

(1995) 07 BOM CK 0067
In the Bombay High Court
Case No : W. P. No. 4234 of 1994

Voltas Ltd.

APPELLANT

Vs

V.K.D. Kochargaonkar and Another

RESPONDENT

Date of Decision : 17-07-1995

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 10(1), 2, 25B(2), 25F

Citation : (1996) 2 BomCR 34 : (1996) 1 LLJ 1173 : (1996) 1 MhLj 291

Hon'ble Judges : B.N. Srikrishna, J

Bench : Single Bench

Judgement

B.N. Srikrishna, J.—This Writ Petition under Article 226 of the Constitution of India raises a ticklish point of law pertaining to the interpretation of the provisions of the Industrial Employment (Standing Orders) Act, 1946 (hereinafter referred to as "the Act").

2. The petitioner is an establishment engaged in the manufacture of engineering goods and supply of engineering services and owns a factory at Thane employing about 700 workmen. The provisions of the Act are applicable to the industrial establishment of the petitioner.

3. The second respondent was intermittently employed as a temporary workman from the year 1982 onwards in unskilled category. His service came to be finally terminated on 23rd November, 1987. It is not in dispute that, in the period of 12 calendar months viz., prior to 23rd November, 1987, the second respondent had completed working for 240 days.

4. The second respondent moved a Complaint, Complaint (ULP) No. 47 of 1988, before the Industrial Court, Thane, alleging unfair labour practices under Items 5, 6, 9 and 10 of Schedule IV of the MRTU and PULP Act, 1971. The crux of the case made out in the Complaint was that the second respondent having completed 240 days of actual working in a span of 12 calendar months immediately prior to the date of the termination of his service, he must be

deemed to have completed one year's continuous service within the meaning of Section 25-B(2) of the Industrial Disputes Act, 1947; that the termination of his service amounted to "retrenchment" within the meaning of section 2(oo) of the Industrial Disputes Act, 1947, that, as admittedly the provisions of section 25-F were not complied with before terminating his service, the termination of his service was illegal and contrary to section 25-F and amounted to an "unfair labour practice" under Item 9 of Schedule IV of the MRTU and PULP Act. A subsidiary contention was also raised that Model Standing Order 4-C notified under the Industrial Employment (Standing Orders) Act, 1946, was applicable to the establishment of the Petitioner, despite the Petitioner having a set of Certified Standing Orders. It was contended that, under the provisions of Model Standing Order 4-C a workman was entitled to permanency on the completion of 240 days' aggregate service in an establishment and these conditions having been fulfilled by the second respondent, he was entitled to get permanency; that as the Petitioner had failed to make him permanent and thus contravened the provision of Model Standing Order and engaged in an "unfair labour practice" within the meaning of Item 9 of Schedule IV of the MRTU and PULP Act. It was also contended that the Petitioner had continued the service of the second respondent workman as a temporary workman for years together with the intention of depriving him of the status and benefits of permanency and thus indulged in an unfair labour practice within the meaning of Item 6 of Schedule IV of the said Act. Finally, it was contended that by continuing the first respondent as a temporary workman for years against his will, the Petitioner had indulged in an "unfair labour practice" under item 10 of Schedule IV of the said Act.

5. The Industrial Court recorded evidence and by the impugned Order dated 7th September, 1994, held that the provisions of Model Standing Order 4-C were applicable to the Petitioner's establishment and that by not making the second respondent permanent from the date of completion of 240 days' aggregate service, the Petitioner had engaged in an "unfair labour practice" under Item 9 of Schedule IV. It also held that the termination of the second respondent's service amounted to "retrenchment" in contravention of the provisions of section 25-F of the Industrial Disputes Act and, hence, an "unfair labour practice" within the meaning of Item 9 of Schedule IV of the MRTU and PULP Act. The Industrial Court held that no unfair labour practices under items 5 and 6 of Schedule IV of the said Act were found to have been engaged in by the Petitioner. Consistent with these findings, the Industrial Court directed reinstatement of the second respondent in service with full back wages and benefits. It also declared him to be a permanent employee of the Petitioner from the date on which he had completed uninterrupted service of 240 days in the 12 months period to his termination on 23rd November, 1987. Being aggrieved, the Petitioner is before this Court by this Writ Petition.

6. The first question seriously canvassed before this Court by Shri Naik, learned Counsel for the Writ Petitioner, is that the finding of the Industrial Court that Model Standing Order 4-C, per se, applies to the establishment of the Petitioner

is erroneous. Though Shri Naik did not dispute that, in the 12 months immediately prior to 23rd November, 1987 - the date of termination of the second respondent's service - the second respondent had completed aggregate service of 240 days, he contends that the termination of the second respondent's service did not amount to "retrenchment" within the meaning of section 2(oo) of the Industrial Disputes Act, 1947 as it was covered by the newly inserted exception clause (bb) in section 2(oo). Shri Naik contends that, at any rate, on 19th March, 1991, the Second respondent had been offered alternative employment as an unskilled workman in its canteen and that offer was spurned by him for no good reason and that, in any event, pursuant to an order passed by this Court at the time of admission on October 12, 1994, the second respondent has been taken in service as a temporary employee with effect from 14th October, 1994 and continued on the Petitioner's service as such. In these circumstances, in the submission of Shri Naik, there is no justification for granting any further relief by way of back wages to the Second Respondent.

7. In order to decide the first question raised by Shri Naik, it would be necessary to consider the provisions of the Act in some detail. The Act was enacted in the year 1946 for the avowed purpose declared in the preamble : "to provide for defining with sufficient precision certain conditions of employment in industrial establishments in the State of Bombay". The Act, a Central Act, has been amended on several occasions by the State Legislature. We are concerned here with the Act, as it applies to the State of Maharashtra. The scheme of the Act was considered by the Division Bench of our High Court in *May and Baker Ltd. v. Shri Kishore Jaikishandas Icchaporia & Ors.* 1991 II CLR 176. After having noticed its relevant provisions and scheme, the Division Bench observed as under :-

"6. The Scheme of the Act, therefore, is that, by reason of sub-section (1) of Section 2-A, the Model Standing Orders apply to every industrial establishment to which the Act is made applicable. The proviso to sub-section (1) is on the statute book only to protect industrial establishment whose Standing Orders have been certified and have come into operation before the coming into force of the State's Amending Act (Industrial Employment (Standing Orders) (Bombay Amendment) Act, 1957). To those industrial establishments the Model standing Orders do not become applicable. The provisions of sub-section (2) of Section 2-A apply only in relation to such Standing Orders as have been provided for in the proviso and, by reason of sub-section (2), Model Standing Orders made in respect of additional matters included in the Schedule after the coming into force of the aforesaid amendment Act are applicable to the workmen of industrial establishments to which the proviso applies unless the Model Standing Orders are, in the opinion of the Certified Officer, less advantageous to the workmen than the Certified Standing Orders applicable to them. We are not concerned here, admittedly, with industrial establishments that fall under the proviso. For our purpose only sub-section (1) of section 2-A is relevant. u/s 3 amendments to the Model Standing Orders have to be proposed for adoption and, after following

the procedures for certification and appeal under sections 5 and 6, come into operation u/s 7. These Certified Standing Orders are what are registered u/s 8 and posted at a prominent place in the industrial establishment u/s 9".

"7. It is, in our view clear from the proviso 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".

As held by the Division Bench in *May and Backer*, (supra) Model Standing Orders are applicable only until such time as amendments thereto have been proposed and certified. Once amendments have been certified, the Certified Standing Orders would continue to operate and an amendment to the Model Standing Orders, per se, does not have effect, until and unless modification to the Certified Standing Orders to bring them into line with amended Model Standing Orders is proposed and certified.

8. Though Shri Pendse, learned Advocate for the second respondent, vehemently and strenuously urged that the amendment made in the Model Standing Orders would automatically apply to an industrial establishment, even if it has a set of Certified Standing Orders, he had to ultimately concede even there is no section in the Act which expressly provides so. Relying on the provisions of Section 2-A of the Act, he contended that the provisions of Section 2-A must be read with considerations of public policy and so read, it indicates that all amendments made in the Model Standing Orders - at any rate, amendment made with regard to the additional matters pertaining to "probationers", "badlis", "temporary" or "casual workmen" - would automatically apply to an industrial establishment, even if it was governed by Certified Standing orders. It is difficult to accept this contention for more than one reason.

9. Section 2-A reads :

"2-A. Application of model standing orders to every industrial establishment. -
(1) Where this Act applies to an industrial establishment, the model standing orders for very 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 Officers less advantageous to them than the 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".

A bare reading of the section makes it clear that the proviso to sub-section (1) applies only to a special category, viz., an industrial establishment which has Standing Orders finally certified before the date of coming into force of the Industrial Employment (Standing Orders) (Bombay Amendment) Act, 1957 (hereinafter, for convenience, referred to as "the 1957 amendment"). The effect of the main body of sub-section (1) is to make the Model Standing Orders applicable to all industrial establishments from the date on which the Model Standing Orders are brought into force by a declaration of the State Government. The proviso, however, exempts industrial establishments which had certified Standing Orders prior to the coming into force of the 1957 amending Act from automatic application of Model Standing Orders. Sub-section (2) of section 1-A of the Act (which was amended by the Industrial Employment (Standing Orders) (Maharashtra Amendment) Act, 1974), however, makes an exception to the exception and provides that, notwithstanding anything contained in the proviso to sub-section (1) of section 2-A, Model Standing Orders made in respect of additional matters added to the Schedule after the coming into force of the 1957 Amending Act, such as additional matters relating to probationers or badlis or temporary or casual workmen, shall also apply to the workmen of the industrial establishment covered by the proviso to sub-section (1). That sub-section (2) operates only in the limited field covered by the proviso to sub-section (1) of section 2-A is clear from a bare perusal of the sub-section. Doubts, if any, are now cleared by the pronouncement of the Division Bench in *May and Baker*, (supra). In *May and Baker*, the Division Bench has pointed out that the non obstante provision made in sub-section (2) was intended to apply to a special category of industrial establishments provided by the proviso to sub-section (1) of section 2-A of the Act.

10. Shri Pendse laid great emphasis on the word "also" used in sub-section (2) of section 2-A and contended that this would indicate that the Model Standing Order, with reference to the special subject (like probationers, badlis, temporary or casual workmen) apply not only to all establishments whose Standing Orders are certified after 1957 Amendment, but "also" to establishments whose Standing Orders are certified prior to the coming into force of the said amending Act. It is not possible to accept this contention, as, in my view, the collocation of words in sub-section (2) of section 2-A indicates an intention to the contrary. The word "also" has been used in the said sub-section only for the purpose of indicating that in the case of some industrial establishments, in addition to the

Certified Standing Orders, the amended Model Standing Orders on special subject like probationers, badlis etc., would also apply to the workmen of such establishments. In my view, considering the language used by the Legislature and the interpretation given to section 2-A, including sub-section (2) thereof, by the Division Bench in May and Baker, (supra), it is not possible to accept the contention that by implication, all Model Standing Order made in respect of additional matters included in the Schedule of the Act after the coming into force of the 1957 amending Act would automatically apply to the workmen of all industrial establishments, even if their Standing Orders had been certified after the coming into force of the 1957 amending Act.

11. A Division Bench of the Karnataka High Court had occasion to consider this controversy in *M.C. Raju Vs. Executive Director*, . This was a case of an establishment having Certified Standing Orders, which provided 55 years as the age of superannuation. In 1982, the Model Standing Orders were amended by the State Government by insertion of clause 15-A providing 58 years as the age of superannuation of a workman. A workman of the employer's establishment was retired on completion of 55 years, which was the age of superannuation prescribed in the Certified Standing Orders. The Workman claimed that, by reason of the addition made in the Model Standing Orders by clause 15-A, which applied automatically by overriding the Certified Standing Orders, his age of superannuation was 58 years and that he had been wrongfully retired. A learned Single Judge of the Karnataka High Court has dismissed the Writ Petition. In appeal, the Division Bench was confronted with the question : whether in the case of every establishment, any amendment made to the Model Standing Orders would automatically override the Certified Standing Orders? The Division Bench relied on Section 12-A and section 10 of the Act to hold to the contrary. We are not concerned with the reasoning of the Division Bench, which proceeds on section 12-A of the Act as sub-section (2) of Section 12-A in terms says that nothing contained in sub-section (1) shall apply to an industrial establishment in respect of which the Government of the State of Maharashtra may be the Appropriate Government. Consequently, the provisions of section 12-A(1) would not apply to any industrial establishment within the State of Maharashtra and, therefore, we may steer clear of the said provision. Referring to section 10 of the Act, the Division Bench observed that there was indication in the scheme of section 10 contrary to the proposition canvassed. The Division Bench pointed out that, by virtue of section 10, Standing Orders which are finally certified under the Act, are not liable to modification for a period of 6 months from the date of the finally Certified Standing Orders coming into operation. Even thereafter, they could only be replaced by following the procedure prescribed in the Act. Section 10(1) precludes amendment of the existing Certified Standing Orders within the period of 6 months from the date of final certification, except on agreement between the employer and the workmen. Therefore, it precludes Standing Orders from being modified to bring them in conformity with the subsequently amended Model Standing Orders for the statutory period of 6 months from the date on

which the Certified Standing Orders came into operation. From this, the Division Bench deduced,

"..... Thus, it becomes clear that it was not the intention of the legislature that the Model Standing Orders should become effective and come into operation immediately as and when they are amended. If the intention of the legislature was that they should be deemed to come into operation, as soon as the amendment came into operation, there would not have been a bar as contemplated in sub-section (1) of section 10. This is an additional reason which suggests that the legislature did not contemplate that the amendment to the Model Standing Orders should become operative as soon as the amendment comes into operation. We have, therefore, no hesitation in taking the view that as and when the Model Standing Orders are amended, the only way to give effect to the amendment is by resorting to the procedure of amendment contemplated by section 10 of the Act and that until the existing Certified Standing Orders are suitably amended, the amended Model Standing Orders cannot be deemed to be applicable to the concerned establishment".

I am in respectful agreement with the observations of the Division Bench of the Karnataka High Court, which gives an additional reason, apart from the general scheme of the Act, for taking the view that every amendment to the Model Standing Orders does not, per se, become applicable to an industrial establishment, which has Certified Standing Orders.

12. Though Shri Pendse emphasised the special nature of the amendment made in the Schedule after the coming into force of the 1957 amending Act and the special subject on which the Model Standing Orders were framed (such as probationers, badlis, temporary or casual workmen), in the absence of a clear-cut provision in the Act showing the legislative intent that additional Standing Orders made on this subject would automatically apply to all establishments, even if they had applicable Certified Standing Orders, it is not possible to accept this contention. For reasons pointed out by the Division Bench of our High Court in *May and Backer*, (supra) and the Division Bench of the Karnataka High Court in *M. C. Raju*, (supra), the provisions of Model Standing Order 4-C would not have automatic application to the establishment of the petitioner. The only way in which the workmen could get the benefit of the said provision would be by taking steps for the certification of amendment as contemplated under the Act. Until then the workmen of the petitioner-establishment would continue to be governed by their Certified Standing Orders. The Industrial Court was, therefore, in error in holding that Model Standing Order 4-C automatically applied to the establishment of the Petitioner and holding that the Second Respondent must be deemed to have become a permanent workman by operation of the said Model Standing Order.

13. Turning next to the question as to whether the termination of service of the Second Respondent amounts to "retrenchment" contrary to the provisions of section 25-F of the Industrial Disputes Act, Shri Naik fairly conceded, after taking

instructions, that he did not contest the finding of the Industrial Court that the termination of service of the second respondent-workman with effect from 23rd November, 1987 - albeit on the footing that he was a temporary workman - was contrary to the provisions of section 25-F, as the necessary notice or notice wages and compensation had not been paid to the second respondent prior to or contemporaneously with the termination of service. In view of this stand taken by the Petitioner, it is unnecessary for me to scrutinise the correctness of the said finding.

14. The issue that remains is the issue of reliefs that could be given to the second respondent. The finding of the Industrial Court that the second respondent was a permanent workman is erroneous and needs to be set aside. The finding of the Industrial Court that the second respondent was removed from service contrary to the provisions of section 25-F would have to be upheld even on the footing that the second respondent was a temporary workman. The second respondent would, therefore, be entitled to reinstatement in service as a temporary workman in Unskilled Category. Since he is already back in service as a temporary mazdoor with effect from 14th October, 1994, the question of reinstatement need not detain us.

15. On the question of back wages, the evidence on record shows that, on 12th/13th March, 1991, the Petitioner had conveyed to Balgopal Nair, father of the second respondent, that there was immediate requirement of Canteen Vendor and, if the petitioner was interested, he should immediately contact the officers of the petitioner for being taken up in service as a temporary Canteen Vendor. This offer was later on followed by the Petitioner's letter dated 19th March, 1991 (which is at pages 165 and 166 of the Petition). There is also another letter dated 1st April, 1991 addressed to the Advocate for the Petitioner, in which it is put on record that the Petitioner had personally met the Assistant Personnel Manager, Shiwajirao Y. Patil, on 28th March, 1991, was once again offered temporary employment as Canteen Vendor effective 1st April, 1991, in view of the fact that he had on earlier occasions worked as Canteen Vendor in the year 1984 as and when required. The letter further places on record that, despite being offered job as canteen Vendor in temporary capacity, on unskilled nature, the second respondent had refused to accept it, for reason best known to himself and would, therefore, be responsible for the consequences thereof. (The said letter is at pages 167 and 168 of the Petition.) In his evidence before the Industrial Court recorded on 15th January, 1992, the second respondent admitted under cross-examination that a temporary job had been offered to him in the Canteen. In these circumstances, I am more than satisfied that, with effect from 1st April, 1991, the Petitioner had been offered a job of unskilled nature in the Canteen as a Canteen Vendor, which work he had done in the past and he had, without good reason, refused to accept the same. In these circumstances, I see no reason why he should be entitled to back wages for any period subsequent to 1st April, 1991, since the employment was in an equivalent category and one with which the second respondent was familiar, having worked

in such capacity earlier.

16. That, finally, leaves the question as to the liability of the Petitioner to pay back wages from 23rd November, 1987 to 31st March, 1991. Shri Naik fairly conceded that he does not contest the position that, for the said period, the second respondent would be entitled to back wages of a temporary unskilled Mazdoor and undertook to the Court that the said back wages would be computed and paid to the second respondent within such time as this Court may direct.

17. In the result, the Petition is partly made absolute. The finding and declaration of the Industrial Court in the impugned Order dated 7th September, 1994, to the effect that Model Standing Order 4-C applies to the industrial establishment of the Petitioner and the finding that the second respondent must be deemed to be a permanent employee of the Petitioner-Company from the date on which he completed 240 days" uninterrupted service in aggregate in the 12 months prior to his termination on 23rd November, 1987, are hereby quashed and set aside. The Petitioner is directed to continue the second respondent in service on the basis that he is a temporary unskilled workman until such time his status is changed in accordance with law. He shall, however, be entitled to continuity of service as a temporary unskilled workmen. The Petitioner shall, within a period of 6 weeks from today, compute the back wages payable to the second respondent for the period 23rd November, 1987 to 31st March, 1991, on the basis that he was a temporary unskilled workman and pay the said amount to him. The Petitioner shall, ensure that while making calculations increments, if any, which the second respondent might have earned for continuous service between 1987 to 1991, are included in the calculation of back wages.

17-A. Rule is, accordingly, made partly absolute. There shall, however, be no order as to costs.

18. Order accordingly.