
(1998) 07 MAD CK 0108

In the Madras High Court

Case No : Writ Petition No. 6446 of 1989

Madras Aluminium Co.

APPELLANT

Vs

Regional Labour Commissioner and Others

RESPONDENT

Date of Decision : 01-07-1998

Acts Referred:

Contract Labour (Regulation and Abolition) Act, 1970 — Section 10(1), 10(2)
Industrial Disputes Act, 1947 — Section 25FF

Citation : (1999) 2 LLJ 1329

Hon'ble Judges : T. Meenakumari, J

Bench : Single Bench

Judgement

T. Meenakumar, J.—This writ petition is filed seeking for the issue of a writ of certiorari calling for the records of the first respondent in Gratuity Appeal No. 6 of 1987 and quash the order of the first respondent dated March 13, 1989.

2. The case of the petitioner Company is that it is engaged in the manufacture of Aluminium and Aluminium products. The petitioner Company has taken up on lease Bauxite Mines at Yercaud, The petitioner Company has got itself registered as principal employer under the provisions of the Contract Labour (Regulation & Abolition) Act. (herein after referred to as the "Act"), The contractors were engaging their own men for attending to work in connection with the execution of the contract and they had also taken out licences under the Act. It is also the case of the petitioner that the third respondent was employed by a contractor R. Raghupathy who was supplying labour to the petitioner mines at Yercaud. The third respondent served under the contractor R. Raghupathy upto December 31, 1977. The third respondent was taken in the direct employment of the petitioner with effect from January 1, 1978. He retired from the services of the petitioner on March 29, 1985. In view of his retirement, he submitted an application for gratuity in Form-I to the petitioner claiming a sum of Rs. 9746.10 which was calculated taking into account his service under the contractor R. Raghupathy. The petitioner declined to entertain his claim with regard to the amount of gratuity for the period of service not rendered to the petitioner. The third

respondent preferred an application to the second respondent in P.G. Case No. 2/86 claiming gratuity of Rs. 9746.10. The petitioner filed its counter statement before the second respondent. However, the second respondent by order dated January 28, 1987 held that the contract between the petitioner and the contractor Raghupathy would not be a legal bar for the claim of the third respondent, that the contractor R. Raghupathy was merely a middleman, that without any written contract of service, it could be only understood and taken for granted that the petitioner would be liable to pay dues of the past services of the third respondent. By the said order, the petitioner was directed to pay a sum of Rs. 9,172.80 as the gratuity amount due to the third respondent. Against the order of the second respondent dated June 28, 1987 the petitioner preferred an appeal u/s 7(7) of the Payment of Gratuity Act before the first respondent. The first respondent by his order dated March 13, 1989 confirmed the order of the second respondent holding that u/s 25-FF of the Industrial Disputes Act, the petitioner is liable to pay the third respondent all service benefits without any discrimination including the benefits pertaining to the period of service rendered under the contractor. In the present writ petition, the orders passed by the first respondent confirming the orders of the second respondent are questioned.

3. The learned counsel appearing on behalf of the petitioner has contended that the third respondent was employed under the contractor during the period August 19, 1968 to December 31, 1977, thereafter he was given a fresh employment effective from January 1, 1978 and he retired on March 29, 1985. He has also further contended that the services rendered by third respondent from August 19, 1968 to December 31, 1977 should not have been taken into consideration for payment of the gratuity by both the authorities as the petitioner Company has given a fresh appointment with effect from January 1, 1978, and the third respondent is entitled to receive the gratuity only for that period. It is also contended that the appellate authority should not have confirmed the orders passed by the second respondent applying the provisions of Section 25-FF of the Industrial Disputes Act. He has also further contended that the provisions of Section 25-FF will not apply as there is no transfer of ownership or management of an undertaking with regard to the petitioner Company and that the third respondent cannot claim it as a matter of right to pay the gratuity for the services rendered under the contractor. He has also further contended that the contractor is neither a management nor an undertaking and hence the provisions of Section 25-FF will not apply in the particular circumstances of the case. It is also further contended that there is no notification as specified u/s 10(1) of the Act so far as the petitioner Company is concerned. Even assuming that there is notification, the third respondent is entitled for the payment of the gratuity only from the date of his appointment in the petitioner Company afresh i.e. from January 1, 1978 to March 29, 1985 and thereby, he is entitled only to a sum of Rs. 3,589.95 towards the gratuity. Learned counsel for the petitioner has also relied upon the decision in *Air India Statutory Corporation, etc. Vs. United Labour Union and others* [overruled], . Based on the above judgment, learned counsel

for the petitioner has submitted that the workman becomes an employee of the Company only from the date he has been given an appointment in the Company and not from the date from which he was working under the contractor. If he is removed by the contractor and taken by the Company, he becomes an employee of the Company only from the date of abolition of contract labour system. In this connection, the learned counsel for the petitioner has argued that as there is no notification u/s 10(1) of the Act, the provisions will not apply and the workman was given a fresh appointment from January 1, 1978 and he has to be treated as an employee of the Company only from January 1, 1978 and not from August 19, 1968.

4. Learned counsel appearing on behalf of the third respondent contended that once the contract labour system was abolished, there would be a direct relationship between the employer and the employee and the employer should take all the responsibilities of the contractor with regard to payment of wages and as per Section 25-FF, the Management is responsible for payment of gratuity and the appellate Court is right in applying the provisions of Section 25-FF.

5. On an application made by the third respondent, the second respondent has allowed the petition on the ground that in a case where the principal employer chooses to employ a workman who was earlier employed in his establishment through the contractor, without any written contract of service it has to be understood and taken for granted that the principal employer would be liable to pay dues for the past service of the workmen and the second respondent held the employer is liable to pay the gratuity amount of Rs. 9,172.80, against which, the employer has filed an appeal. In the appeal, the first respondent has confirmed the order of the second respondent applying the provisions of law as laid down u/s 25-FF of the Industrial Disputes Act.

6. In this context, it is very pertinent to note down Section 25-FF of the Act, which reads as under:

"25-FF. Compensation to workmen in case of transfer of undertakings: Where the ownership of management of an undertaking is transferred, whether by agreement or by operation of law, from the employer in relation to that undertaking to a new employer, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled to notice and compensation in accordance with the provisions of Section 25-FF, as if the workman had been retrenched:

Provided that nothing in this section shall apply to workman in any case where there has been a change of employers by reason of the transfer, if -

(a) the service of the workman has not been interrupted by such transfer;

(b) The terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer and

(c) the new employer is, under the terms of such transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer."

7. Section 2(ka) of the Industrial Disputes Act, 1947 reads as under:

""Industrial establishment or undertaking" means an establishment or undertaking in which any industry is carried on:

Provided that where several activities are carried in an establishment or undertaking and only one or some of such activities is or are an industry or industries, then, -

(a) if any unit of such establishment or undertaking carrying on any activity, being an industry, is severable from the other unit or units of such establishment or undertaking, such unit shall be deemed to be a separate industrial establishment or undertaking;

(b) if the predominant activity or each of the predominant activities carried on in such establishment or undertaking or any unit thereof is an industry and the other activity or each of the other activities carried on in such establishment or undertaking or unit thereof is not severable from and is, for the purpose of carrying on, or aiding the carrying on of, such predominant activity or activities, the entire establishment or undertaking or, as the case may be, unit thereof shall be deemed to be an industrial establishment or undertaking;"

8. From the above, it is very clear that there is no transfer of ownership or management of an undertaking either by agreement or by operation of law. In this case, neither of the counsels produced any agreement or any other material to show that there is transfer of ownership. As per the provisions of Section 25-FF it could be assumed, that there is no transfer of ownership or management of an undertaking, the appellate Court should not have applied the provisions at all to bring the workmen within the purview of Section 25-FF.

9. Coming to the next point with regard to the effect of abolition of the contract labour system under the Contract Labour (Regulation & Abolition) Act, 1970, the Supreme Court in *Air India Statutory Corporation's case* (supra) in paragraph 58 has observed as follows:

"It is true that we find no express provision in the Act declaring the contract labour working in the establishment of the principal employer in the particular service to be the direct employees of the principal employer."

It is also to be noted down that as per Sub-section (2) of Section 10, the continuance of contract labour stands prohibited, and abolished. The concomitant result would be that source of regular employment becomes open. On abolition of contract labour, the intermediary, i.e., contractor, is removed from the field and direct linkage between labour and principal employer is established. Thereby,

the principal employer directly becomes responsible for taking the services of the workmen hitherto regulated through the contractor. But the question arises from what "date, the principal employer becomes responsible? The Supreme Court in paragraph 66 of the above judgment, has observed that it is necessary to recapitulate that on abolition of the contract labour system, by necessary implication, the principal employer is under statutory obligation to absorb the contract labour. The linkage between the contractor and the employee stood snapped and direct relationship stood restored between the principal employer and the contract labour as its employees. Therefore, the Supreme Court has observed that the date of engagement will be the criteria to determine their inter se seniority. The Supreme Court declined to grant the benefit to the employees of the respondent Union from the date of the abolition of the contract labour system. The Supreme Court directed that the services should be regularised from the date of the judgment of the High Court. The Supreme Court held that the employees would be entitled to be treated as regular employees at least from the day on which the contract labour system in the establishment for the work which they were doing gets abolished.

10. From the above, it could be culled out that the appellate authority is not right in applying the provisions laid down u/s 25-FF as there is no transfer of ownership or management of the undertaking either by agreement or by operation of law. The Supreme Court in the above judgment, has held that there is no express provision in the Act for absorption of the employees whose contract labour system stood abolished by way of publication of notification u/s 10(1) of the Act. In view of the above observation, it could be easily said that the principal employer is not under obligation to absorb the employees whose contract labour system stood abolished. In this case, even assuming that there is no notification u/s 10(1) as contended by the learned counsel for the petitioner, the argument of the learned counsel for the third respondent is that once the contract labour system is abolished, the principal employer is bound to take into account the services of the workman and he should account the services from the date he was engaged by the contractor and not from the date the principal employer gives appointment. Thus it could be seen that in view of the findings of the Supreme Court that there is no express provisions in the Act for absorption of the employees, the principal employer cannot be forced to absorb the employee from the date on which the contractor has employed him making the principal employer liable to pay the gratuity from such date.

11. Taking into consideration the fact that there is inordinate delay in the payment of gratuity due to the workman and also the fact that the workman is now dead and his Legal Representative fourth respondent has been impleaded in the case, I consider it just and necessary to award interest at the rate of 12% p.a. as a special case and this should not be taken as a binding precedent.

12. The order of the second respondent as confirmed by the first respondent is set aside and the petitioner is directed to pay the gratuity from January 1, 1978

to March 29, 1985 after adjusting the amount which has already been deposited in pursuance of the interim orders dated July 12, 1991 together with the interest at the rate of 12% p.a., within a period of four weeks from the date of receipt of a copy of this order to the fourth respondent who is the Legal Representative of the deceased third respondent workman. With the above directions the writ petition is allowed. No costs.

Note:- It is brought to my notice by both the counsel that the gratuity amount from January 1, 1978 is in Fixed Deposit and some interest has accrued in that account. They requested that an order may be passed to adjust the interest accrued, out of the 12% interest which has been already granted by this Court. The ends of justice will be met, an order may be passed to adjust the interest out of the fixed deposit by the Management and can be adjusted out of the 12% already granted by this Court and the interest may be paid to the 4th respondent.