Salvara M.D. & Anor. v Alteo Agri Limited

2022 IND 28

Cause Number 651/19

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

1. **Mr. Mario Daniel Salvara**
2. **Mr. Faizal Neemajee**

Plaintiff

v.

Alteo Agri Limited

Defendant

Judgment

In this plaint, the undisputed issues are that Plaintiff no.1 and Plaintiff no.2 were in the continuous employment of Defendant as Field Workers since 5.2.1979 and 3.7.1989 respectively.

Their terms and conditions of employment were governed by the Sugar Industry (Agricultural Workers) (Remuneration Order) Regulations 1983, GN No. 214 of 1983, as amended and by a Protocol D'Accord.

They were employed on a 6-day week basis during the crop season and 5-day week basis during inter-crop season.

During the crop season 2016, they had respectively, cut 32.665 and 32.304 tonnes of canes which were not trashed at all and were each paid an additional

allowance at the rate of Rs 18.09 per tonne (33%) and not Rs 54.81(full allowance) per tonne. During the crop season 2017, they had respectively, cut 28.154 and 77.504 tonnes of canes which were not trashed at all and were each paid an additional allowance at the rate of Rs 19.03 per tonne (33%) and not Rs 57.68 per tonne.

For the crop seasons of 2016 and 2017, both Plaintiffs and Defendant were relying on paragraphs 5 (3)(a) and 5(3)(b) to the Second Schedule of the Sugar Industry Remuneration Order 1983 as amended by GN 73 of 2016 and respectively amended by GN No.98 of 2017 with a little enhancing by the Protocol D' Accord as regards the full allowance as per Docs. C & D.

The unchallenged evidence led by the only 2 witnesses for Defendant namely Mr. Patrice de Coriolis in his capacity as Area Manager and Mr. Pierre Magon in his capacity as Field Supervisor is to the following effect:

1. Trashing of canes had stopped for about 10 years before 2015 and the workers were only asked to do light trimming during the crop season and were paid the full allowance.

2. Until 2015, the employees were asked to do light trimming and were being paid the full rate which was further adjusted by a Protocol D'Accord. Then, in 2015, the Defendant through its Area Manager, Mr. Patrice de Coriolis, told Plaintiffs that as from the year 2015, they would not be required to do light trimming and that they would be paid an allowance of 33% from then onwards and which had been the case. According to Defendant, it was in conformity with paragraph 5(3)(b) of the Remuneration Order wherein it was mentioned that if a worker was not required to carry out the light trimming, he was to be paid the minimum of 33%. Since then, he had been paying 33% of the full rate as prescribed by law.

3. For the crop seasons of 2016 and 2017, Plaintiffs were remunerated in accordance with the task that they were assigned and the work that they performed. Thus, he had all the time paid Plaintiffs correctly according to the law.

4. As was mentioned in paragraph 5 (3)(b) of the Second Schedule of the Remuneration Order applicable for the 2 years concerned as regards the mode of payment and that paragraph also talked about negotiations that

should take place prior to the crop season to decide on the rate to be paid because of no light trimming being done.

5. In relation to Plaintiffs, there had never been any negotiations prior to the crop seasons of 2016 and 2017 so that there was no agreement or "Accord" in writing in relation to the rate for cutting the canes without light trimming. The 33% was what Defendant company had paid to Plaintiffs once the work had been done although they did complain about not being given the full allowance, because of the difficulties they had encountered in cutting canes without trashing. Indeed, the Field Supervisor conceded that he was told and understood about Plaintiffs' difficulties, but he was not the one who decided. Defendant had to face the difficulty that each time the crop season started, there were new prices emanating from the Ministry concerned.

6. Defendant have thus denied being indebted to Plaintiffs in the sums claimed or in any sum whatsoever although there had been no negotiations at all prior to the crop seasons of 2016 and 2017 among Plaintiffs and Defendant but instead had only 33% of the full allowance imposed upon them which Defendant claimed was according to the law.

The unchallenged evidence led by Plaintiffs and their witness namely Mrs. Sudha Nepaulsing in her capacity as Senior Labour and Industrial Relations Officer boils down to the following:

(a) For the crop seasons 2016 and 2017, they were asked to cut canes which were not trashed at all and without doing light trimming which they did. They encountered a lot of difficulty as the canes were not burnt meaning green. They had to put their cutting tool into the dry cane leaves and pull them to see where the canes were to cut them right from the bottom (precisely where the dry cane leaves stack when the cane grows) obviously for maximum tonnage. In order to be able to cut the canes without being injured, they needed to see where they were walking meaning where they were putting their feet in order to do so and in the course of that exercise they needed to pull the dry cane leaves because the land was not flat everywhere, at some places, the land was rocky and at others the land was on the slope of the mountain or was steep. Therefore, they needed to put in more effort and more time as they ran

the risks of injuries when they were not asked to do light trimming and which got worst in rainy weather.

(b) Thus, Plaintiffs have claimed from Defendant the sum of Rs. 2,287.59 and Rs. 4,181.73 respectively being the full rate less what had been paid the 33%, because they had not been paid for what they had worked for as they had to work in difficult conditions and deserved full pay for the crop seasons of the years 2016 and 2017. Both Plaintiffs have also claimed one day's work for attending Court at the full rate.

I have given due consideration to all the evidence put forward before me and the submissions of both learned State Counsel for the Plaintiff and learned Senior Counsel for the Defendant.

For the crop seasons of 2016 and 2017, both Plaintiffs and Defendant were relying on paragraphs 5 (3)(a) and 5(3)(b) to the Second Schedule of the Sugar Industry Remuneration Order 1983, GN No. 214 of 1983 as amended by GN No. 73 of 2016 and respectively amended by GN No. 98 of 2017 with a little enhancing by the Protocol D' Accord as regards the full allowance as per Docs. C & D. The recurring provision since its origin from the Industrial Relations Act 1973 although the parent Act was repealed, the same provision continued to be found in the Employment Relations Act as amended by GN No. 73 of 2016 and GN No. 98 of 2017 and thereafter have remained intact in the latest amendment by GN No. 227 of 2019 showing the importance of those provisions which have remained untouched all the time save and except that the amount of full allowance payable has shown an increasing trend over the years.

Now it is pertinent to note that the first Sugar Industry (Agricultural Workers) Remuneration Order was made on 27 September 1974 by the Minister of Labour and Industrial Relations upon recommendations from the National Remuneration Board under Section 96 of the Industrial Relations Act 1973 and which set down the minimum rates of wages and conditions of employment in respect of certain categories of workers. Prior to that, the wages and conditions of employment were governed by the Wages Regulation Orders made under the Regulation of Wages and Conditions of Employment Ordinance 1961.

It is significant to note that some provisions of the First Remuneration Order which has been echoed in its subsequent amendments in the Employment Relations

Act leading to its latest one under GN No. 227 of 2019 made by the Minister of Labour and Industrial Relations glaringly reveal that paragraphs 5 (3)(a) and 5(3)(b) to the Second Schedule of the Sugar Industry Remuneration Order 1983, GN No. 214 of 1983 as amended by GN No. 73 of 2016 and GN No. 98 of 2017 although now revoked by GN No. 227 of 2019, the provisions in those paragraphs have remained constant although there has been an increasing trend in the amount of full allowance to be paid to the worker of that sector and categories.

Thus, I find it apt to reproduce only paragraphs 5 (3)(a) and 5(3)(b) to the Second Schedule (regulation 3) of the Sugar Industry (Agricultural Workers) (Remuneration Order) Regulations 1983, GN No. 214 of 1983 under the Industrial Relations Act as amended by GN No.73 of 2016 under the Employment Relations Act in order to avoid repetition and which read as follows:

"5. Rates of pay for cutting and/or loading

(3) (a) Where canes have not been properly trashed within 3 weeks of cutting, an additional allowance of 35.12 rupees per tonne shall be paid to the worker who may, in such cases, be required by the employer to carry out light trimming with a billhook.

(b) Where canes have not been properly trashed within 3 weeks of cutting and the worker is not required to carry out light trimming, he shall be paid an allowance to be agreed upon between the worker and the employer, but which shall not be less than 33 per cent of the allowance payable under subparagraph (a)."

Now as per paragraph 5(3)(a), the full allowance per tonne shall be paid to the worker who may be required to carry out light trimming, which means that it is not mandatory for him to carry out light trimming in order to obtain the full allowance.

However, para. 5(3)(a) has been qualified by para. 5(3)(b) which stipulates that where the worker is not required to carry out light trimming, he shall be paid, that is, it is mandatory for him to be paid an allowance to be agreed upon between the worker and the employer but which shall not be less, that is, it is mandatory that it is not below 33% of that full allowance.

This means that the amount of allowance mandatorily agreed between them could be the maximum namely the full allowance meaning (para.5(3)(a)) or the minimum being 33% (para. 5(3)(b)).

Thus, in that context, when the efforts that have to be put in by a worker who carries out light trimming is *quasi* the same efforts encountered by a worker who has not been required to do light trimming to cut the canes like in the present case, then the worker could have negotiated for the full allowance and which could have been highly likely to be agreed by the parties.

On the other hand, where the effort that has to be put in by a worker who carries out light trimming to cut the canes can hardly be equated with the very little effort required by the worker to cut the canes without light trimming, then the employer and the worker could have negotiated and agreed on the basis of the 33% as the latter would have been an adequate allowance for the work he had performed.

Thus, it is all a question of degree, meaning it all depends on the state of the canes to be cut in the type of fields that they are to be found. Therefore, in order to negotiate and to be able to secure an agreement, then the worker and the representative of the employer will have to make a physical assessment of the state of the canes together in the type of fields they are found in order to be cut. Now, say in the event that no agreement has been reached yet after that exercise, say prior to the crop seasons of 2016 and 2017 despite the negotiations between them, when reconciled with the present case, then the full amount would best serve the ends of justice as the 33% would be inadequate given the amount of efforts having been put in by the Plaintiffs to cut the canes.

Now, in the present case, there <u>were no negotiations at all</u> among Defendant and Plaintiffs in respect of that allowance to be paid to them so that an agreement could be reached which was mandatory as they could have agreed on the maximum, that is, the full allowance given the efforts having been put in by Plaintiffs to cut the canes being in the nature of a *quasi*- light trimming. Besides, they were only informed that they would be paid the strict minimum viz. the 33% by the Area Manager of Defendant and that was irrespective of the fact that its Field Supervisor was made aware by at least one of them of the difficult situation they had to work and which he understood but could not do anything as he was not the one who decided.

Thus, the point that calls for consideration is whether <u>such a decision</u> which has failed to comply with such a mandatory obligation would be unenforceable in the sense that the breach of any mandatory act, the performance of which is cast in an imperative form by the legislator using the word “shall” would render the act invalid.

The relevant question that arises is that in the light of the consequences of having a unilateral imposition of a 33% allowance on Plaintiffs, what the legislator must be taken to have intended in order to deal with a breach of that statutory requirement.

In **Wang v Commissioner of Inland Revenue [1994] 1 WLR 1286**, in an appeal from Hong Kong, which was in relation to a breach of a time limit by way of analogy (given that the provisions of paras. 5(3)(a) & 5(3)(b) have survived all amendments) the Privy Council applied the following dictum of Lord Hailsham in **London and Clydeside Estates Ltd v Aberdeen District Council [1980] 1 WLR 182**, p 190:

"When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events."

Indeed, the case of **Wang(supra)** was cited in the Supreme Court case of **Ng Kuet Leong A.P.M.(Dr) v The Medical Council of Mauritius** [2019 SCJ 1] which went on to say the following:

*"In **Attorney General's Reference (No.3 of 1999) [2001] 2 AC 91**, the House of Lords declined to apply the mandatory/ directory distinction. The House instead concentrated on the consequence of non-compliance of a statutory requirement which had been enacted by Parliament in an explicitly imperative language. The House finally addressed the question by considering what, in the light of the consequences, must Parliament be taken to have intended in order to deal with a breach of the statutory requirement.*

*In **R v Soneji [2006] 1 AC 340**, the House of Lords, after having reviewed the case law on that issue, stated that the consequences of a failure to comply with a statutory requirement do not depend on prior classification as either mandatory or directory, but on an analysis of what Parliament had intended the consequences of such a breach should be. The House rejected "the rigid mandatory and directory distinction, and its many artificial refinements" and asserted that "Instead, as held in Attorney-General's Reference (No.3 of 1999), the emphasis ought to be on the*

consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity."

(…) The same approach was adopted by the Australian High Court in **Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355** in its conclusion [para 93]:

"(…) They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid…….A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. (…) In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute."

(…) The following decisions illustrate the approach that has been adopted in Mauritius."

Then, the case of **Ng Kuet Leong(supra)** went on to cite the cases of **Ping Fen v Tickfine & Ors [1997 MR 43]** and **Rogers & Co. Ltd v The Sugar Industry Pension Fund [2005 SCJ 114]** which relied on the absence of prejudice to hold that the breach of the mandatory statutory requirement which was the issue of time limit in those cases was not fatal.

Now, in the present case, the question that calls for consideration is whether the legislator has expressly laid down in the Remuneration Order itself that any act done in breach of paras. 5(3)(a) and 5(3)(b) would render the decision of the Defendant invalid or has the legislator indicated what should be the consequences for non-compliance with those provisions namely of having an agreement mandatorily to be reached among the parties debarred.

Again as illustrated in **Ng Kuet Leong(supra)**, *"Although the word "shall" is meant to be imperative, it is necessary to ascertain the consequences which was intended by Parliament in case of non-compliance (…) For that purpose, it is incumbent upon the Court to try to get at the real intention of the legislature by examining the object and design of the whole statute and by evaluating the seriousness of the breach and any resulting prejudice, public inconvenience or prejudice which may be caused either by invalidating or maintaining the decision."*

Now, true it is that the legislator has not expressly laid down in the Remuneration Order 1983, GN No.214 of 1983 as amended by GN No. 73 of 2016 and GN No. 98 of 2017 respectively, as applied in the present case, that a combined breach of paras. 5(3)(a) & 5(3)(b) would render a decision of the Defendant invalid and nor has the legislator indicated what should be the consequences for non-compliance with the requirement of having an agreement mandatorily to be reached among the parties.

Obviously in the present case, there would be material prejudice caused to Plaintiffs as they could have negotiated for the full amount and if not slightly less given the hardship they had faced as revealed above and to the knowledge of Defendant. But what the Defendant has done, it has debarred them the opportunity of negotiating in order to reach an agreement in relation to the crop seasons of 2016 and 2017 and has imposed the strict minimum of 33% on them irrespective of the significant hardship faced by the said workers. The overriding principle in all labour legislations in Mauritius is that primacy should be given to the security of tenure which is inextricably linked with the livelihood of the worker in line with the International Labour Organisations of which Mauritius is a signatory and as such the public interest compellingly militate towards the Plaintiff's conditions of service not being altered so as to make them less favourable than what is stipulated in the Remuneration Order. Therefore, the combined effect of paras. 5(3)(a) and 5(3)(b) would mean that a breach of the mandatory provision in para. 5(3)(b) would be fatal and could not be enforced and as such are invalid in the present context because of material prejudice having been caused to the Plaintiffs. Had barely any prejudice been caused to the Plaintiffs who, for instance, had put in very little effort in cutting the canes without light trimming in view of the state of the canes in a specifically easy field, when compared to the additional work of doing light trimming by other workers in order to cut the canes which are in a difficult state in another specifically difficult field, then the imposition of the 33% would be justified and a breach of the mandatory provision in para. 5(3)(b) would not be fatal and could be enforced and as such would have been valid.

It is all a question of degree and it depends on the state of the canes in the fields where the canes are to be cut and as such it is of paramount importance for the employer to physically assess same through its representative so that no prejudice is being caused to the workers.

Now, true it is that both Plaintiffs and Defendant have relied on the provisions of paras. 5(3)(a) and 5(3)(b) of the above Remuneration Order as amended. Although all parties have stressed that by virtue of the evidence borne by the record which stood uncontested that prior to crop seasons 2016 and 2017 no trashing at all was done which is in line with the averments of the plaint when the paras. 5(3)(a) and 5(3)(b) deal with the situation where the canes have not been properly trashed which inescapably mean that they were trashed but that exercise was not properly done.

Thus, the applicable provision would be paragraph 5(3)(c) to the Second Schedule of the Sugar Industry (Agricultural Workers) (Remuneration Order) Regulations 1983, GN No. 214 of 1983 as amended by GN No. 73 of 2016 and GN No. 98 of 2017 respectively and which has also remained constant.

Hence, at this stage, I deem it necessary only to reproduce paragraph 5(3)(c) of GN No. 73 of 2016 as the provision is the same in GN No. 98 of 2017 which reads as follows:

"(c) Where at the time of cutting, a full trashing is required owing to the condition of the canes, such work shall be paid for a rate to be agreed upon between the employer and the worker or, failing such agreement, at a rate to be fixed by the Minister." (**emphasis added**)

For all the reasons given above, the case for the Plaintiffs should fail in view of the wrong provision of the law having been relied upon and applied as the canes had not been trashed at all as opposed to canes which had not been properly trashed. The plaint is accordingly dismissed. I make no order as to costs.

S.D. Bonomally (Mrs.) *(Vice President)*
28.6.2022