Hartex Tubes Pvt. Ltd. Vs Assistant Commissioner of Labour, Nagpur and Others

Court: Bombay High Court

Date of Decision: Sept. 4, 1997

Acts Referred: Industrial Disputes Act, 1947 â€" Section 2, 9

Citation: (1998) 1 ALLMR 104 : (1998) 1 MhLj 187

Hon'ble Judges: F.I. Rebello, J

Bench: Single Bench

Advocate: R.B. Puranik, R.M. Daruvala and Kum. S.K. Khandekar, for the Appellant; B.M. Khan, for the Respondent

Judgement

F.I. Rebello, J.
The petitioners, on 22-8-1994 put up a Notice informing all the employees, that due to shortage of some necessary

material, the Factory would not function on Tuesday the 23rd August, 1994, and the employees, for the aforesaid reason, would get their weekly

off on Tuesday i.e. 23-8-1994. Wednesday, the 24th August, 1994 was the normal weekly off. There are some other directions pertaining to

employees reporting for shifts. At the relevant time and even today, there are three Unions representing the employees of the petitioners. The

members of respondent No. 2, in spite of the notice dated 22-8-1994, presented themselves at the Factory Gate on 23-8-1994 for work. They

were informed of the change of the weekly off. There were some altercations which are not relevant. Suffice it to say, that they reported for duty

on 23-8-1994 and did not report for duty on 24-8-1994, which was the due weekly off. The employees represented by the two other Unions did

not report for duty on 23-8-1994, but report, for duty on 24-8-1994.

The respondent No. 2, thereafter, moved an application before the 1st respondent, claiming that, they were denied work when they presented

themselves and as such, they were entitled to the wages for the said date. Thereafter, the respondent No. 2 treated the said representation as

application u/s 33-C(1) of the Industrial Disputes Act, 1947. He issued a Certificate, which is purportedly an order on 27-4-1995 and held therein

that the petitioners herein had laid off the workers and the said lay off was illegal. Consequently, the 1st respondent held that the employees

represented by the respondent No. 2 were entitled for the wages for the said date and accordingly directed the Collector, Nagpur to recover the

said amount as arrears of land revenue. It is, this order of the 1st respondent, which is challenged by these petitioners under Articles 226 and 227

of the Constitution of India.

2. On behalf of the petitioners, two contentions have been raised. Firstly, it is contended that, in fact, there was no lay off and what the employer

did was merely a change in weekly off as contemplated by Section 52(1)(b) of the Factories Act; and secondly it is contended that, at any rate, the

authority u/s 33-C(1) of the Industrial Disputes Act, 1947 could not have so decided the issue as he had a limited jurisdiction and on that count the

order, being without jurisdiction is liable to be set aside.

On behalf of the respondents, it is contended that the Notice itself shows that the Factory was being closed on 23-8-1994 for the reason, that

there was shortage of some material and clearly therefore, this was a case of lay off. It is further contended that the change of weekly off amounted

to change in conditions of service and the procedure required by Section 9-A of the Industrial Disputes Act had not been followed. The change

was illegal and consequently the members of respondent No. 2 were entitled to the wages for the day on which they were denied work.

Both the parties have cited authorities which will be discussed at the time of consideration of the arguments on behalf of the parties. Suffice it to

say, what emerges from the contentions of the parties is, whether as contended by the employer, the change of weekly off has been done in terms

of Section 52(1)(b) of the Factories Act and hence there is no violation of the provisions of Section 9-A of the Industrial Disputes Act and for that

matter it was no lay off or as contended by the Union-respondent No. 2 that the change of weekly off was in breach of Section 9-A of the

Industrial Disputes Act and further amounted to a lay off and therefore, they were entitled for the wages of that day.

3. Section 52 of the Factories Act provides for weekly holidays. Sub-section (i) of Section 52 sets out that, no adult worker shall be required or

allowed to work in a factory on the 1st day of the week. The 1st day of the week is Sunday. There are exceptions carved out to this, that apart

from Sunday, some other day could also be declared as a weekly off. If such worker has a holiday for whole day on one of the three immediately

preceding before or after the said day. The said day is the 1st day of the week. Sub-clause (b) of sub-section (1) of Section 52 thereafter

contemplates that, such weekly off can be substituted where the Manager of the Factory has, before the said date or the substituted date under

Clause (a) whichever is earlier, delivered a notice at the office of the Inspector of his intention to require the worker to work on the said day and of

the day which is to be substituted and display the notice to that effect in the Factory. At this stage, it may be mentioned that, it is the contention of

the petitioners, that they have complied with both the requirements of Clause (b)(1) of Section 52. There is some dispute raised by the respondent

No. 2 in that behalf. However, that will not be of much relevance for the purpose of deciding the issue. Suffice it to say that there has been

substantial compliance as can be seen from the record by the petitioners with the requirements of Clause (b)(1) of Section 52.

The next provisions to be considered are the provisions of Industrial Disputes Act, 1947. Section 2(kkk) defines what is ""lay off"". Lay off has been

defined as, failure, refusal or inability of an employer on account of shortage of coal, power or raw materials or the accumulation of stocks or the

break down of machineries or natural calamity or for any other connected reasons to give employment to a workman whose name is borne on the

muster rolls of his industrial establishment and who has not been retrenched. There is an explanation to the said sub-section which sets out that,

every workman whose name is borne on the muster roll of the industrial establishment and who present himself for the work at the time appointed

for the purpose during normal working hours on any day and is not given employment by the employer within two hours of his so presenting

himself, shall be deemed to have been laid off for the day within the meaning of this Clause. There are some provisos which need not be referred

to. Thereafter Section 25(c) is the section which sets out the right of a workman laid off for compensation. Section 25(E) sets out, when

compensation is not to be paid. This section also would not be relevant for the purpose of discussion of the issues involved in the matter. In so far

as the present case is concerned, Chapter VB is also relevant as the provisions or Chapter VB are applicable to the facts of this case. Section 25-

M is the section pertaining to prohibition of lay off. The said section contemplates that, no worker to whom the provisions of Chapter VB applies

shall be laid off by his employer except with the prior permission of the appropriate Government or such authority as may be specified by the

Government. Unless, the permission has been so obtained, the only exceptions carved out are that, such a lay off is not occasioned due to shortage

of power or to natural calamity. There are some other situations which are covered by Section 25-M. The other sub-sections of 25-M prescribe

the procedure, which the employer has to follow while applying for permission to lay off. Sub-section (8) is important in the context, as it sets out,

that the application for permission under sub-section (1) is made, or where no application for permission under sub-section (3) is made within the

period specified therein, or where the permission for any lay-off has been refused, such lay-off shall be deemed to be illegal from the date on which

the workmen had been laid-off and the workmen shall be entitled to all the benefits under any law for the time being in force as if they had not been

laid-off. In short, what Section 25-M contemplates is that, there can be no lay-off in respect of a workman to whom the provisions of Chapter VB

are directed, unless permission is obtained and if no permission is obtained, then, in that event, the lay-off would be deemed to be illegal and the

workman would be entitled to the benefits which are available to him in the law for the time being in force. The next section which has to be

considered for discussion of this matter and for answering the issues raised, is Section 33-C(1). Section 33-C(1) sets out that, where any money is

due to a workman from an employer under a settlement or an award under the provisions of Chapter VA, or Chapter VB, the workman himself or

any other person authorised by him in writing in this behalf, or in the case of the death of the workman, his assignee or heirs may, without prejudice

to any other mode of recovery, make an application to the appropriate Government for the recovery of money due to him, and if the appropriate

Government is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector who shall proceed to recover the same

in the same manner as an arrears of land revenue. The section also provides for the period of limitation within which such application can be made.

This will not be relevant, as the application in the instant case was moved within the prescribed period of limitation. It is, therefore, clear that, if the

respondent No. 2 is able to make out a case that the lay-off was in breach of the provisions of Chapter VB, then application u/s 33-C would be

maintainable.

4. With this background, the questions, as raised in this petition, can now be dealt with. In the instant case, can it be said that, there is no lay-off

and in fact what the petitioner has done is merely a change in the weekly off from the date "X" to "Y", as provided in Section 52 of the Factories

Act and without violating the mandate of sub-section (1) of Section 52 of the said Act. Counsel contends that, under sub-section (1) Clause (b) of

Section 52, it is permissible for the employer to change the weekly off after complying with the requirement of sub-clauses (i) and (ii) of Clause (b)

of sub-section (1) of Section 52, and in the present case, they have complied with the requirement. In that event, it is pointed out, this is not a case,

where there is a change in the conditions of service, as contemplated by Section 9-A or for that matter, it is not a case of lay-off. It is pointed out

that, lay-off would contemplate refusal to give work on a working day. In the instant case, the petitioners have changed the weekly off and as such,

it is not a case of refusal of employer on a working day and that being the question, the question of the day being working day would not arise. It is

further pointed out, that this was a mere substitution and one time occasion and not a change in the weekly off and in these circumstances also, it

could not be said that the petitioners have violated section 9-A of the Industrial Disputes Act. The provisions of Section 9-A would be attracted if

the weekly off was substituted by a new weekly off. In the present case, it was done solely in the exigencies and in the Circumstances of the case.

It is, therefore, contended that, there has been no violation on the part of the petitioners. The Counsel has relied for this purpose on a Judgment of

Single Judge of this Court, in the case of, Mistry Lallubhoy and Co. v. Engineering and Metal Workers'' Union, reported in 1978 M.L.J. 80. It is

pointed out that the said Judgment covers a similar situation as has arisen in the present case, and the ratio of the said case should be applied to this

case. In the case of Mistry Lallubhoy and Co. (supra), the weekly off was changed from 22-11-1970 to 24-11-1970 as on 24-11-1970 a call for

''Bandh'' had been given in the State of Maharashtra. After considering several Judgments of the Apex Court, the learned Single Judge came to the

conclusion that, there was no violation of Section 9-A of the Industrial Disputes Act and that neither entry No. 4, 5 or 8 of Schedule IV of the

Industrial Disputes Act was applicable. A mere isolated incidence could not amount to change in service condition and accordingly held that the

workmen in the said case were not entitled for wages for the said period. It is this Judgment that has been passed by the Counsel for the petitioners

to buttress its claim, that an isolated incident of change of weekly off and that too after complying with the requirements of Section 52(i)(b) would

not bring the said change of weekly off within the ambit of Section 9-A of the Industrial Disputes Act.

5. The learned Single Judge, while so holding distinguished the Judgment of the Apex Court in the case of Tata Iron and Steel Co. Ltd. Vs. The

Workmen and Others, , on the ground that, an earlier Judgment of the Apex Court, in the case of, The Workmen of Workmen of Sur Iron and

Steel Co. (P) Ltd. Vs. Sur Iron and Steel Co. (P) Ltd. and Another, had not been considered. The learned Single Judge himself noted that, in so

far as the Judgment of the Apex Court in the case of The Workmen of M/s Sur Iron and Steel Co. Pvt. Ltd. (supra), was a case, where the Apex

Court itself has noted that the State of West Bengal has issued a Notification in respect of the weekly off on account of power shortage. In that

Judgment, the learned Judge also noted that, the Apex Court had come to the conclusion that, none of the items in Schedule IV were attracted in

case of change in weekly off and in the alternative had taken note of Notification issued by the State Government. The Judgment of M/s Tate Iron

and Steel Co. Ltd. was distinguished on the ground that the Judgment in the case of The Workmen of Sur Iron and Steel Co. had not been taken

in consideration while deciding the said case. The learned Judge then without taking into consideration these two Judgments proceeded on the

footing that there was a conflict of law and the matter could be independently considered as set out by him in para 17 of his Judgment. The learned

Judge, thereafter, proceeded to hold that, an isolated incident would not attract entry 5 and consequently held Section 9-A was not attracted.

6. In the case of Workmen of M/s Sur Iron and Steel Co. Pvt. Ltd., the issue was also in respect of change of weekly off. In that case, the Apex

Court noted that the said change was brought about at the request of a substantial number of workers. It was further brought on record that the

change had to be effected on account of shortage of power supply and the Government of West Bengal itself has brought out the Notification. It

was, under those circumstances, it is true, the Apex Court also held that the case of change in weekly off would not be considered under items 4

and 5 of the IVth Schedule. Thereafter, in the later Judgment in the case of M/s Tata Iron and Steel Co. Ltd v. The Workmen, the question again

directly in issue was, the change of weekly off. True the Apex Court did not consider its earlier Judgment in the case of The Workmen of M/s Sur

Iron and Steel Co. Pvt. Ltd. while pronouncing the Judgment. The Apex Court, however, clearly in that case, held that in the case of change of

weekly off Section 9-A would be clearly attracted. The Apex Court held that the entries dealing with ""hours of work and rest intervals"" and ""leave

with wages and holidays"" are wide enough to cover the case of illegal strikes and rest days. It further proceeded to set out that, entry No. 8 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. In so far as, Section 9-A is concerned, the Apex Court was pleased to observe as under :

Further the real object and purpose of enacting Section 9-A seems to be to afford an opportunity to the workmen to consider the effect of the

proposed change and, if necessary, to present their point of view on the proposal. Such consultation further serves to stimulate a feeling of

common joint interest of the management and workmen in the industrial progress and increased productivity. This approach on the part of the

industrial employer would reflect his harmonious and sympathetic co-operation in improving the status and dignity of the industrial employee in

accordance with the egalitarian and progressive trend of our industrial jurisprudence, which strives to treat the capital and labour as co-sharers and

to break away from the tradition of labour"s subservience to capital.

This Judgment, has therefore, clearly pronounced the law in so far as Section 9-A is concerned, though, as pointed out by learned Single Judge,

there is some conflict with the Judgment of the Apex Court in the case of The Workmen of M/s Sur Iron and Steel Co. Pvt. Ltd.

7. The attention of the learned Single Judge, however, was not drawn to the Judgment of the Apex Court in the case of, John Douglas Keith

Brown Vs. State of West Bengal, . This was a case u/s 52 and some other provisions of the Factories Act. Of course, there was a issue, whether,

apart from the Manager, the Occupier of the Factory could be prosecuted for non-complying with certain provisions of the Act and the Rules.

While holding that the Occupier was also liable, the Apex Court proceeded to answer the scope of Section 52(1)(a) and (b), as under :

We may further point out that what the provisions of Section 52(1)(a) and (b) permit is to grant exemptions to specified workmen from the

operation of the prohibition enacted in Section 52 from working in factories on weekly holidays. No general permission can be granted under

Clauses (a) and (b) of sub-section (1) of Section 52 for altering the day of the weekly holiday so as to cover all the workmen. Therefore, upon the

proper construction of the provisions it is clear that whenever workers are required (or are permitted) to work on a weekly holiday the specific

permission of the Chief Inspector of Factories in respect of each and every worker who is required to work on such a day should be obtained.

The Apex Court, by these observations, has set out that the change of weekly day as contemplated by the aforesaid sub-section would be in

respect of some employees and not the change of weekly off in respect of all the employees. These are the observations of the Apex Court to

which attention is invited by the Counsel for the respondent No. 2.

8. However, what is more relevant in this case, would be the provisions of Chapter VB. Of course, on behalf of the petitioners, it is contended

that, change of weekly off is covered by Section 52 and as they have fulfilled the requirement, the question of lay off does not arise. In the instant

case, the reason for changing the weekly off is in terms of Notice dated 22-8-1994. The Notice clearly contemplates that the weekly off is being

changed on account of shortage of material. If the employees were refused work, in such event, on any other day, the provisions pertaining to lay

off would be attracted. Can, therefore the argument be sustained that because the employer has chosen to shift the weekly off, then in that event, it

will cease to be a lay-off. As pointed out earlier, the definition of lay-off itself is as set out u/s 2(kkk) of the Industrial Disputes Act. The reasons

given in the notice dated 22-8-1994 would by itself indicate that the weekly off was changed on account of shortage of material. In a case, where

the provisions of Chapter VB are attracted, contemplates that, permission is required. Can the employer contend that because in law u/s 52(1)(b)

as it sought to be argued, he can change the weekly off by giving notice to the Inspector and put a Notice on Display Board he can dispense with

the requirement of Chapter VB. The answer must be clearly in the negative. It is not possible for an employer to change the weekly off solely on

the ground that there was no material available for work to be provided on a particular date. Such exercise would be clearly a colourable exercise

to defeat the very object of the weekly off. If in law there are statutory requirements under Chapter VB in seeking permission before a lay-off is

effected, ingenuity cannot be allowed to defeat the requirement of law. In the instant case, clearly the sole reason for change in the weekly off was

shortage of material. In such a case, if the employer had to lay off, he was bound to pay compensation. This he cannot avoid by resorting to

change in the weekly off itself bearing in mind the law laid down by the Apex Court in the case of John Douglas (supra).

9. Dealing with the Judgment of the learned Single Judge of this Court in the case of, Mistry Lallubhoy and Co. (supra), I am unable to subscribe

to the view taken by the learned Single Judge. First and foremost the said Judgment was delivered on 1-8-1977. The Judgment does not disclose,

whether the provisions of Chapter VB which had come into effect were attracted to the Industry in question. Secondly, the learned Single Judge

did not consider the Judgment of the Apex Court in the matter of interpretation of weekly off and change thereof, as has been held by the Apex

Court in the case of John Douglas (supra), and finally in the case of M/s Tata Iron and Steel Co. Ltd., which is a later Judgment than the Judgment

in the case of, The Workmen of M/s. Sur Iron and Steel Co. Pvt. Ltd., the Apex Court had clearly held that, Section 9-A would be attracted in

the case of weekly off. I am, therefore, unable to subscribe to a view taken by the learned Single Judge in the case of Mistry Lallubhoy and Co.

The view I am taking is also not in conflict with the said Judgment, as I have already pointed out that the Judgment of the Apex Court in the case of

John Douglas (supra) and the provisions of Chapter VB did not come up for consideration before the learned Single Judge. In view of the above, I

am clearly of the opinion that action of the petitioners in changing the weekly off was in violation of the requirements of Section 9-A and Chapter

VB of the Industrial Disputes Act.

10. The last question to be answered is the question of the applicability of Section 33-C(1). The learned Counsel for that purpose relied on the

Judgment of the Apex Court in the case of Kasturi and Sons (Private) Ltd. Vs. N. Salivateeswaran and Another, . This Judgment was pointed out

for the purpose of showing that, Section 33-C came up for consideration before the Apex Court while considering the provisions of Section 17 of

the Working Journalists Act. The Apex Court held that, u/s 33(c) the nature of the inquiry was restricted and as such the appropriate Government

or its delegate u/s 33-C(1) cannot embark on the inquiry as contemplated. I am unable to subscribe to the plea of the Petitioners. Section 33-C

itself contemplates that, if claim is due amongst others under Chapter VB of the Industrial Disputes Act, the workman himself or any other person

authorised by him in writing in this behalf, or in the case of the death of the workman, his assignee or heirs may, without prejudice to any other

mode of recovery, make an application to the appropriate Government for the recovery of money due to him, and if the appropriate Government is

satisfied that any money is so due to him, it shall issue a certificate for that amount to the collector who shall proceed to recover the same in the

same manner as an arrears of land revenue. It cannot be said that the Labour Court had no jurisdiction to try the incidental issue whether the lay off

was in violation of Chapter VB. The Labour Court would have jurisdiction to decide the said issue to do justice to the parties who come before it

claiming that there is violation of the provisions of Chapter VB of the Industrial Disputes Act.

In the present case, once it is held that infact the action of the petitioners amounted to lay-off the authority had jurisdiction to recover the amounts

claimed under Chapter VB. In view of the aforesaid, the second argument, on behalf of the petitioners, is also rejected.

11. For the aforesaid reasons, rule is discharged. In the facts and circumstances of this case, there shall be no order as to costs. The amount

deposited, on application being moved by the respondent No. 2 to the Additional Registrar of this Court, be paid to the respondent No. 2, along

with accrued interest.

12. At this stage, Counsel for the petitioners seeks four weeks'' time for stay of the operation of the order. Operation of the order is stayed for four

weeks.

13. Petition rejected.