
(2013) 02 KAR CK 0016

In the Karnataka High Court

Case No : Writ Petition No's. 80161-80176 and 80306 of 2011

Ashok Telkar and Others

APPELLANT

Vs

Associated Cement Co. Ltd. and Another

RESPONDENT

Date of Decision : 11-02-2013

Acts Referred:

Industrial Disputes Act, 1947 — Section 10(4-A), 2(s), 25

Citation : (2013) 138 FLR 828 : (2013) 4 LLN 662

Hon'ble Judges : N. Kumar, J

Bench : Single Bench

Advocate : P. Vilas Kumar, for the Appellant; Ashok S. Kinagi and A.M. Patil, for the Respondent

Final Decision : Dismissed

Judgement

N. Kumar, J.—These writ petitions are filed challenging the order passed by the Presiding Officer of the Labour Court, Gulbarga, dismissing the applications filed u/s 10(4-A) of the Industrial Disputes Act (as amended in "Karnataka) Act, 1987, holding that there" exist no relationship of employer and workman between the parties and therefore dispute is not maintainable.

The case of the workman is, each of them is appointed against clear vacancy of courier services in the year 1982. Since the date of appointment they are working sincerely, honestly and to the fullest satisfaction of the management. Though they are similarly situated as that of other employees who are equally working in the industry, they have been paid too nominal wages and they have not been given various other benefits as that of so-called permanent employees. The courier services are treated as temporary employment, paid less wages and are deprived of many benefits. They were demanding equal treatment, equal pay. Though it was promised, it was not forthcoming. When they pressed their demand, all of a sudden, their services came to be terminated from 18.8.2005. From 18.8.2005 onwards the salary and other allowances were paid to them in the name and style of Roopali Communications. Some signatures have been

obtained on some papers stating that they would be regularized. In fact, the said allowance was paid by the respondent-company itself. But with the mala fide intention and by way of unfair labour practice, it is being given in the name and style of Roopali Communications, which is not in existence any where in Wadi to the knowledge of the workmen. Therefore, they sought for setting aside the order of oral termination dated 18.08 2005 and reinstatement with consequential benefits.

After service of notice, the respondent-management entered appearance and contended that Cement either in the form of Bags or through the specially designed Railway Containers is transported to different destinations. As and when the wagons and containers reach the designated railway stations, it is necessary to produce the railway receipts and take delivery of the Cement for being stored in the godowns either of the company or others. If the railway receipts are not produced the delivery of the Cement will not be given. If there is a delay in production of railway receipt and consequent delay in obtaining delivery of the cement, demurrages will be charged by the railways. In order to ensure that the railway receipts are produced at the designated railway stations. and to eliminate the time gap between the arrival of the wagons/containers at the designated railway station and production of railway receipt for taking delivery, company entrusted the delivery of the documents with respect to despatch of consignment to the identified couriers. The engagement of these applicants was on assignment basis. They were not employees of the company. They have been engaged only for specific assignment as and when need arose. There was no obligation on part of either the Company to engage them for every document sent by courier with regard to despatch to railway wagons/containers or there was any such obligation on the part of the applicants. The applicants were not required to present themselves everyday at the factory. They were at liberty to do any other work when they are not entrusted with carrying documents. Even when they proceeded for delivering the documents they were free to attend any other work either during their onward journey or during their return journey. They were only required to deliver the documents at the designated place and to the specified official or person and submit to the company the acknowledgment given by the said authority. There are no working hours fixed. There are no other control exercised by the Company on the applicants. They are free to pursue their own avocation. They are at liberty not to accept any particular assignment to carry the document. They are not subject to any disciplinary jurisdiction of the company. They were thus self-employed and independent contractors. The applicants used to submit courier expenses bills for each assignment and payment were made accordingly. They were not paid any wages. Payment of courier expenses bills cannot be treated as wages. The applicants were engaged in a non core activity and they were employed outside the factory premises and was out workers. The system of transporting the documents through individual courier was reviewed and in order to streamline the whole working, the company decided to allot the work of courier to Roopali

Communication from August, 2005. It is a proprietary concern. They have obtained the service tax code from the office "of the Superintendent of Central Excise, Yadgir Range, Yadgir. The courier work was entrusted to the said firm. Therefore they contended that there is no relationship of master and servant or employer and workmen between the parties and therefore the provisions of Industrial Disputes Act are not applicable.

2. On the aforesaid pleadings, the Labour Court framed the following issues:

1. Whether the claimant proves that he is the workman as courier service u/s 2(s) of the I.D. Act?

2. If so, whether he has continuously worked in the respondent office for more than 240 days?

3. Whether the management has terminated the services of the claimant on 18.8.2005 is in violation of section 25 of the I.D. Act?

4. Whether the claimant is entitled for reinstatement and other reliefs?

3. The applicants examined one witness and got marked 7 documents in support of their case. The respondent got examined two witnesses and got marked 78 documents. No evidence was adduced on behalf of second respondent, i.e., Roopali Communications.

4. The Labour Court on appreciation of the aforesaid oral and documentary evidence on record held that the evidence on record establishes that all the applicants used to carry out the work of the respondent on assignment basis. The documents clearly indicate that applicants never worked under the first respondent on regular salary and wage basis. There is no relationship of employer and employee between the parties and therefore it held Issue No. 1 against the applicants. Similarly, it also held the other issues against the applicants and dismissed these applications. Aggrieved by the said order, the present writ petition is filed.

5. The learned Counsel for the petitioners assailing the impugned order of the Labour Court contend that admittedly, the management hired the services of these applicants, entrusted the work and paid them money for the services rendered. They have been working for more than 20 years. The management has not produced the register maintained by them showing the name of all these applicants. When once the employment is admitted, they have worked for more than 20 years and their names find place in the register of the management, the presumption is, they were employed by the management and it is for the respondent to rebut the said presumption by producing the documents which were in their custody. Though the respondent has chosen to use the words, what the Courts have to see is, the factual aspect by lifting the veil and if so done, the material on record discloses that there exists a relationship of employer and employee as defined u/s 2(s) of the Industrial Disputes Act, 1947, for short, hereinafter referred to as the "Act". It is admitted on record that after the

services of these applicants were terminated, the said work was entrusted to the second respondent under whom the applicants were made to work and money was paid through the second respondent. It is a clear case of unfair labour practice. Therefore the applicants are entitled to protection at the hands of this Court. These aspects are not properly appreciated by the Labour Court, on the contrary, he has taken into consideration, facts which are not material, which are unwarranted and thus he has misled himself to arrive at a wrong conclusion, which requires to be set aside. When once the relationship is admitted and when the respondent-management is in possession of the documents, fails to produce the same, an adverse inference is to be drawn.

6. Per contra, the learned Counsel appearing for the respondent-management submits that the actual burden of proving the existence of relationship of master and servant is on the applicants. None of the documents produced by them establishes the said relationship. Admittedly, they were not employed regularly to do any work inside the factory premises. They were given work as and when there was a need. After completing the work, they were expected to submit the bills, which after scrutiny, were paid. The management had no control over these persons except to the extent of finding out whether the entrusted work has been done or not. No monthly salary was paid. No other benefits were extended and the terms and conditions entered into between the parties clearly indicate the terms of employment. Therefore the Labour Court was justified in recording the finding which it has done, which is based on legal evidence and therefore no case for interference is made out.

7. In the light of the aforesaid facts and rival contentions, the point that arise for consideration in this writ petition is:

Whether the finding of fact recorded by the Labour Court calls for interference under Article 226 of the Constitution of India?

8. The specific case pleaded by all these applicants is that they were appointed against clear vacancy of courier services in the year 1982. They have not produced the appointment order. There are 16 applicants. Only one applicant has been examined on his behalf and on behalf of remaining 15 applicants. Therefore, in order to find out the nature of employment, the nature of duty discharged and the remuneration paid, we have to fall back upon the oral evidence adduced by PW-1.

9. In the examination-in-chief, P.W. 1 has deposed that all of them have been treated as temporary employees, paid less wages and deprived of many benefits. By engaging them through alleged false and fictitious contractor, from 18.8.2005 onwards, the salary and other allowances, etc., is being paid to all of them in the name and style of Roopali Communication. Some signatures have been obtained on some papers stating that they would be regularized. All of them have put in more than 23 years of continuous service. There are not even likely chance of getting employment elsewhere in future. The respondent was maintaining a

ledger and as per the ledger they were allotted duties to him and some others. The manner in which the work was being extracted from them were analogous to daily wage or casual employee. However, there was no break of service in respect of any of them. All of them were being paid specific and definite wages. It can be termed as monthly wages, of course it was varying. There was no contract for service, on the other hand, there was contract of service. They were under control and supervision of the management. None of them were having independent or supervisory powers over anybody. They were liable for termination or dismissal in case they were found to have committed any dereliction of duties. All of them have gate pass to enter the factory. Every morning at 8.00 am and at 4.00 pm they were required to keep themselves present at the Cement Despatch Section. The respondent is in the habit of engaging employees against permanent vacancy and brand them as casuals, temporaries etc., with the sole intention of paying too less wages to them. It is a clear case of unfair labour practice. Therefore, they wanted their dismissal to be set aside.

10. The said witnesses have been extensively cross-examined. In the cross-examination he admitted that in the respondent-company there are employees who are permanently employed. These permanent employees have union of their own. Whenever their service conditions are affected, through the union, they get the dispute resolved. In order to see that the goods reach in time, the respondent utilized the services of couriers. Their job was, copy of the documents were handed over to them along with the goods. They used to travel in train and hand-over the documents to the consignee. Similarly goods were transported through trains. After the goods reached the destination, as to how they came back and what is the expenses incurred by them, they prepared a bill and gave it to the company. On submission of the said bill, they would make payment. Except the said payment, no other payments are made by the respondent to them. Before making the payment, the contents of the bill are verified by one officer and a senior officer makes the order for payment. When they took out these documents, they use to deliver them to the consignee and they use to obtain signature of persons who are authorised to receive the same and deliver back the said acknowledgement to the company. Along with the bill they used to hand over the bills showing the expenses incurred by them. It is on the basis of the bills submitted by them, the respondent used to prepare their bill. Ex.M-1 is one such bill, which the witness admits. It also bears the signature of one S. Peter and Ramanna, which he admits. He also admits that except the amount mentioned in the said bill they were not entitled to any other amount from the respondent. Witness further admits that in the attendance register, their names are not found. But when they enter the premises their names were entered in the register, they have to affix their signature and get inside. They use to affix the signature either in the morning or in the evening or on both occasion. The only job they had was to collect the documents. Except that they had no work inside the factory premises. The respondent has not paid them bonus at any

point of time as they were being paid to the permanent employees. They have not given any application to the respondents requesting them to confirm them as permanent employees. From 18.8.2005 the Courier services were entrusted to the 2nd respondent. The witness has volunteered that after removing them from the services of the 1st respondent, they were entrusted to the 2nd respondent. They had office in Wadi. They used to go to that office, collect documents and go to the destination. It is the 2nd respondent, who was assigning them work. When the husband of the Proprietrix of the 2nd respondent died, the company lost its business. Thereafter, the said work was entrusted to VIP Couriers. The petitioners are also working under them. They used to collect the courier from the 2nd respondent. After the said work was over, they used to collect another consignments or set of documents. This is the evidence, which is on record on behalf of the applicants.

11. Insofar as the respondents are concerned, they have produced documents in support of their contention. The learned I Judge has set down the documents on which reliance is placed at paras 35 to 40. From the said evidence, it is clear that these applicants submitted applications on different dates for the post of courier server. Accordingly, the 1st respondent has issued orders under Ex.M51 to Ex.M58 stating that these applicants are entitled to actual rail/bus fare to and fro, conveyance charges, journey allowance and actual coolie charges. The Labour Court has extracted the relevant terms of the letter, they read as under

1. You will be paid actual Rail/Bus fare (to and fro) including sleeper charges/ reservation charges as the case may be.
2. You will be paid conveyance charges, journey allowance and daily allowances as fixed by the company from time to time.
3. In addition to the above you will be also paid coolie charges that has been incurred by you while bringing heavy luggage's from the destination.
4. In case if you loose the documents during transit, your services will be deemed to be terminated without further notice and no TA will be paid in such circumstances.
5. Kindly acknowledge the receipt of the letter in token for having accepted the above terms and conditions.

12. From the aforesaid terms and conditions, it is clear that the management entrusted the work to the applicants. The nature of work is to travel with the goods along with the documents relating to the goods. Therefore, they were paid actual Rail/Bus fare including sleeper charges/reservation charges as the case may be i.e., actual expenditure incurred for travel. Then they were also paid conveyance charges, journey allowances and daily allowances as fixed by the company. Then they were also paid actual coolie charges that has been incurred by them while bringing heavy luggage's from the destination. It was made clear that if the documents were lost during transit, their services will be deemed to be

terminated without further notice and no TA will be paid in such circumstances. This piece of documentary evidence coupled with the oral evidence of the applicant set down above clearly demonstrates that these persons were engaged whenever there was work by giving them the actual expenses incurred for travel in addition to the remuneration to the service rendered. That is why it is called as courier service. In fact the Management has set out the terms and conditions under which they employed their employees and when compared with that, where these applicants stands. It is extracted in their objection statement, which reads as under:

They have also set out in the statement of objections the number of assignments given to each of these applicants and one such tabular column is found at page 155 para 7 which is extracted as under:

13. It is in this background, we have to look into the definition of the word, workman as defined u/s 2(s) of the Industrial Disputes Act which reads as under:

2(s) "workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person --

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding ten thousand rupees per mensem, or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

14. In this background, it is relevant to notice the distinction between the servant, an agent and an independent contractor. In Halsbury's Laws of England (Hailsham Edition), Vol. I at page 193, the distinction is brought about in this fashion:

An agent is to be distinguished on the one hand from a servant, and on the other from an independent contractor. A servant acts under the direct control and supervision of his master and is bound to conform to all reasonable orders given to him in the course of his work; an independent contractor, on the other hand, is entirely independent of any control or interference and merely undertakes to

produce a specified result, employing his own means to produce that result. An agent, though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject to its exercise to the direct control and supervision of the principal.

15. Keeping in mind, the distinction between an agent, an independent contractor and a servant, when we look at the facts of this case, it is clear that the only job these applicants were expected to perform was to carry the documents, deliver it to the consignee, obtain an acknowledgement, submit the acknowledgement along with its bill for making payment. Therefore, they were not under the contract, control and supervision of the respondent and the question of their confirming to any reasonable orders given to them in the course of work do not arise. Once they collect the documents for being delivered to the consignee, they were entirely independent of any control or interference. They were only expected to hand over the documents obtained and then produced the same before the respondent. How they carried the documents; where they kept the documents, how they delivered the documents of the consignee, the mode of acknowledgement they have obtained were all completely within the discretion of these applicants. The terms and conditions make it clear that if they fail to perform this obligation cast on them under the contract, then the contract shall stand terminated and they are not entitled to any consideration. Therefore, in the facts of these cases, from the material placed on record it is clear that there existed no relationship of master and servant, employer and employee. At any rate, the employees are not workman as defined u/s 2(s) of the Industrial Disputes Act. The learned Judge of the Labour Court has carefully gone through the entire material on record. He has set out oral and documentary evidence. Then he has taken note of the various decisions cited by the authorities and then he has recorded a finding that there exists no relationship of employer and employee between the parties. In that view of the matter, the findings recorded by the Labour Court is based on legal evidence. I do not see any infirmity in the order of the Labour Court, which calls for interference. The question of going into the other two issues will be academic since the Labour Court has undertaken the exercise and recorded a finding. In view of the affirmation of the findings on issue No. 1, going into the correctness of the issues 2 and 3 does not arise. There is not merit in this petition.