

(2023) 09 OHC CK 0106
In the Orissa High Court
Case No : Writ Petition (C) No. 338 Of 2013

M/s. Utkal Auto, Cuttack

APPELLANT

Vs

State Of Orissa And Anr

RESPONDENT

Date of Decision : 14-09-2023

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Industrial Disputes Act, 1947 — Section 2(oo), 2(s), 10(1)(d), 12(4), 12(5), 25F
Sales Promotion Employees (Conditions of Service) Act, 1976 — Section 2(d), 6(7)

Citation : (2023) 09 OHC CK 0106

Hon'ble Judges : Dr. B.R. Sarangi, J; M.S. Raman, J

Bench : Division Bench

Advocate : G. Mukherji, P. Mukherji, A.C. Panda, S.D. Ray, S. Mishra, S.S. Kanungo, B. Baral, S.R. Mishra, T. Lenka, B.N. Jena, G. Parida

Final Decision : Dismissed

Judgement

Dr. B.R. Sarangi, J

1. The management-petitioner, by means of this writ petition, seeks to quash the award dated 16.06.2012 passed in I.D. Case No.21 of 2010 under Annexure-6, by which the Presiding Officer, Industrial Tribunal, Bhubaneswar, while answering the reference in favour of workman-opposite party no.2, directed the management-petitioner to reinstate the workman-opposite party no.2 in service and pay full back wages within a period of two months of the date of publication of the award in the official gazette.

2. The factual matrix of the case, in a nutshell, is that the workman-opposite party no.2 joined as a Sales Executive on probation under the management-petitioner in December, 1982 and his services were regularized in April, 1984. Till 08.09.2009, he was in continuous service under the management-petitioner. Thereafter, he was refused employment w.e.f. 09.05.2009, but the termination of service, by way of such refusal, was effected without compliance of the provisions contained in Section 25-F of the Industrial Disputes Act, 1947 (for

short I.D. Act, 1947).

2.1 After retrenchment of the workman-opposite party no.2, the management-petitioner engaged a new employee to work in his place. As a consequence thereof, industrial dispute was raised and the Conciliation Officer-cum-District Labour Officer, Cuttack, vide letter dated 30.09.2009, submitted conciliation failure report under Section 12(4) of the I.D. Act, 1947. On the basis of such report, the Government of Odisha in Labour & Employment Department, (now the Labour and E.S.I. Department), in exercise of powers conferred upon them by Sub-section (5) of Section 12 read with Clause (d) of Sub-section (1) of Section 10 of the I.D. Act, 1947, referred the following dispute for adjudication, vide order no.ID-9/10 3716/LE dated 06.05.2010:-

"Whether the termination of service of Sri Haramohan Biswal, Ex-Sales Assistant with effect from 09/05/2009 by the management of M/s. Utkal Auto, Cuttack is legal and/or justified? If not, to what relief the workman Sri Biswal is entitled ?"

2.2 The Presiding Officer, Industrial Tribunal, Bhubaneswar, considering the claim statement and written statement filed by the respective parties, settled as many as four issues, which read as follows:

"1) Whether the reference is maintainable?

2) Whether the Second Party is a 'workman' as defined under the Industrial Disputes Act?

3) Whether there was termination of service of Sri Harmohan Biswal w.e.f. 9.5.2009 by the Management of M/s. Utkal Auto, Cutack and if so, if it is legal and/or justified?

4. Whether the Second Party is entitled to any relief?"

2.3. While answering issues no.1 & 2, the Presiding Officer, Industrial Tribunal, Bhubaneswar, held that it is not possible that the workman-opposite party no.2 is excluded from the definition of 'workman' and even if, it is held that his nature of work was that of a workshop in-charge, it cannot be said solely on that description that his work was supervisory in nature. Therefore, the Tribunal held that the workman-opposite party no.2 comes within the definition of 'workman' and accordingly the industrial dispute is maintainable. While answering issue no.3, the Tribunal held that since notices under Section 25-F of the I.D. Act, 1947 were not served on the workman-opposite party no.2 and no domestic enquiry was conducted, his retrenchment is illegal and thereby directed the management-petitioner to reinstate the workman-opposite party no.2 in service and pay full back wages within two months of the date of publication of the award in the official gazette. Hence, this writ petition.

3. Mr. G. Mukherji, learned Senior Counsel along with Mr. S.D. Ray, learned counsel appearing for the management-petitioner vehemently contended that the Tribunal has committed gross error apparent on the face of the records by

directing reinstatement of the workman-opposite party no.2 in service with full back wages. It is contended that the entire allegations of the workman-opposite party no.2 are based on anticipation and there is not a single document to show that such anticipation has come true or are well founded. It is contended that the Tribunal has failed to appreciate the definition of 'retrenchment', as defined under Section 2(oo) of the I.D. Act, 1947 and, as such, the question of reinstatement of the workman-opposite party no.2 in service does not arise. As a consequence thereof, the impugned award dated 16.06.2012 passed by the Tribunal in I.D. Case No.21 of 2010 is vitiated. It is further contended that the workman-opposite party no.2 abandoned his job willfully and, as such, he having not been terminated by the management-petitioner at any point of time, direction given by the Tribunal for his reinstatement in service cannot be sustained in the eye of law. It is further contended that the workman-opposite party no.2 is not a workman, as he was discharging the work and responsibility, which is supervisory in nature and, thereby, the proceeding is not maintainable before the Industrial Tribunal. It is further contended that the workman-opposite party no.2, being engaged gainfully elsewhere, abandoned the job voluntarily, therefore, he is not entitled to get any relief, as granted by the Tribunal. It is further contended that since the workman-opposite party no.2 has discharged the duty of Sales Executive, he comes under the Sales Promotion Employees (Conditions of Service) Act, 1976 (for short S.P.E (C.S) Act, 1976). Thereby, the Tribunal has committed gross error in considering the workman-opposite party no.2 as 'workman' and, as such, the impugned award passed by it cannot be sustained in the eye of law and is liable to be set aside. To substantiate his contentions, learned Senior Counsel has relied upon T.P. Srivastava v. National Tobacco Co. of India Ltd, AIR 1991 SC 2294; Upendra Ramanlal Mehta v . State of Maharashtra, 2000(85) FLR 787 : (2000) IILJ 111 Bom; Anglo-French Drug Co. v. Presiding Officer, (2004) IIILLJ 324 A11; Adyanthaya v. Sandoz (India) Ltd., AIR 1994 SC 2608; Chitturi Subbanna v. Kudapa Subbanna, AIR 1965 SC 1325 and the judgment of this Court reported in 2001 (I) OLR 484 (Atul Churiwala v. State Of Orissa).

4. Mr. B. Baral, learned counsel appearing for the workman-opposite party no.2 contended that the workman-opposite party no.2 joined with the management-petitioner in December, 1982 as a Sales Executive on probation with monthly salary of Rs.300/-and his services were regularized in April, 1984. He was in continuous service under the management-petitioner till 08.09.2009 and performed the duties assigned to him. Thereby, he has already rendered more than 24 years of continuous service and during his entire service period, he has not been subjected any proceeding including suspension. But, on 09.05.2009, as usual when he went to join his duty, he was not allowed to enter into the premises by the management-petitioner and was told that his services have been terminated w.e.f. 09.05.2009. It is contended that on the date of termination, the workman-opposite party no.2 was drawing a salary of Rs.4,993/-per month. Thereafter, he requested the management-petitioner time and again to reinstate

him, but the management-petitioner removed him from service without paying any salary. As he was removed from service without serving any notice and without any valid reason, he assailed the said arbitrary and unreasonable action of the management-petitioner by raising industrial dispute. Ultimately, the matter was referred to conciliation, which also failed. It is further contended that finally the Presiding Officer, Industrial Tribunal, Bhubaneswar passed award on 16.06.2012 in I.D. Case No.21 of 2010 in favour of the workman-opposite party no.2. Thereby, no illegality or irregularity has been committed by the Presiding Officer, Industrial Tribunal, Bhubaneswar in passing the award in favour of the workman-opposite party no.2 so as to warrant interference of this Court at this stage.

5. This Court heard Mr. G. Mukherji, learned Senior Counsel along with Mr. S.D. Ray, learned counsel appearing for the management-petitioner and Mr. B. Baral, learned counsel appearing for the workman-opposite party no.2 in hybrid mode and perused the record. With the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. The management-petitioner has formulated four questions in paragraph-3 of the writ petition for adjudication of the case, which read as under:-

“(i) Whether in absence of any termination order, the Ld. Tribunal can pass an order for re-instatement in anticipation of termination ?

(ii) Whether a person who has voluntarily abandoned the job will be entitled for any benefit during those period of abandonment ?

(iii) Whether the principles of no work no pay applies to the facts & circumstances of the present case ?

(iv) Whether the applicant would fall within the definition of the Workman and seek protection under the Act when he admittedly describes himself as a Sales Executive ?”

But, at the time of hearing, Mr. G. Mukherji, learned Senior Counsel appearing for the management-petitioner laid emphasis on the issue raised before the Tribunal that, whether the workman-opposite party no.2, being a sales promotion employee under Section 2(d) of the S.P.E. (C.S.) Act, 1976, comes under the definition of ‘workman’ under the Industrial Disputes Act. It is further contended that if workman-opposite party no.2 is not a workman under the I.D. Act, 1947, the award so passed by the Tribunal cannot sustain in the eye of law and the same is liable to be quashed and, as such, the same is not maintainable.

7. For just and proper adjudication of the case, the provisions contained in Sections-2(oo), 2(rr), 2(s) and 2-A of the I.D. Act, 1947 are quoted below:-

“2 (oo) “retrenchment” means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or]

(c) termination of the service of a workman on the ground of continued ill-health;]

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(rr) "wages" means all remuneration capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied, were fulfilled, be payable to a workman in respect of his employment or of work done in such employment, and includes-

(i) such allowances (including dearness allowance) as the workman is for the time being entitled to;

(ii) the value of any house accommodation, or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of foodgrains or other articles;

(iii) any travelling concession;

(iv) any commission payable on the promotion of sales or business or both;]

but does not include—

(a) any bonus;

(b) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the workman under any law for the time being in force;

(c) any gratuity payable on the termination of his service;]

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[(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 expressed 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

(v) 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.

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2A. Dismissal, etc., of an individual workman to be deemed to be an industrial dispute.—Where any employer discharges, dismisses, retrenches, or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute.”

8. On perusal of the aforementioned provisions, it is made clear that any person 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 expressed or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute can be described as workman. Though the workman-opposite party no.2 was engaged as a Sales Executive and was doing supervisory work, for which he was getting remuneration of Rs.4,993/- per month as wages, he comes under the definition of workman, as mentioned above. The contention was raised by the learned Senior Counsel appearing for the management-petitioner that the workman-opposite party no.2, who was working as Sales Executive, comes within the definition of sales promotion employee, as per Section-2(d) of the S.P.E.(C.S), Act, 1976.

For better appreciation, Section-2(d) of the S.P.E.(C.S), Act, 1976 is quoted below:-

“2(d). “sales promotion employees” means any person by whatever name called (including an apprentice) employed or engaged in any establishment for hire or reward to do any work relating to promotion of sales or business, or both, but does not include any such person—

(i) who, being employed or engaged in a supervisory capacity, draws wages exceeding sixteen hundred rupees per mensem; or

(ii) who is employed or engaged mainly in a managerial or administrative capacity.

Explanation.—For the purposes of this clause, the wages per mensem of a person shall be deemed to be the amount equal to thirty times his total wages (whether or not including, or comprising only of, commission) in respect of the continuous period of his service falling within the period of twelve months immediately preceding the date with reference to which the calculation is to be made, divided by the number of days comprising that period of service;]

(e) all words and expressions used but not defined in this Act and defined in the Industrial Disputes Act, 1947 (14 of 1947), shall have the meanings respectively assigned to them in that Act.”

On perusal of the above mentioned definition, it appears that sales promotion employee is employed or engaged in any establishment for hire or reward to do any work relating to promotion of sales or business or both, but does not include any such person, who, being employed or engaged in a supervisory capacity, draws wages exceeding sixteen hundred rupees per mensem or who is employed or engaged mainly in a managerial or administrative capacity. Thereby, the contention raised by learned Senior Counsel appearing for the management-petitioner that the workman-opposite party no.2, being employed as Sales Executive, comes within the meaning of definition of 2(d) of the S.P.E.(C.S), Act, 1976 and cannot be construed to be a ‘workman’ under the I.D. Act, 1947 is not tenable in the eye of law. Furthermore, the said stand was not taken before the industrial forum at any point of time and for the first time the same has been raised before this Court. In this connection, reliance has been placed on the case of Chitturi Subbanna (supra), wherein the apex Court held that a pure question of law not dependent on the determination of any question of fact and such question is allowed to be raised for the first time even at later stages. The principle of law, as has been enunciated by the apex Court, there is no dispute for the same. If the said principle is applied to the present case, the management-petitioner has to establish the fact that the workman-opposite party no.2 has come within the definition of Section 2(d) of the S.P.E. (C.S.) Act, 1976. But nothing has been placed on record or no evidence has been adduced before the industrial forum to satisfy such requirement so as to consider that the workman-opposite party no.2 is not a workman.

9. Per contra, the workman-opposite party no.2 produced relevant materials before the Tribunal and he also categorically pleaded in paragraph-6 of the written statement to the following effect:-

“6. That on 9.5.09 when the 2nd party workman went to join in his duty the 1st party management did not allow him to performing his duties and told that your service has been terminated with effect from 09.05.09. It is pertinent to mention here that at the time of termination of service of the workman by way of refusal of employment the 2nd party workman has drawn Rs.4993/- per month towards his salary/wages.”

While dealing with issue no.3 and considering the evidence adduced by MW-1,

who is the 1st party management, the Tribunal recorded that MW-1 has not stated in his evidence that any intimation was sent to the 2nd party-workman asking him to report for duty. On the other hand, the management tried to prove that fact by examining MW-2, who has claimed that after the 2nd party-workman had remained absent from duty, he was sent by the management twice to request the 2nd party-workman to join duty, but he refused. But notice in writing was never served on the 2nd party-workman.

10. The evidence of MW-2 is found to be interested for the management-petitioner. Though he claims that he was an ex-employee of the management-petitioner, he has admitted that in 2006, he took voluntary retirement and thereafter, he has been working under the management-petitioner on contractual basis to transport two-wheelers to different sub-dealers. Thus, he is still getting his employment from the management-petitioner and, thereby, his version cannot be accepted. On the other hand, when the workman-opposite party no.2 claimed higher remuneration, he was subjected to hire and fire by the management-petitioner. To substantiate the said contention, the workman-opposite party no.2 exhibited his representation dated 03.04.2009 as Ext.C, which was filed demanding higher salary and better emoluments, but the same was not acceded to even after 24 years of service and the management-petitioner resorted to such activities and ousting him from employment by terminating his service and consequentially, he raised industrial dispute. Thereby, the management-petitioner failed to prove the factum of remaining absent from duty by the workman-opposite party no.2, w.e.f. 09.05.2009. As such, without compliance of the provisions of Section 25-F of the I.D. Act, 1947, when the workman-opposite party no.2 was not allowed to discharge his duty, it amounts to termination of service. Thereby, due to non-compliance of the provisions of Section 25-F of the I.D. Act, 1947, the termination of the workman-opposite party no.2 is bad. The action of the management-petitioner, by engaging another person in place of the workman-opposite party no.2, clearly indicates the intention of the management-petitioner not to allow the workman-opposite party no.2 to discharge his duty and responsibility. Thereby, the termination of services of the workman-opposite party no.2 by way of refusal of employment by the management-petitioner cannot be sustained in the eye of law. Therefore, the Tribunal is well justified in holding the termination of the workman-opposite party no.2 is in violation of the provisions contained in Section 25-F of the I.D. Act, 1947.

11. The plea advanced by the management-petitioner is that the workman-opposite party no.2 has abandoned his service. 'Abandonment' means the act of intentionally and voluntarily relinquishing a known right absolutely and unconditionally without vesting it in any other person. 'Abandonment' is the relinquishment of a right, the giving up of something to which one is entitled. Therefore, to constitute service, there must be total and complete giving up of duties so as to indicate an interest not to resume the same.

12. In *Buckingham & Carnatic Co. Limited v. Venkatiah*, AIR 1964 SC 1272, the apex Court held as follows:-

"Under common law, an inference of relinquishment of service can be legitimately drawn from the length of absence and other surrounding circumstances and it can be assumed that an employee intended to abandon service. This normally requires adequate evidence in support of this contentions, if not otherwise agreed and laid down in certified standing orders."

Therefore, to establish that there was abandonment of service, normally adequate evidence in support of this contention is required, if not otherwise agreed and laid down in certified standing orders. Nothing has been placed by the management-petitioner to establish the same against the workman-opposite party no.2. Therefore, the plea advanced by learned Senior Counsel appearing for the management-petitioner that the workman-opposite party no.2 had abandoned his service cannot be sustained in the eye of law.

13. As per the amendment to the Payment of Wages Act, 1936, the wage ceiling of Rs.1600/- per month was enhanced to Rs.6500/- per month. Therefore, placing reliance on clause-2(d)(i) read with Section 6(7) of the S.P.E. (C.S.) Act, 1976 the contention raised that since the workman-opposite party no.2 draws salary of Rs.4,993/- per month, which is more than Rs.1600/- per month, he is not a 'workman' under the I.D. Act, 1947 and no reference could have been made to the Industrial Tribunal, cannot have any justification. As such, the proceeding under the I.D. Act, 1947 is maintainable. As a consequence thereof, the decisions rendered in *T.P. Srivastava*, *Upendra Ramanlal Mehta* and *Anglo-French Drug Co. (supra)*, as relied upon by learned Senior Counsel appearing for management-petitioner, have no application to the present case.

14. In *H.R. Adyanthaya (supra)*, the question was whether "medical representatives" are workmen under Section-2(s) of the Industrial Disputes Act. The apex Court delved into the object behind the enactment of the S.P.E. (C.S.) Act, 1976 and found that the Legislature considered it more suitable to have a separate legislation for governing the conditions of services of sales promotion employees instead of making changes to the I.D. Act, 1947. But fact remains, in view of the definition of 'workman', as contemplated in Section 2(s) of the I.D. Act, 1947, the workman-opposite party no.2 comes within the ambit of the said definition and the applicability of S.P.E. (C.S.) Act, 1976 in respect of workman-opposite party no.2 is not justified.

15. In view of such position, the Tribunal has not committed any error apparent on the face of the record in considering opposite party no.2 as 'workman', as defined under Section 2(s) of the I.D. Act, 1947, and adjudicating the industrial dispute in his favour. Thereby, the argument advanced by Mr. G. Mukherji, learned Senior Counsel appearing for the management-petitioner to that effect does not hold good. As a consequence thereof, the award dated 16.06.2012 passed by the Presiding Officer, Industrial Tribunal, Bhubaneswar in I.D. Case

No.21 of 2010 does not warrant interference of this Court.

16. In the result, the writ petition merits no consideration and the same stands dismissed. But, however, under the circumstances of the case, there shall be no order as to costs.

LCR be sent back to the Presiding Officer, Industrial Tribunal, Bhubaneswar, forthwith.

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