Respondent

Judgement

D.Y. Chandrachud, J.—A complaint of unfair labour practices was filed by the Petitioner Union under Items 9 and 10 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. The dispute in the present case related to a notice issued by First Respondent on 4th December 2001 as a result of which four workmen who had been engaged as drivers were informed that the pattern that was earlier followed by the management of giving weekly offs on Saturdays and Sundays was being altered. Thereafter, on 5th December 2001, the management set down a schedule for the month of December 2001 and informed the four drivers that for January 2002, a schedule would be announced in the last week of December 2001. The schedule which was notified for the month of December 2001 provided that two of the four drivers would have both Saturdays and Sundays as holidays. One of the other two drivers was however, required to work on Sundays and he was given weekly holidays on Fridays and Saturdays while the fourth driver who was required to report for duty on Saturdays was given holidays on Sunday and the ensuing Monday.

2. The Union instituted a Complaint contending that the Head Office of the Company has been observing a five day working week since 1960 with Saturdays

and Sundays as days of weekly off for all categories of employees, save and except for the security staff. The contention of the Union was that the management had unilaterally altered the weekly off without complying with the requirement of Section 9A of the Industrial Disputes Act, 1947. It may be noted at this stage that Item 4 of the Fourth Schedule is entitled "hours of work and rest intervals", whereas Item 5 deals with "leave with wages and holidays". The four workmen whose conditions of service form the subject matter of the complaint had initially been engaged at the Head Office of the management at Ballard Estate until 21st December 2001. The complaint was instituted on 18th December 2001, after which upon the closure of the Ballard Estate establishment, the four drivers came to be transferred to the establishment at Chinchpokli. The management had, at the material time, a factory governed by the Factories Act, 1948 at Chinchpokli, but it is common ground between the parties before this Court that the present workmen were not governed by the provisions of the Factories Act, 1948 inasmuch as being workmen attached to the Head Office, their service conditions were governed by the Bombay Shops and Establishments Act, 1948.

3. Evidence was adduced on behalf of the Union and the management. The evidence of the workmen was to the effect that since 1962, Saturdays and Sundays had been observed as weekly off days for all categories of workmen in the Head Office, save and except for the Security Department. A copy of the settlement between the management and the workmen dated 8th November 1982 was produced and marked in evidence as Exh.U-2. The evidence of the workmen shows that though the four drivers were given a weekly off on Saturdays and Sundays, they were allowed overtime wages in the event that they were called upon to work on either of the two days. On the part of the management, the Chief General Manager incharge of administration stepped into the witness box. The witness for the management specifically accepted that Saturdays and Sundays had been observed as weekly offs for a long period of time in respect of the Ballard Estate office to which the Bombay Shops and Establishments Act, 1948, applies. The management's witness also admitted that earlier the management was paying overtime wages to drivers if they were working on Saturdays and Sundays. However, the management's witness deposed that there was a change in the market situation as a result of which the presence of drivers was required on Saturdays and Sundays.

4. The Industrial Court dismissed the complaint by its order dated 28th November 2002. Before the Industrial Court, reliance was placed on the settlement dated 15th January 1962 that was entered into between the management and its Union. The Industrial Court noted that a five day week has been agreed upon.

The settlement provided that certain categories of workmen of Chinchpokli were called upon to work on the day of the weekly off for which they were given substitute holidays without additional compensation. The Court noted that there

was one other clause under which it was said that in cases of other workmen the present practice of weekly holidays as well as an additional off day would be continued. The Industrial Court also found that it had emerged from the evidence that in the past whenever drivers were called upon to work on days of weekly holidays, they were given overtime wages. However, the Court observed that the practice of paying overtime wages cannot become a right of the workmen. The Industrial Court was of the view that there was a considerable amount of justification on the part of the management having altered the existing two holidays in the case of drivers, having regard to the fact that by the very nature of the work, a driver is required to remain present on duty whenever the exigencies of work required.

5. On behalf of the Petitioner it has been submitted that the Industrial Court has overlooked both the relevant provisions of law having a bearing on the subject as well as the evidence on the record. In appreciating the submission, it would be necessary at the outset to advert to the judgment in *Tata Iron and Steel Co. Ltd. Vs. The Workmen and Others*, . The Supreme Court held that the entries in the Fourth Schedule dealing with "hours of work and rest intervals" and "leave with wage and holidays" are wide enough to cover the case of illegal strike and rest days. Similarly, it was held that Entry 8 in the Fourth Schedule to the Industrial Disputes Act, 1947 dealing with "withdrawal of customary concession or privilege or change in usage" is also wide enough to take within its fold the change of weekly holidays from Sunday to some other day of the week. The Court held that it was a plausible argument to urge that fixation of Sundays as weekly rest days is founded on usage and/or is treated as a customary privilege and any change in such weekly holidays would fall within the expression "change in usage" or "customary privilege". The Supreme Court held that while it is true that even if a holiday is changed from Sunday to some other week day, it would not affect the material gain or financial benefit available to the workmen, financial benefit cannot be the sole criterion in considering as to whether there was a breach of Section 9A. The Court then observed as follows:

In this connection it must not be ignored that due to long usage and other factors Sunday as a holiday may for conceivable reasons have assumed importance for workmen. For certain classes of workmen Sunday as a weekly rest day may also have special significance. Workmen may, for example, also generally like to have weekly rest day on a Sunday when their school going children have a holiday so that the entire family may be able to take part in recreational or other social activities. This consideration has its own importance. If that be so, then, notice for effecting such a change would be within the contemplation of Section 9A.

6. In the present case, a settlement was entered into between the management and the Union on 8th November 1982. Clause (3) of the settlement deals with working hours. Sub-clause (A) of clause 3 deals with working hours and holidays for the Thane and Chinchpokli establishments. Sub-clause (B) deals with

workmen of the Security Department. Sub-clauses (C) and (D) provided for a phased introduction of a five day week for workmen at the Thane and Chinchpokli establishments. Sub-clause (E) of Clause 3 provides that in the Fort Area Offices, the categories of workmen who are not given the benefit of a five day a week shall hereafter work "five days a week". It would appear from the settlement that at the Head Office at Ballard Estate a five day week had already been implemented by the management, save and except for certain categories such as the Security Department. The settlement provided that a five day week would be progressively introduced at Thane and Chinchpokli. However, subclause (E) of Clause 3 provided that the benefit of a five day week shall continue in so far as the Head Office is concerned, even for workmen who had not been given the benefit thus far. The settlement came into operation immediately upon being signed and was to remain in force upto 31st October 1985 and thereafter until it was terminated. Clause 15 of the settlement was to the following effect:

15. EXISTING RIGHTS:

That all existing rights, privileges and such other conditions of service that are already being enjoyed by or applicable to workmen by virtue of practices, settlements and awards and which are not specifically varied/replaced/amended by this Settlement will continue to remain in force.

On behalf of the Union, it has been submitted that the Industrial Court has failed to give due weightage to the relevant clauses of the settlement of 8th November 1982. Counsel submitted that the evidence on the record would show that since 1962 the employees of the Head Office Establishment had been allowed a five day week in which Saturdays and Sundays were observed as weekly holidays. The evidence of the management's witness clearly established that the workmen were allowed overtime wages in the event that they were required to perform work on Saturdays and Sundays with an additional weekly off. Hence, Counsel submitted that within the meaning of clause 15 of the settlement of 8th November 1982, a right or privilege of Saturdays and Sundays being the weekly offs was protected and that even thereafter this was continued in force until December 2001. Counsel submitted that the notice which was issued by the management on 4th December 2001 clearly showed that until date of the notice and hence, even after the settlement of 1982, the same pattern of weekly off on Saturdays and Sundays was continued. In other words, for a period of 40 years, the management continued the same practice which must be regarded as having fructified into a condition of service.

7. A perusal of the judgment of the Industrial Court would show that the Court has made a reference to the settlement and to the evidence which has come on the record. The foundation of the decision of the Industrial Court has, however, rested upon what the Court considers to be a justification for the action of the management having regard to the function of the workmen who were engaged as drivers. The Industrial Court was of the view that due to a change in the market scenario, the management was justified in altering the weekly off. There

is merit in the submission urged on behalf of the Petitioner that the effect of the settlement read together with the admitted position which has emerged from the evidence has not been appreciated by the Industrial Court. In a complaint under item 9 of Schedule IV, the Industrial Court is required to consider whether there is a breach of a settlement. The management may well have justification for an alteration of the position which obtains under the existing conditions of service but the modification of those conditions can only be carried out in accordance with law. The Industrial Court has allowed its view as to the justification of the management's conduct to affect the decision as to whether the action of the management is in breach of a settlement or in violation of Section 9A of the Industrial Disputes Act, 1947.

8. While there is merit in the submission of the Petitioner that the Industrial Court has misdirected itself, I am of the view that it would not be appropriate for this Court to reappreciate the evidence and to make a determination, in the exercise of its supervisory jurisdiction, as to whether a right or privilege can be regarded as having been crystalised or as to whether the observance of Saturdays and Sundays as weekly off days can be regarded as part of the conditions of service. Counsel appearing on behalf of the management has drawn the attention of the Court to the fact that there have been subsequent settlements after 8th November 1982. These settlements may have a bearing on the subject matter of the controversy, but have not been placed by either of the parties on the record of the Industrial Court or of this Court. The Industrial Court is a primary fact finding Court. That role cannot be assumed by this Court to substitute a view of the evidence which may appear proper or just. Out of four workmen who were engaged as drivers, the record shows that two have already obtained voluntary retirement. The dispute, therefore, survives basically in respect of two workmen. Similarly, the question as to whether there is a customary concession or privilege needs to be considered on the basis of all the evidence on record.

9. In these circumstances, I am of the view that the appropriate course of action would be to set aside the impugned order and to remand the proceedings back to the Industrial Court for a fresh determination. In order to facilitate this course and without expressing any conclusive opinion on the merits of the controversy, the impugned judgment dated 28th November 2002 is quashed and set aside. Complaint (ULP) 1056 of 2001 is restored to the file of the Industrial Court. In fairness, it must be recorded that both the Counsel have agreed to this course of action being adopted, but a request was made that the proceedings before the Industrial Court may be expedited. Parties shall appear before the Industrial Court on 21st August 2006 for directions and the Industrial Court shall endeavour an early disposal of the complaint by the end of January 2007. It would be open to the parties to produce additional documentary material before the Industrial Court particularly the subsequent settlements. In the event that an application is made for leading oral evidence, the Industrial Court shall consider the same on its merits. The Petition is disposed of in the aforesaid terms. No

order as to costs.