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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2988 OF 2006

Anant Mahadeo Pimple ...Petitioner

vs

Bai Jerbai Wadia Hospital For Children And 4 Ors. ...Respondents

WITH

WRIT PETITION NO.152 OF 2007

WITH

WRIT PETITION NO.168 OF 2007

.....

Mr. Himanshu Kode, a/w. Mr. Pankaj Kode, for the Petitioner in WP/2988/06.

Mr. Susheel Mahadeshwar, a/w. Ms. Sonali Humne, i/b. Ranjana Todankar, for the Petitioner in WP/152/07 and 168/07.

Mr. T.S. Shetty, a/w. Mr. Santosh Shetty, for the Respondents.

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CORAM : S.C. GUPTE, J.

DATED: APRIL 11, 2016

P.C.:

. These petitions, filed under Article 226 of the Constitution of India, challenge a judgment and order dated 9 March 2006 passed by the Industrial Court at Mumbai in Complaint (ULP) No.217 of 2004 and twenty other identical connected complaints.

2. The Petitioners were employees in Bai Jerbai Wadia Hospital for Children. This hospital has been established pursuant to an Indenture between the Municipal Corporation of Bombay and the

industrial house of Wadias. The hospital was established with contributions from the Municipal Corporation as well as the Wadias and has been administered by the Board of Management, which consists of four members appointed by the Wadias and four members appointed by the Corporation. The hospital has a teaching hospital attached to Seth G.S. Medical College of Mumbai. The dispute pertains to compulsory retirement of employees of the hospital upon attaining the age of 55 years with notice of not less than three months. Hospital Service Rules, particularly Clause 23 thereof, provides for such compulsory retirement without assigning any reason. Clause 23 of the Hospital Service Rules, which according to the Respondent Hospital, applies in the present case, is in the following terms :-

“The Dean is the competent authority to retire any Hospital employee on attaining the age of 55 years by giving 3 months notice without assigning any reason, after obtaining the sanction of the Chairman”.

On the other hand, the Model Standing Orders, particularly Clause 27 thereof, provides as follows :-

“The age for retirement or superannuation of the workmen may be sixty years or such other age as may be agreed upon between the employer and the workmen by any agreement, settlement or award which may be binding on the employer and the workmen under any law for the time being in force”.

The controversy in the petition, as originally framed, concerns the applicability of Clause 27 of the Model Standing Orders, as claimed by the Petitioners, as opposed to Clause 23 of the Hospital Services Rules, which is said to govern the Petitioners' case according to

the Respondent Hospital. That, in short, has been the original controversy in the matter. As explained below, at the hearing of the Petition, a different line of arguments is adopted by the Petitioners. What is basically submitted now is that compulsory retirement even under the Hospital Rules (i.e. Rule 23 thereof) can only be on the basis of considerations of public interest, which are not applied to the retirements in dispute.

3. By separate orders dated 16 March 2004, 22 March 2004, 15 June 2004 and 17 June 2004, the Petitioners were compulsorily retired from service. The orders of compulsory retirement issued to the Petitioners provided that the Competent Authority had decided to retire them from service under Clause 23 of the Hospital Service Rules. All the Petitioners were given three months' notice for the same so as to cease to be in the service of the hospital with effect from the relevant dates after expiry of three months. These orders were challenged by the Petitioners by filing of complaints under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971("Act"). The Petitioners' case was that the compulsory retirement orders amounted to an unfair labour practice within the meaning of items 9 and 10 of Schedule IV to the Act. The Industrial Court, by its impugned order, held that the Respondent Hospital, being a charitable institution, was not an industry under section 2(j) of the Industrial Disputes Act, 1947. The Industrial Court also found that the Hospital Service Rules, read with the appointment orders issued to the concerned employees, applied to the employees and not the Model Standing Orders and particularly Clause 27 thereof and that, accordingly, the case of the

complainants for illegal compulsory retirement orders, cannot be accepted. The Industrial Court held that the complainants had failed to prove that the Respondent Hospital indulged in unfair labour practices under Item 9 of Schedule IV of the MRTU & PULP Act. The Court held that it was an admitted fact that the Respondent Hospital was aided by the Government; that the Government had withdrawn funds, due to which the union was required to file a writ petition and that the Government had released funds from time to time only in pursuance of directions given in such writ petition. The Industrial Court likewise found that though till 2001 the Hospital was running purely on charity, since 2001 due to non-availability of funds, it started levying charges; that the number of its beds got reduced due to these aspects and that, in the premises, the management had decided to reduce the strength of the employees so as to reduce the financial burden on the hospital and that, accordingly, it could not be said that there was no justifiable ground for compulsorily retiring the employees, under Rule 23. The Industrial Court, in the premises, dismissed all twenty- one complaints. The order of dismissal is in challenge in the present petitions.

4. It may be seen from the record of the complaints as well as the pleadings filed in the present petitions that the original complaints of the Petitioners were on the basis of applicability of Model Standing Orders, particularly Clause 27 thereof. The submission of the Petitioners was that, as held by the learned Single Judge of this Court in the case of **Engineering Workers' Association vs. J.D. Jamdar, Member Industrial Court**¹, the purpose of Clause 27 of the Model Standing

¹ 2004 III CLR 315

Orders was to ensure that the retirement age of the workmen was at least 60 years and whereas, any statement or agreement or award stipulating any age of retirement below 60 years, was not permissible. The Industrial Court, as we have noted above, held Clause 23 of the Hospital Service Rules to be the applicable clause and justified the compulsory retirement of the Petitioners on that basis. The main grievance of the Petitioners in the present petitions was that the impugned order of the Industrial Court was in breach of the law laid down by this Court in the case of **Engineering Workers' Association**. In other words, the dispute clearly hinged on the applicability of either Clause 27 of the Model Standing Orders or Clause 23 of the Hospital Service Rules and the Petitioners were placing heavy reliance on the judgment of this Court in the case of **Engineering Workers' Association** (supra).

5. Since the filing of these petitions, a Division Bench of our Court in the case of **Tulsiram K. Gothad vs. The Superintendent Mahatma Gandhi Memorial Hospital**² has unequivocally held that the judgment of this Court in the case of **Engineering Workers' Association** was not good law. The Division Bench has held that Model Standing Order No.27 clearly provided for the retirement age of 60 years, or such other age as may be agreed between the employer and the workmen by any agreement, settlement or award which may be binding on the employer and the workmen. Besides, according to the Division Bench, Standing Order No.32 also made it amply clear that the Standing Order could not operate in derogation of any law for the time being in

² 2007 III CLR 718

force or to the prejudice of any right under a contract of service, custom or procedure or agreement, settlement or award. The Division Bench, therefore, held that the age of retirement, as per the Standing Orders, would be 60 years only if there was no contract to the contrary between the parties. The Division Bench held that inasmuch as the learned Single Judge, in his judgment in **Engineering Workers' Association**, placed a construction on a standing order which resulted in addition of words to that condition, the judgment did not lay down good law. The Division Bench, accordingly, overruled that judgment. In other words, after the judgment of our Court in the case of **Tulsiram K. Gothad** (supra), the Model Standing Order No.27 would hold good only if another age of retirement was not agreed upon between the parties. Clause 23 of the Hospital Service Rules provides such contrary stipulation. These Service Rules were adopted by the Respondent Hospital in 1977 and a notice of having so adopted the Rules was displayed under the signature of the then Dean of the Hospital. The appointment letters issued to the employees of the Hospital also made it clear that all appointments in the Hospital would be subject to and governed by Hospital Service Rules. So also, whilst accepting the appointment letters, the concerned employees endorsed their acceptance of all terms and conditions of service without reservation. The main controversy as to the applicability of Standing Order No.27 versus Clause 23 of the Hospital Service Rules, thus, stands settled since the filing of the writ petitions and is no more *res integra*.

6. Learned Counsel for the Petitioners, however, submits that the impugned order of the Industrial Court does not discuss the aspect of

public interest involved in the Bombay Municipal Corporation (Service Rules), 1989. It is submitted that under these Service Rules, compulsory retirement was permissible provided the appropriate authority was of the opinion that it was in public interest. Relying on the judgment of the Supreme Court in the case of **S. Ramachandra Raju vs. State of Orissa**³, it is submitted by Counsel that the exercise of power of compulsory retirement must be bonafide and to promote public interest. It is submitted that the purpose of a rule, such as the present, was to weed out the worthless without the punitive extremes covered by Article 311 of the Constitution and the administration, to be efficient, must not be manned by drones, do nothings, incompetents and unworthies who may not be exactly delinquents liable to be punished but may, at the same time, be a burden on the administration and impede the flow of work or promote stagnation. Relying on the judgment in **S. Ramachandra Raju**, it is submitted that it is settled law that the Government must exercise the power of compulsory retirement only in the public interest to effectuate efficiency of service, that to say, to remove dead wood to augment efficiency and maintain integrity in public service. It is submitted that, in the present case, these considerations have not been applied either by the Competent Authority or by the Industrial Court. In the first place, it is important to note that the question as to whether or not the compulsory retirement orders were issued in public interest, was not a question raised before the Industrial Court. The parties had not joined issues on this question. What was instead argued before the Court was that the compulsory retirement provision in the Hospital Service Rules did not apply and that it was the

³ 1944 Supp. (3) SCC 424

Model Standing Order No.27, which governed the case. There was, in the premises, no occasion for the Industrial Court to consider this aspect. In any event, it is difficult to hold that compulsory retirement of workmen of a public hospital run on charitable lines, in the case of employees being superfluous having regard to the work carried out by the Hospital, is not a matter of public interest. The compulsory retirement provisions may well be used in a case as the present.

7. In the premises, there is no merit in the challenge to the impugned order of the Industrial Court inasmuch as it does not hold the compulsory retirement of the Petitioners as not offending Item 9 or 10 of the Schedule IV of the MRTU & PULP Act. The petitions are, accordingly, liable to be dismissed.

8. In Petition No.2988 of 2006, in addition to the common submissions in the group of petitions, it was submitted that the concerned employees in this petition have actually worked with the Respondent Hospital under a notice dated 28 December 2004, till the age of 58 years, that is to say, till their respective superannuations. It is, however, an admitted position that this notice was issued in pursuance of an interim order passed by the Industrial Court on the subject complaints. The interim order itself provided (Clause 5 of the order) that, in the event of dismissal of the complaints, the complainants were liable to refund to the Respondents 50% of wages, which might have been earned by them in the interregnum for services rendered on the strength of the interim order. It was provided that the Respondents were entitled to adjust this amount of 50% wages whilst making

payment of retirement benefits to the complainants. In view of the interim order, which has been accepted by everyone including the Petitioners in Writ Petition No.2988 of 2006, there is no question of giving any benefit of the interim order without the stipulation of refund of 50% of wages upon dismissal of the complaints, simply on the footing that the Petitioners actually worked with the Respondent Hospital through this period. Whatever work the Petitioners did with the Respondent Hospital was expressly under an interim order and with a condition that, in the event of the dismissal of their complaints, they will be liable to refund 50% of wages earned post the interim order. In that respect, the case of these Petitioners is not distinguishable from the case of the other Petitioners.

9. In the premises, the petitions are dismissed. There shall be no order as to costs.

(S.C. GUPTE, J.)