
(2009) 04 JH CK 0103
In the Jharkhand High Court

Ador Welding Limited

APPELLANT

Vs

Sri B. Gope

RESPONDENT

Date of Decision : 16-04-2009

Acts Referred:

Bihar Shops and Establishments Act, 1953 — Section 2, 26, 26(2), 4

Citation : (2009) 04 JH CK 0103

Hon'ble Judges : Rakesh Ranjan Prasad, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

R.R. Prasad, J.—It is a case of the petitioner- a Company duly registered under the provisions of Indian Companies Act that respondent No. 1 was initially appointed as Welding Demonstrator in Jamshedpur area office. Subsequently, he was given promotion and at the relevant point of time, he was holding the post of Assistant Manager and was discharging duties of Managerial and Administrative nature. Oftenly he, in absence of Area Business Manager, used to hold office as In-charge Area Business Manager which was the top most position of the Jamshedpur area office, commonly known as Jamshedpur Unit a controlling unit of Bihar and Orissa which had maximum number of 17 employees. On 9.5.1994, respondent No. 1 had tendered his resignation from his service but later on, he was allowed to withdraw the letter of resignation on promise being given that he will improve his efficiency. However, when it was found that there is no improvement in his efficiency, his services were terminated on 15.2.1995 (Annexure 1/1) as per the rules and contract of the employment with one month's salary in lieu of notice which was sent to the complainant through cheque dated 28.2.1995 and whatever the petitioner was entitled, that was paid through cheque towards full and final settlement of the dues. Respondent No. 1 initially accepted the order of termination and got the amount encashed but subsequently, respondent No. 1 in order to lodge complaint before the Labour Court u/s 26 of the Bihar Shops and Establishment Act, 1953 (hereinafter referred to as "the Act") deposited the entire amount on 25.3.1995

in the account of the petitioner Company. Thereafter on 29.3.1995 he filed a complaint u/s 26(2) of the said Act before the Presiding Officer, Labour Court, Jamshedpur which was numbered as B.S.C Case No. 5 of 1995 by taking pleas that he was appointed as Welding Demonstrator and was given promotion on finding his performance as excellent, still his services were terminated while he was working as Sales Engineer, at the instance of Mr. Kher against whom he had raised voice for his illegal acts. It has been admitted that a cheque of Rs. 13,967.86 was received but that had been deposited in the petitioner's account.

2. Petitioner on his appearance submitted his written report where on amongst other took the plea that respondent No. 1 is not an employee as defined under Sub-section(4) of Section 2 of the Act as respondent No. 1 falls within the exemption clause as contemplated in Sub-section (2) of Section 4 of the Act read with serial No. 5 of the Schedule of the said Act and that respondent No. 1 being Assistant Manger was also discharging the duties of the Area Manager off and on in absence of Area Manager and that his services were terminated absolutely in terms of the contract and one month's salary in lieu of notice was sent towards full and final settlement of the dues which had been accepted but that was subsequently deposited in order to file the case. On the basis of the pleading, following issues were framed:

- (i) Whether the case as framed is maintainable ?
- (ii) Whether the termination of the service of the complainant is proper and justified ?
- (iii) Whether the complainant is entitled to any relief claimed in this case ?

3. On the point of maintainability it was held by Presiding Officer, Labour Court that as per the assertion of the opposite party, it was the Area Business Manager who was holding top most position of Jamshedpur unit whereas the complainant was employed as Assistant Manager and thereby he was not exercising control over the affairs of the Company and as such, the complainant comes within the definition of employees.

4. So far merit of the case is concerned, the learned Presiding Officer having found the order of termination not in accordance with the terms of the contract, set aside it and directed the petitioner to reinstate the complainant with continuity in service and payment of 25% back wages within 60 days failing which the complainant would be entitled to realize the same through process of the court with 9% interest per annum.

5. Being aggrieved with that order, this writ application has been filed.

6. The only point which was urged by learned Counsel appearing for the petitioner in order to assail the impugned order is that respondent No. 1 by holding the post of Assistant Manager was discharging the duties of the Managerial and Administrative nature and Oftenly he used to function as In-charge Area Business Manager, a top most position of the Jamshedpur Area

Office and under such circumstances, respondent No. 1 is not an employee within the meaning of the said Act read with its Rule and Schedule. Alternatively it was submitted that if this Court does not find respondent No. 1 to have been discharging duties of the Area Manager, a top most position of the Unit, he would be next to Area manager and thereby respondent No. 1, in view of the factual position that Jamshedpur Unit does have employees 17 in number, would still not be falling within the definition of "employee" as defined under Sub-section (2) of Section 4 of the said Act read with its Schedule and hence, the entire order passed by the Presiding Officer, Labour Court, gets vitiated.

7. Having heard learned Counsel appearing for the parties and on perusal of the record it does appear that the petitioner was initially appointed as Welding Demonstrator. Subsequently, he was promoted to the post of Sales Engineer. However, according to the case of the petitioner, respondent No. 1 at the relevant point of time was holding the post of Assistant Manager of Jamshedpur Area Office and was discharging the duties of Managerial and Administrative nature and was frequently holding the office as Incharge of area business Manager in absence of area business Manager which is a top most position of Jamshedpur Area Office. This assertion of the petitioner itself demonstrates that the petitioner was never holding topmost position to exercise ultimate control over the affairs of the establishment, rather as per the case of the petitioner, it was the area business Manager, who has been exercising ultimate control over the affairs of the establishment and as such the respondent No. 1 cannot be said to be an employer in terms of Section 2 Sub-clause (5) of the Bihar Shops and Establishments Act, 1953.

8. However, it was submitted that even if respondent No. 1 is not found to have been exercising ultimate control over the establishment but still the provision of the Bihar Shops and Establishment Act would not be applicable in case of respondent No. 1, by virtue of the provision as contained in Sub-section (2) of Section 4 read with Serial No. 5 of Schedule I of the Act as the petitioner No. 1 by virtue of the situation that the establishment does have 17 employees in total, would be placed at second position next to area business Manager and thereby he would not be entitled to have benefit of any provision of the Bihar Shops and Establishments Act, 1953.

9. Before advertng to the submission advanced on behalf of the petitioner it be stated that Bihar Shops and Establishments Act, 1953 was enacted for the benefit of employees so that the employees may have certain, as stipulated under the Act, statutory service conditions. However, in certain cases of the establishment / employees, the provision of the Act is not applicable as has been enshrined under Sub-section (2) of Section 4 read with serial No. 5 of Schedule I which reads as follows:

Sub-Section (2) of Section 4 reads as under:

Notwithstanding anything contained in this Act, the provisions thereof specified in

the third column of the Schedule shall not apply to the establishment, employees and other persons referred to in the corresponding entry in the second column;

Provided that the State Government may, by notification, add to, omit or alter any of the entries in the Schedule in respect of one or more areas of the State and on the publication of such notification, the entries in either column of the Schedule shall be deemed to be amended accordingly.

Serial No. 5 to Schedule I of the Act reads as follows:

Sl. No. Establishments, employees or other Persons Provisions of the Act

5. Person occupying positions of managerial or supervisory character in an establishment employing more than five persons, provided that not more than ten per centum of the total number of employees in an establishment shall be so exempted: Provided that where ten per centum of the total number of employees in an establishment comes to a fraction less than one such fraction shall be rounded off to one.

All provisions

10. From the conjoint reading of the provisions as enshrined in Sub-section (2) of Section 4 read with provision as contained in serial No. 5 of Schedule I, it does appear that 10% of the total number of employees, in case of establishment having more than 5 persons would be exempted from the purview of the aforesaid Act. It has been further made clear that if 10% of the total number of employees comes into fraction, it should be rounded up to one. Here, in the instant case, admittedly, number of total employees were 17 and in that event, 10% would come to 2. Therefore, the question would be as to whether respondent No. 1 has been working at the relevant point of time at number 2 position. By referring to the statement made by respondent No. 1 before the Court, it was stated on behalf of the petitioner that the petitioner has admitted that at the relevant point of time he was working as area business Manager whereas it is the case of the petitioner that in absence of area business Manager, he was also discharging the duty of area business Manager and thereby he is certainly next to area business Manager, that is to say that he will be at number 2 position. This submission of the petitioner that respondent No. 1 was holding post next to the topmost post is based on surmises as neither it has been the case of the petitioner that the respondent No. 1 had been working at number 2 position nor there has been anything in the statement of the respondent No. 1 before the court below that he was working at number 2 position.

11. In this regard, I may refer to the evidence of respondent No. 1 as has been annexed with writ petition wherein he has stated that he, at the relevant point of time, was Sales Engineer and he was senior most amongst Sales Engineers and that altogether there were 17 employees but it is difficult to say that who were the

12. senior most among them. In this view of the matter and in absence of other

evidence showing the respondent No. 1 to be at number 2 position, it cannot be held that respondent No. 1 was holding number 2 position in the establishment. Accordingly, the contention of the petitioner that the provisions of the Act would not be applicable in the case of the respondent No. 1 is hard to accept.

13. In the result, I do not find any merit in this application. Hence, this application is dismissed.