

Engineering Construction Corporation Ltd. Vs. Additional Labour Court and ors.

Engineering Construction Corporation Ltd. Vs. Additional Labour Court and ors.

SooperKanoon Citation : sooperkanoon.com/820850

Court : Chennai

Decided On : Oct-30-1979

Reported in : (1980)IILLJ16Mad

Judge : Ramanujam and Padmanabhan, JJ.

Appellant : Engineering Construction Corporation Ltd.

Respondent : Additional Labour Court and ors.

Judgement :

Ramanujam, J.

1. The second respondent herein was working under the petitioner-management as a foreman (carpentry) on a consolidated salary of Rs. 800 per month with effect from 12-2-1972 in the construction of reactor and turbine buildings at Kalpakkam in the Madras Atomic Project, Unit I. The management, however, terminated the services of the second respondent by an order dated 8-4-1974 on the ground that his services are no longer required. On a dispute having been raised by the second respondent on his non-employment, that dispute was referred to the Labour Court, the first respondent herein by the Government. The Labour Court, after a due enquiry, held that the non-employment of the second respondent was not justified and that, therefore, he must be reinstated in service with back wages

and other attendant benefits, if any. The management prays for the issue of a writ of certiorari to quash the said award passed by the Labour Court in this writ petition mainly on two grounds: (1) As the second respondent's work was supervisory in nature and his salary exceeded Rs. 500 he is not a workman as defined in Section 2(s) of the Industrial Disputes Act entitled to seek any benefit under the said Act and that as such the reference itself is bad for that reason. (2) In any event the second respondent having been employed for a particular work, his termination on completion of the said work cannot be said to be a retrenchment as defined in Section 2(ss) of the Industrial Disputes Act and, therefore, the Labour Court was in error in holding that as there was violation of Section 25F the order of termination was not valid.

2. The order dated 18-4-1972 appointing the second respondent with effect from 12-2-72 as foreman (carpentry) contained the following terms and conditions:

(1) The appointment will be temporary only for the object of constructing reactor and turbine buildings at Kalpakkam for the Madras Atomic Power Project, Unit I undertaken by the management on contract basis and that the same shall be liable to be terminated in any event on the completion of the said work. In the meantime, either party shall be entitled to terminate the said employment by giving 14 days notice in writing to the other.

(2) During the term of the employment, the second respondent will be paid a consolidated salary of Rs. 800 per month inclusive of all emoluments.

(3) The second respondent will be governed by be subject to the service rules applicable to temporary staff framed by the management from time to and for the time being in force.

This order of appointment has been signed by the General Manager of the petitioner-management and the same has also been signed by the second respondent in token of his having accepted the terms and conditions.

3. According to the management, since the second respondent has been appointed as foreman (carpentry), his work is supervisory in nature and, therefore,

he is not entitled to claim the benefits under the Industrial Disputes Act. In support of the said plea the management has examined M.W. 1 another foreman and he has deposed that the work of the second respondent was to supervise the work of the carpenters, that the second respondent need not work as a carpenter along with the carpenters whom he has to supervise, and that the second respondent while he was working as a foreman (carpentry) was doing only supervisory work.

4. As against this, the second respondent pleaded that his work was not supervisory in nature and that though some carpenters were asked to work under him, he has also to do carpentry work along with them, and, therefore, he cannot be taken to fall outside the scope of Section 2(s) of the Industrial Disputes Act. He examined himself as M.W. 1 and he had deposed that though 10 or 12 carpenters are made to work according to his directions, he also does carpentry work and that he was not supervising the work of carpenters and that there were other persons to supervise his work as well as the work of 10 or 12 carpenters who were working according to his directions. He has, however, admitted that there was no record to show that he actually did carpentry work and that the wages of a carpenter were Rs. 4.50 to Rs. 9 per day.

5. The management did not produce any record as to the exact duties which the second respondent was required to perform, apart from the evidence of M.W. 1. The Labour Court, after considering the oral evidence adduced on either side, took the view that the work done by the second respondent was of a skilled and technical nature, that his work was supervised by another officer, that it cannot be said that the main and substantial work done by him was supervisory in nature, that apart from his doing carpentry work he also supervised and checked the work of few other carpenters and that, therefore, his work was not substantially of a supervisory nature. The Labour Court also took the view that the letter sent by the management to the second respondent dated 23-5-1974 (Ext. M. 24) offering to pay a sum of Rs. 1,588.80 which is said to be due to him as per the Labour Laws, indicates that even the management itself proceeded on the basis that the second respondent is a workman as defined in the Act. This view of the Labour Court has been questioned by the petitioner on the ground that the oral evidence adduced in the case does not support its finding and that the evidence, if properly construed

and appreciated, the only conclusion that is possible is that the second respondent will not be a workman as defined in the Act as his work is only supervisory in nature. According to the petitioner the evidence of M.W. 1 clearly indicates that the second respondent's work was only to supervise the work of the carpenters under him, that he does not do any carpentry work and that the Labour Court should not have accepted the interested testimony of the record respondent as W.W. 1. It is true that M.W. 1 another foreman under the same management, has come and deposed that the second respondent's work involves supervision of 10 or 12 carpenters who are directed to work under him and that he does not do any carpentry work, while on the other hand, W.W. 1, the second respondent had said that his main work consists of doing carpentry work though he has also been directed to supervise the work of some carpenters and that, therefore, he will come under the definition of 'workman' under Section 2(s).

6. In this case, the petitioner has not, apart from examining M.W. 1 produced any document to indicate the nature of the duties to be performed by the various categories of foremen in general and by the foremen (carpentry) in particular. When the second respondent is appointed as foreman (carpentry) one would expect the management to instruct the second respondent as to his duties. But the management has not produced any order passed by the management with reference to the duties assigned to foremen (carpentry). The Labour Court points out that even the service rules applicable to the temporary staff framed by the management from time to time which are referred to in the order appointing the second respondent as foreman has not been filed by the management. But the said service rules had been produced by the management at the time of the hearing of the writ petition before us and we gave an opportunity to the learned Counsel for the second respondent also to peruse the same. We, however, find that the said service rules do not indicate the nature of the duties to be performed by the foreman (carpentry) and, therefore, the service rules cannot be taken to help either the petitioner or the second respondent. Thus we are faced with two inconsistent statements one made by M.W. 1 and the other made by W.W. 1 as regards the nature of the duties to be performed by a foreman (carpentry). On this oral evidence the Labour Court has chosen to accept the claim made by the second respondent that he has to do carpentry work in addition to the supervision

of the carpenters who are working under him. The question is whether that finding of the Labour Court can be said to be vitiated merely because the evidence given by M.W. 1 was not accepted by that Court.

7. The second respondent has produced the order of appointment and has spoken to the duties performed by him. The management, however, has not produced the necessary records to indicate the duties of a foreman (carpentry). Since it is admitted that there are 11 carpentry foremen in the service of the petitioner, it cannot be accepted that the petitioner had no record showing the nature of the duties to be performed by the foremen, and it is not, possible to accept the stand taken by the management that there is no record maintained by the management setting out the details of the work to be done by the foreman (carpentry). Therefore, it cannot be said that the management has let in all the relevant evidence touching the question as to what are the duties to be performed by the second respondent in his capacity as foreman (carpentry). It is in the light of these facts, the Labour Court has given a finding that as the second respondent also does carpentry work in addition to his duty to supervise the work of the other carpenters allotted to him he is a workman as defined in Section 2(s) of the Act. We do not, therefore, see any error in the finding given by the Labour Court that the second respondent is a workman as defined in Section 2(s), accepting the evidence let in by the workman.

8. Even assuming that the work of the second respondent involves supervision of the work done by 10 or 12 carpenters, unless it is shown that the second respondent does not do any carpentry work apart from his work of supervision, he cannot be taken out of the definition of 'workman'. Even M.W. 1 on whose evidence the management entirely relies does not say that the second respondent was not doing any carpentry work. He merely makes general statements that the carpentry foreman have to supervise the work of other carpenters, that they need not work a scars penters and that the carpentry foremen are not expected to work as carpenters, though in one place he says that W.W. 1 was only supervising the work of carpenters, and that he was not himself working as a carpenter. Thus even if M.W. 1's evidence is accepted in toto it will only show that W.W. 1 was giving instructions to the carpenters regarding the work to be done by them. The question

is whether mere giving of instructions or directions regarding the work to be done by the carpenters put under the second respondent, will take him out of the purview of the definition of 'workman' in Section 2(s) as a person working in a supervisory capacity and receiving a salary of more than Rs. 500.

9. In *Andhra Scientific Co. Ltd. v. Seshagiri Rao and Anr.* 1961-II L.L.J. 117, it has been pointed out that what functions were actually being performed by an employee is a question of fact and that when the Labour Court has on a consideration of the evidence come to the conclusion as regards these functions and has on the basis thereof held that the employee comes within the definition of workman in Section 2(s) of the Act, the High Court could not interfere under Article 226 of the Constitution with such a finding except in a case where there is a clear error on the face of the record. In *Prem Sagar v. Standard Vacuum Oil Co.* : (1964)ILLJ47SC , the Supreme Court had pointed out:

It is difficult to lay down exhaustively all the tests which can be reasonably applied in deciding this question as several considerations would naturally be relevant in dealing with this problem. It may be enquired whether the person had a power to operate on the bank account or could be made payments to third parties and enter into agreements with them on behalf of the employer, was he entitled to represent the employer to the world at large in regard to the dealings of the employer with strangers, did he have authority to supervise the work of the clerks employed in the establishment, did he have control and charge of the correspondence, could he made commitments on behalf of the employer, could he grant leave to the members of the staff and hold disciplinary proceedings against them, has he power to appoint members of the staff or punish them; these and similar other tests may be question about the status of the employee, in relation to the requirements of Section 4(1)(a). The salary drawn by the employee may have no significance and may not be material though it may be treated theoretically as a relevant factor.

The above observations squarely apply to the interpretation of Section 2(s) as well. The same case points out the distinction between jurisdictional fact which are collateral and the proof of which confers jurisdiction on the Special Tribunal and

facts which are left to the decision of the Tribunal on the merits and states that the decision on the question relating to the status of the employee which touches the jurisdiction of the authority can be corrected by the High Court under Article 226 of the Constitution if the error is an error of Law apparent on the face of the record. In *All India Reserve Bank Employees' Association v. Reserve Bank of India* 1965 II L.L.J. 178, the question arose as to whether the work of a particular workman is supervisory in nature. There the workman was not only checking the work of others but was also distributing work, detecting faults, reporting for penalty and making arrangements for filling up vacancies. It was held that the employee was doing the work of a supervisory character. In that connection the Supreme Court observed that the question whether a particular workman is a supervisor within or without the definition of 'workman' is ultimately a question of fact, or at best one of mixed fact and law and will really depend upon the nature of the industry, the type of work in which he is engaged, the organisational set up of the particular unit of industry and like factors. In *Ananda Bazar Patrika v. Its Workmen* : (1969)II LLJ670SC , an employee who was doing mainly clerical work but occasionally discharging some duties of supervisory nature was held to be not a 'workman' as defined in Section 2(s) of the Act. The Supreme Court pointed out that the principal work of the employee was that of maintaining and writing the cash book and preparing various returns though a small amount of control over other clerks working in the section was given to him as a senior-most clerk such as the allocation of work between them, permitting them to leave during office hours and recommending their leave application. It was held that the few minor duties of a supervisory nature cannot convey his office of senior clerk-in-charge into that of a superior. The Supreme Court stated in that case that the principle which should be followed in deciding the question whether a person is employed in a supervisory capacity or on clerical work is that if a person is mainly doing supervisory work but incidentally or for a fraction of the time does some clerical work, it would have to be held that he is employed in supervisory capacity and conversely if the main work done is of clerical nature, the mere fact that some supervisory duties are also carried out incidentally or as a small fraction of the work done by him will not convert his employment as a clerk into one in supervisory capacity.

10. *Burmah Shell Co. v. Burmah Shell Management Staff Association* : (1970) IILLJ590SC , was a case where the scope of Section 2(s) of the Act was considered. It was pointed out in that case that it is now well-settled that for the purpose of Section 2(s) a workman must be held to be employed to do that work which is the main work he is required to do, even though he may be incidentally doing other types of work, that in such cases it must be ascertained as to what is the main and substantial work which he is employed to do, that if it is supervisory work it must be held that he is employed to do supervisory work though he may also be doing some technical, clerical or manual work. But on the other hand the supervisory work is incidental to the main and substantial work of any other type, then the employment would not be in a supervisory capacity. In that case the status of persons working in various categories in the Burmah Shell Oil Storage and Distribution Company of India Ltd., were considered with reference to the definition of 'workman' contained in Section 2(s). While considering the status of persons working as foremen (chemicals) it was found that 20 workmen were working under him in the Chemical department including checkers, general workmen, packers and chemical mixers, that he signs gate passes and other material vouchers, that he recommends promotions of the men working under him, that he is entitled to select persons for acting in a higher capacity, that this duty is to ensure maximum utilisation of man power, and that he is solely responsible for the blending of the chemicals. It is in the light of these duties he was held to do the work of supervisory nature and the manual work done by him personally was only incidental. Dealing with the work of persons who are working as foremen in the blending department it was found that 25 workmen worked under him, that he has to supervise the work of 25 workmen under him, that no technical knowledge was involved, and such a foreman was held not to be a workman. The decision in that case clearly indicates that one cannot proceed merely on the basis of the designation given to an employee as foreman. In the case before us the Court is invited to hold from the designation of the second respondent as foreman (carpentry) that his work is of a supervisory nature without actually letting in any evidence as to the nature of his duties. It is not the case of the petitioner-management that the second respondent was having any control over the 10 or 12 carpenters whose work he was asked to supervise. It is not their case that the

second respondent had any disciplinary control over them or that he was himself sanctioning leave to the workmen working under him. Even accepting the facts spoken to by M.W. 1, the only evidence on the side of the management, it will only indicate that a particular work such as shuttering was entrusted to him to be completed with the help of 10 or 12 carpenters, who were daily-rated, in accordance with the designs and specifications given. That will lead to the only inference that the second respondent is the foreman or leader of the team of carpenters who were entrusted with the task of doing the work of shuttering. That will not make the work of the second respondent to be one of supervisory nature. In this view, we do not see any error in the finding of the labour Court holding the second respondent to be a workman as contemplated in Section 2(s).

11. On the second question whether the termination of the second respondent's employment amounts to retrenchment and, therefore, it attracts the provisions of Section 25F of the Act, the contention of the petitioner-management is that the services of the second respondent were purely temporary, terminable on 14 days notice as is made clear in the order of appointment and therefore, the termination of the second respondent on completion of the work for which he was recruited cannot amount to as order of retrenchment. The learned Counsel for the petitioner contends that the word 'retrenchment' will connote discharge of surplus labour and that an order of mere termination on the completion of the work for which he was appointed cannot, in any sense, amount to an order of retrenchment. The learned Counsel refers to the decision in *Hariprasad Shivshankar Shukla v. A.D. Divikar* (1957) S.C.R. 212, (hereinafter referred to as Hariprasad's case) wherein the Supreme Court observed that the word 'retrenchment' as defined in Section 2(oo) and the word 'retrenchment' in Section 25F of the Industrial Disputes Act, 1947 as amended in 1953 have no wider meaning than the ordinary accepted connotation of those words and mean the discharge of surplus labour or staff by the employer for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action and that the word 'retrenchment' has acquired no special meaning. The learned Counsel for the second respondent contends that in view of the amended definition of 'retrenchment' in Section 2(oo) of the Act any termination of service otherwise than as a punishment inflicted by way of disciplinary action has to be taken as retrenchment and in support of that

contention refers to the decision of the Supreme Court in *State Bank of India v. Sundaramoney* : (1976)ILLJ478SC (hereinafter referred to as Sundaramoney's case). In that case the Supreme Court has pointed out that retrenchment as denned in Section 2{oo) of the Act would mean the termination by the employer of the service of any workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action that the expression 'for any reason whatsoever' is very wide, almost admitting of no exception and that, therefore, whatever the reason, every termination spells out retrenchment, that termination embraces not merely the act of termination by the employer, but the fact of termination, however, produced, and that, therefore, a termination of employment otherwise than by way of punishment will attract Section 25F. The learned Counsel for the petitioner points out that the later decision of the Supreme Court in Sundaramoney's case does not refer to its earlier decision in Hariprasad's case and that in view of the conflict between the two decisions, the earlier decision which has been rendered by a fuller Bench has to be followed by this Court. In support of this contention reference has been made to the decisions of the Supreme Court in *Mattulal v. Badhe Lal* : [1975]1SCR127 and *Union of India v. K.S. Subramanian*. In the first case it has been laid down that as between two contradictory decisions of the Supreme Court, the former decision of a large Bench than the later should be followed. In the second case the Supreme Court cautioned the High Courts by observing that the proper course for a High Court is to try to find out and follow the opinions expressed by larger Benches of the Supreme Court in preference to those expressed by smaller Benches and that such a practice is being followed by the Supreme Court itself which practice has now been crystallized into a rule of law declared by the Supreme Court.

12. After going through the two decisions of the Supreme Court in Hariprasad's case : [1957]1SCR121 and Sundaramoney's case : (1976)ILLJ478SC , though we prima facie were of the view that the later decision of the Supreme Court composed of a smaller Bench is in conflict with the earlier decision rendered by a fuller Bench of the same Court, we are not able to say that there is any conflict, as the Supreme Court has in *Hindustan Steel Ltd. v. State of Orissa* : (1977)ILLJ1SC , has categorically observed that there is no conflict between the decisions rendered in Hariprasad's case : [1957]1SCR121 and Sundaramoney's case :

(1976)ILLJ478SC and that in the light of the earlier decision the later decision did not require any reconsideration. As a matter of fact the principle laid down in Hariprasad's case (supra) has been reiterated in Hathising ., Ahamedabad and Anr. v. Union of India and Anr. : (1960)ILLJ1SC ; The Workmen of the Bangalore Woolen, Cotton and Silk Mills Co. Ltd. v. The Management of the Bangalore Woolen, Cotton and Silk Mills Co. Ltd. 1962 I L.L.J. 213 and in Civil Appeal No, 634 of 1975. At the same time the principle laid down in Sundaramoney's case (supra) has been reiterated in Hindustan Steel Ltd. v. State of Orissa (supra), Delhi Cloth and General Mills Ltd. v. S.N. Mukherjee : (1978)ILLJ1SC ; Assistant Personnel Officer, Southern Railway Olavakkot v. K.T. Antony 197 II L.L.J. 254 and Avon Services v. Industrial Tribunal : (1979)ILLJ1SC . Thus there is a set of decisions of the Supreme Court following the principle laid down in Hariprasad's case (supra) and another set of decisions of the Supreme Court following the view taken in Sundaramoney' s case (supra). The Kerala High Court in a recent Full Bench decision in L. Robert D'souza v. Executive Engineer, Southern Railway, : (1979)ILLJ211Ker , has .after noting the apparent conflict between Hariprasad's case and Sundaramoney's case and after considering the two sets of decisions referred to above, one following the Hariprasad's case and the other following Sundaramoney's case expressed the view that wherever there is an element of surplusage then the termination will amount to a retrenchment so as to attract Section 25F on the principles laid down in Sundaramoney's case and wherever there has not been an element of surplusage, then the termination will not constitute retrenchment.

13. In this case the Labour Court has applied the principle laid down in Sundaramoney's case and has held that the termination of service is a retrenchment and that as the requirements of Section 25F had not been satisfied, the termination is invalid. The appointment of the second respondent is subject to the termination of his services on the completion of construction Unit No. 1 of reactor and turbine buildings at Kalpakkam. The order terminating the second respondent's services does not say that the said construction work is complete, and, therefore, his services had been terminated. The termination order merely says that his services are no longer required by the management. Apart from this aspect that the order of termination does not refer to the completion of the

constructions work for which the second respondent was appointed, the evidence adduced in the case also does not establish that the work for which the second respondent was appointed had been completed. Even M.W. 1 who was examined on the side of the management categorically admits that there are two units, Unit No. 1 and Unit No. 2 and at the time of the termination of the second respondent's services the work in Unit No. 1 was coming to a close and the work in Unit No. 2 was not complete. He also admits that at the time of the termination of the services of the second respondent, the second respondent was working in Unit No. 2. This admission shows that the second respondent was engaged not only in connection with the work in Unit No. 1 but also in Unit No. 2 M.W. 1 also says that on the date of his deposition the work in Unit No. 2 has come to a close but the petitioner is doing some extra work in relation to the same construction work. This, the conduct of the management shows that the second respondent has been asked to work in Unit No. 2 even while the work in Unit No. 1 was not complete. Whatever that be, the deposition of M.W. 1 indicates that the work in Unit No. 1 was not actually complete on the date when the second respondent's services were terminated for he says that the work in Unit No. 1 was coming to a close and not that it has actually come to a close. The order terminating the second respondent's services says that his services are no longer required. While the work in Unit No. 1 was not actually complete, the termination of the second respondent's services on the ground that his services are no longer required suggests that the termination was only on the ground of surplusage. Therefore, the facts in this case will attract the principle laid down in Sundaratnoney's case and the impugned order of the Labour Court, following the principle laid down in Sundaratnoney's case cannot be said to be erroneous.

14. It is relevant to note the decision of the Supreme Court in Hindustan Steels Ltd. v. State of Orissa (supra) wherein even an automatic termination of service by efflux of time was held to amount to retrenchment. In that case it was contended by the management that the services of the employee came to an end by efflux of the time and that such termination of services will not fall within the definition of 'retrenchment' in Section 2(oo). The Supreme Court, relying on the following observation in Sundaratnoneys case held that though the termination was automatic on the expiry of the contractual period of service, the requirement, of

Section 25F should be satisfied.

Termination-for any reason whatsoever are the key words. Whatever the reason, every termination spells retrenchment. So the sole question is has the employee's service been terminated?.... A termination takes place where a term expires either by the active steps of the master or the running out of the stipulated term.... Termination embraces not merely the act of termination by the employer, but the fact of termination, whatsoever, produced...an employer terminates employment not merely by passing an order as the service runs. He can do so by writing a composite order, one giving employment and the other ending or limiting it. A separate, subsequent determination is not the sole magnetic pull of the provision. A preemptive provision to terminate is struck by the same vice as the post-appointment termination.

In this view of the matter, the writ petition fails and it is dismissed. There will, however, be no order as to costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com