

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.**

WRIT PETITION NO.2689 OF 2018

Anupama R. Dhukande

... Petitioner

Vs

M/s.Podar Mills & Ors.

... Respondents

Mr.S.N. Deshpande with Ms.S.P. Munshi and Ms.N.S. Deshpande
for the Petitioner

Ms.Meena Doshi for Respondent No.1

Ms.P.M. Palshikar with Mr.P.K. Sonawane for Respondent - Union
of India

**CORAM: AKIL KURESHI &
S.J. KATHAWALLA, JJ.**

DATED: AUGUST 19, 2019

ORAL JUDGMENT (PER AKIL KURESHI, J.):

1. Rule. The learned Counsel for the respondents waive notice of Rule. With the consent of the advocates, the petition is taken up for final disposal forthwith.

2. The petitioner is a female employee of respondent No.1 – Mill, which is a unit of National Textile Corporation Ltd. ('NTC' for

short). She has prayed for a direction striking down a portion of Standing Order 11A framed by the employer under the provisions of Bombay Industrial Relations Act, 1946 (now, renamed as Maharashtra Industrial Relations Act; for short, hereinafter referred to as 'the Act') to the extent it discriminates between male and female employees.

3. The petitioner was working as a Clerk in Respondent No.1 – Mill. As per the Standing Orders, she would superannuate on reaching the age of 60 years. On 4.6.2018, respondent No.1 therefore, issued a communication to her conveying to her that she would retire on superannuation with effect from 4.7.2018 i.e., the date on which she would attain the age of 60 years. At that stage, the present petition came to be filed on the premise that the Standing Order 11A permits the employer to engage the male employee for a further period of three years beyond the normal age of retirement of 60 years. According to the petitioner, this distinction between female employee and male employee was wholly arbitrary and violative of Articles 14 and 15 of the Constitution of India. The concerned Standing Order 20A and 11A pertaining to the operative staff and clerical staff read as under:

“20-A For Operatives: - “An operative shall retire from service on attaining the age of 60 years, but a male operative shall be retained in service, if he continues to be efficient, up to the age of 63 years, provided that when retrenchment becomes necessary, a person who has completed the age of 60 years may be retired in preference to younger men”.

“11-A: - An employee shall retire from service on attaining the age of 60 years, but a male employee shall be retained in service if he continues to be efficient up to the age of 63 years, provided that when retrenchment becomes necessary, an employee who has completed the age of 60 years may be retired in preference to younger person”

4. Respondent No.1 has filed an affidavit in reply, relevant portion of which reads as under:

“9. I say that in respect of male employees, the issue arose as to whether the Standing Order no.20A as applicable to the operatives, could claim extension in service for 3 years after crossing the age of 60 years as a matter of right or whether the employer has had any discretion to grant the said extension. The said issue became the subject matter of a decision of the Division Bench of this Hon'ble Court in the case of Tata Textile Mills (U.C.) & Ors. v/s. Munnial Nanhoo Yadav & Ors., reported in 1990 H.C. Bom 120. The principal issue decided in the said matter was that a male employee was entitled to an extension for 3 years subject to his medical fitness and his efficiency. In paragraphs 17 to 19 of the said Judgement, the Division Bench of this Hon'ble Court have found that it would not be possible for operative to contend that once he was efficient when he crossed the initial hurdle ie. The ordinary age of superannuation of 60 years, he would automatically go to the extended age of superannuation i.e. 63 years, irrespective of his efficiency. During the said period, he has to continue to remain efficient. Thus, it was found that a periodical evaluation was required

generally at the end of each chronological year and that an employer would be in a position to superannuate him if there was a marked fall in the efficiency of the operative. Hereto annexed and marked as **Exhibit "A"** is a xerox copy of the said Judgment in the case of Tata Mills (supra).

13. I submit that a female employee has to be efficient and be medically fit in order to claim extension in service for 3 years like the male counterpart. Further, it is the case of the Respondent No.1 that female employees are not engaged in certain occupations in certain departments of the textile mills on the ground that the physical strength at manual labour required to perform those occupants is much higher which only a male operative may possess. It is the case of the Respondent that female employees are engaged only in certain occupations in the Mill in the category of operatives. Hereto annexed and marked as Exhibit "B" is a true copy of the Statement showing the occupations in which female employees are engaged in the category of operatives and clerical cadre. In the clerical category, female employees are generally engaged as Junior Clerk, Senior Clerk or Chief Clerk.

14. I say that in none of the 3 mills which are currently operational in the city of Mumbai viz., Podar Mill, India United Mill No.5 and the Tata Mills. There are no female employees in the technical and supervisory category. Further, in the Model Standing Orders as applicable to the technical and supervisory category, there is no provision for extension even for male employees. Therefore, in any event, any female employee, if at all engaged at any time in the technical and supervisory category cannot claim any extension in service after crossing the age of 60 years. All the male employees in the said category are superannuated at the age of 60 years.

....

16. In reply to the paragraph 8 of the Petition, I submit that there cannot be any blanket declaration as regards the standing order being violative of Article 14 of the Constitution of India. It is submitted that it is for the employer to decide as to the advisability of engaging male operatives

in certain occupations and female operatives in certain other occupations. The declaration sought by the Petitioner can only be granted in respect of occupations where male and female employees are engaged and wherein male employees are granted extension if they are medically fit and efficient. It is further submitted that female employees are also required to meet the said criteria of medical fitness and efficiency in order to claim extension in service beyond the age of 60 upto the age of 63 years.

17. In reply to the paragraph 9 of the Petition, I am not aware and do not admit that she is the main earning member in the family or that she needs her job. I say that the Petitioner will cross 63 years of age on June 2021. However, as per the Judgement of the Tata Mills (supra), the Respondent No.1 is entitled to consider her efficiency on a yearly basis while taking a decision as to extend service each year upto the said period."

5. Learned Counsel for the petitioner submitted that the artificial distinction drawn between female and male employees for the purpose of extension beyond the age of 60 years is wholly arbitrary. He relied on a report of the Commissioner of Labour, Maharashtra dated 10.5.2013 which was submitted pursuant to the order passed by this Court dated 6.2.2013 in Writ Petition (Lodging) No.3600 of 2015 to contend that there is no reason to believe that beyond the age of 60 years, as a general rule, efficiency of a female employee is likely to go down more than that of a male employee.

6. He drew our attention to the conclusions contained in the said report which read as under:

“9) Conclusion: -

After going through the entire evidence on record, written statements from the respective Authorities and the petitioner, I have come to the following conclusion:-

As per the contention of Mill authorities working under NTC, they are mainly insisting on the present economic status of the Mills, its longevity and the possibility of its survival in the future. They have not elaborated the gender issue in the desired manner. Same can be said about the statement given by Mr.Tamane who represented the Mill owners Association. He is more keen on reducing the retirement age and making it on par with the State Government employees. The issue of workload, the nature of work handled by female workers were not properly discussed in his statement.

The NTC mills i.e. Potdar Mills & Tata Mills were kind enough to provide the details about the workload which gave comparative figures of workload amongst female and male workers. As discussed above, the female workers who are in the age-group of 60-63 or 55-60 showed similar capacity of work as compared to their male counter parts.

So question of giving priority to service extension only to the male workers as per Standing orders appears to be out of date. Therefore the same facility of extension of retirement age i.e. 60-63 shall be made available to the female workers in the textile industry.”

7. On the other hand, learned Counsel for Respondent No.1 – NTC relied on the affidavit in reply and submitted that even in case of male employee, whether to extend the service beyond 60 years is within the discretion of the employer which would depend on a

range of factors such as availability of work, the efficiency and suitability of the concerned employee. She was however unable to support the artificial distinction made in the concerned Standing Order between a female and a male employee only on the basis of gender. The affidavit in reply on which she placed reliance and the relevant portion of which we have reproduced in the earlier portion of the order, also generally proceed on such basis.

8. Having heard the learned Counsel for the parties and having perused the documents on record, the short controversy that calls for consideration is whether the concerned Standing Orders permitting the employer to refrain a male employee beyond the age of 60 years, while not recognising any such power in case of a female employee is legal or not? In view of the affidavit in reply filed by NTC in which, as noted earlier, no material or any supporting contentions or documents are produced to draw such distinction, it is not necessary for us to dilate on this issue at length. Suffice it to record that the policy of the NTC as contained in the said Standing Orders of considering extension of tenure of male employee beyond the age of 60 years (upto a maximum of 63 years), while not doing so in the case of female employee,

cannot meet the test of equality and lack of gender bias. Even the report of the Commissioner does not support any such distinction. Article 14 of the Constitution of India guarantees equal opportunity in public employment. Article 15 frowns upon discrimination inter alia on the ground of gender. NTC is concededly the State within the meaning of Article 12 of the Constitution and is therefore required to formulate its policies in tune with the said constitutional provisions. Providing for retention only of male employees and keeping the female employees out of the purview of this facility is wholly arbitrary and discriminatory. The relevant Standing Orders insofar as they apply only to male employees are violative of Articles 14 and 15 of the Constitution. We, therefore, declare that the provisions of Standing Orders 20A and 11A shall apply irrespective of the fact whether the concerned employee is a male or female employee.

9. At the same time, the stand of the NTC that any such extension even in case of female employee must be subject to same scrutiny and rigors as in case of male employee is perfectly legitimate. We do not intend to enlarge the scope of the retention of the service of female employee beyond what a male employee

can seek consideration of. Essentially, it is in the realm of the power of the employer, a corresponding right in the employee for being considered, which must be based on relevant factors such as his/her efficiency. We also take note of a decision of the Division Bench of this Court in case of **Tata Textile Mills vs. Munnilal Nanhoo Yadav**¹ in which similar observations have been made. We may reproduce the same here:

“19. We must further emphasise that the decisions having a bearing on the extended age of superannuation, viz., 63 years, on the ground of efficiency or the subsequent retention of efficiency have to be taken honestly and properly. We are not called upon in this decision to indicate what is encompassed is the phrase "efficient or continues to be efficient". That will have to be interpreted in an appropriate proceeding if any dispute arises hereafter. This disposes of the writ petition. We may record that it is not the case of the employer in case of this employee that there was any fall in the efficiency of the workman, viz., Respondent No. 1, and, therefore, the insistence of the employer that he retired by superannuation on 1st January, 1989 would have to be held to be incorrect. The employer may have a right to review the case of this workman as we have suggested at the end of one year. However, as we have made clear, these observations are obiter, since they go beyond the requirement of the writ petition.”

10. Under the circumstances, it is declared that respondent No.1 was not justified in not considering the petitioner's case for extension of service beyond the age of 60 years only on the

1 1990(1) CLR 120

ground that she was a female employee. She is entitled to the such consideration in accordance with the rules and regulations and judicial pronouncement noted above. During the pendency of this petition, the petitioner has been protected by an interim order against her termination. While disposing off this petition, therefore, we require respondent No.1 to consider her case for extension beyond the age of 60 years upto a maximum of 63 years, as per its policy keeping in mind the observations made above and take a final decision thereon preferably within 4 weeks from the date of receipt of a copy of this order. Till the same is done and subject to the outcome thereof, her service shall continue as at present.

11. Petition is disposed of accordingly.

(S.J. KATHAWALLA, J.)

(AKIL KURESHI, J.)

Vishwanath
S. Sherla

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by Vishwanath S.
Sherla
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