

Singer India Ltd. and anr. Vs. State of U.P. and ors.

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Court : Allahabad

Decided On : Jan-21-2003

Reported in : [2003(97)FLR690]; (2003)2UPLBEC1058

Judge : Sunil Ambwani, J.

Acts : Uttar Pradesh [Industrial Disputes Act, 1947](#) - Sections 2, 6H, 6H(1) and 6N; [Industrial Disputes Act, 1947](#) - Sections 2 and 25F; [Minimum Wages Act, 1948](#) - Sections 20

Appeal No. : Civil Misc. Writ Petition No. 4262 of 2003

Appellant : Singer India Ltd. and anr.

Respondent : State of U.P. and ors.

Advocate for Def. : Shyam Narain, ;Sudhanshu Narain, Advs. and ;S.C.

Advocate for Pet/Ap. : V.B. Singh and ;Vijay Sinha, Advs.

Disposition : Writ petition dismissed

Judgement :

Sunil Ambwani, J.

1. This writ petition along with Writ Petition No. 4262 of 2003 was heard at length and dismissed on 21.1.2003. Due to paucity of time, the reasons could not be

dictated in Court. The detailed reasons for which no interference is required to be made in the matter, are given as below.

2. Km. Madhu Chauhan, Respondent No. 3 in Writ: Petition No. 12360 of 2001, was engaged as lady demonstrator by M/s. Singer India Limited at its Shop No. 2, Rajendra Market, Agra on 9.3.1995. She was required to give information of the various sewing machines, including 'fashion maker', to the customers and to train them for operating the machine. She was also required to sell the machines prepare cash memos maintain hire purchase accounts and prepare various other documents, as required by the company; and to carry out other works according to the directions of the Manager of the shop. She was made permanent on 1.9.1995 and that on 1.5.1995, she was designated as sales representative. Her services were engaged at the rate of Rs. 450/- per month and that she was made entitled to commission on the sales. It was alleged by her that when she demanded minimum wages for the clerical nature of work performed by her, she was ill treated and was not paid the commission on sales with effect from November, 1997. The petitioner terminated her services on 13.1.1998, without following the mandatory provisions as pre-condition of retrenchment.

3. The Additional Labour Commissioner, Agra by his order dated 12.4.1999 referred an industrial dispute Under Section 4-K of the U.P. [Industrial Disputes Act, 1947](#) to the Labour Court, UP., Agra to adjudicate with regard to the validity of the termination of her services dated 13.1.1998, and for consequential relief.

4. The petitioner employer filed their written statement stating that Km. Madhu Chauhan was appointed as demonstrator to demonstrate the goods of the company in attractive manner so that the customers appreciated the goods of the company and, in turn, sales were to be promoted. She was not performing her duties properly and despite warning, she failed to come up to the required standard of performance. There was no improvement and, as such, her services were terminated in accordance with the terms and conditions of her appointment letter which forms apart of the contract of service. The employer took preliminary objections to the effect that she was required to explain the good points and working of goods, for promotion of sales and thus, she cannot be considered as

workman, as defined under the U.P. [Industrial Disputes Act, 1947](#), as she did not perform any manual, clerical or technical work and, as such, there does not exist any industrial dispute to be adjudicated between the parties. It was further submitted in Paragraph 9 of the written statement that the present case is contractual termination of service which cannot be treated as retrenchment.

5. The petitioner filed a rejoinder statement stating that she was not required and she did not go out of the retail shop for promotion of sales and that she falls within the definition of 'workman' under the U.P. [Industrial Disputes Act, 1947](#) and Payment of Wages Act, 1948. In case there was any truth in the allegation against her, the employers were required to follow the principles of natural justice by giving her charge-sheet and holding inquiry into the alleged charges. They have adopted 'hire and fire' policy and thus, she is entitled to protection of the labour laws.

6. The respondent examined herself in support of her case on 1.3.2000 and was cross-examined by the Counsel for the employer on 8.3.2000. On behalf of the employer, Sri Kanhaiya Lal Dixit, Shop Assistant, M/s. Singer India Limited at Rajendra Market, Agra was examined and was cross-examined by the Counsel for the workman.

7. By impugned order dated 14.3.2000, Labour Court found that Respondent No. 3 workman was performing duties relating to clerical work and sales and that she falls within the definition of 'workman' under the U.P. [Industrial Disputes Act, 1947](#). Her services were terminated without any notice or any charge-sheet on 13.1.1998 and without following the provisions of Section 6-N of the Act, as she had worked continuously for more than one year. The charges of misconduct were not proved against her and thus, her termination comes within the purview of retrenchment. It was found that the statement of Kanhaiya Lal Dixit was wholly irrelevant and that he has not given any such statement which may show that the concerned workman was not discharging clerical nature of work or that she committed any misconduct. It was recorded that apart from the aforesaid, no other evidence was adduced by the employer.

8. Sri V.B. Singh, Senior Advocate submits that the appointment letter dated 1.4.1995, the letter of confirmation of her services dated 2.1.1996, with effect from

01.09.1995 and the letter of re-designation of her services as sales representative dated 7.6.1997 giving job description of a sales representative were filed on record of the Labour Court, but the Labour Court failed to consider the aforesaid documents.

9. In Paragraph 5 of the counter-affidavit, Km. Madhu Chauhan has denied that she was only a sales promotion employee and that any such documents were filed in the Labour Court. She has also filed an application Under Section 340, Cr.P.C, for taking appropriate action against the petitioner for making false averments with regard to filing of the aforesaid documents in the Labour Court and has levelled these documents as fabricated and forged. The petitioner has not filed any reply to this application supported by her affidavit, a copy of which was served on them on 17.1 2002.

10. In the rejoinder-affidavit, the allegation that these documents were not filed before the Labour Court has been denied and it has been stated in Paragraphs 5 and 6 that the letter of appointment was duly filed before the Labour Court to explain the point that the concerned respondent was appointed as demonstrator and that the appointment letters were exhibited and produced before the Labour Court. The employer has, however, not given the dates when these documents were filed nor they have cared and filed certified copies thereof in this Court. Their witness KanhaiyaLal Dixit has not referred to these documents in his statement.

11. The Labour Court in its order has referred to the documents filed by the workman. There is no mention of documents filed by employer in the order of the Labour Court. I, therefore, find that these documents were not filed before the Labour Court and have been produced at this stage to support the contention that the Respondent No. 3 was not a workman and that her termination of service was contractual in nature which does not attract the conditions of retrenchment.

12. Sri V.B. Singh has submitted that the respondent workman was engaged in sales promotion and was not required to perform any clerical work. She was required to issue cash memo, hire purchase receipt and keep accounts which were only incidental to her work of sales promotion and that since her work related to the skilled employment where she was required to exercise her discretion and

use innovative methods, she cannot be treated as workman, as defined under the U.P. [Industrial Disputes Act, 1947](#). He further, submits that she was appointed under a contract of service which provided for terminating her services without assigning any reason, by giving her one month's notice and since her services were terminated in pursuance of the stipulated notice, she cannot be treated to have been retrenched and has claimed exclusion from the word 'retrenchment' Under Section 2(s) of the U.P. [Industrial Disputes Act, 1947](#). Lastly, he submits that there is a separate procedure provided for award of minimum wages by making a claim Under Section 20 of the [Minimum Wages Act, 1948](#), and that the Labour Court has no authority to award minimum wages to Respondent No. 3 and that the impugned order dated 11.12.2002 passed by the Additional Labour Commissioner, Agra in Writ Petition No. 4262 of 2003 awarding minimum wages to her and directing recovery of Rs. 1,69,697.75 p. in execution of the award was bad on the ground that the interim order passed by this Court in Writ Petition No. 12360 of 2001, till the next date of listing was operative, as the matter was not heard on any of the subsequent dates and further that the Deputy Labour Commissioner has no authority to adjudicate minimum wages under the provisions of Section 6-H(I) of the U.P. [Industrial Disputes Act, 1947](#).

13. Sri Shyam Narain, on the other hand, submits that whereas Km. Madhu Chauhan was appointed as a lady demonstrator, she was required extensively to work as a clerk by preparing cash memos, hire purchase documents, the registers at the shop and making correspondence with the company. There was no other person deputed to work as clerk in the shop. The terms and conditions of her appointment were not given to her and that she falls within the definition of 'workman' and was entitled to raise industrial dispute. According to the statement of Kanhaiya Lal Dixit, Shop Assistant, who appeared as a witness on behalf of the employer, there were allegations of conspiracy in mismanaging the shop between Km. Madhu Chauhan and Satish Chandra Sharma who were not preparing the accounts properly and were wrongly crediting accounts of the customers. The customers were not satisfied. He, however, could not produce any complaints and denied that her services were terminated for failing to carry out proper demonstration or for not issuing proper receipts to the customers. Termination of her services was, as such, motivated and was made under a colourable exercise

of power with mala fide intentions and amounted to unfair labour practice. He submits that her termination from service cannot be termed as contractual and, in any case, according to the decision of this Court which has been affirmed by the Apex Court, the proviso to Section 2(oo)(bb) of the U.P. Industrial Disputes Act is not applicable in U.P. and has relied upon the judgment of this Court in U.P. State Sugar Corporation Limited v. Presiding Officer, Labour Court, Gorakhpur and another, 2000 (85) FLR 879, which has been affirmed by the Supreme Court in U.P. State Sugar Corporation Ltd. v. Om Prakash Upadhyay, 2001 LLR 1220, and has been followed by this Court in Micro Abrasives (India) Limited, Dhampur, District Bijnore v. Dhanvir Singh and another, (2001) 1 UPLBEC 669, as well as Executive Engineer, C.P. W.D. v. Madhukar Purushottam K. and another, 2000 (87) FLR 727. According to him, the Labour Court did not commit any illegality in awarding minimum wages for which a claim was not necessary to be filed under the [Minimum Wages Act, 1948](#) and that the interim order in Writ Petition No. 12360 of 2001 was neither extended beyond the next date of listing of the writ petition on 7.10.2002, 9.10.2002, 11.10.2002 and 28.10.2002, nor any application for stay extension was filed. The Deputy Labour Commissioner, merely calculated the amount in execution of the award and thus, there was no illegality in issuing recovery Under Section 6-H(1) of the Act. The employer has given a cheque to the Deputy Labour Commissioner in pursuance of the recovery made against him as arrears of land revenue and thus, cannot be heard to dispute the amount.

14. In *Management of May and Baker (India) Ltd. v. Their Workmen*, AIR 1967 SC 678, it was held that the main work of the workmen was that of canvassing and any clerical or manual work that he had to do was incidental to his main work of canvassing and could not take more than a small fraction of the time for which he had to work. The Tribunal seems to have been led away by the fact that the workman had no supervisory duties and had to work under the directions of his Superior Officers and that his duties were mainly manual or clerical. The Supreme Court for reaching the aforesaid conclusion relied upon the definition of 'workman' Under Section 2(s) of the Industrial Disputes Act, as it stood prior to its amendment and the legal position that the designation of the employee was not of great moment, and what was of importance was the nature of his duties.

15. In *T.P. Srivastava v. National Tobacco Co. of India Ltd.*, AIR 1991 SC 2294, it was held that where the duties involve suggesting of ways and means to improve the sales, a study of the type of status of the public to whom the product has to reach and a study of the market condition. He was also required to suggest about the publicity in markets and melas, advertisements, including the need for posters, holders and cinema slides. These duties do require the imaginative and creative mind which could not be termed as either manual, skilled, unskilled or clerical in nature. Relying upon the decision in *Burmah Shell Oil Storage and Distribution Company v. Burmah Shell Management and Staff*, AIR 1971 SC 922, it was held that the petitioner in the said case was not a workman and that the provisions of the Industrial Disputes Act were not applicable to him.

16. In *H.R. Adyanthaya and others v. Sandoz (India) Ltd. and others*, (1994) 5 SCC 737, it was held by Constitution Bench of the Supreme Court, following the aforesaid cases, that till 29.8.1956, the definition of 'workman' under the Industrial Disputes Act was confined to skilled or unskilled, manual or clerical work and did not include the categories of persons who were employed to do supervisory and technical work. These categories came to be included in the definition with effect from 29.8.1956 by virtue of Amending Act No. 36 of 1956 and that, for the first time, by virtue of Amending Act No. 46 of 1982, the categories of workmen employed to do operational work came to be included in the definition and that, for the first time, those doing non-manual, unskilled or skilled work also came to be included in the definition with the result that the persons doing skilled or unskilled work, whether manual or otherwise Qualified to claim wages under the Industrial Disputes Act. The proposition of law, as it obtained according to the Constitution Bench, is that a person to be a workman under the Industrial Disputes Act must be employed to do work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough, that he is covered by either of the four exceptions to the definition.

17. By Amending Act, No. 46 of 1982, in the definition of 'industry' in Section 2(j) of the Industrial Disputes Act, among others, any activity relating to the promotion of sales or business or both carried on in the establishment was included, but the said amendment has not yet come into force. The amendment made by same

Amending Act of 1982 to the definition of 'workman' in Section 2(s) to include every employee to do operational work and to definition of 'wages' in Section 2(rr) to include any commission payable on the promotion of sales or business or both has, however, come into force with effect from 21.8.1984.

18. In the present case, the petitioner was engaged as lady demonstrator. She was confirmed and, thereafter re-designated as sales representative. She was not required to go out of the shop and to engage herself in any activities of sales promotion which may require any imaginative or supervisory work of creative mind. Her work was confined to deal with the customers, explaining them the value of the product, train them to operate the sewing machine and also to prepare cash memos, and fill up hire purchase registers, accounts of the parties and to perform all other or such functions which were required by the Shop Manager. There was no clerical staff posted at the shop. The employer's witness deposed that she was not preparing the accounts of the customers and registers properly. The nature of her work, thus, cannot be excluded from the definition of 'workman'.

19. Section 2(oo)(bb) of the Industrial Disputes Act, provides exception to the definition of 'retrenchment'. Where the services of the workman are terminated as a result of non-renewal of the contract of employment or on its expiry or on such contract being terminated under stipulation in that behalf, the termination cannot be treated to be a retrenchment, inviting the compliance of the pre-conditions of retrenchment.

20. In U.P. State Sugar Corporation Ltd. v. Presiding Officer, Labour Court, Gorakhpur and another, 2000 (85) FLR 879, this Court held, following the decision in Jai Kishun v. U.P. Co-operative Bank Ltd., (1989) 1 UPLBEC 144, that Section 2(oo)(bb) of the Central Act does not apply to the proceedings under the old Act and this view was affirmed by the Supreme Court in U. P. State Sugar Corporation Ltd. v. Om Prakash Upadhyay (supra), where it was held that by virtue of Section 31 of the Industrial Disputes Act, it does not override the State Law. There is a repugnancy in the definition of 'retrenchment' under the Central Act and the U.P. Industrial Disputes Act and taking the legislative history the Apex Court found that the High Court was justified in taking the aforesaid view. The same view has been

followed by this Court in *Micro Abrasives (India) Limited, Dhampur, District Bijnore v. Dhanvir Singh and another (supra)*.

21. There, is yet another aspect of the matter. Even, if it be accepted as an argument, that one month's notice was provided before terminating the contractual service, the services of Respondent No. 3 were not terminated only on the ground of unsuitability of her services. The evidence adduced by the employer brought on record not only the allegations of inefficiency, but, irregularities committed by Respondent No. 3 in failing to maintain hire purchase registers properly and for making wrong entries in the accounts of the customers, for which he found Respondent No. 3 and Satish Chandra Sharma to be in conspiracy. The Labour Court, as such, rightly found that the respondent's services were terminated on account of misconduct for which she was not charged, nor any domestic inquiry was held to prove the charges. The termination of her services, therefore, in any case, cannot be treated as termination under the contract of service and amounts to colourable exercise of power which has to be treated as unfair labour practice. It was stated by the petitioner that when she demanded minimum wages, the employer stopped giving her commission on sale of sewing machines. She was not allowed to sign attendance register, and that the then Area Manager R.K. Singh, misbehaved with her and threatened to terminate her services. A complaint was made at Police Station Madan Mohan Gate, Agra, Exhibited as W/4. A complaint was also made to Deputy Inspector General of Police, Agra and to Incharge, Mahila Thana. The employer, thereafter, started persecution and stopped giving her commission which was credited to the accounts of the Shop Manager's wife in Code No. 027 who never worked at the shop. She made prolonged correspondence with her employers, and made an application for payment of minimum wages before the Labour Welfare Officer. All this resulted into termination of her services. These allegations apparently formed the motive to terminate her services and in the facts and circumstances, it cannot be said that her termination was by way of a condition of her service of contract.

22. From the aforesaid, it is found that the respondent was not only discharging her work as demonstrator, but was also working as a Clerk and that she was, as such entitled to minimum wages applicable to her as Clerk. The Labour Court did

not commit any illegality in awarding her minimum wages payable to a sales man at the shop and that it cannot be said that the Deputy Labour Commissioner erred, in law, in computing the wages Under Section 6-H(1) of the U.P. Industrial Disputes Act and directing the employer to pay the same to the workman.

23. Both the writ petitions are, accordingly, dismissed with no order as to costs.

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