

Indian Tobacco Co. Ltd., Nagpur

Vs

Industrial Court, Nagpur and Another

Civil Appeal No. 3210 of 1991

(M. M. Punchhi, R. M. Sahai JJ)

23.02.1994

ORDER

1. The narrow question which requires to be determined in this appeal is as to the interpretation of Section 38-B of the Bombay Shops and Establishments Act, 1948 (hereafter referred to as 'the Shops Act') and the Standing Orders issued under the Industrial Employment (Standing Orders) Act, 1946 (hereafter referred to as the 'Standing Orders Act'). The terms of grant of special leave require so.
2. The appellant is a Public Limited Company. It has branches throughout the country, one of which is at Nagpur. The branch at Nagpur is registered under the Shops Act. Accordingly to the appellant its personnel never exceeded 7 and at the relevant time that was the number it maintained. On 14-2-1984 the second respondent was appointed on probation as a "Sales Representative" for the establishment at Nagpur. One of the terms of the contract of employment was that he will be placed on probation for a period of 12 months commencing from 14-2-1984 up to 18-2-1985 or for such extended period as may be determined by the management. In terms thereof the said respondent started working with the appellant. According to the appellant his work and activity was found to be unsatisfactory. By letter dated 24-6-1985, the service of the second respondent were terminated with effect from 24-7-1985. A cheque of a sum representing emoluments as due was sent to the respondent.
3. A complaint was filed by the second respondent before the Labour Court, Nagpur, under Section 28 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, alleging inter alia that the appellant company had indulged in an unfair labour practice in terminating his service inasmuch as the standing orders issued under the Standing Orders Act were given a go-by, as on the date of termination of his services, the period of probation of three months, as prescribed under the standing orders, stood completed and in terms thereof he was assumed to have been confirmed in his post as a regular employee. It was asserted by the second respondent that his services could not be terminated on the pretext that his work and activity was unsatisfactory by the appellant by arrogating to itself a large period of probation of about 17 months.
4. There was stiff opposition to the complaint by the appellant. It was asserted that when the second respondent had failed to achieve the desired level of quality of work, as was expected of him, and that being unsatisfactory he was not found suitable for the job. It was maintained that the respondent was poor in field work and not suitable to carry on as Sales Representative. The termination of the services of the second respondent were claimed to be justified.
5. The Labour Court on the strength of the standing orders found that the second respondent had

successfully completed the probationary period of three months and had become a permanent employee. On this ground, and on some other grounds with which we are not concerned for the present, the appellant was called upon to cease and desist from engaging in unfair practices. The appellant at the same time was directed to reinstate the second respondent in service and to pay him back wages.

6. The orders of the Labour Court were initially challenged by the appellant in revision before the Industrial Court but unsuccessfully, and thereafter it moved the High Court of Bombay by means of a writ petition under Article 226 of the Constitution and there again unsuccessfully.

7. The contention of the appellant before the High Court, as also here, is based on the interpretation of Section 38-B of the Shops Act, as it then stood, which may be reproduced as under :

"38-B. The provisions of the Industrial Employment (Standing Orders) Act, 1946, in its application to the State of Maharashtra (hereinafter in this section referred to as 'the said Act'), and the rules and standing orders (including model standing orders) made thereunder from time to time, shall, mutatis mutandis, apply to all establishments to which this Act applies, as if they were industrial establishments within the meaning of the said Act."

8. Due to the limited scope of the appeal, no meaningful relief would otherwise fall for the appellant as the appellant on his own had undertaken to reinstate the second respondent in service, continuing him as such, and undertaking to pay him 50% of the back wages for the period between June 1985 to June 1988. Residually only 50% back wages is the stake insofar as the respondent is concerned, whereas there are higher stakes insofar as the appellant is concerned as it does not want to remain adjudged guilty of commission of the suggested unfair labour practice.

9. As its preamble suggests, the Shops Act is an Act to consolidate and amend the law relating to the regulation of conditions of work and employment in shops, commercial establishments, residential hotels, restaurants, eating houses, theatres, other places of public amusement or entertainment and other establishments. Section 2(8) goes to define the word 'establishment'. There is no provision in the Act so as to fix any limit as to the number of persons working in an establishment, which means a shop or a commercial establishment too, conditions of which would be regulated regarding their work and employment. Illustratively, it may be noted from the definition of 'commercial establishments' that it may be manned by a sole legal practitioner and likewise a 'shop' by a sole merchant. Now advertent to Section 38-B, what is significant to note is that by means of that provision the Standing Orders Act, in its application to the State of Maharashtra brings along therewith its brood of rules and standing orders, including the model standing orders, made thereunder from time to time as a package, and mutatis mutandis applying to all establishments to which the Shops Act applies by a legal fiction as if those establishments were industrial establishments within the meaning of the Standing Orders Act. The contention on behalf of the appellant is that when by virtue thereof every establishment wherein 100 or more workmen are employed or were employed on any day in the preceding 12 months, or of a lesser number under the proviso thereto when the appropriate Government notifies and specifies so to a particular industrial establishment a number less than 100 persons, the establishment of the appellant covered under the Shops Act fictionally becomes an industrial establishment under the Standing Orders Act and a fortiori it being an establishment having only 7 persons in employment at the relevant time, neither the Standing Orders Act nor the standing orders framed thereunder had any application to govern the relationship of the appellant with the second respondent. To put it plainly, it is suggested that the

3 months' period of probation as prescribed under the standing orders could not apply to regularise the services of the respondent. Stress has been laid on the expression *mutatis mutandis* employed in Section 38-B to contend that the meaning thereto according to Legal Dictionaries being "with the necessary changes in points of detail meaning that matters or things are generally the same, but to be altered when necessary" as to names, offices and the like, as adopted by this Court in *Ashok Service Centre V, State of Orissa* ((1983) 2 SCC 82 : 1983 SCC (Tax) 90 : (1983) 2 SCR 363) - 'establishments' under the Shops Act become 'industrial establishments' of employees only when numbering 100 (unless lessened under the proviso) and above, and when the number fell short the Standing Orders Act does not apply.

10. In our view, such an interpretation is impermissible as that would defeat the very purpose for which Section 38-B was introduced, as would presently be seen. Fictionally, when establishments become industrial establishments by the thrust of Section 38-B, the standing orders issued under the Standing Orders Act, from time to time, would apply *mutatis mutandis* to establishments under the Shops Act. Up to this point the fiction works. But there cannot be fiction over a fiction. It cannot be suggested for a moment that shops and establishments on becoming industrial establishments must qualify thenceforth to have 100 employees or more. Such an interpretation would destroy not only the purpose of Section 38-B but the working of the Shops Act too and the purpose for which it was enacted. The mere fact that in the year 1986 Section 38-B of the Shops Act was amended, so as to read as follows :

"38-B. The provisions of the Industrial Employment (Standing Orders) Act, 1946, in its application to the State of Maharashtra (hereinafter in this section referred to as 'the said Act'), and the rules and standing orders (including model standing orders) made thereunder from time to time, shall, *mutatis mutandis*, apply to establishments wherein fifty or more employees are employed and to which this Act applies as if they were industrial establishments within the meaning of the said Act."

does not help the appellant at all. Rather, it goes against its contention because, as is plain, now it is to the establishments where 50 or more employees are employed, does the Standing Orders Act apply treating them industrial establishments within the meaning of the said Act. The argument that the State Legislature stepped in to reduce the qualifying figure of 100 as given in Section 1(3) of the Standing Orders Act to the figure 50, is totally misplaced. Rather, the establishments under the Shops Act in which 50 or more employees were employed have alone now been brought to come within the fiction of the Standing Orders Act as if they were industrial establishments, whereas prior to the amendment all establishments without a qualifying number were covered. Thus it is held that the provisions of Sections 38-B of the Shops Act applied to all establishments as if industrial establishments irrespective of the number of persons employed therein and the standing orders would apply instantly providing a period of probation of three months only. It, thus, appears to us that, the High Court was right in importing the applicability of the Standing Orders Act and the standing orders to enable the respondent ripen his period of probation to one of regularity after the expiry of three months of successful completion. Our interpretation being in accord with that of the High Court, as also on the result achieved, we dispose of this appeal by directing that the appellant pay to the second respondent the balance of 50% back wages within a period of 2 months from today.

11. Parties are at variance as to when Respondent 2 was reinstated in service. Respondent 2 claims that he is entitled to full back wages till the date of his reinstatement. This is so. Should there be any difference on calculation of back wages the appellant is held direction bound to satisfy Respondent

2 within a period of two months.

12. There will be no order as to costs.

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