

(2005) 03 BOM CK 0078

In the Bombay High Court

Case No : Writ Petition No. 1165 of 2002

Welcomgroup Searock

APPELLANT

Vs

Searock Hotel Employees" Union and Another

RESPONDENT

Date of Decision : 24-03-2005

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(12)
Factories Act, 1948 — Section 2
Industrial Disputes Act, 1947 — Section 10, 25F, 25G, 25H, 25K
Mines Act, 1952 — Section 2(1)
Plantations Labour Act, 1951 — Section 2

Citation : (2005) 4 ALLMR 74 : (2006) 2 BomCR 899 : (2005) 106 FLR 692 :
(2005) 3 LLJ 483 : (2005) 3 MhLj 191

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

Bench : Single Bench

Advocate : V.P. Vaidya and S.P. Dhulapkar, for the Appellant; N.M. Ganguli, for the Respondent

Final Decision : Allowed

Judgement

D.Y. Chandrachud, J.—The present Petition is directed against an award of the Industrial Tribunal dated 15th February, 2002 on a reference to adjudication u/s 10 of the Industrial Disputes Act, 1947. The Petitioner conducts and manages the Searock Hotel at Bandra, Mumbai. On 5th March, 1991, 12 workmen who were engaged as liftmen for the purposes of the hotel were retrenched after due compliance with the provisions of Section 25-F of the Industrial Disputes Act, 1947. The union representing the workmen sought a reference to adjudication which was made by the appropriate government. The contention of the union in the statement of claim was to the effect that the management had made a false plea that the company had installed automatic lifts and that consequently, the services of the workmen concerned who were operating the lifts were not necessary. In the statement of claim it was also alleged that there was a breach of the provisions inter alia of Sections 25-G, H and N of the Industrial Disputes

Act, 1947. The management filed its written statement and its defence was that the services of the 12 liftmen have become surplus upon the installation of automatic self operating lifts at the premises of the hotel. The management submitted that it had duly complied with the provisions of the Industrial Disputes Act, 1947 in so far as they are applicable. In so far as the provisions of Section 25-N were concerned, the case of the management was that the provision was not attracted.

2. Evidence was adduced before the Industrial Tribunal and by its award dated 15th February, 2002 the Industrial Tribunal Court held that : (i) There was no breach of the provisions of Section 25F of the Industrial Disputes Act, 1947; (ii) That the principles of seniority have been duly followed and that consequently there was no breach of Section 25-G and (iii) That no new persons have been appointed in place of the concerned workmen and hence, there was no breach of Section 25-H. Having said this, the Industrial Tribunal came to the conclusion that the provisions of Chapter V-B of the Act were attracted in the case of the Petitioner and since, more than 100 persons were employed and no permission had been sought or received from the appropriate government, the retrenchment had to be regarded as invalid. On merits, the Industrial Tribunal held that the retrenchment was not justified, on the ground that the hotel had automatic lifts even when the workmen had been engaged; that since the earlier lifts were replaced by self operating automatic lifts in phases, the management should have retrenched the workmen in phases and that even after the replacement work was carried out in October-November 1990, the workmen were retrenched only on 5th March, 1991.

3. The first issue which requires consideration is as to whether the Industrial Tribunal was justified in coming to the conclusion that the provisions of Chapter V-B of the Industrial Disputes Act, 1947 were attracted and that the permission of the appropriate government was necessary before retrenching the workmen. Section 25-K lays down that the provisions of Chapter V-B shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than 100 workmen were employed on an average on a working day for the preceding 12 months. The expression "industrial establishment" is defined in clause (a) of Section 25-L thus :

"25L(a) "industrial establishment" means

(i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);

(ii) a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952); or

(iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951)."

4. For the purposes of the present proceedings what is material is the definition in sub clause (i) of clause (a) under which a factory as defined in clause (m) of Section 2 of the Factories Act, 1948 falls within the purview of the definition of the expression "industrial establishment". Section 2(m) of the Factories Act defines a factory as follows :

"2(m) "factory" means any premises including the precincts thereof

(i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on; or

(ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on but does not include a mine subject to the operation of [the Mines Act, 1952], [a mobile unit belonging to the armed forces of the Union, a railway running shed or a hotel, restaurant or eating place]."

The explanations are not material for the present case. The definition of the expression "factory" in Section 2(m) specifically excludes a hotel. Thus, a hotel is not a factory u/s 2(m) of the Factories Act, 1948 and is, therefore, not an industrial establishment as defined in Section 25-L of the Industrial Disputes Act, 1947 for the purposes of Chapter V-B.

5. Counsel appearing on behalf of the workmen relies upon the decisions of this Court in *Poona Industrial Hotel Limited v. I.C. Sarin* 1980 L I.C. 100 and in *Cricket Club of India and Others Vs. Employees' State Insurance Corporation and Others*, , as well as upon a decision of the Supreme Court in *G.L. Hotels Limited and Others Vs. T.C. Sarin and Another*, . In all these cases, what was in issue was the applicability of the Employees' State Insurance Act, 1948 to the establishment of a hotel. The Employees' State Insurance Act, 1948, it may be noted, defines the expression "factory" in Section 2(12) in the following terms:

""factory" means any premises including the precincts thereof whereon twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on but does not include a mine subject to the operation of the Mines Act, 1952 or a railway running shed."

6. Ex-facie, it is apparent from the aforesaid definition that while it does not include a mine or railway running shed, there is no exclusion of a hotel, restaurant or eating place as in Section 2(m) of the Factories Act, 1948. Hence, a hotel is to be treated as a factory for the purposes of the Employees' State Insurance Act, 1948. In its application to Chapter V-B, a factory is defined with reference to the definition in Section 2(m) of the Factories Act, 1948 which specifically excludes the establishment of an hotel. In that view of the matter, the

Industrial Court was patently in error in holding that the provisions of Chapter V-B of the Industrial Disputes Act, 1947 were attracted.

7. In the decision in Poona Industrial Hotel (*supra*), the Court held that preparing of food involves a manufacturing process as defined and that it was enough if 20 employees were working in premises in a part of which a manufacturing process is carried on. Similarly, in Cricket Club of India (*supra*), the Division Bench held that the club in question satisfied the definition of being a factory u/s 2(12) of the E.S.I. Act, 1948. In G.L.Hotels Ltd. (*supra*), the question which arose before the Supreme Court was again under the E.S.I. Act, 1948 and the contention was that merely because a manufacturing process was carried on in the kitchen, the rest of the premises of the hotel could not be treated as a factory u/s 1(4). This submission was repelled. The basic point is that the definition of industrial establishment in Section 25-L of the Industrial Disputes Act, 1947 provides a statutory dictionary limited in its application to Chapter V-B. The definition incorporates the meaning ascribed to the expression "factory" in Section 2(m) of the Factories Act, 1948. Since Section 2(m) specifically excludes a hotel, there can be no gainsaying the fact that a hotel does not constitute a factory u/s 2(m) of the Factories Act, 1948 and therefore, is not an industrial establishment for the purposes of Chapter V-B of the Industrial Disputes Act, 1947.

8. In so far as the merits of the case are concerned, it would be material to make a reference to the evidence which was adduced on behalf of the management in justification of the retrenchment. The first witness who deposed in support of the management was the Personnel Manager and he stated that there were 9 lifts in the establishment and 12 liftmen had been engaged. The liftmen were supposed to operate the lifts which included opening the lift door, receiving guests in the lift and leaving guests on the required floors. The services of the liftmen, the witness deposed, had become redundant when high speed automatic elevators were installed. All the lifts, it was stated, had become automated by October-November 1990. The process of renovation was stated to have begun in 1988. The witness explained what he meant by a high speed lift with a self operating mechanism thus :

"Self operating mechanism would mean that the lift will pick up signals from any floor and from any directions of the hotel of a very high speed. It can also pick up signals from various floors at the same time and they will be registered by the lift. It will automatically go on the floor, open its door, and close the door after its stipulated time. The lift moves at a high speed, the whole process does not require any lift operator."

The witness in the course of his cross-examination stated that the work was available to these liftmen from the date of their appointment till their retrenchment, but he then also volunteered that the work was available till the lifts became automatic. The witness stated that though initially all lifts were automatic, they were not high speed self operating lifts. The second witness who deposed in support of the management was the Chief Engineer. He too stated

that the work of automation began some time in 1989 and was completed in 1990.

9. On this evidence, the Industrial Court, has in my view, clearly transgressed the limits on its jurisdiction in arriving at the conclusion which it did. The management came before the Industrial Court expressly with the case that upon the installation of high speed self operating elevators, it was no longer necessary to have liftmen stationed in each lift for opening the doors, receiving the guests and dropping them to their floors of destination. The decision, in my view, on whether automated high speed self operating elevators should be installed was for the management to take. The management is responsible for conducting the hotel. The facilities which should be maintained in a hotel in order to make it competitive is a matter which is one of managerial discretion. The Industrial Courts have no role or function to second guess a considered managerial decision. The Management of a hotel is best equipped to determine what is necessary for the establishment to survive the competition. In a service establishment in the hotel industry a management must necessarily upgrade its facilities continuously to keep up with competing establishments. The Industrial Court could not really have transgressed into this area. The Industrial Court held that though the lifts were replaced in October-November 1990, retrenchment took place on 5th March, 1991. This could, however, not weigh against the management. The Industrial Court observed that the liftmen are required in each shift to operate the lifts. This inference is not based on any evidence on the record. The Industrial Court then found fault with the management for not retrenching the workmen phasewise when the work of renovating the lifts was carried out phasewise. Here again the approach of the Industrial Court was completely flawed. The work of replacing the lifts commenced in 1989 and continued until 1990. Undoubtedly it would have been open to the management to retrench the work force of liftmen proportionately to the lifts which were being phased out. The management, however, chose to wait until the entire project was complete and carried out retrenchment in March 1991. This action, in my view, is a matter of managerial discretion. There is no allegation of victimization and indeed no evidence to that effect. That being the position, the Industrial Court has manifestly erred in coming to the conclusion that there was no justification for carrying out retrenchment. The Industrial Court has transgressed the limits on its jurisdiction and while doing so it has ignored the material evidence on the record. The interference of this Court is, in the circumstances, warranted.

10. Before parting with the matter, it would be necessary to record that one of the submissions that was urged before the Court on behalf of the workmen was that the provisions of Section 9-A of the Industrial Disputes Act, 1947 were not complied with. I am not inclined to accept the submission for more than one reason. For one thing, a breach of Section 9-A was not set up in the statement of claim before the Industrial Court. No such submission was urged before the Industrial Court. That apart, there is merit in the submission of the Petitioner

that Item 10 of Schedule IV of the Industrial Disputes Act, 1947 deals with rationalization, standardization or improvement of plant or technique which is likely to lead to retrenchment of workmen. In the present case, the replacement of elevators was complete in November 1990 without any protest on behalf of the workmen; atleast none appears on the record. At the stage when retrenchment was effected on 5th March, 1991, there was no question of the applicability of Section 9-A.

11. In the circumstances, the award of the Industrial Tribunal is unsustainable and the Petition has to be allowed. The award of the Industrial Tribunal dated 15th February, 2002 is accordingly quashed and set aside. Reference (IT) 18 of 1992 shall accordingly stand dismissed. In view of the disposal of the Petition, Notice of Motion 571 of 2003 does not survive and is accordingly disposed of. In the circumstances of the case, there shall be no order as to costs.