(1999) 04 BOM CK 0082

Bombay High Court

Case No: Writ Petition No. 88 of 1997

Mukund Staff and Officers Association		APPELLANT
	Vs	
Mukund Ltd. and another		RESPONDENT

Date of Decision: April 13, 1999

Acts Referred:

- Factories Act, 1947 - Section 52
- Industrial Disputes Act, 1947 - Section 9
- Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 - Section 28

Citation: (1999) 3 ALLMR 174 : (1999) 3 BomCR 779 : (1999) 2 BOMLR 597 : (1999) 82 FLR 648 : (1999) 2 LLJ 500 : (1999) 2 MhLj 919

Hon'ble Judges: N.J. Pandya, J

Bench: Single Bench

Advocate: J.P. Cama, instructed by Anil Kumar, for the Appellant; P.K. Rele and V.N. Tayade, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

N.J. Pandya, J.
The present petition arises out of the judgment given in Complaint (U.L.P.) No. 139 of 1995. The complaint was initiated by the Union alleging Unfair Labour Practices Under Item 9 of the Schedule IV of M.R.T.U. & P.U.L.P. Act, 1971. It was the say of the Union that all throughout the respondent-Company has given Sunday as a weekly off. The Company used to call some workmen on Sunday giving compensatory holiday on any other week-day and this was being done in consultation with the Union. The Company has now decided to virtually make it a common practice leading to staggering off the weekly holiday starting with the work of supervisors, who were at the relevant time 26 in number. This the Company has been insisting

without entering into a dialogue with the Union, and the workmen having decided not to give up their weekly off, the insistence on the part of the Company that the workmen should come on Sunday, viz. weekly off, is being a complaint of as an unfair labour practice.

2. The respondent Company has been saying that the workmen were being called on Sunday and were being given compensatory holiday and were also paid extra amount for having work done on Sunday, and it being totally exigency based, there is no question of this action of the Company amounting to a change in service conditions leading to the unfair labour practice as alleged.

3. Virtually, there is little dispute between the parties. The Sunday being a weekly off is accepted. The workmen having worked on Sundays i.e. weekly off, is also accepted by both, the Union and the Company. The Union however maintains that this was done with its consent or in consultation with the Union and it having decided not to either give consent or take up a stand of not working on weekly off, the insistence on the part of the Company, in this regard, would amount to a change and, therefore, unfair labour practice. The Company, on the other hand, says that there is no scope of any consent or dialogue and there has never been any consent or dialogue with the Union because calling the workmen on Sunday depends upon the requirement of a given section of the Company manufacturing steels, and hence on account of exigencies of the work, the Company is forced to call workmen on Sundays. It does not amount to any change in service conditions requiring any notice u/s 9A of the Industrial Disputes Act, 1947.

4. The respondent-Company is a steel manufacturing Company, and in its unit of Mill and Scrap Melting Section, on account of disparity of capacity in respective sections, either of the two has to work for a long period. The Scrap Melting Unit supplies the material for being processed in the rolling mill. Whenever there is any extra need of rolling mill to cope up with the same, the melting unit has to put in extra work, and that is how, that happens to he the need for it to run the unit on Sundays. This will happen vice versa in relation to the need of scrap melting unit as against the need of milling unit.

5. This has been elaborated in paragraph 7, internal page 6 of the affidavit of Mr. Krishnan Nair sworn on 19th February, 1997. On page 7 of that affidavit, at the end of that paragraph 7, the deponent reiterates that calling on Sundays on the aforesaid basis has been a consisting practice prevailing in the Company for many years and there has been no change in the conditions of service of the employees concerned.

6 Initially, when the complaint was filed on 7th February, 1995, there were 26 supervisors affected as a result of the aforesaid action of the Company. Later on, some of them have either left the services of the Company or transferred from the Company, as set out in paragraph 4 of the said affidavit of Mr. Krishnan Nair,

internal page 2. In paragraph 5 of the said affidavit, internal page 3, the Company says that, as on the date of the said affidavit, the number of supervisors has gone upto 31 in K.P. III Section. This information is annexed to at Exhibit-I setting out details pertaining to 17 different Supervisors who could have either enjoyed Sundays as weekly off or could not have enjoyed Sundays as weekly off during different months as set out therein.

7. The controversy is, therefore, very narrow. Admittedly, the Sunday is a weekly off. Admittedly, the supervisors are called to work on Sundays. According to the Company, this is exigency based and, according to the Union, this is high handedness on the part of the Company as the Company wants to assert its right to call the workers on Sundays without either giving notice of change or without obtaining consent of the Union or even that of the concerned workers.

8. Going by this fact, if one look at the situation, one thing that strikes is that in large steel factory like the respondent-Company, if, on account of disparity of capacity of two different sections of a given unit, it becomes necessary for the Company to call Supervisors on duty on Sunday, the disparity of capacity being known to the Company the aforesaid requirement would not arise all of a sudden.

9. The production of steel will certainly depend upon the eventual off take of the finished products. As per the Company, this is largely based upon the order which it receives. When there is higher demand, on account of disparity of two sections of a given unit, the aforesaid requirement of calling Supervisors on Sundays would arise. This can well be anticipated.

10. Another perplexing aspect is that, going by the nomenclature, if Supervisors are called, obviously, the persons, over whom they are to supervise viz. workmen, actually working in either of these two sections, would also be called. This being a factory u/s 52 of the Factories Act, 1947 read with section 2(f) thereof, the Sunday is admittedly a weekly off and that is a statutory provision. As this aspect viz. the other workmen working on Sundays has not been gone into either before the trial Court or this Court, I would leave it aside.

11. However, the fact remains that if, to actually run these two sections, the Supervisors are required to be called, it necessarily follows that the workmen too would be called and if in respect of the workmen when there is no grievance made, and if calling upon the workmen is satisfactorily programmed and arranged, the requirement, in that regard, was definitely envisaged by the Company. Whether this has been done or not and in absence of any material because there is no controversy, even if the insistence is only on the Supervisors being called, obviously, the word exigency used by the Company cannot help it. It is not possible to believe that the need of these two different units for meeting the production target on account of higher demand cannot be visualised sufficiently in advance to enable the Company to either enter into the consultation or dialogue with the Union or to

obtain the consent of the respective workmen.

12. All throughout, an attempt on the part of the Company has been to make out a case of exigency only. The learned Counsel appearing for the petitioner Union has conceded that if by this it is ment to be an emergency or exigency, the Union cannot be heard to say that in this situation also without consulting the Union or without the consent of the workmen, they cannot be called on duty even on Sundays. The Union, therefore, expects that in case of genuine emergency or real exigency, the Company is within its right and the workmen should respond positively. To insist that supervisors will not work on Sundays even in such situation would amount to insisting on an impossibility. Save and except the aforesaid impossibility, if the requirement of workmen is to work on Sunday, that can reasonably be anticipated or visualised. Shelter taken behind the word exigency should not be accepted as an answer justifying the action of the Company.

13. The learned trial Judge in his otherwise elaborate judgment running into 59 typewritten pages has held on the complaint of the Union that the workmen have been called on Sundays and that if it does amount to change of the weekly off, it is a temporary change.

14. The use of the said phrase ''temporary change'' was subject matter of the considerable debate. From the perspective of the Union, this temporary change is a concept totally new to the provisions of the Industrial Disputes Act, 1947 envisaged by the learned trial Judge. As against that, the Company tried to make out a case of temporary change in respect of each of the workman who has been called on Sundays while retaining the weekly off on Sunday in respect of the entire remaining work force. The change is temporary because only on those Sundays when the supervisors are called, there is a change but for that they also like other workmen of the Company continued to hold Sunday as a weekly off. In this manner, it is a temporary change.

15. If there is a change, as envisaged by the said Act, 1947, either temporary or otherwise, provisions must strictly be construed against the Company. If this is not done, it will leave room open to an unscrupulous Management to exploit the situation. If the word "temporary" is to be introduced, as an aspect to be considered, in relation to a change including a change of weekly off, it will introduce an element of uncertainty totally to the disadvantage of workmen. In other words, it should be exigent circumstance alone and in that sense only it could be a temporary change. However, as admitted by the Company, this will virtually be a regular feature in respect of one supervisor or the other all throughout but its incidence is temporary in relation to a given supervisor as he may have to work on some of the Sundays in a calendar year, out of total 52 Sundays. In effect, therefore, in the supervisory cadre, the change of weekly off would be a permanent feature throughout the year because, no doubt, what the Company has chosen to describe is an exigency arising out of disparity of capacity being known and requirement of calling the persons on

Sunday being directly linked up with the demand of product, it is not possible to accept the Company''s defence that it is totally a need based leaving no time either to rush to the Union or to take the consent of the workmen.

16. The trial Court initially had circulars to deal with as issued by the Company calling upon different supervisors to attend on Sundays. Later on, this was changed as reflected from the entries in the log book which was indeed found to be very strange even by the trial Court.

17. The trial Court has categorically found that the workers were being called on Sundays and the Union was co-operating with the Company and, therefore, according to the trial Court, there was a customary practice in the Company to call the workers on Sundays for work. On behalf of the petitioner-Union, it has been urged that even assuming that there was no murmur of protest so far, if it is a change not in compliance with the statutory provision, the Company would not get any right whatsoever to plead the said practice. It is true that the statute would prevail over such claim. However, as stated above, the learned trial Judge has gone only on the point of it being a temporary change and nothing else. The learned trial Judge was also impressed by the fact that out of 835 staff and officers, only 26 supervisors were called to work on Sundays which number, later on, has gone upto 31, as noted above.

18. In the tabular statement accompanying the said affidavit of Mr. Nair, the position of different supervisors who have worked on different Sundays in a calender year, is set out explaining the situation which was urged before trial Court.

19. On behalf of the Company, in support of the order of the trial Court, it was urged that when there is no change in the weekly off, section 9-A is certainly not attracted. However, this submission on the face of it is in vein. The respondent-Company also urged that only few of the workers have been called on Sunday without changing their weekly off permanently and giving the compensatory holiday in lieu of Sundays for which they have worked and, therefore, it would not amount to a change, which is also on the basis of the subsisting practice of calling the workmen on Sunday to work. As discussed above, this submission of the Company cannot be accepted.

20. It was urged on behalf of the Company that the decision of the trial Court is rendered on 20th October, 1995, while petition has been filed on 16th January, 1997 and, on account of delay, the petition should fail. However, it having been entertained, rule having been issued and argued on merits, I do not see any substance in this contention.

21. Even an attempt was made to urge that the complaint being in respect of the supervisors and as they are not workmen, the complaint is not maintainable. All throughout in the judgment of the trial Court, there is no mention of this controversy at all . No doubt, the Company has raised this plea and even in written argument, this aspect has been dealt with but some how or the other, neither

evidence is led by either of the parties nor is there any issue raised before the trial Court in this regard. Though, no doubt, the Company''s solitary witness Mr. Dalvi, at page 26, enumerates duties of the supervisors which includes supervision on the workmen, to solve problems of the workmen, to deviate the situations from standards and to coercive discipline and distribution of work, in the absence of any discussion in the trial Court Order, in my opinion, this is to be taken as the point given up and not dealt with by the trial Court. As the Company has not filed any petition, I would not enter into this aspect any further.

22. Regarding delay, there was another aspect of the matter, urged on behalf of the Company, for which there are two letters produced at pages 112 and 113. After the decision of the trial Court, when some of the supervisors refused to attend the work on Sundays, the Company has initiated departmental proceedings against them. Letters at pages 112 and 113 show that the understanding reached between the Union and the Company was to the effect that the order of the trial Court to be accepted and acted upon by the Union and, therefore, the Company was to drop proceedings and to release the salary.

23. As against that, the Union has been maintaining the stand that the assurance given by the Company was that, only in exigency, the Company will call supervisors on Sundays, but the Company having insisted on it being a regular feature, the Union has decided to file petition. From the Union''s point of view, this was very valid reason and, therefore, though the Company described it to be a very vague reason, in my opinion, it is sufficient to explain delay, if any. It is true that in the petition, there is no mention of letters at pages 112 and 113 of the Affidavit of the respondent-Company.

24. After examining the facts as stated above what emerges from the authorities cited at the bar is that section 9-A read with Schedule IV of the Industrial Disputes Act, 1947 as also if necessary read with section 52 of the Factories Act and other relevant provisions of the Central Act, item under Schedule IV should be interpreted widely enough to cover weekly holidays. The Division Bench of this Court in the case of Cooper Engineering Ltd., Satara v. B.B. Vagyani & others, reported in 1981 Lab.I.C. 45 has, in paragraph 14 at page 47 which continues upto next page also categorically, held that section 9-A has been introduced in the Industrial Disputes Act, 1947 to meet with the diverse situations that might arise in running of the industrial establishment. The conditions of service envisaged by section 9-A read with Schedule IV are, therefore, covered under the provisions of the Act.

25. On behalf of the respondents, a decision in the case of Samnuggur Jute Factory Co. Ltd. (North Mill) v. Workmen of Samnuggur Jute Factory Co. Ltd. (North Mill) and others, reported in 1982 Lab.I.C. 1345 is cited, where also a question raised was in respect of change in weekly off. Learned Judges of the Division Bench have held that the change of the weekly off does not come within the mischief of section 9-A of the Industrial Disputes Act, 1947 nor does it come within the Fourth Schedule of the Act.

Further in that case, notice u/s 52 of the Factories Act was given, therefore, a statutory requirement was fulfilled, which is not the position here.

26. A decision in the case between Workmen of Sur Iron and Steel Co. (P) Ltd. Vs. Sur Iron and Steel Co. (P) Ltd. and Another, has been cited where section 9-A exemption of the Industrial Disputes Act, 1947 was granted by the State Government on account of electricity cut. This has led the Company to change the weekly off from Sunday to Saturday. Clearly, therefore, section 9-A would not be attracted. The workers resorted to strike which was totally uncalled for and the management had responded by a lock-out. Striking workers were preventing the willing workers to attend the work. In this background, Apex Court has observed that section 9-A read with the Fourth Schedule may not be attracted. The Apex Court also observed that if at all it were attracted, section 9-A exemption would be an answer to it. This discussion is to be found in paragraph 3 on page 573.

27. One more decision is cited on behalf of the Company. It is 1969(2) L.L.J. 739 between Bhiwani Textile Mills and Their Workmen and others. Section 9-A matter was carried to the Industrial Tribunal which, on account of emergency as recorded in the course of judgment on page 741, declined to go into it but had decided to grant 20 per cent extra wages. The Company carried the matter before the Supreme Court. Workers did not challenge the order of the tribunal. In this background, the said order of payment of 20 per cent extra wages was struck down. So far as the important point of 9-A is concerned, obviously, on account of emergency, it is not considered and, on the contrary, the tribunal had kept open for the workmen to raise its demand afresh after the end of the emergency.

28. The aforesaid decisions, in my opinion, therefore, do not help the respondent-Company.

29. On behalf of the petitioner Tata Iron and Steel Co. Ltd. Vs. The Workmen and Others, , was cited. The Division Bench of the Supreme Court has held that liberal interpretation be given to Entry No. 8 of the Fourth Schedule and the matter be dealt with. Page 265 paragraph 12 of the judgment clearly so observed. In fact, as observed thereunder, the entries relating to "hours of work and rest intervals" and "leave with wages and holidays" were held to be wide enough to cover the case of illegal strikes and rest days.

30. Moreover, the learned Judges of the Supreme Court in paragraph 13 on page 265 of the said judgment held that the extra payment is hardly any consideration for a rest day and particularly in the heterogeneous population of city like Bombay where Sunday is virtually off day for almost all working population. A change thereunder has to be viewed strictly in accordance with section 9-A read with Schedule IV.

31. In fact, the learned Single Judge of this Court in the case of M/s. Mistry Lallubhoy and Co. v. Engineering and Metal Workers Union and another, reported in 1979

L.I.C. 196, after going through the different decisions of the Supreme Court, in paragraphs 6 and 7 as also in paragraph 9 and further carrying on discussion right upto page 203 in paragraph 17 has indicated that without being fettered or restricted by any decision, he proceeded to decide the matter on the basis of the facts before him and peculiar facts and circumstances of the case and held that there is no substantive change and the change was not permanent at all but was one of a solitary instance. According to the learned Single Judge, the change to be considered u/s 9-A of the Act should be of a nature which would materially or adversely affect the workman''s right which reads "leave with wages and holidays".

32. Needless to say, the Company does rely on this judgment but, in my opinion, on the facts and discussions made above, it can also be said that the change introduced by the Company adversely affects the workman''s right to leave with wages and holidays.

33. Net, result, therefore, is that the facts discussed above as also as per the law culled out from various decisions, petition would succeed. As a result, the order of the trial Court will have to be set aside. Accordingly, petition is allowed and the Order of the trial Court is set aside. Rule made absolute accordingly.

34. Mr. Rele, learned Counsel for respondent No. 1 requests that the judgment be stayed for a period of eight weeks. The request is granted.

35. Issuance of certified copy be expedited.

36. Petition allowed.