**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**SPECIAL CIVIL APPLICATION NO. 16904 of 2007**
**With**
**SPECIAL CIVIL APPLICATION NO. 16906 of 2007**
**To**
**SPECIAL CIVIL APPLICATION NO. 16923 of 2007**
**With**
**SPECIAL CIVIL APPLICATION NO. 16930 of 2007**
**To**
**SPECIAL CIVIL APPLICATION NO. 16949 of 2007**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR. JUSTICE K.M.THAKER** **Sd/-**

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | Yes |
| 2 | To be referred to the Reporter or not ? | Yes |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | No |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? | No |

THE SABARKANTHA DISTRICT COOPERATIVE MILK PRODUCERS....Petitioner(s)

Versus

MALJIBHAI JETHABHAI DESAI SINCE DECD. THRO'HEIRS & L/R....Respondent(s)

Appearance:
MR KM PATEL, SR. ADVOCATE, WITH MR VK PATEL, ADVOCATE for the Petitioner(s) No. 1
MS RATNA VORA, ADVOCATE for the Respondent(s) No. 1.1 - 1.5

CORAM: **HONOURABLE MR.JUSTICE K.M.THAKER**

**Date : 23/12/2015**

**ORAL JUDGMENT**

1. Heard Mr. K.M.Patel, learned Senior Counsel, with Mr. V.K.Patel, learned advocate for the petitioner - Mandli, and Ms. Ratna Bora, learned advocate for the respondents.

2. In this group of petitions, the central issue and subject matter which arises for consideration is similar and though in respect of each complaint and the concerned persons, learned Tribunal has passed separate orders, however, the contents of the separate orders, the reasoning and observations, the findings and conclusions and final directions in all individual/separate orders are similar. The learned Senior Counsel for the petitioner and learned counsel for the respondents - workmen have made common submissions and also stated that even the learned Tribunal has, by an order, consolidated all complaints and that the issue for consideration are common in all matters and therefore, all petitions may be heard and decided as single proceedings. Under the circumstances, all petitions are heard together and decided by this common judgment.

3. The petitioner has brought under challenge the order dated 29.12.2006 and other similar orders passed by learned Industrial Tribunal,

Ahmedabad, in complaint (IT) No.689 of 1998 and other cognate – identical complaints filed by similarly situated complainants / workmen. By such different but similar orders, the learned Tribunal has set aside the action of the petitioner Mandli in relieving the complainants on completing 55 years of age prescribed for superannuation and has directed the petitioner Mandli to pay difference of salary to the complainants by treating them in service until they completed 60 years of age. The petitioner Mandli is aggrieved by the said decision and directions, hence, present petitions.

4. So far as factual background involved in and leading to presentation of this group of petitions are concerned, it has emerged from the record and from the submissions by learned Senior Counsel for the petitioner Mandli and learned counsel for the respondent workmen that:-

4.1 The petitioner is a federal cooperative society incorporated and registered under the provisions of the Gujarat Cooperative Societies Act, 1961 and is engaged in activity of procuring, producing and marketing milk and milk products.

4.2 It has established a dairy plant where it

employs more than 100 employees.

4.3 According to the petitioner Mandli, under applicable standing orders 55 years of age is fixed as age for superannuation for its employees and the employees are made to retire on attaining age of superannuation i.e. 55 years.

4.4 Some of the employees claimed that age of superannuation in their particular case was fixed at 58 years or 60 years. Some employees claimed that in their cases, appointment letters mentioned age of 58 years as age for superannuation but they were subsequently informed that the age for superannuation was revised to 60 years. On the other hand, other group of employees claimed that the age for superannuation should be fixed at 60 years and not 55 years.

4.5 It appears that in this background an industrial dispute with demand to fix 60 years of age as age for superannuation was raised.

4.6 The appropriate Government considered the said demand and response of the petitioner Mandli and referred the said demand for adjudication vide order of reference dated 4.2.1997. The said order of reference was registered by learned

Tribunal has Reference (IT) No.38 of 1997.

4.7 While the said reference was pending for adjudication, when certain workmen (i.e. present respondents) were relieved from service (as they completed 55 years of age) on the ground that they had reached age of superannuation prescribed under the standing orders, such workmen invoked provisions under Section 33A read with Section 33 of the Industrial Disputes Act and filed individual / separate complaints in a Reference which was pending at relevant time i.e. Reference (IT) No.38 of 1997. In the said complaints, before the learned Tribunal the complainants alleged that by relieving them when they completed 55 years of age, the petitioner Mandli had committed change in the service conditions applicable to them immediately before the commencement of the (reference) proceedings and that therefore such action of retiring them at the age of 55 years breached Section 33 of the Industrial Disputes Act.

4.8 The said complaints came to be filed at the time when the said reference (IT) No.38 of 1997 was pending and was not finally decided.

4.9 Before proceeding further, it is appropriate to mention that, subsequently, the learned

Tribunal finally decided the said reference (IT) No.38 of 1997 vide award dated 27.3.2003 whereby learned Tribunal concluded and held that:-

"O R D E R

The age of superannuation of all the employees of the Sabarkantha Jilla Co.op. Dudh Utpadak Sangh Ltd., Himatnagar is not required to be fixed at the age of 60 years. The employees of Sabarkantha Jilla Co.op. Dudh Utpadak Sangh Ltd. can be superannuated before reaching the age of 60 years. No order as to costs."

4.10 In the said complaints, the complainants filed their respective statements of claim which contained almost similar factual narration and allegations except the facts related to the respective dates on which each of the complainant completed age of 55 years.

4.11 The complainants i.e. present respondents claimed and alleged in the memo of the complaints that with effect from 1.4.1990, the petitioner mandali has settled the Standing Orders and according to clause 2.3 of the said Rules / Standing Orders if there is any discrepancy between the terms and conditions in the agreement / contract and the Standing Orders, then the terms under the contract / agreement shall prevail. The complainants further claimed that there is discrepancy between the conditions related to age of superannuation mentioned in the

agreement / agreement and clause 36 of the Standing Orders inasmuch as according to the appointment order the age for retirement is 60 years whereas under the standing orders the prescribed age for superannuation is 55 years and that therefore, the terms of appointment letter should prevail but the petitioner mandali relieved the complainant/s from the service on completion of 55 years of age and thereby the petitioner committed change in the service condition applicable immediately before the commencement of Reference No. 38 of 1997 and thereby there is violation of section 33 of the Industrial Disputes Act, 1947. All individual complaints came to be filed with similar allegations and for identical relief.

4.12 The petitioner mandali had filed its reply / written statement and contested the complaints. The maintainability of the complaints was challenged and it was claimed that the complaints are not maintainable. The petitioner opposed the complaints on diverse grounds on merits and it was claimed, inter alia, that the demand which can be claimed and can be considered in the reference proceeding, is prayed for in the complaint and that, therefore, the complaints do not deserve to be entertained. The petitioner claimed that the complains may be dismissed.

4.13 After the stage of evidence, the learned Tribunal heard rival contentions and then passed separate but similar orders in all complaints whereby the learned Tribunal accepted the contentions raised by the complainants and allowed the complaints with earlier mentioned directions.

4.14 Feeling aggrieved by the orders, the mandli has taken out this group of petitions.

5. The learned senior counsel for the petitioner mandali submitted that the complainants, who claimed that according to the conditions of their appointment, the age for superannuation was fixed at 60 years, would not be the “concerned persons” in view of the terms of the order of reference and that, therefore, the complaints filed by such complainant would not be maintainable. Learned senior counsel for the petitioner mandali further submitted that when the petitioner mandali superannuated the complainants when they completed age of 55 years, it actually acted in consonance with the provisions under the Standing Orders and the said action cannot be termed to be change in service condition applicable immediately before the commencement of reference and that, therefore, the action would not fall

under the scope of section 33 and consequently, the complaints were not maintainable and could not have been entertained, however, the learned Tribunal failed to appreciate the said contention.

Learned senior counsel for the petitioner mandali further submitted that the substantive reference is decided by the learned Tribunal whereby the learned Tribunal has held that the retirement age of the employees is 55 years and it is not required to be fixed at 60 years and the employees can be superannuated before reaching age of 60 years and that, therefore, the complaints were rendered infructuous and were not required to be adjudicated upon and in any case the complaints could not have been decided contrary to the decision in substantive reference. Learned senior counsel for the petitioner mandali submitted that the award dated 27.3.2003 passed by the learned Tribunal in substantive reference was placed on record before the learned Tribunal where the complaints were pending, however, the learned Tribunal has not taken the said factual aspect as well as the award into consideration.

Mr. Patel, learned senior counsel for the petitioner mandali submitted that the Standing Orders are certified and that, therefore, the provisions under the Standing Orders are

applicable and binding to all employees. Learned senior counsel for the petitioner mandali further submitted that the petitioner mandali had examined the Assistant Commissioner of Labour during the proceeding of Reference No.38 of 1997 and considering his evidence, the learned Tribunal has, while deciding Reference No.38 of 1997, accepted and recorded that the Standing Orders are certified Standing Orders and the said conclusion has attained finality. He further submitted that even if it is assumed that the procedure and condition for certification is not complied and therefore the Standing Orders cannot be termed as "certified Standing Orders" then the provision under model Standing Orders (which take in its purview award as well as settlement) would be applicable to the employees.

Mr. Patel, learned senior counsel for the petitioner mandali emphasized that only one letter of confirmation of appointment in respect of only one employee was placed on record and any appointment letters were not placed on record, however, the learned Tribunal proceeded on the presumption that in case of all complainants similar letters revising the age for retirement to 60 years were passed and issued which is erroneous and contrary to evidence on record. Learned senior counsel for the petitioner mandali further submitted that the expression

"agreement / contract" under clause 2.3 of the Standing Orders relates to special contracts under which an employee might have been engaged specially for specific work and it does not refer or relate to the usual appointment letters issued to the employees in ordinary course of the selection and recruitment.

The learned Senior Counsel for the petitioner submitted that the standing orders came to be framed and introduced and brought in force in the petitioner mandli since 1990 by and under a settlement arrived at with the workmen's union during process of conciliation and in light of provision under Section 2(P) and under Section 18 of the Industrial Disputes Act the settlement and thereby the standing orders are binding to all and the condition related to age for superannuation is in force since 1990. Learned senior counsel for the petitioner mandali relied on the decisions in the cases of *Blue Star Employees Union vs. Executive Officer, Principal Secretary to the Government [AIR 2000 SC 3110]*, Standard Chartered Bank vs. Union of India [2007 LAB IC 1134], *Cipla Ltd. vs. Jaykumar R. & Ors. [(1999) 1 SCC 300], Mohini Sugar Mills Ltd. vs. Hassan (A) & Ors. [(1962) 2 LLJ 389]*.

6. Per contra, Ms. Vora, learned advocate for the complainants – present respondents opposed

the said submissions and contended that the petitioner mandali has placed reliance on Standing Orders, however, the said Standing Orders are not duly certified in accordance with the provisions under the Industrial Employment Standing Orders Act and that, therefore, the said Standing Orders are not binding and consequently, its cognizance cannot be taken. Learned advocate for the complainants further submitted that even if the Standing Orders are taken as applicable and binding in the petitioner mandali, then also in view of clause 2.3 of the standing orders which prescribes that in the event of any discrepancy between the terms of agreement / contract and standing orders, the terms in the agreement/contract will prevail and that, therefore, the petitioner mandali could not have relieved the concerned workmen when they completed age of 55 years, i.e. by invoking provisions under the Standing Orders and without taking into consideration the terms mentioned in the agreement / contract. Learned advocate for the complainants further submitted that the Managing Director of the petitioner mandali had informed the complainants that though their retirement age according to appointment order is 58 years, it is revised to 60 years and that, therefore, by virtue of the said communication from the Managing Director of the petitioner

mandali, their age of retirement was 60 years and consequently the said provision would prevail over clause 36 of the Standing Orders and that, therefore, the action of relieving the complainants on completing 55 years of age, is in violation of section 33 of the Industrial Disputes Act, 1947. She submitted that when reference was pending the action of relieving the complainants could not have been taken without permission i.e. without complying the condition under Section 33 of the Act. Learned advocate for the concerned workmen relied on the decisions in the cases of *Charanji Lal vs. Financial Commissioner Haryana [AIR 1978 Punjab & Haryana 126], S.P. Chengalvaraya Naidu (dead) by L.R. vs. Jagannath (dead) by L.R. [AIR 1994 SC 853], Ram Lakhan vs. Presiding Officer [(2000) 10 SCC 201], General Manager, Bhilai Steel Project, Bhilai (Madhya Pradesh) vs. Steel Works Union, Bhopal [1964 AIR SC 1333], Guest, Keen, Williams Pvt. Ltd. vs. P.J. Sterling [1959 AIR SC 1279], Bajaj Auto Ltd. vs. Bhojane Gopinath [(2004) 9 SCC 488], Bansidhar Sarma vs. Certifying Officer and Labour Commissioner, Assam at Guwahati [(1997 Lab IC 3061], Gangpur Labour Union vs. Industrial Tribunal, Orissa [1993 LLR 80]*. Except the said contention, any other contention is not raised.

7. I have considered the submissions by learned

senior counsel for the petitioner mandali and the learned counsel for the complainants / concerned persons.

7.1 The complaint is filed under Section 33-A of the Act. For invoking said provision contravention of Section 33 must be demonstrated. In absence of proof of breach of Section 33 of the Act, the complaint under Section 33-A would not be competent. Therefore, in present case, it would be necessary to decide whether the respondent had demonstrated breach of Section 33 of the Act.

8. So as to consider and appreciate the rival contentions, it is relevant and necessary to keep in focus the provisions under section 33 of the Industrial Disputes Act. The said section 33 of the Act reads thus:-

> "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.

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [2] or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],--

(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or

(b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

(3) … … … … …

(4) … … … … …

(5) … … … … …"

8.1 For attracting the provision under Section 33 of the Act, it must be established that:-

[a] at the time of alleged alteration in service conditions, a dispute/proceedings must be pending before the Court or tribunal or authority; and

[b] the employer must have altered existing service condition;

[c] such alteration must have been made

without prior permission or approval – as the case maybe i.e. depending on whether the condition / alteration was connected with or was not connected with the pending dispute;

[d] the workman in whose respect the service condition is allegedly altered must be concerned workmen in the pending dispute; and

[e] the service condition which is allegedly altered must be applicable to the workman (concerned in pending dispute) immediately before the commencement of the pending dispute; and

[f] the alteration of service condition must be to the prejudice of the concerned workman;

[g] complaint by a workman who is not concerned in the pending dispute and complaint with regard to the service condition (which is allegedly altered) which was not applicable immediately before the commencement of proceedings and / or the complaint in respect of alleged alteration made before the commencement of the pending dispute and / or by a workman whose service condition is not altered to his prejudice will not attract section 33 and Section 33-A of the Act.

9. The complainants alleged that the petitioner mandali committed violation of section 33 of the Act. The complainants based their said allegation

on the ground that during the pendency of Reference (IT) No.38 of 1997 the petitioner mandali altered the service conditions (related to age for retirement) which were applicable to the workmen immediately prior to the commencement of the said proceedings (i.e. Reference No.38 of 1997).

10. Therefore, it becomes necessary to ascertain as to whether (a) the complainants were "workmen concerned in" the pending dispute i.e. in Reference (IT) No.38 of 1997; and (b) whether the alleged change is prejudicial to the concerned workmen and whether it is connected with the subject matter of Reference (IT) No.38 of 1997; and (c) whether the petitioner had actually altered service conditions applicable to the complainants immediately before commencement of Reference (IT) No.38 of 1997.

(A) Concerned Workman:-

11. For examining the issue viz. who can be considered concerned workmen "in the pending proceedings" the scope and the subject matter of the Reference (IT) No.38 of 1997 and the exact terms of Reference will have to be kept in focus. The appropriate government had referred below quoted dispute for adjudication and said dispute was pending at the time of alleged alteration.

The text of the order of Reference dated 4.2.1997 reads thus (free translation from vernacular):-

> "Whether the retirement age for all employees of the Sabarkantha Jilla Dudh Utpadak Sahkari Sangh Limited should be fixed at 60 years or not".

11.1 In view of the said order of Reference and its subject matter, those workmen in whose case the age of superannuation is fixed at less than 60 years would be "concerned workmen in pending proceedings" because the workmen in whose case age for superannuation is fixed at 60 years would not be interested in or concerned with the demand to revise and raise the age for superannuation to 60 years of age inasmuch as in their case, the age for superannuation is, according to their claim, already fixed at 60 years of age.

11.2 Thus, the workmen who claim that in their case age for superannuation is fixed at 60 years of age cannot be considered "concerned workmen" in the pending reference No.38 of 1997. The complaints of the complainants who claim that the age for superannuation in their case is 60 years ought not have been entertained.

11.3 It is pertinent that in present case, the claimants have asserted that their appointment letters provided for superannuation at the age of 58 years and subsequently by Managing Director's

letter it was conveyed that the age for superannuation is revised to 60 years. On such premises, the complainants claimed that action of relieving them at 55 years of age is in violation of Section 33. Thus, on the premise of their own claim, the complainants would not fall within the scope of terms of Reference.

11.4 It is also relevant that the appointment letters of each of the complainants were not placed on record and instead, in respect of only one employee a letter of confirmation of appointment was placed on record. In this view of the matter, the learned Tribunal could not have presumed that such alleged change with regard to age for superannuation was made and must have been made in respect of every complainant and the learned Tribunal could not have proceeded on the basis of such presumption.

11.5 The learned Tribunal ought to have appreciated and held that the complainants who claimed that in their case, the age for superannuation is 60 years, would not be concerned workmen in the Reference No.38 of 1997 and therefore, complaint by them was not maintainable. Such workmen may, on the premise that they were prematurely relieved from the service take out other appropriate proceedings in

accordance with the Act, but complaint on ground of breach of Section 33 would not be maintainable by them.

11.6 Unfortunately, the learned Tribunal has not addressed and considered and decided the said aspect and proceeded on the premise – based on presumption, that all complainants are “concerned persons” in pending dispute. The error i.e. not considering the issue about maintainability of the complaints in light of the aforesaid aspect amounts to irregular exercise of jurisdiction and vitiates the impugned orders.

11.7 Despite this position, if it is assumed, only for considering other aspects related to and arising from the impugned orders and the controversy that all complainants are – or can be treated as - “concerned persons” and thereby first condition to attract Section 33 is complied then it would be necessary to consider the aspects/issues mentioned at Sr. No.'B' and Sr. No. 'C' above.

12. For sake of convenience, it is considered appropriate to address and deal with the aspect mentioned at serial No.”C” above before addressing the issue at serial No.”B”.

(C) The Service Conditions applicable before the commencement of Reference and Whether there is any prejudicial alteration:-

13. On this count, it is relevant to mention that undisputedly the standing order or the service Rules applicable in the petitioner mandali prescribe, by virtue of clause 36.1 thereof, that age for superannuation for all employees shall be 55 years.

14. In this context, it is also relevant to take into account the deposition of the sole witness who was examined by and on behalf of the complainants wherein the deponent, i.e. Mr. Manilal K. Patel (one of the complainants) accepted and admitted that the Standing Orders prescribing service conditions were settled and brought in force with effect from 1.4.1990 by virtue of a settlement which was accepted by all workmen and the union and the benefits flowing from the settlement (including wage revision and other benefits) were received and accepted by all workmen. Thus, the standing order which prescribe that the age for superannuation shall be 55 years for all employees is in force in the petitioner mandali since 1.4.1990 and since then the workmen have been relieved from the service on completion of 55 years of age and that any

employee has never raised any dispute.

14.1 It is an undisputed fact that the standing order which prescribe the age for superannuation (55 years of age, brought into force w.e.f. 1.4.1990) has not been challenged and/or changed or modified since 1.4.1990 and it was applicable to all employees (in view of the terms of settlement dated 1.4.1990) when the order of Reference was passed i.e. immediately before the commencement of the proceedings.

14.2 Meaning thereby, when the order of Reference was passed (i.e. immediately before the commencement of the Reference / proceedings), the service conditions applicable to the complainants was 55 years of age.

14.3 When the said aspect is demonstrated from the standing order and also from the deposition by the union's witness, then, the learned Tribunal ought to have appreciated that the action of relieving the employees when they attain the age prescribed as age for superannuation will not amount to alteration in service condition but it would be an action in accordance with the standing orders and that therefore it cannot be said that the employer had altered any service condition.

14.4 This also translates into the fact – situation that the employer did not make any alteration in the service condition which was applicable to the complainants immediately before commencement of the proceedings i.e. of the Reference No.38 of 1997 and the employer's action merely enforced relevant service condition which was in force at the material point of time and the said action did not result into alteration of service conditions of the complainants which was applicable to all employees of the petitioner mandli before commencement of Reference and cannot be termed as "alteration in service conditions applicable immediately before commencement of proceedings". Consequently, the said action would not fall within the purview of Section 33 of the Act. Hence, the said action would not amount to breach of Section 33 of the Act.

15. In this context, it would be appropriate to take into account, at this stage, observations by Hon'ble Apex Court in paragraph Nos.3 to 5 in the case of Blue Star Employees Union and profitable reference may also be made to the observations in paragraph Nos.12 and 13 in the decision in case of Cipla Ltd. (supra). The said decisions and the observations by Hon'ble Apex Court support and

fortify foregoing discussion in respect of earlier mentioned aspects.

16. So as to come out of above discussed position which emerges from the fact that (a) the provision related to age for superannuation is introduced w.e.f. April-1990 and since then it is in operation and that (b) the said provision/standing orders are put in operation by a settlement with the union which is executed under Section 18(3) and 2(P) of I.D.Act and thus, it is binding to all, and that (c) at the time when the proceedings commenced the provision under standing order was applicable, the complainants have alleged that (a) the standing orders on which the petitioner are not “certified standing orders”; and (b) there is discrepancy between the provision in the appointment letter and the provision under the Standing Orders and that therefore in view of clause 2.3 of the standing orders, the provision in the appointment letter should prevail.

17. So far as the contention on ground of Standing orders is concerned, viz. that the Standing Orders are not certified Standing Orders and that, therefore, the provision thereunder should not be taken into consideration is concerned, Mr. Patel, learned senior counsel for

the petitioner mandali relied on the observations and conclusions recorded by the learned Tribunal in the award dated 27.3.2003 passed in the Reference No.38 of 1997 and submitted that the learned Tribunal has held that the Standing Orders are certified Standing Orders.

17.1 On this count, it is pertinent to mention that the law prescribes procedure for certification of standing orders and only if such procedure is complied then only the standing orders can be considered as “certified standing orders”. Otherwise, the standing orders do not acquire status of “certified” standing orders.

17.2 On this count, the petitioner has relied on award passed in Reference No.38 of 1997. However, on examination of the award in Reference No.38 of 1997, it also comes out that actually the learned Tribunal has not recorded final conclusion to the effect that the Standing Orders are “certified after following procedure of certification” prescribed by law i.e. under Industrial Employment Standing Orders Act.

17.3 Therefore, so as to determine as to whether the standing orders of the petitioner mandali are “certified” or not, it would be necessary to ascertain whether in present case, the procedure

was followed or not. However, in present case, it is not necessary to examine the said factual aspect viz. whether the Standing Orders can be said to be “certified” or not because even if it is assumed that the Standing orders are not certified then “Model Standing Orders” prescribed under the Industrial Employment Standing Orders Act would be applicable in view of the provisions under the said Act and clause 27 under the model Standing Orders (which is the provision with regard to age of superannuation under model Standing Orders) will be attracted and applicable in such cases.

17.4 In this view of the matter, at this stage, it is relevant to consider the effect of clause 27 under Model Standing Orders. The said provision under Model Standing Orders takes in its purview ‘award’ as well as ‘settlement’ and prescribes that the age for retirement would be 60 years, however, the employer and the workman may decide any other age as age of retirement, by “settlement” or by an “award”.

17.5 Thus, in light of the said provision under model standing orders, it is permissible for the employer and workmen to settle and fix any other age (i.e. other than 60 years) as age for retirement and that can be done either by way of

settlement or an award.

17.6 In present case, the provision related to retirement age is introduced and brought in force w.e.f. 1.4.1990 by virtue of "settlement" arrived at between the petitioner mandali and the association of the workmen in accordance with the provision under section 12(3) read with section 2(p) and section 18(3) of the Act. Therefore, said "settlement" would fall within purview of clause 27 of Model Standing Orders.

17.7 Consequently, the provision related to age for superannuation as prescribed under the standing order would be applicable to the mandli and its employees and the contention that the standing orders are not certified and therefore, said provision cannot be considered is misconceived and cannot be accepted. Besides this, it is also relevant that according to the provisions under the Industrial Disputes Act, a settlement which is arrived at during conciliation proceedings under section 12(3) read with section 18(3), shall be binding to all employees.

17.8 By virtue of the said settlement, particularly clause 9 thereof, it is stipulated and declared that the new rules which are framed

for prescribing service conditions are acceptable to the workmen and they will be binding and applicable to all employees.

17.9 Therefore, when the said settlement is read conjointly with Model Standing Orders, then it comes out that by virtue of the said settlement, age for superannuation at 55 years is fixed since April 1990 and since then it is accepted by the employer and all workmen (by virtue of the settlement) and in view of the said provision under the Model Standing Orders read with the settlement, the age of superannuation determined by the parties by virtue of the settlement is binding to the parties.

18. In this view of the matter, it would be appropriate to turn to the provision which is made under the Standing Orders/service Rules which prescribe service conditions related to age for superannuation i.e. the clause No.36.1.

18.1 When the said clause 36.1 is taken into consideration, it comes out that according to the said clause 36.1, the age prescribed for retirement is 55 years, however, service of an employee may be extended for a period of 3 years at the discretion of the Board, in special cases after considering physical and medical fitness of

the concerned employees. The said provision is in force w.e.f. 1.4.1990.

18.2 Thus, it was applicable immediately before the commencement of the proceedings. Meaning thereby, when the complainants were relieved from the service (when they completed age prescribed for superannuation 55 years of age) under the Standing Orders, the employer actually acted in accordance with the service condition applicable to the complainants immediately before the commencement of the proceedings.

18.3 Hence, it cannot be said that employer altered the service condition applicable to the complainants immediately before the commencement of the standing orders.

19. In this view of the matter, so as to bring the action of the employer within purview of Section 33, it was necessary for the complainants to establish that the employer had committed alteration in respect of the service conditions which was applicable to them immediately before the commencement of Reference. For the said purpose and so as to come out of this situation the complainants, as mentioned earlier, relied on clause 2.3 of the Standing Orders and raised plea of discrepancy between the clause in appointment

letter and the clause in Standing Orders.

20. Therefore, I may now turn to the said provisions.

20.1 The clause 2.1 of the said Standing Orders provides, *inter alia*, that the service regulations shall be applicable to '*all employees working with the petitioner mandali including permanent employees, trainees, probationers and temporary employees*'. Thus, the service regulations under the standing orders are applicable to all employees. The clause 36.1 of the standing orders prescribes 55 years of age for superannuation.

20.2 Therefore, when the clause 9 is read with clause 36.1 then it emerges that the action of the petitioner cannot be termed as an action in breach of Section 33 of the Act.

20.3 The complainants, therefore, relied on clause 2.3 of the standing orders which, inter alia, provides that in case of any discrepancy between provision under Standing Orders and agreement / contract provision under agreement / contract would prevail. The complainants, therefore, claimed that there is discrepancy between clause 36.1 and the provision in their

appointment letters and therefore, the provision in appointment letters shall prevail. So as to justify said contention, the complainants tried to rely on one letter of confirmation of appointment of one employee and a letter said to have been issued by the Managing Director in respect of one employee.

20.4 Before proceeding further, it is necessary to mention that the complainants did not place on record any contract/agreement contemplated under clause 2.3 nor did they place on record even any appointment letter of any complainant.

20.5 So far as the appointment order is concerned, it is also pertinent to mention that (a) the letter placed on record before the learned Tribunal is not letter of appointment but it is letter of confirmation in service; and (b) further, only one such letter in respect of only one employee was placed on record; (c) except one order of confirmation of appointment, any other order much less any appointment order in respect of any complainant is not on record; (d) merely on the basis of one order of confirmation of appointment in respect of one employee (and the provision thereunder), the learned tribunal presumed that in respect of all complainant's similar orders of confirmation in respect of all

complainants must have been issued and similar letters by Managing Director in respect of all complainants must have been issued and then the learned Tribunal proceeded to decide the cases of all complainants on such presumption; (e) it is also relevant that a copy of appointment letter of the same complainant (i.e. Mr. M.J.Desai – whose confirmation order was placed on record by the complainants / witness of complainants) is shown to the Court by learned Senior Counsel for the petitioner (any appointment letter of any complainant was not placed on record before the learned Tribunal) and when the said appointment letter is examined it is noticed that there is no provision related to age of superannuation.

20.6 On this count, learned Tribunal failed to consider and appreciate that one letter of confirmation of appointment in respect of one employee and / or one letter by Managing Director addressed to one employee can neither lead to nor justify any conclusion in respect of all complainants, more particularly when any contract/agreement or even appointment letter in respect of all complainants and/or similar communication by Managing Director in respect of all complainants are not placed on record or when any evidence to prove that appoint letters prescribing (60 years – or even 58 years) age

other than 55 years of age as age for superannuation is fixed for all complainants is not placed on record. In absence of such evidence, any conclusion in respect of all complainants could not have been reached.

20.7 It has also emerged from the record that the letter referred to by the witness is letter of confirmation of appointment, and not appointment order. The appointment letter – though not on record of learned Tribunal – is made available by the petitioner and when the said appointment order is examined, it is noticed that the said appointment order does not contain any provision with regard to age of superannuation.

20.8 In this view of the matter, it has emerged that the complainants failed to prove and establish that the age for superannuation applicable to them immediately before the proceedings (Reference No.38 of 1997) was 60 years or even 58 years.

20.9 Besides this, it is pertinent to mention that the very fact that the employees demanded that the age for superannuation should be fixed at 60 years establishes that until the said order of reference came to be passed the age for superannuation in the petitioner Mandli was not

60 years otherwise such demand would not have been raised.

20.10Moreover, even if it is further presumed that subject mentioned in said letter of Managing Director was applicable to all complainants and in their case also age for superannuation was fixed at 60 years, then the alleged alteration can be said to have occurred on 1.4.1990 when the settlement was executed and standing orders were brought in force and that was long time before (before almost 7 years) the proceedings (of Reference No.38 of 1997) commenced. Thus, when in 1998 the proceedings of the Reference commenced, the provision which was in force prescribed 55 years of age as age for superannuation. Hence, complaints filed in 1998 in respect of or against the alleged alteration made in April, 1990 would not be maintainable.

20.11From the foregoing discussion, it emerges that the complainant's claim that immediately before commencement of the reference the age for superannuation in their case was 60 years, is neither established nor sustainable and cannot be accepted. However, the learned Tribunal did not consider and over looked this aspect. This error vitiates the order.

21. Despite such fact – situation, the learned Tribunal heavily, rather solely, relied on said clause 2.3 of Standing Orders. The learned Tribunal, without appreciating that the claimants had failed to establish that in their case the age for superannuation was fixed at 60 years (or even 58 years) and that at the time when proceedings of Reference No.38 of 1997 commenced, said provision/service condition was applicable in their case and that therefore it cannot be held that alleged discrepancy was proved held that in light of clause 2.3 the petitioner could not have relieved the complainants on completion of 55 years of age.

21.1 Now, on this count, it is relevant to mention that any “agreement/contract” whatsoever, much less any “agreement / contract” with such clause is not placed on record.

21.2 The complainants claim that the “appointment letters” should be treated as “agreement/contract”. Without strong justification and until it is established that, the said provision admits and contemplates such interpretation, the said submission cannot be accepted and acted upon lightly and casually when the matter under consideration is “complaint” filed under Section 33-A of the Act. This is so

because the said proceedings entail criminal proceedings, if breach is established and that therefore, an interpretation which is not contemplated cannot be accepted casually and lightly. Moreover, what is pertinent is the fact that even the appointment letters of the complainants are also not placed on record.

21.3 Thus, it cannot be said that the factum about the provision prescribing age for superannuation (in respect of all complainants) at 60 years in respect of all complainants, was duly proved and established with cogent evidence.

21.4 In this backdrop, the petitioner has claimed and submitted that the expression in clause 2.3 would be applicable in cases of those employees who are appointed in special case for special purpose by way of special agreement/contract and not in routine manner by virtue of “appointment letters”. The said submission and explanation with regard to the said expression in clause 2.3 seem to be justified in view of the provision under clause 2.1 and clause 36.1 read with clause 9.

21.5 Further, it is also relevant to note that if the said clause 2.3 is not read in the said manner, then clause 2.1 and clause 36.1 will be

rendered redundant. The learned Tribunal failed to consider this aspect also.

21.6 Further, the said clause 2.3 could have been invoked and applied only if there was no dispute with regard to existence of agreements/contracts in respect of all complainants. Whereas in present case, there is dispute about existence of such contract/agreement. Actually any agreement or contract of such nature does not exist. Therefore, the complainants claimed that the appointment letters should be treated as the contract – agreement. However,it is pertinent that even appointment letters do not contain such provision and the alleged letter of Managing Director cannot be termed as agreement/ contract within the purview of said clause 2.3.

21.7 In absence of cogent evidence about such contracts / agreements and such clause / provision in respect of all complainants, the learned Tribunal could not have presumed existence of such agreement / contract much less, in favour of all complainants.

21.8 Unfortunately, in present case, despite absence of relevant and necessary evidence, learned Tribunal presumed existence of such contract / agreement and such provision in favour

of all complainants and proceeded on such presumption. The learned Tribunal also presumed that such agreements / contracts and such provision exist in respect of all complainants. The learned Tribunal further presumed that the provision in the contract are in conflict with the provision under the Standing Orders and the learned Tribunal invoked and applied said clause 2.3 on basis of such presumption.

21.9 Such approach is not sustainable in law and the conclusions reached and recorded on the basis of such approach also cannot be sustained.

21.10 The learned Tribunal also failed to consider that even if it is assumed that by virtue of the Managing Director's communication, the age for superannuation in respect of all complainants was revised and enhanced to 60 years of age, then in that event the complainants would fall outside the purview of scope of Reference No.38 of 1997 inasmuch as the said reference would cover only those employees whose retirement age was less than 60 years. Consequently, such complainants cannot be said to be the “persons concerned in” the pending industrial dispute (which is primary condition and requirement under section 33 of the Act). In this view of the matter, the conclusion recorded by learned Court is not sustainable. The

learned Tribunal failed to consider above mentioned aspects related to the said issue.

21.11Besides this, the learned Tribunal also failed to take into account that:-

[a] in first place age for superannuation in petitioner mandali was not fixed at 60 years;

[b] secondly, if age for superannuation was fixed at 60 years in petitioner mandali then the demand to revise and fix age for superannuation at 60 years in petitioner mandali would not have been raised;

[c] thirdly, even after complete adjudication of said demand in Reference No.38 of 1997, the learned Tribunal did not find any justification in said demand and learned Tribunal held the demand is not sustainable;

[d] fourth, the learned Tribunal, after complete adjudication process in Reference No.38 of 1997, did not find any evidence / material which would establish that at any point of time age for superannuation in petitioner mandali was fixed at 60 years;

[e] fifth, the Standing Orders (which prescribe 55 years of age as age for superannuation) had been in force and in operation since 1990 in the petitioner mandali and any dispute with regard to said

provision and / or that the provision was contrary to any provision in appointment letters was never raised and until the order of Reference came to be passed all employees stood relieved on superannuation on completion of 55 years of age.

21.12The learned Tribunal has, while deciding the complaints, lost sight of, or failed to consider, above mentioned issues and aspects arising from the complaints and the subject matter of the complaints. This error has vitiated the awards. Therefore, the orders deserve to be set aside and they are hereby set aside.

22. Now, I may revert to the issue mentioned at “B” above. Before taking up the said issue mentioned at “B” above, it is appropriate to mention that the decisions on which learned counsel for the petitioner placed reliance addressed issue about certification of standing orders or malafides. In present case, allegation for malafide was neither expressly pleaded nor proved. There is no evidence that the petitioner acted malafide in relieving the complainants on attaining age of superannuation prescribed under standing orders. Further, in view of clause 27 under Model Standing Orders and the settlement executed between the petitioner and the

employees/union, question of certification of standing order do not also relevant in facts of present case. Thus, the said decision do not render any assistance to the respondent.

22.1 Whether connected with pending dispute and whether the alteration is prejudicial:-

In present case, it has emerged from foregoing discussion that (1) the complainants failed to prove that the age for superannuation applicable to them, before commencement of Reference No.38 of 1997, was 60 years (or even 58 years); and (2) the standing orders brought in force w.e.f. 1.4.1990 prescribe 55 years of age as age for superannuation; and (3) the action of relieving the complainants when they completed 55 years of age was in accordance with the provision under the standing orders; and (4) the said provision was in force since 1.4.1990 which means that the said provision was applicable when the proceedings of the Reference commenced; and (5) therefore, it was not proved and the learned Tribunal could not have held that any alteration in service condition applicable to the complainants before Reference No.38 of 1997 was effected by the employer. Consequently, neither any alteration, much less prejudicial alteration was proved before the learned Tribunal. Thus, when alteration in service condition applicable

before commencement of the Reference is not established and when it is demonstrated that the employer's action was in accordance with the standing orders which were in force and applicable when Reference commenced then it was also demonstrated that the employer's action actually amounted to an action in accordance with, and enforcement of, the applicable and prevailing service conditions and not an alteration in the service condition prevailing and applicable at the commencement of the Reference. Thus, when it cannot be said that any alteration in prevailing service condition was effected, any question about alteration was connected with the dispute and/or to the prejudice of the complainant do not arise.

23. For the aforesaid reasons and in light of the foregoing discussion, the conclusion recorded by the learned Tribunal that the concerned persons were entitled to continue in service upto 60 years (which observation is beyond the scope of reference) and / or that the petitioner Mandli acted in contravention of the provision under Section 33 when it relieved the complainants when they completed age of 55 years and/or that the said action amounted to alteration in the service conditions applicable to them immediately before the commencement of the proceedings, are not in

consonance with the relevant provisions and / or the evidence on record and cannot be sustained. The said conclusions deserve to be set aside. The learned Tribunal has failed to take into account above discussed aspects.

24. Therefore, impugned orders suffer from error of non-application of mind to relevant aspects, material and facts. The learned Tribunal has also misconstrued relevant provisions and documents on record. The learned Tribunal has also irregularly exercised the jurisdiction. The award passed in substantive reference and the findings and conclusions recorded by the tribunal in said substantive reference/award are also not considered and findings contrary to the decision in said substantive reference have been recorded in the orders impugned in these petitions. The material available on record is not considered and facts – material not available on record and not proved, are presumed by learned Tribunal. For all these reasons, the impugned orders are defective, erroneous, unjust and unsustainable. Consequently, the impugned awards cannot be sustained and deserve to be set aside and are, hereby set aside.

25. During the hearing, Mr. Patel, learned Senior Counsel for the petitioner Mandli, submitted that

so far as respondent Nos. 6, 7 and 13 in Special Civil Application No.16923 of 2007 are concerned, the said persons had reached age of retirement and were relieved on 17.4.1996, 31.8.1996 and 1.4.1996 respectively, i.e. before the date of order of reference (4.2.1997) and that therefore, the complaints filed by said persons were otherwise also not maintainable because the action in question was taken before the order of reference. Similar submission is made with regard to the respondent in Special Civil Application No.16906 of 2007 where the concerned respondent had retired on 12.8.1996 i.e. before 4.2.1997. Therefore, the said complaint was not maintainable as the action in question was taken before the order of reference.

25.1 Consequently, the said complaints fail on the said additional ground as well.

25.2 It is further submitted that the concerned person Mr. Baldevbhai in Special Civil Application No.16931 of 2007 had withdrawn the complaint itself while proceedings were pending before the learned Tribunal, however, the award is made in respect of the said person and that therefore, the said award is otherwise also not sustainable because it is based in respect of the complaints which was withdrawn before the learned

Tribunal itself.

25.3 In light of said submissions, it is hereby held, directed and clarified that the petitions in respect of the respondents No.6, 7 and 13 in Special Civil Application No.16923 of 2007 and the case of respondent in Special Civil Application No.16906 of 2007 are allowed for the aforesaid additional reasons as well.

The petitions are accordingly allowed to the aforesaid extent. Rule is made absolute to the aforesaid extent.

Sd/-

**(K.M.THAKER, J.)**

kdc/Bharat