

B.K.PATEL, J

W.P.(C) NO.8419 OF 2008.Decided on 21.04 2010

ACHYUTA CHARAN PANDA

.....Petitioner

. Vrs.

M.D.,PARADEEP PHOSPHATES LTD.

.....Opp parties

INDUSTRIAL DISPUTES ACT, 1947 (ACT NO.14 OF 1947) – SEC.33-A.

For Petitioner - M/s.G.Bihari Jena, Smt.S.Jena, P.Dash & S.Mohanty.

For Opp.Party – M/s.G.Rath, S.Rath & S.Mishra.

B.K. PATEL, J. This writ application is directed against the award dated 17.3.2008 passed by learned Presiding Officer Industrial Tribunal, Bhubaneswar (for short 'the Tribunal') in I.D. Misc. Case No. 02 of 2007 initiated on the basis of complaint filed under Section 33-A of the Industrial Disputes Act, 1947 (for short the 'Act') by the petitioner.

2. Petitioner joined as Junior Mobile Equipment Operator under opposite party-M/s. Paradeep Phosphates Limited (for short 'PPL'), a Government of India Undertaking, in terms of appointment letter dated 23.6.1983, which is annexure-1 to the writ petition. While petitioner was working as such, Government of India took decision to enhance the age of retirement of the employees. Accordingly, the Board of Directors of PPL took decision for enhancement of the normal age of retirement of the employees from 58 years to 60 years with effect from 27.5.1998 and office order dated 19.11.1998, which is Annexure-2 to the writ petition, was issued. As per the decision of the Central Government, the management of the PPL was taken over by private management, namely M/s. Zuari Maraco Phosphates Ltd. in terms of agreement dated 28.2.2002. Employees of PPL challenged the transfer of management before this Court in OJC No. 1625 of 2002 which was disposed of by judgment dated 11.7.2002, copy of which is Annexure-4 to the writ petition. Thereafter, by office order at Annexure-6 the age of retirement of the employees was reduced from 60 years to 58 years. The employees of the PPL through their unions raised a dispute in I.D. Case No. 16 of 2003. PPL issued notice dated 2.8.2007, which is Annexure-9 to the writ petitioner, directing retirement of the petitioner on superannuation at the age of 58 years with effect from 31.10.2007. In such circumstances, petitioner initially filed W.P.(C) 13261 of 2007 assailing the order of retirement. Said writ application was disposed of by order dated 8.11.2007 granting leave to the petitioner to approach the Tribunal. On the basis of such averments the petitioner instituted I.D. Misc. Case No. 2 of 2007 alleging violation of provision under Section 33-A of the Act by the PPL.

3. Opposite party resisted petitioner's complaint, inter alia, on the ground that service condition of the employees of PPL is governed by the Certified Standing Orders. As per the said Standing Orders, the age of retirement of workmen is 58 years. It was also averred that the age of retirement of an employee is not a service condition within the meaning of Section 33-A of the Act,

4. In order to substantiate respective stands one witness each, W.W.1 and M.W.1, was examined on behalf of the petitioner and opposite party. On consideration of materials on record, and upon reference to relevant legal provisions and judicial decisions, including the judgment of this Court in O.J.C. No.1625 of 2002, it was held by the learned Tribunal that in terms of the appointment letter Annexure-1 the service conditions of the petitioner were to be governed under the Certified Standing Orders of PPL. Even after taking over of the management of the PPL by private company the service conditions of the employees were held in O.J.C. No.1625 of 2002 to continue to be governed by the Certified Standing Orders in which retirement age was never altered from 58 years to 60 years. Moreover, change of retirement age does not amount to a change in the service conditions within the meaning of the Act. On the basis of such findings it was held that complaint under Section 33-A of the Act is not maintainable.

5. In assailing the impugned award it was contended by Smt. Jena, learned counsel for the petitioner that it is not disputed that the action of the management of the PPL in reducing the retirement age of the employees from 60 years to 58 years is one of the references pending for adjudication in I.D. Case No.16 of 2003. It was argued that retirement of petitioner pending adjudication of I.D. Case No.16 of 2003 without prior permission of the Tribunal contravenes provision under Section 33(1) of the Act. Learned Tribunal committed grave illegality in holding the complaint filed by the petitioner under Section 33-A of the Act to be not maintainable. Learned counsel for the petitioner relied upon decisions in **The Bhavnagar Municipality –vrs.- Alibhai Karimbhai and others** : AIR 1977 SC 1229, **Lilly Kurian –vrs.- Sr. Lewina and others** : AIR 1979 SC 52 and **Barauni Refinery Pragatisheel Shramik Parishad –vrs.- Indian Oil Corporation Limited** : AIR 1990 SC 1801.

6. In reply, Sri Rath, learned counsel for the opposite party contended that Certified Standing Orders of PPL all along governed the service conditions of the employees of PPL including the petitioner. Retirement age as prescribed in the Certified Standing Orders was never changed despite taking over of the management of the PPL by private company consequent upon disinvestment of majority of the shares. Hence, there is no scope for the petitioner to urge that there has been any change in any of the service conditions. It was further argued that a combined reading of Sections 9-A, 33 and 33-A read with the 4th Schedule of the Act would make it abundantly clear that fixation of age of retirement is not a condition of service within the meaning of the Act so as to warrant compliance of provision under Section 33(1) or action under Section 33-A of the Act. In support of his contentions learned counsel for the opposite party also relied upon decision in **Barauni Refinery Pragatisheel Shramik Parishad –vrs.- Indian Oil Corporation Limited** (supra) relied upon by the petitioner. He also cited the decisions of Hon'ble Supreme Court in **Harmohinder Singh –vrs.- Kharga Canteen, Ambala Cantt.** : (2001) 5 SCC 540 and of Karnataka High Court in **Gokak Mills (Division of Gokak Patel Volkari Ltd.) and etc. –vrs.- Workmen of Gokak Mills and others** : 1993 LAB.I.C.1850.

7. Offer was given to the petitioner for appointment in terms of appointment letter at Annexure-1. While enclosing the copy of the Service Rules of the PPL with the appointment letter sent in duplicate, he was asked to accept the offer and all other terms and conditions enumerated in the Service Rules by signing the duplicate copy of the appointment letter. It is not disputed that petitioner was appointed upon accepting the terms and conditions enumerated in the Service Rules. Clause 18.1.0 of the Service Rules as well as Clause 19 of the Certified Standing Orders of the PPL provide that normal age of retirement for PPL employees shall be 58 years, i.e., from the afternoon of

the last day of the month in which the employee completes the age of 58 years. Despite transfer of management and control of the PPL from the Central Government to private company consequent upon disinvestment PPL remained the employer of the petitioner. It has been held by this Court in the judgment dated 11.7.2002 passed in O.J.C. No.1625 of 2002 :-

“Thus, by the disinvestment of 74 per cent of the shares in PPL and by transfer of the management and control from the Government of India to the strategic partner, the employer of the members of the four petitioner Unions/Associations remains the same and the members of the four petitioner Unions/Associations continued to remain as employees under the PPL an change of management does not in law amount to change in employment. The service conditions of the members of the four petitioner Unions/Associations also continued to be governed by the Certified Standing Orders of the PPL and any change in the said service conditions in the Certified Standing Orders of PPL can only be made in accordance with law, as has been held in para 54 of the judgment of the Supreme Court in **BALCO Employees Union (Regd.) –vrs.- Union of India and others**: AIR 2002 SC 350.”

Notwithstanding enhancement of age of retirement of employees from 58 years to 60 years for a brief period, admittedly, there has never been any change in the service conditions as provided in the Certified Standing Orders of PPL. Therefore, there is no scope for the petitioner to urge that any of the conditions of his appointment under Annexure-1 was altered to his disadvantage.

8. Section 33-A of the Act provides for adjudication of dispute relating change of conditions of service during the pendency of proceedings in violation of provision under Section 33 of the Act. Section 33(1) of the Act reads:

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings. – (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or

Tribunal or National Tribunal in respect of an industrial dispute, no employer shall,-

(a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or

(b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.

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Section 33-A of the Act reads:

“33-A. Special provision for adjudication as to whether conditions of service, etc., changed during pendency of proceedings.- Where an employer contravenes the provisions of section 33 during the pendency of proceedings [before a conciliation officer, Board, an arbitrator, Labour Court, Tribunal or National Tribunal] any employee aggrieved by such contravention, may make a complaint in writing, [in the prescribed manner, -

(a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in mediating in, and promoting the settlement of, such industrial dispute; and

(b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act shall apply accordingly.]”

9. It is apparent from a plain reading of above cited provisions of the Act that complaint under Section 33-A of the Act may be made when there is an alteration of the conditions of service to the prejudice of the workmen during pendency of a dispute in regard to any matter connected with such service condition. Section 9-A of the Act provides that an workman is required to be given notice of change in the condition of service only in respect of matters specified in the Forth Schedule of the Act. Section 9-A of the Act reads:

“9-A. **Notice of change.** – No, employer, who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule, shall effect such change, -

(a) without giving to the workmen likely to be affected by such change a notice in the prescribed manner of the nature of the change proposed to be effected; or

(b) within twenty-one days of giving such notice:

Provided that no notice shall be required for effecting any such change-

(a) where the change is effected in pursuance of any (settlement or award); or

(b) where the workmen likely to be affected by the change are persons to whom the Fundamental and Supplementary Rules, Civil Services (Classification, Control and Appeal) Rules, Civil Services (Temporary Service) Rules, Revised Leave Rules, Civil Service Regulations, Civilians in Defence Services (Classification, Control and Appeal) Rules or the Indian Railway Establishment Code or any other rules or regulations that may be notified in this behalf by the appropriate Government in the Official Gazettee, apply.”

The Fourth Schedule of the Act reads:

“THE FORTH SCHEDULE

(see section 9-A)

CONDITIONS OF SERVICE FOR CHANGE OF WHICH NOTICE IS TO BE GIVEN

1. Wages, including the period and mode of payment;
2. Contribution paid, or payable, by the employer to any provident fund or pension fund or for the benefit of the workmen under any law for the time being in force;
3. Compensatory and other allowances;
4. Hours of work and rest intervals;
5. Leave with wages and holidays;
6. Starting, alteration or discontinuance of shift working otherwise than in accordance standing orders;

7. Classification by grades;
8. Withdrawal of any customary concession or privilege or change in usage;
9. Introduction of new rules of discipline, or alteration of existing rules, except insofar as they are provided in standing orders;
10. Rationalisation, standardization or improvement of plant or technique which is likely to lead to retrenchment of workmen;
11. Any increases or reduction (other than casual) in the number of persons employed or to be employed in any occupation or process or department or shift, (not occasioned by circumstances over which the employer has no control)."

The Fourth Schedule of the Act does not enumerate age of retirement to be one of the condition of service for change of which notice is required to be given by the management. Therefore, even if there has been any change in conditions of service relating to age of retirement during the pendency of a dispute which relates to age of retirement also, age of retirement being not a condition of service for change of which notice is required to be given under Section 9-A of the Act, the embargo contained under Section 33 of the Act does not operate against the employer for change of service condition relating to the age of retirement. Consequently, there is no scope to invoke provision under Section 33-A of the Act alleging violation of provision under Section 33(1) of the Act by a workman when there is a change by the employer of the age of retirement.

10. Schedule to the order dated 24.12.2003 at Annexure-8 contains the following references sent for adjudication to the Tribunal in I.D. Case No.16 of 2003 :

"SCHEDULE

1. "Whether the action of the management of M/s-Paradeep Phosphates Ltd., Paradeep in reducing the prevailing retirement age limit from 60 years to 58 years through its office Order No.10/05/0223 dt-17.7.2002 amount to infraction of Section 9-A of the I.D. Act and whether such action of the Management is legal and/or justified ?"
2. "Whether the action of the management of M/S-Paradeep Phosphates Ltd., Paradeep in retiring Sri (1) M.S. Kanwasi, (2)- O.M. Prakash, (3) Mastilal Choudhury, (4)- T.S. Rout and Sitaram with effect from 31.8.2002 instead of allowing them to continue in service upto 60 years of age is legal and / or justified ? if not what relief are they entitled to ?"

As has been held above, not only service condition of the petitioner as contained in the Certified Standing Orders with regard to age of retirement was never altered but also age of retirement is not one of the conditions of service enumerated under the 4th Schedule of the Act alteration of which can be made only after service of notice under Section 9-A of the Act. Therefore, there is no infirmity in the impugned award holding that there has not been infraction of provision under Section 33 of the Act by the opposite party.

11. In **The Bhavnagar Municipality –vrs.- Alibhai Karimbhai and others** (supra) it was held that retrenchment of the temporary workers during the pendency of dispute relating to conversion of the temporary employment of such workers into permanent status amounts to tampering with status quo ante of such temporary workers and, therefore, clear alteration of the conditions of their service. By retrenchment of the employees, even the temporary employment of the workers ceased while their dispute before the Tribunal to improve temporary status to permanent employment was pending. In such circumstances, it was held by the Hon'ble Suprme Court that there has been

infraction of provision under Section 33 of the Act. Therefore, the decision is of no help to the petitioner. Learned counsel for the petitioner cited the decision in **Lilly Kurian –vrs.- Sr. Lewina and others** (supra) to urge that provision relating to age of retirement is also a condition of service. However, said decision relates to a case under Kerala University Act, 1957 wherein it has been broadly observed that conditions of service includes everything from the stage of appointment to the stage of the termination of service and even beyond, and relates also to matters pertaining to disciplinary action. In the present case, as is evident, the Act itself enumerates under the 4th Schedule specific conditions of service alteration of which requires compliance of the provision under Section 9-A of the Act.

12. Though decision in **Barauni Refinery Pragatisheel Shramik Parishad –vrs.- Indian Oil Corporation Limited** (supra) relied upon by the petitioner as well as opposite party does not directly relate to the question raised in the present writ application, in the said decision also it has been observed that provisions under the Standing Orders Act clearly show that the purpose of the Certified Standing Orders is to define with sufficient precision the conditions of employment of workman and to acquaint them with the same. There is nothing in the decision to support the contention raised on behalf of the petitioner that stipulation regarding age of retirement is also a condition of service alteration of which would warrant compliance of provisions under Section 9-A or 33 of the Act.

13. In **Harmohinder Singh –vrs.- Kharga Canteen, Ambala Cantt.** (supra), it has been held:

“12. Section 9-A of the Act relied upon by the appellant only provides that an employer proposing to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule to the Act cannot affect such change without giving to the workmen notice in the prescribed manner. The provisions of the section are no doubt mandatory. But the preconditions to their applicability are:

- (i) there must be a change in the conditions of service;
- (ii) the change must be such that it adversely affects the workmen; see *Hindustan Lever Ltd. v. Ram Mohan Ray*; and
- (iii) the change must be in respect of any matter provided in the Fourth Schedule to the Act.

13. In other words, not all changes are required to be notified. The Fourth Schedule provides for eleven conditions of service for change of which notice is to be given. Apart from the express conditions, there may be conditions which by a process of interpretation can be included within one or other of the eleven listed.

14. The conditions of service for change of which notice is to be given under the Fourth Schedule do not in terms include the subject-matter of para 3-A, namely, the fixation of a period of service or date of retirement. No argument has been advanced as to which of the eleven items could, even by a process of interpretation, include para 3-A. xx xx xx xx”

14. In the Karnataka High Court decision of **Gokak Mills (Division of Gokak Patel Volkari Ltd.) and etc. -vrs.- Workmen of Gokak Mills and others** (supra) also, it has been held that the 4th Schedule to the Act sets down certain matters and the age of

retirement as such is not one of the aspects dealt with nor any general condition of service. It refers to specific items of condition of service.

15. In view of the above discussion, there appears no justification to interfere with the impugned award. Therefore, the writ application is dismissed.

Writ petition dismissed.