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(2009) 08 OHC CK 0021

In the Orissa High Court

Narendra Nath Biswal APPELLANT

Vs

State of Orissa and Others RESPONDENT

Date of Decision : 31-08-2009

Acts Referred:

Citation : (2010) 109 CLT 185 : (2010) 1 OLR 54

Hon'ble Judges : Indrajit Mahanty, J;B.P. Das, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Indrajit Mahanty, J.—The petitioner-Narendra Nath Biswal was appointed as a contract casual labour and has been working as Time Keeper since 1984 with the IDCOL Cement Ltd. (as government company of the State of Orissa), has filed the present writ application with a prayer to direct the opposite parties to regularize his services as well as to grant him equal pay for equal work.

2. Learned Counsel for the petitioner submitted that the petitioner was engaged as "Time Keeper" in the mines of the erstwhile IDCOL Cement Ltd. (ICL), a Government of Orissa enterprises w.e.f. 15.7.1984 and w.e.f. 12.7.1988 since the Time Keeper-Shri R.K. Pattnaik superannuated and the post had fallen vacant, the petitioner though engaged through a labour contractor, was directed to perform the duty as a Time Keeper. Since then he has been working as Time Keeper. It was submitted that although various contract labourers who were junior to him were absorbed as regular employees by the opposite party-ICL, the petitioner has been discriminated, inspite of filing of several representations since he has not been regularized nor given equal pay for equal work, he was compelled to file the present writ application in the year 1997.

3. It appears that during the pendency of the writ application, the State Government''s shareholding in IDCOL Cement Ltd. was transferred in favour of the Associated Cement Company Ltd.(ACC Ltd.) vide the Share Purchase Agreement dated 22.12.2003. Thereafter, the said company i.e. M/s. IDCOL

Cement Ltd was duly amalgamated with the Associated Cement Company Ltd.

4. In course of the present proceeding, the ICL has filed its counter affidavit through the Senior Deputy Manager (Personnel) of Danguri Mines Lime Stone Quarry. While admitting the fact that the petitioner was working as a contract labour working under them, yet, it has been averred that he could not claim for regularization or absorption into the services of the opposite party. It has been asserted that since the petitioner was a contract labour and was beyond the disciplinary control of the principal employer, he was not given the responsibility of a "regular" Time Keeper nor his assignment of work and duty was in the nature of a regular Time Keeper. Thus, by merely working in the Time Office, he could not ipso facto be conferred with the status of the direct regular worker/ employee. Apart from the above, it was averred that the claim for equal pay for equal work is also unacceptable since the petitioner was a contract labour and this principle of law would have no application to such contract labourers. The Opposite Party-ICL further stated in the affidavit that though the petitioner was working in the Time Office, he had not been employed as a regular Time Keeper and although the work of a Time Keeper was of an essential and responsible nature, the petitioner was not doing any physical checking of attendance at the site and was not maintaining all statutory records nor was authorized to sign on such records nor making postings of leave of the employees, nor checking T.A. bills of the employees which are required to be done by a regular Time Keeper and merely because the petitioner was doing some routine clerical work as and when required, he could not be conferred with the status of a regular Time Keeper.

5. The petitioner has filed a rejoinder affidavit in reply to the affidavit of ICL and stated that although the petitioner was a matriculate and was originally employed as a contract labour, he had been engaged in the time office of the opposite parties vide order dated 22.11.1995 under Annexure-1. In that order, he was directed to work as a Time Keeper at the Time Office at Dunguri Mines Lime Stone Quarry and he had been directed for shift duty, making attendance of the employees in ''D'' & ''E'' register, maintaining records of Exit, Pass, overtime intimations, preparation of night shift allowance bill, conveyance allowance bill, dust allowance bill and checking of casual supply bill and other matters from time to time required. Placing reliance on Annexure-1, the petitioner asserted that he has been working as a Time Keeper and discharging all responsibilities of a Time Keeper in a regular vacant post, which the opposite party did not fill up. In so far as the allegation of discrimination is concerned. The petitioner in Paragraphs-5 of the rejoinder affidavit stated that many casual labourer, who were junior to him and were originally employed as contract labour, have been regularized without conducting any interview and he was named Kabi Khusal, Ashok Pradhan, Dillip Kumar Behera, Dillip Kumar Dora and many others who are juniors to the petitioner and have been regularized in course of their service, thereby alleging gross discrimination.

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6. As noted hereinabove, since the shares of ICL were sold in favour of M/s. ACC Ltd., M/s. ACC Ltd. have also filed a counter affidavit, inter alia, claiming that since the ICL is now, being owned by M/s. ACC Ltd., a private company the writ application was not maintainable on this score. Apart from the aforesaid objection, M/s. ACC Ltd. has also raised a further plea that after purchase of the shares of the ICL and amalgamation of the plant and mines with M/s. ACC Ltd., the contractor under whom the petitioner had been employed, namely, Upendra Kumar Sahu (O.P.8) floated Voluntary Retirement Scheme (VRS scheme) by notice dated 22.7.2007, pursuant to which, all contract workers (except the petitioner) have accepted the scheme and have been duly paid the benefits of such a scheme except the present petitioner.

7. Shri Upendra Kumar Sahu, labour contractor has also filed an affidavit enclosing thereto, the notice of the Voluntary Retirement Scheme and further stated that the petitioner did not accept the Voluntary Retirement Scheme under which he was entitled to receive Rs. 1,29,356.61. Pursuant to the order of this Court dated 6.5.2008 the said amount was deposited by way of demand draft in favour of the Registrar (Judicial), Orissa High Court and the same has been kept in short term fixed deposit with the Registry.

8. In the light of the aforesaid submissions made by the parties, the following undisputed facts emerged:

(i) The petitioner had been engaged as a contract labour with M/s. ICL since 1984.

(ii) He has been working in the Time Office as Time Keeper as evident from Annexure-1 dated 22nd November 1995 in a regular vacancy.

(iii) At the time of filing the writ application M/s. ICL along with its Danguri Mines Lime Stone Quarry was a Government of Orissa enterprise.

(iv) A Share Purchase Agreement was entered into between M/s. ICL and M/s. ACC Ltd. dated 22nd December, 2003. Pursuant to which shares of ICL were transferred in favour of M/s. ACC Ltd.

(v) M/s. ICL, therefore, amalgamated with its parent company, i.e. M/s. ACC Ltd.

9. Now, it becomes imperative to take note of certain provisions of Share Purchase Agreement dated 22nd December 2003 pertaining to the service condition of the employees of the erstwhile ICL and the same is quoted herein below:

5.4 The Purchaser and the Company agree and covenant and undertake that they shall take and cause to be taken all actions and do and cause to be done all that is within their authority, power or control and they shall jointly and severally liable for and ensure that the following is duly done/complied with/accomplished:

(i) After the conclusion of the transactions contemplated in this Agreement the Company shall continue to retain the services of all the permanent employees of

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the Company who are in employment of the Company as on the Closing Date and shall not retrench and/or terminate any such employee for a period of up to 2 (two) years from the said date other than dismissal of any such employee on disciplinary grounds which shall be made in accordance with the applicable Law.

(ii) In case the Company initiates, implements or administers any voluntary retirement scheme (VRS) for any of its permanent employees, during the said two years from the Closing Date, the said scheme should offer a VRS package that would be substantially superior to the existing VRS package approved by the State Government of Orissa.

(iii) The Company shall continue with/renew the labour contract(s) with the existing contractor(s) for job work and for supply of labour that are in force as on the Closing Date for a period of at least 2 (two) years from the Closing Date and remuneration and benefits not less favourable to the contractor and the labourer than that existing on the Closing Date provided that any such contract may be terminated earlier than 2 (two) years on the grounds of any material breach thereof by the contractor or on disciplinary grounds and such termination shall be made in terms of the contract and the applicable Law.

In case the Company initiates, implements or administers any voluntary retirement scheme for any of its contract employees during the period of two years from the Closing Date, the said scheme should offer a VRS package that would be superior to any VRS package approved by the State Government of Orissa for non regular employees before the Closing Date.

(iv) After the conclusion of the transactions contemplated in this Agreement, all loans and advances given by the Vendor to the Company (after 3.12.02) guarantees, undertakings, indemnities and/or securities provided by the Vendor, and any mortgage, hypothecation, lion, pledge charge or any other encumbrance created on any of the proportions or assets of the Vendor in favour of any Person, for the benefit of or for the purpose of the business of the Company, as specified in Schedule ''II'' shall, in case of loans and advances be paid by the Company in 8 (eight) equal annual instalments without interest or penalty with the first instalments failing due for payment on the date 4 (four) years from the Closing Date and in other aforesaid cases got replaced, substituted, cancelled or revoked and the Vendor and the property and assets of the Vendor shall be got released and/or discharged and made free of all liens, liabilities, obligations and encumbrance of any nature whatsoever in this regard as and from the Closing Date to the entire satisfaction of the Vendor and/or this may be accomplished by a date to be mutually agreed between the Vendor and the Purchaser, not being later than 3 (three) months from the Closing Date but in any case the liability and obligations of the Vendor in respect of each of the aforesaid cases shall cease as from the Closing Date in respect thereof.

(v) The Company shall, so long as it continues to use the brand name ''Idcol'' in respect of the products of the Company, continue to pay royalty to the Vendor on

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the same terms and conditions as is presently applicable. If the Company, discontinues the use of the said brand name or a name in any way similar to or matching with or representing the said brand name, it shall notify the Vendor three months in advance and shall pay the royalty in advance for here months at a rate averaging the sales per month in 2002 from April 2002 to December 2002. It is however, agreed between the Parties that if the Company intends to discontinue the use of the said brand name or a name in any way similar to or matching with or representing the said brand name, from the day following the Closing Date, the Company shall notify the Vendor on the Closing Date and the Company shall not be liable to pay any royalty in respect of the use of the said brand name or a name in any way similar to or matching with or representing the said brand name from the Closing Date.

In view of the aforesaid Clauses in the Share Purchase Agreement, it would be clear that the fate of the petitioner and his further continuity in employment with M/s. ACC Ltd. and his status would depend upon the question, as to whether the petitioner could claim himself as a permanent employee of the company from the date of the aforesaid agreement or as a contract employee? Answer to this question would be extremely important, since, in the present case, the labour contractor had floated the VRS scheme to which, of course, the petitioner did not accept.

10. We would like to first deal with the claim of the petitioner for equal pay for equal work. It is well settled in the case of V. Markendeya and Others Vs. State of Andhra Pradesh and Others, that the principles of equal pay for equal work is not an abstract one. While it is open to the State to prescribe different scales of pay for different cadres having regard to the nature of its and/or responsibilities as well as educational qualification but where two classes of employees perform identical or similar duties and carrying out the same functions with the same nature of responsibility having same academic qualifications, they would be entitled to equal pay. If the State denies them equality in pay, its action would be violative of Articles 14 and 16 of the Constitution and it is the obligation of the Court to strike down the discrimination and grant relief to the aggrieved employee. But before such relief is granted, the Court must consider and analyze the rational behind the State action and if on an analysis of the relevant rules, orders, nature of duties, functions, measure of responsibility and educational qualifications required for the relevant posts, the Court finds that the classification made by the State in giving different treatment to the two classes of employees is founded on rational basis having nexus with the objects sought to be achieved, then such classification must be upheld. But relief to an aggrieved person seeking to enforce the principles of equal pay for equal work can only be granted after it is demonstrated before the Court that discrimination has been practiced by the State without there being any reasonable classification for the same.

It has also been well settled by the Hon''ble Supreme Court in the case of Food

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Corporation of India Vs. Shyamal K. Chatterjee and Others, that contract casual workers are entitled to parity in pay with the regular employees if they perform similar work with responsibility and no distinction can be made in so far as equal pay for equal work is concerned on the basis that the aggrieved employee is a contract casual worker.

11. In view of the aforesaid judgments of the Hon''ble Supreme Court what needs to be first determined is the nature of the duties being performed by the petitioner vis-a-vis a regular employee.

In the present case at hand, the petitioner has annexed as Annexure-1, the letter of the Sr. Deputy Manager (Personnel) dated 22nd November 1995 addressing the petitioner as a "Time Keeper" at the Time Office at the Dunguri Mines Lime Stone Quarry and assigned the following specific responsibilities:

1. Shift duty-Marking attendance of the employees, including marking attendance in the ''D'' & ''E'' Register for staff employees as per Staff attendance Register daily & preparation of Daily report.

2. Marking C.B., comp. off in the attendance Register as and when received approved intimations.

3. Maintaining Records of Exist pass O.T. intimations etc.

4. Filling up columns No. 1 to 7 in the attendance Register in Form-D & E every month by the end of proceeding month.

5. Preparation of Night shift Allowance bill, conveyance allowance, Dust Allowance etc.

6. Checking of Casual supply bills and any other matter from time to time as and when required.

In the counter affidavit of ICL although the deponent, Sr. Deputy Manager (Personnel) has sought to deny the authenticity of the said document, yet, in the rejoinder affidavit, the petitioner has annexed a further document as Annexure-11, a letter addressed by the self-same Deputy Manager (Personnel) to one Sri B. Patnaik (Regular Employee) who was addressed as Clerk, who has been assigned with the following duties of Time Keeper in the Time office:

1. Shift duty-Marking attendance of the employees in D & E Register both operatives & staff and preparation of daily Labour reports.

2. Marking C.B. in the attendance Registers and maintaining different records of Time Office such as Exit pass, O.T. intimation etc.

3. Writing names & designation etc. of officers and staff of D.L.O. & Behera Banjipali Mines in the attendance Register every month.

4. Preparation of Bonus Bill/Posting Registers of the Employees.

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5. Writing of Attendance Cards of all operatives each month.

6. Maintenance of all papers and Registers, Records and files in connection with shift and receiving daks from different Departments.

7. Any other work that may be entrusted to him from time to time.

On a comparison of the assignment given to the regular employee-Sri B. Patnaik an the petitioner (casual worker), it is seen that the nature of duties, responsibilities and obligation are exactly the same and, therefore, it can safely be concluded that the petitioner, in fact, while working as a Time Keeper, has discharged the function and duties of a regular Time Keeper.

12. The case of the petitioner is further substantiated by the fact that the Deputy Manager (Personnel) has also recommended the case of the petitioner for absorption as early as on 12.7.1988 and the said note appended as Annexure-3 which is quoted hereunder.

General Manager (Mines)

I. Shri Narendra Nath Biswal has been working in the time Officer as Casual Office Assistant being supplied through Casual Labour Supply Contractor since 1984 against the post of Time Keeper, which have fallen vacant subsequent to the superannuation of Shri R. K. Pattnaik, Jr. Clerk and Shri L.M. Sarkar Jr. Clerk. At present, he is paid Rs. 207- per day. He has read up to H.S.C. Examination.

Since the job of Time Keeper is of permanent nature, engagement of contract Labour in the said job for a longer period may lead to legal complication in future. Further, this job is also of confidential in nature and most vital in an Industry. Shri Biswal is very sincere and hard working and is now well acquainted with the job of Time Keeper including preparation of allowance bill, Casual Labour supply Bill etc.

It is suggested to appoint Shri Biswal as Apprentices on the consolidated allowance of Rs. 4007- per month initially for a period of one year in satisfactory completion of which he will be fixed in the regular grade.

Once again the Deputy Manager (Personnel) affirmed the fact that the petitioner was discharging his duty as regular Time Keeper under his note dated 26.12.1991 under Annexure-4 and the same is quoted hereunder.

Manager (Personnel)

The representation dated 23.10.91 of Shri Narendra Nath Biswal, casual labour, working as Time Keeper may kindly be seen. In the Time office at present we are having two Nos. of shift Time Keeper against the required strength of 4 Nos. (3 for three shifts and one for leave reserve & off). As such we are forced to run the Time Office in two shifts i.e. ''A'' & ''B'' against the required 3 shift operation. In absence of any one of the existing Time Keeper we are running the Time office with Sri Narendra Biswal supplied through the Contractor as casual labour,

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violating the provision of the Mines Act, As a Time Keeper, he puts his signature in various documents.

Shri Biswal has been working as Time Keeper since 1984 and he has been efficiently discharging his duties as Shift Time Keeper. So far as his qualification is concerned, he has passed H.S.C. Examination from Board of Secondary Education, Orissa.

In view of the duties and responsibilities on him and his long services with him we may consider his case for regular appointment as Junior Clerk against the existing vacancy or else his case be considered on short term appointment.

Submitted.

Once again on 26.12.1991, the General Manager (Mines) recommended the case of the petitioner as quoted hereunder:

Ref: Note at prepare & above.

Due to shortage of Time Keepers, one Sri Narendranath Biswal, a matriculate, is working as Time Keeper in our Dungri Limestone Quarry as a casual labour since 1984. At present he is drawing Rs. 28.15 per day.

We have only 2 time keepers against our requirement of 4 Nos. to run the Time Office in a shift.

We have found Sri Biswal to be very sincere and has gained experience in preparation of monthly bills including maintenance of time office records.

We may also require such experienced hand Damapala & Behera Banjapali Limestone Mines.

Mr. Biswal may be appointed on probation period of one year against the post of Jr. Clerk Time office for Damapara Mines Submitted.

13. On a con-joint reading of the aforesaid facts and keeping in view the fact that the averments made by the petitioner in his rejoinder affidavit have not been responded to by the opposite parties, we are left with no option other than to hold that the petitioner has been discharging the responsibilities of a regular Time Keeper since adequate number of Times as required under law were not available in the regular establishment. Further, his work has always been to the satisfaction of his superior officers who from time to time has strongly recommended his case for his sincerity in discharging the job.

14. The present case is a case where an employee though engaged as a contract labour since 1984, has only been paid minimum wages as applicable to him from time to time. Although, in fact and in reality, he has been discharging duties of a regular Time Keeper and also possesses necessary qualifications to hold such post as well as in view of the fact that vacancies in the said post continues to exist, without being filled up.

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Therefore, in the light of the above, we have no hesitation in holding that the petitioner is entitled to the benefit of "equal pay for equal work" as may be payable to regular employees for the period of service rendered by him as a Time Keeper with Dunguru Mines Lime Stone Quarry. Having come to hold that the petitioner is entitled to his claim for equal pay for equal work, the next question that arises for consideration is as to from which date he shall be entitled for benefits on such a direction.

15. It is by now well settled in the case of State of Haryana and Others Vs. Charanjit Singh and Others, etc. etc., that before any direction can be issued by a Court, the Court must first see that there are necessary averments and there is a proof and if the High Court is, on the basis of material placed before it, convinced that there was equal work of equal quality and all other relevant factors are fulfilled, it may direct payment of equal pay from the date of the filing of the respective writ petition.

In view of the aforesaid decision of the Hon''ble Supreme Court, we hold that the benefit for equal pay for equal work shall be extended to the petitioner from the date of filing of the writ application, i.e. 8.4.1997.

16. In the present case, it is seen that the petitioner has been serving as Time Keeper in the Time Office of the Dunguri Mines Lime Stone Quarry of ICL since 1984 although he has been employed through labour contractor. The petitioner has possessed matriculation certificate and is otherwise eligible for being posted to the said post. The employer required more than four Time Keepers to operate the Time Office and admittedly, on superannuation of the earlier Time Keeper, the petitioner along with only one other regular Time Keeper, managed the affairs of the Time Office. The recommendation of the management (Annexures-3 and 4) are also in favour of the petitioner and it is stated that he is sincere and has shown devotion to his duty and he having been continued in such post since 1984 to the satisfaction of the superior, his original appointment as Time Keeper may be treated as "merely irregular" but not illegal. Apart from the above, it is clear from the facts of the present case that there is a continuous need for such a Time Keeper in the establishment of the employer and he, having admittedly worked for more than ten continuous years, is entitled for consideration for the purpose of regularization/absorption.

17. The present writ application was filed in the year 1997 and the transfer of the shares by the State Government in favour of the present employer, i.e., M/s. ACC Ltd. took place in the year 2003 (i.e. during the pendency of the writ application). In terms of the Share Purchase Agreement (the relevant portion of which has been quoted in Paragraph-9 hereinabove), it is clear there from that, M/s. ACC Ltd. Company is required to retain the services of all the permanent employees who were in employment of the company as on the closing date. The agreement also perceives that the company may initiate a Voluntary Retirement Scheme for its permanent employee, but in the present case, it is the admitted position that the opposite party-company has not yet initiated any Voluntary

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Retirement Scheme for the "permanent" employees.

It is worthwhile to mention here that a plea has been raised by the labour contractor-Upendra Kumar Sahoo (O.P.8) that he had framed a Voluntary Retirement Scheme for contract workers, which admittedly, has not been accepted by the petitioner. Since we have held that the petitioner was entitled to seek regularization/absorption in service under the erstwhile IDCOL Cement Ltd., we therefore, further declare that the petitioner should be treated as a "regular employee" with effect from the date of filing of the present writ application, i.e., 8.4.1997. Consequently, the petitioner having been declared to be a "regular employee", in terms of Clause-5.4 of the Share Purchase Agreement, the petitioner''s services stand protected, to the extent applicable to the permanent employees. Therefore, the offer of VRS made to the petitioner as a contract labour is declared invalid in law and in any event could not be imposed on the petitioner who was unwilling to accept the terms of the VRS floated for contract labours.

18. Accordingly, the writ application is allowed with the following directions:

(i) the petitioner shall be entitled for equal pay for equal work as applicable to regular employees from the date of filing of the writ application i.e. 8.4.1997.

(ii) The petitioner is also further declared to be a regular employee of ICL w.e.f. 8.4.1997.

(iii) The petitioner being declared as permanent employee of erstwhile ICL shall be entitled to the protection given to permanent employees under Clause-5.4 of the Share Purchase Agreement.

(iv) The petitioner shall be entitled for release of the arrears within a period of three months from the date of receipt of certified copy of this judgment.

(v) The petitioner shall be deemed to continue as employee in the erstwhile ICL as taken over by M/s. ACC Ltd.

(vi) The fixed deposit made with the registry by the contract labourer along with the interest thereon be released in favour of Upendra Kumar Sahu-Opposite Party No. 8.

B.P. Das, J.

I agree.

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