
(2010) 01 SHI CK 0092
In the High Court Of Himachal Pradesh
Case No : C.W.P. No. 1952 of 2010

Himachal Pradesh State Electricity Board and Another	APPELLANT
Vs	
Laxmi Devi and Another	RESPONDENT

Date of Decision : 22-01-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 2, 2(14), 25B, 25F

Citation : (2011) 1 LLJ 819

Hon'ble Judges : Kurian Joseph, C.J;Kuldip Singh, J

Bench : Division Bench

Judgement

Kurian Joseph, C.J.—Whether a part time "workman" is covered under the provisions of Section 2(s), 25-B and entitled to the protection u/s 25-F of the Industrial Disputes Act, 1947, is the question to be decided in this case.

2. Facts not in dispute. The Respondent had been engaged regularly as a part time Sweeper during the year 1991 to 1997 by the Petitioners. When the Respondent was disengaged from service without any notice, it led to the industrial dispute. The question referred for adjudication reads as follows:

Whether the termination of services of Km. Laxmi Devi D/o Shri Kanshi Ram ex part time sweeper by the Executive Engineer HPSEB Division Nahan, District Sirmour HP w.e.f. May, 1997 without complying the provisions of Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation the above, aggrieved workman is entitled to?

3. The Industrial Tribunal-cwm-Labour Court, Shimla, as per Annexure P-4, award answered the reference in favour of the workman Respondent and passed the award to re-instate the Respondent in service with seniority and continuity but without back wages and hence the writ petition by the employer.

4. Learned Counsel for the Petitioners contended that the Respondent was not even a daily wager. She was engaged only as a part time Sweeper @ Rs. 4.30

per hour. It is also submitted that she had never completed un-interrupted service of 240 days in a calendar year, preceding the date of retrenchment and thus, in any case, she is not entitled to any protection u/s 25-F of the Industrial Disputes Act, 1947. On the contrary, learned Counsel for the workman submitted that even a part time employee is covered under the protective umbrella of the provisions of the Industrial Disputes Act, 1947. It is further submitted that the Tribunal having found on evidence on record that the "workman" had continuous service, that finding of fact may not be upset in proceedings under Article 226 of the Constitution of India since the same does not suffer from any perversity.

5. As far as the latter part of the submission of the learned Counsel for the Respondent is concerned, it is a well settled position that unless the award is unreasonable or perverse, the writ Court will not interfere with the same. The writ Court does not sit in appeal over the award. Therefore, a finding of fact, unless it is perverse or unreasonable and shocking to the judicial conscience will not be upset by the writ Court.

6. The crucial question is whether a part time employee is a "workman" u/s 2(s) of the Industrial Dispute Act? Section 2(s) of the Industrial Disputes Act, 1947, reads as follows:

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 one thousand six hundred 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.

7. Section 25-B of the Industrial Disputes Act, 1947, reads as follows:

25-B. Definition of continuous service- For the purpose of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not

illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of Clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) ninety-five days, in the case of a workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case.

Explanation.- For the purposes of Clause (2),, the number of days on which a workman has actually worked under an employer shall include the days on which-

(i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under this Act or under any other law applicable to the industrial establishment;

(ii) he has been on leave with full wages, earned in the previous years;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks.

8. The definitions of "workman" u/s 2(s) and "continuous service" u/s 25-B, of the Act show that the expressions are not to be restricted to full time employees. What is required is that the workman claiming the continuous service should fulfill the conditions under both the provisions so as to be covered under the protective umbrella of Section 25-F of the Act. The whole purpose of Industrial Disputes Act, is to focus on resolution of industrial disputes. Once, there is an employer-employee relationship and the relationship is in such a way so as to denote employment in any industry to do the specified manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward and if not carved out. by the other specified provisions, such an employee would be a

workman u/s 2(s) of the Act. It will be dangerous to adjudge the nature of the work from the allowance an employee is paid. That is wholly an irrelevant factor under the provisions of the Industrial Disputes Act. In this context, it would be relevant to refer to the factual position as found by the Labour Court, as is stated in paragraph 14 in the Award:

14. In the instant case, no notice nor any compensation was paid to the Petitioner at the time of her termination, and even no opportunity of being heard was afforded to the Petitioner before her termination which is illegal and contrary to the provisions of Section 25-F of the Industrial Disputes Act, 1947. I have also observed from the man-days chart Exhibit RA that the Petitioner had put in 122 hours from 1/97 to 5/97 which means that she had completed 122 days in the year 1997 even if she had worked one hour a day. I have scrutinized the man-days chart Exhibit RA and observed that the Petitioner had put in 336 hours in twelve calendar months preceding her termination w.e.f. 5/96 to 5/97 which means that she had completed 336 working days even if she had put in one hour a day and therefore, the Petitioner has fulfilled the basic requirement and protection of Section 25-F of the Industrial Disputes Act, 1947 as no notice nor compensation was paid to the Petitioner at the time of her retrenchment which is not disputed by the Respondent.

9. Thus, in the instant case, the Respondent has established that she had been engaged as a "workman" and had been in continuous service of the Petitioners, in terms of Section 2(s) and Section 25-B of the Industrial Disputes Act.

10. The Hon'ble Supreme Court in a recent decision has considered the question on principle in Div. Manager, New India Assurance Co. Ltd. Vs. A. Sankaralingam, The issue is discussed at paragraph 10 to 12 of the judgment, to quote at p. 607 of LLJ:

10. ...the preponderance of judicial opinion that a workman working even on a part time basis would be entitled to benefit of Section 25-F of the Act is clear from the various judgments which we have referred to above. In Silver Jubilee Tailoring House and Others Vs. Chief Inspector of Shops and Establishments and Another, which is a judgment rendered by a 3- Judge Bench of this Court, the question was as to whether the workers who were paid on piece-rate basis-though working in the shop, were workmen in terms of Section 2(s) of the Act. That is what the Court had to say:

11. The question for decision was whether; the agrarians were workmen as defined by Section 2(s) of the Industrial Disputes Act of 1947 or whether they were independent contractors. The Court said that the prima facie test to determine whether there was, relationship between employer and employee is the existence of the right in the master to supervise and control the work done by the servant not only in matter of directing what work the employee is to do but also the manner in which he has to do the work. In other words, the proper test according to this Court is, whether or not the master has the right to control

the manner of execution of the work. The Court further said that the nature of (sic) extent of the control might vary from business to business and is by its nature incapable of precise definition, that it is not necessary for holding that a person is an employee, that the employer should be proved to have exercised control over his work, that even the test of control over the manner of work is not one of universal application and that there are many contracts in which the master could not control the manner in which the work was done.

11. For arriving at this conclusion, the Supreme Court referred to various judgments of this Court including *Shri Birdhichand Sharma Vs. First Civil Judge Nagpur and Others*, but distinguished the judgment in *Shankar Balaji Waje's* (supra) case (1962) Supp. 1 SCR 249) (rendered by two Hon'ble Judges) by observing that the workman who was claiming that status was not called upon to attend duties in the factory itself as he was permitted to take the tobacco from the factory owner and role the bidis at his residence at any time without any fixed hour of work and that there was absolutely no supervision of the so called employer over his work. In conclusion, the Bench observed in (paragraph 37):

That the workers are not obliged to work for the whole day in the shop is not very material. There is of course no reason why a person who is only employed part time, should not be a servant and it is doubtful whether regular part time service can be considered even prima facie to suggest anything other than a contract of service. According to the definition in Section 2(14) of the Act, even if a person is not wholly employed, if he is principally employed in connection with the business of the shop, he will be a "person employed" within the meaning of the Sub-section. Therefore, even if he accepts some work from other tailoring establishments or does not work whole time in a particular establishment, that would not in any way derogate from his being employed in the shop where he is principally employed.

12. It will be seen from a perusal of the aforequoted passages that the observations made therein clearly suggest that a workman employed on a part time basis but under the control and supervision of an employer is a workman in term of Section 2(s) of the Act, and is entitled to claim the protection of Section 25-F thereof, should the need so arise. The fact that the workman was working under the control and supervision of the Appellant employer is admitted on all sides.

11. Thus, on facts and guided and bound on law, we do not find any perversity, error or illegality in the award under challenge. The writ petition is hence dismissed.