

(2007) 11 KAR CK 0058
In the Karnataka High Court
Case No : Writ Appeal No. 2028 of 2006

Management of Asian Paints (India) Limited	APPELLANT
Vs	
Appellate Authority Under The Payment of Gratuity Act, 1972 (Central) and Jayanth V. Deshpande rep. by the General Secretary	RESPONDENT

Date of Decision : 27-11-2007

Acts Referred:

Payment of Gratuity Act, 1972 — Section 2 (e), 2 (s), 7 (7)

Citation : (2008) 117 FLR 121 : (2008) ILR (Kar) 1819 : (2008) 1 KarLJ 695 :
(2008) 1 KCCR 241 : (2008) 1 LLJ 943

Hon'ble Judges : S.R. Bannurmah, J;A.N. Venugopala Gowda, J

Bench : Division Bench

Advocate : K. Kasturi for Kasturi Associates, for the Appellant; N. Ravindranath
Kamath, for R 2, for the Respondent

Final Decision : Allowed

Judgement

A.N. Venugopala Gowda, J.—As the dispute between the parties lies in a narrow compass, with the consent of the learned Counsel appearing on both the sides, the appeal is heard for final disposal.

2. Brief facts of the case necessary for consideration and disposal of this appeal are:

(i) The appellant is a Company engaged in paints and varnishes Industry. The 2nd respondent was employed as sales representative by the appellant on 1.7.1985. He has resigned from service of the appellant with effect from 1.4.1996. Thereafter he was paid an amount of Rs. 2,128.50 as gratuity, as per the scheme of the appellant 2nd respondent being dissatisfied with the said payment, had filed an application u/s 7 of the Payment of Gratuity Act, 1972 (for short "the Act") in Form N, before the Controlling Authority to determine the amount of gratuity payable to him. In the annexure to the said application, the appellant has stated that the post held by him was "sales representative" and he

had put in service of 10 years and 8 months.

(ii) The appellant on being notified of the said application by the Controlling Authority, has filed its objections opposing the application inter alia contending that the 2nd respondent was appointed purely to discharge the duties of sales representative; he does not fall within the definition of "workman" in terms of Section 2(e) of "the Act" which is similar to the one defined u/s 2(s) of the Industrial Disputes Act and that the employees who are discharging duties of sales promotion, were covered by Section 6(6) of the Sales Promotion Employees (Conditions of Service) Act, 1976 (for short "SPE Act") and the sales representative does not come within the purview of "the Act". It was contended that the application was not maintainable and the gratuity in terms of the scheme, as in force has been settled.

(iii) Evidence was recorded by the Controlling Authority. The 2nd respondent has deposed as PW1, wherein he has admitted that he was working as a sales representative. The documents produced by him have been marked as Exs.P1 to P11. On behalf of the appellant, two witnesses have been examined as RWs.1 and 2 and Exs.R1 to R5 have been marked. It was deposed by the said witnesses that the 2nd respondent herein who was employed as a sales representative, his duty was to canvass business of the appellant with the influences like architects, painting contractors, printers and garages and was also required to implement the promotion schemes and follow up and recover the payments, apart from attending to complaints with dealers and influences. It was stated that the job of the 2nd respondent did not involve unskilled, skilled or supervisory jobs and he was not exercising managerial functions nor was he a manager and the orders procured were executed by the Godown staff. It has been stated that for the sale promotion work, company was paying incentive/commission in addition to salary. It has been stated that the provisions of Section 6(6) of "the SPE Act" was not made applicable by issue of any notification in respect of the appellant industry. After hearing the arguments and considering the record, the Controlling Authority has come to the conclusion that the 2nd respondent herein was not performing the duties of any skilled, semi-skilled, manual, supervisory, technical or clerical work, as he was engaged for canvassing, promoting sale of the product of the establishment and even though he was doing some clerical work, it was only incidental to his principal work and therefore he does not fall within the definition of the "employee" u/s 2(e) of "the Act". The Controlling Authority has thus ordered, the application filed seeking determination of the amount of gratuity as untenable and has dismissed the same, as per its decision dated 29.2.2000.

(iv) The said decision of the Controlling Authority was questioned by the 2nd respondent herein by filing an appeal u/s 7(7) of "the Act" before the Appellate Authority. After notifying the appellant, the appeal having been heard, the Appellate Authority has formulated the following point for consideration:

Whether "sales representatives" are covered by the definition of an employee u/s

2(e) of the Payment of Gratuity Act, 1972?

The Appellate Authority taking into account the judgment of Bombay High Court in the case of *United India Insurance Co. v. H.K. Katau and Ors.* 1984 (I) LLJ 454, has held that the work of canvassing has to be construed as performing of manual work and clerical work and thus fall within the definition of the "employee" u/s 2(e) of "the Act" and has consequently allowed the appeal and set aside the decision of the Controlling Authority and has directed the payment of gratuity in terms of the provisions of "the Act" with simple interest at 10% p.a. from the date it became payable till the date of payment, by an order dated 4.1.2002.

(v) The appellant has challenged the order of Appellate Authority in the writ petition. The learned Single Judge has held that the finding of the Appellate Authority is based on evidence on record and he did not find any perversity or illegality or error or irregularity committed by the Appellate Authority, and has upheld by the order passed by the Appellate Authority. Questioning the said orders this appeal has been filed.

3. We have heard Sri Kasturi, learned Senior Counsel for the appellant and Sri N. Ravindranath Kamath, learned Counsel for the 2nd respondent and perused the record.

Sri Kasturi, learned Senior Counsel would contend that the Appellate Authority while passing the impugned order, has not considered and appreciated the undisputed fact that the 2nd respondent is a sales representative, which is clear from annexure to Form N filed before the Controlling Authority as well as the admission of PW.1 to the same effect and also the evidence of RWs.1 and 2. It was contended that the Controlling Authority having held that during the course of employment, 2nd respondent was not performing duties of any skilled, semi-skilled or unskilled, supervisory, technical or clerical work and that he was engaged in canvassing, promoting sale of the product of the establishment, the findings having not been reversed by any cogent reasoning by the Appellate Authority, the order passed by the Appellate Authority, allowing the appeal was illegal and perverse. It was contended by the learned Sr. counsel that the learned Single Judge is also in error in upholding the order passed by the Appellate Authority, by holding that the finding of Appellate Authority is based on the evidence on record and there was no perversity or illegality. The learned Senior Counsel taking us through the record of the case and placing reliance on the decision of the Apex Court in the case of *H.R. Adyanthaya Vs. Sandoz (India) Ltd., etc. etc.*, would contend that the order passed by the Appellate Authority as opposed to the record of the case, arbitrary, perverse and illegal. It was contended that such an order could not have been upheld by the learned Single Judge. The learned Senior Counsel contends that the orders impugned, call for interference in view of the clear enunciation of law, in the case of *H.R. Adyanthaya, supra*.

4. Per contra, Sri N. Ravindranath Kamath, learned Counsel for 2nd respondent would contend that the Controlling Authority had committed an error in recording the finding that the 2nd respondent does not fall within the meaning of "employee" u/s 2(e) of "the Act" and the Appellate Authority having examined the matter, has correctly decided that the 2nd respondent, as falling within the definition of "employee" u/s 2(e) of "the Act". It is contended by the learned Counsel that the learned Single Judge was justified in upholding the order passed by the Appellate Authority. The learned Counsel would generally support the impugned orders.

5. The point that arises for our consideration is:

Whether the 2nd respondent was an employee under the appellant as defined u/s 2(e) of the Payment of Gratuity Act, 1972?

In the application filed in Form N before the Controlling Authority seeking determination of the amount of gratuity u/s 4 of "the Act", the 2nd respondent has stated that the post held by him and in which he was last employed, was "sales representative". The objection put forth to the said application by the appellant was to the effect that the 2nd respondent was doing the job of "sales representative" and as not falling within the category of "employee" u/s 2(e) of "the Act" or u/s 2(s) of the Industrial Disputes Act. It was pleaded that the employees discharging the duties of sales promotion, were covered u/s 6(6) of "the SPE Act". The 2nd respondent while deposing as PW.1 has admitted that he was working with the appellant at its Hubli depot as "sales representative". In his cross examination, he has admitted that he was appointed as "sales representative Grade-III" and his basic pay was Rs. 250/- p.m. and D.A. was Rs. 6316.58. RW.1 who was the Divisional Manager in the appellant, has deposed that the 2nd respondent was working as a sales representative and his duty was to canvass business for the appellant with influences like architects, painting contractors, printers and garages etc., He has deposed that the 2nd respondent was not doing any unskilled, skilled or supervisory jobs, was not exercising managerial functions and the orders procured were being executed by the godown staff. For the sale promotion work, company was paying incentive/commission, in addition to the salary. RW.2 who was HR Manager (Manufacturing) in the appellant, has deposed that the 2nd respondent was working as a sales representative.

6. The Controlling Authority after adverting to the evidence placed on its record in the inquiry conducted under Sub-section (4) of Section 7 has arrived at the categorical conclusion that the 2nd respondent during the course of his employment with the appellant did not perform the duties of skilled, semi-skilled or unskilled, managerial, supervisory, technical or clerical work and he was engaged for canvassing, promoting sales of the products of the establishment and the clerical work done by him was only incidental to his principal work and thus was not an employee as defined u/s 2(e) of "the Act". On entering the said finding, the application of the 2nd respondent for determination of the amount of

gratuity was dismissed.

7. In the appeal filed by the 2nd respondent, the Appellate Authority without adverting to the evidence of PW.1, RWs.1 and 2 or the documentary evidence placed on record of the Controlling Authority, has held that the Controlling Authority was influenced by the definition of "workman" as interpreted by various Courts including the Apex Court and has applied the same analogy to the employee defined under the Payment of Gratuity Act and If had been considered independently, the position would have been different. By recording the said finding, by referring to the judgment of the Bombay High Court in UNITED INDIA INSURANCE COMPANY'S case, referred to supra, has jumped to the conclusion that the 2nd respondent as an employee u/s 2(e) of "the Act". The said finding has been upheld by the learned Single Judge, holding that the Appellate Authority's finding is based on evidence and there is no perversity or illegality. Having perused the order passed by the Appellate Authority, in our view, the Appellate Authority has not considered either the pleadings or the evidence placed on record by the parties before the Controlling Authority during the course of inquiry held under Sub-section 4 of Section 7 of "the Act". The order passed by the Appellate Authority is one without reference to the pleadings of the parties or to the evidence, both oral and documentary, available on record of the Controlling Authority. The relevant statutory provisions has also not been noticed by the Appellate Authority. The appeal has been allowed without reference to the relevant pleadings and evidence, available on the file of the Controlling Authority. Thus the order passed by the Appellate Authority is arbitrary, perverse, perfunctory. The learned Single Judge, in our view, has erred in upholding the order passed by the Appellate Authority.

8. The 2nd respondent has admitted in the annexure to Form N filed before the Controlling Authority that, he held the post of sales representative in the appellant and he has also admitted in his examination-in-chief that he was working as a sales representative, having been initially appointed as sales representative Grade-III, which aspect has also been spoken to by RWs.1 and 2. Hence, there cannot be any dispute that the 2nd respondent was appointed as a sales representative and held that post till he resigned on 1.4.1996. u/s 2(e) of the Act, "employee" means any person (other than an apprentice) employed on wages, in any establishment, factory, mine, oilfield, plantation, port, railway company or shop, to do any skilled, semi-skilled, or unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment are express or implied, (and whether or not such person is employed in a managerial or administrative capacity, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity.)

From the definition, it is clear that the person should be employed on wages to do any skilled, semi-skilled or unskilled, manual, supervisory, technical or clerical work. The 2nd respondent was specifically employed as sales representative. The

nature of duties performed by the 2nd respondent, has been spoken to by himself as PW.1 as well as the management witnesses RWs.1 and 2, from which, it is clear that he was not doing the duties of the aforesaid nature, in view of which the Controlling Authority has rightly come to the conclusion that the 2nd respondent did not fall within the category of the "employee" defined u/s 2(e) of "the Act".

9. Constitution Bench of Hon"ble Supreme Court in H.R. ADYANTHAYA's case, referred to supra, while considering the question whether the "medical representatives" as are commonly known, are workmen according to the definition of "workman" u/s 2(s) of the Industrial Disputes Act, taking note of the amendments that were made from time to time, and the divergent views taken by the different Benches, has held that a person to be a "workman" under the Industrial Disputes Act, must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory and it is not enough that he is not covered by either of four exceptions to the definition. In the said decision, the definition of "sales promotion employee" under "the SPE Act" as well as Section 6 thereof, which made applicable to the medical representatives, the provisions of other Labour and Industrial laws was also noticed and considered. It was held that on and from March 6, 1976, the provisions of Industrial Disputes Act became applicable to the medical representatives depending upon their wages up to May 6, 1987 and without any limitation on their wages, thereafter and upon the capacity under which they were employed or engaged. The contention put forth that the medical representatives perform duties of skilled and technical nature and therefore they are workmen within the meaning of the definition u/s 1(4) of "the SPE Act" was held to be untenable in the light of the position of law discussed in detail therein. As regard the word "skilled", it was held as follows:

As regards the word "skilled", we are of the view that the connotation of the said word in the context in which it is used, will not include the work of a sales promotion employee such as the medical representative in the present case. That word has to be construed ejusdem generic and thus construed, would mean skilled work whether manual or non-manual, which is of a genre of the other types of work mentioned in the definition. The work of promotion of sales of the product or services of the establishment is distinct from the independent of the types of work covered by the said definition. Hence the contention that the medical representatives were employed to do skilled work within the meaning of the said definition, has to be rejected. As regards the "technical" nature of their work, it has been expressly rejected by this Court in *Burmah Shell case* (supra). Hence that contention has also to be rejected.

10. The Appellate Authority without taking into account the evidence on record with regard to the post in which the 2nd respondent was employed, the duties performed by him during the course of his employment and the legal position, has arbitrarily held that the 2nd defendant falls within the definition of

"employee" u/s 2(e) of "the Act", even though the Controlling Authority had held otherwise. The decision of the Controlling Authority is supported by the evidence on record and thus requires to be restored and upheld. In this view of the matter the learned single Judge was not justified in dismissing the writ petition.

11. "SPE Act" would have applied only if the appellant was a notified industry. In the absence of the notification by the Government of India, the said Act is not applicable. As per the provisions contained in Section 6 the applicability of the Labour and Industrial laws, stated therein, would have applied to the sales promotion employees, had the appellant been a notified industry, as required u/s 3 of "SPE Act".

12. In view of the foregoing discussion, we do not find any merit in the contentions canvassed by the learned advocate for the 2nd respondent. The impugned orders are unsustainable and hence we pass the following:

ORDER

(a) Appeal is allowed;

(b) Order dated 28.10.2006 passed by the learned Single Judge dismissing W.P.16805/2002 is hereby set aside;

(c) Order passed by the Appellate Authority under the Payment of Gratuity Act 1972, in Appeal No. 68/2000 dated 4.1.2002 is hereby quashed;

In the facts and circumstances of the case, there shall be no order as to costs.