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High Court Of Punjab And Haryana At Chandigarh

Case No: L.P.A. No. 35 of 1998

Atam Parkash and Others		APPELLANT
	Vs	
State of Haryana and Others		RESPONDENT

Date of Decision: Sept. 21, 2004

Acts Referred:

- Factories Act, 1948 - Section 2(1)
- Industrial Disputes Act, 1947 - Section 12(3), 19(2), 2, 25F, 29

Citation: (2005) 2 LLJ 195

Hon'ble Judges: Virender Singh, J; G.S. Singhvi, J

Bench: Division Bench

Advocate: V.G. Dogra, for the Appellant; K.K. Gupta, for the Respondent

Final Decision: Allowed

Judgement

G.S. Singhvi, J.

Whether the appellants, who were engaged as Weavers, Wrappers and Winders in the production centres established by the Haryana State Handlooms and Handicrafts Corporation (for short, ''the Corporation'') at Panipat and Bhiwani fall within the definition of ''workman'' u/s 2(s) of the Industrial Disputes Act, 1947 (for short, the ''the Act'') is the question which arises for determination in this appeal filed under Clause 9 of the Letters Patent for setting aside order dated April 2, 1997 vide which the learned single Judge dismissed the writ petition filed by the appellants for nullifying the decision of the management of the Corporation to retrench their services and for issuance of a direction to the Corporation to restart the production or in the alternative to provide assistance to them for starting production at Panipat and Bhiwani Centres.

2. For deciding the aforementioned question, we may briefly notice the facts.

3. The Corporation is a Haryana Government undertaking. It was incorporated under the Companies Act, 1956 with the following objects:

"(i) to set up factories, training centres, research institutes, quality making centres, and co-operatives for small, large, medium and cottage industries particularly handicrafts, handlooms, ginning, combing, spinning, dyeing, processing, weaving, shoe making, toy-making, pottery, crockery etc. for the benefit of artisans, weavers, backward classes and others in the State of Haryana;

(ii) to promote, establish, run, aid, assist, finance industrial undertakings of small, medium and large scale within the State of Haryana whether run by Government or any other statutory authority, company, firm or individuals or co-operatives for ginning, combing, spinning cotton, silk, wool or any other synthetic material for manufacturing and weaving yarn and its processing, dyeing and weaving, tanning, shoe-making, toy-making etc. and any other cottage industry;

(iii) to manufacture buy, sell, import, export all kinds of raw materials used in shoe-making, handicrafts, handlooms, spinning, weaving, cloth making and other cottage industries;

(iv) to set up artisans villages, industrial estates, export promotion centres and to provide all kinds of financial and technical assistance to artisans and weavers and to provide them with raw materials and other common facilities such as power, water, factory sites, dwelling houses, marketing facility etc.;

(v) to take up business as dealers and manufacturers of leather and tanning of leather."

4. In the course of employment, a dispute arose between the workmen of Bhiwani centre and the management of the Corporation on the issue of payment of wages and production targets. The workmen went on strike on July 4, 1989. The dispute was resolved with the intervention of Labour-cum-Concilation Officer, Bhiwani and the representatives of the parties signed settlement dated August 17, 1989 (Annexure P. 3), paragraphs 2 to 5 of which read as under:

"2. Both the parties agree that a Committee be constituted to fix up the production targets and the Committee shall submit its report within one month to the management. The following shall be the members of the Committee:

Representatives of the management:

1. Shri Surender Bhandari, Deputy Project Officer;

2. Shri Sudesh Kumar Bhatia, Project Officer, Panipat;

Representatives of workmen

1. S/Shri Bhudh Ram, Ram Chander, Rajender Kumar.

Government representative:

Labour Inspector, Bhiwani.

The Committee, if finds necessary, can call the Weaving Expert from the Weaving Service Centre, Government of India, Panipat for which a request may be made by the management and its expenses shall be borne by the management.

3. Both the parties agree that the workers shall achieve the production norm given by the committee and if any worker intentionally fails to achieve less than 60% of the fixed norm, the management can initiate disciplinary proceedings. If for any reason, the management is unable to provide work to the workmen and some time is wasted beyond the control of the workmen, the wages for such period shall be paid to the workers.

4. Both the parties agree that while fixing the piece rate wages, the minimum rate of wages shall be acceptable to both the parties. These wages shall be payable w.e.f. January 1, 1989 and till the report of the Committee is not received, the existing rate shall continue to be paid and the arrears shall be paid later on. As and when production of any new item is started, the Committee shall fix the target and the piece rate wages. The Committee shall consist of two representatives of each workman and management. The weavers shall nominate their representative within one month of the notice of the new item. Whenever, there is any increase in the minimum wages by the State Government, the piece rate Wages shall be proportionately increased and shall be payable from the date fixed by them.

5. Both the parties further agreed that the workers shall report at factory and will work honestly and sincerely and in discipline, whereas the management shall not victimise any worker."

5. In the 77th meeting of the Board of Directors of the Corporation held on September 28, 1993, it was decided to wind up loss making activities including captive looms at Panipat and Bhiwani. Consequently, 39 posts of different categories of staff were identified to be surplus. In the 79th meeting of the Board held on December 29, 1993, it was noted that 46 piece rates weavers etc. working at Panipat and Bhiwani have also become surplus on account of suspension of production activities and that the efforts made to absorb them in the services of Khadi Gramodyog Board had not yielded any result. The matter was again considered in the 81st meeting of the Board of Directors held on September 30, 1994 and it was decided to do away with the services of the appellants. Before taking final decision, the management of the Corporation consulted its advocate at Chandigarh who advised that it was not necessary to comply with the provisions of the Act because the appellants were not workers. This is borne out from the agenda item prepared for the 81st meeting of the Board of Directors, the relevant extracts of which are reproduced below:

"Presently, the Corporation is paying lay off compensation to these 46 piece rates weavers in view of the settlement with the representative of workers on August 17, 1989 before the Labour-cum-Concillation Officer, Bhiwani. The amount of laid off compensation computes to be approximately Rs. 2.50 lacs per year. Production activities at Panipat/Bhiwani was suspended in March, 1993 and since then these piece rates weavers are being paid compensation, even when - Corporation is having no work to offer them. On the other side, they were not terminated/ retrenched because the Corporation was not having sufficient funds to pay them the required amount of compensation as was calculated on the advice of Shri Surinder Kaushal, Management Consultant. The matter has been discussed at length with Shri K.K. Gupta, advocate and expert in Labour Law matters, at Chandigarh, wherein opinion given by Surinder Kaushal and settlement dated August 17, 1989 were also discussed. He has opined that these weavers were engaged on contract basis as per work requirement under piece rate system and not against any sanctioned post. As such, there is no employee-employer relationship and also no violation of the settlement dated August 17, 1989 because this settlement in no way changes their nature of engagement and it was never agreed that they will be paid any Compensation, if the Corporation does not require them. As such when Corporation is not having any work to offer them, they have no claim on wages/ compensation. In support of his opinion he has quoted a number of judgments of the Hon''ble Supreme Court of India and Hon''ble High Court of Punjab and Haryana. He is of the considered opinion that since these piece rates weavers were not engaged against any sanctioned post and were engaged on contract basis, this will be termination of contract only and not services and as such, they are not entitled for any retrenchment compensation because they are not workers under I.D. Act, and either party (Corporation or Weavers) can terminate the contract without service of any notice or compensation.

In view of the above position, Board is requested to consider the matter and accord its approval to terminate the contractual engagement with the piece rates weavers etc. at Panipat and Bhiwani and resolve as under:

"Resolved that approval of the Board be and is hereby accorded to terminate the contract with weavers engaged on piece rate basis at Panipat and Bhiwani, there being no work to offer them."

6. The appellants challenged the decision of the Corporation in C.W.P. No. 15102 of 1994 mainly on the ground of violation of Section 25F of the Act by asserting that before terminating their services, the competent authority did not give them notice or pay in lieu thereof and retrenchment compensation, as required by Clauses (a) and (b) of Section 25F. In support of their claim that they are workmen, the appellants relied on settlement dated August 17, 1989 (Annexure P.3) entered into between the representatives of the workmen and management of the Corporation u/s 12(3) of the Act. They averred that they had worked under the Corporation for 6

to 14 years and their services had been dispensed with in an arbitrary manner without making any effort to explore the possibility of their absorption. The appellants also claimed that by virtue of Section 19(2) of the Act, settlement dated August 17, 1989 was binding on the management of the Corporation and their services could not have been terminated without complying with the mandate of Section 25F of the Act.

7. In the written statement filed on behalf of the Corporation, an objecton was taken to the maintainability of the writ petition on the ground that for enforcing the settlement entered into between the parties u/s 12(3) of the Act, an effective alternative remedy was available to the appellants u/s 29 of the Act. On merits, it was averred that the appellants (except appellant No. 25 who was a part-time employee) had been engaged on contract basis and they were paid on piece rate and further that the Corporation did not have any control over their work etc.

8. The learned single Judge referred to the averments contained in the pleadings of the parties, judgments of the Supreme Court in Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra, ; Chintaman Rao and Another Vs. The State of Madhya Pradesh, ; P.M. Patel and Sons and Others Vs. Union of India (UOI) and Others, and Silver Jubilee Tailoring House and Others Vs. Chief Inspector of Shops and Establishments and Another, and held that the writ petitioners (appellants herein) cannot be treated as workmen within the meaning of Section 2(s) of the Act. Accordingly, he dismissed the writ petition.

9. Shri V.G. Dogra, learned counsel for the appellants argued that the findings recorded by the learned single Judge on the issues of the nature of employment and the mode of payment are contrary to the facts brought on record and the conclusion recorded by him is legally unsustainable. Learned counsel relied on the terms of settlement (Annexure P. 3) and the agenda item prepared for the 81st meeting of the Board of Directors of the Corporation to show that till that time, the management of the Corporation had treated the appellants as workmen and argued that payment of wages on piece rate basis was, by itself, not sufficient for holding that they were not workmen within the meaning of Section 2(s) of the Act. He submitted that the appellants were working at Bhiwani and Panipat centres of the Corporation under the direct control and supervision of the management and were subject to its disciplinary control and that this should be treated as conclusive of their status as workmen within the meaning of Section 2(s) of the Act.

10. Shri K.K. Gupta, learned counsel for the Corporation supported the order under challenge and argued that the appellants cannot be treated as workmen of the Corporation because the latter did not have any control over their work. He conceded that the Corporation had entered into settlement with the representatives of the workmen, but submitted that it was a mistake on the part of the management and the appellants cannot take advantage of such mistake.

11. We have thoughfully considered the respective arguments and have carefully scanned through the record. In the last 57 years, the Courts have evolved various tests for determining whether an employee can be treated as workman within the meaning of Section 2(s) of the Act. Some of the factors which have bearing on this issue are:

(i) As to who has the right to direct what shall be done and when and how it shall be done;

(ii) existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price;

(iii) independent nature of his business or his distinct calling;

(iv) his employment of assistants with the right to supervise their activity;

(v) his obligation to furnish necessary tools supplies and materials;

(vi) work except as to final results;

(vii) the time for which the workman is employed;

(viii) the method of payment to be made, by time or job; and

(ix) whether work is part of the regular business of the employer.

12. In one of the earliest decisions in Shivnandan Sharma Vs. The Punjab National Bank Ltd., the Supreme Court held that an element of supervision and control exercised by the employer was crucial for determining whether the employee was a workman or an independent contractor.

13. In Dharangadhra Chemical Works Ltd. v. State of Saurashtra (supra), their Lordships of the Supreme Court noticed the definition of ''workman'' u/s 2(s) of the Act and laid down the following proposition:

"The prima facie test in the determination of relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work. The nature or extent of control which is requisite to establish the relationship of employer and employee must necessarily vary from business to business and is by its very nature incapable of precise definition. The correct method of approach, therefore, would be to consider whether having regard to the nature of the work there was due control and supervision by the employer. A person can be a workman even though he is paid not per day but by the job. The fact that rules regarding hours of work etc. applicable to other workmen may not be conveniently applied to them and the nature as well as the manner and method of their work would be such as cannot be regulated by any directions given by the Industrial Tribunal, is no deterrent against holding the persons to be workmen within the meaning of the definition if they fulfil

its requirement. The Industrial Tribunal would have to very well consider what relief, if any, may possibly be granted to them having regard to all the circumstances of the case and may not be able to regulate the work to be done by the workmen and the remuneration to be paid to them by the employer in the manner it is used to go in the case of other industries where the conditions of employment and the work to be done by the employees is of a different character."

14. The Supreme Court also indicated the distinction between a workman and a contractor in the following words Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra, at pp. 483 & 484:

"..... The broad distinction between a workman and independent contractor lies in this that while the former agrees himself to work, the latter agrees to get other persons to work. Now a person who agrees himself to work and does so work and is therefore a workman does not cease to be such by reason merely of the fact that he gets other persons to work along with him and that those persons are controlled and paid by him. What determines whether a person is a workman or an independent character is whether he has agreed to work personally or not. If he has, then he is a workman and the fact that he takes assistance from other persons would not affect his status....."

15. In Chintaman Rao v. State of Madhya Pradesh (supra), the Supreme Court considered the definition of ''worker'' u/s 2(1) of the Factories Act, 1948 as also the definition of ''workman'' u/s 2(s) of the Act and held as under Chintaman Rao and Another Vs. The State of Madhya Pradesh, t p. 256:

".... The concept of employment involves three ingredients: (1) employer (2) employee and (3) the contract of employment. The employer is one who employs, i.e., one who engages the services of other persons. The employee is one who works for another for hire. The employment is the contract of service between the employer and the employee whereunder the employee agrees to serve the employer subject to his control and supervision . . . . . "

16. Their Lordships of the Supreme Court highlighted the distinction between a contractor and a workman in the following words Chintaman Rao and Another Vs. The State of Madhya Pradesh, at p. 256:

"A ''contractor'' is a person who, in the pursuit of an independent business, undertakes to do specific jobs of work for other persons, without submitting himself to their control in resPect to the details of the work."

"There is, therefore, a clear-cut distinction between a contractor and a workman. The identifying mark of the latter is that he should be under the control and supervision of the employer in respect of the details of the work....."

"..... The prima facie test for the determination of the relationship between the employer and employee is the existence of the right in the employer to supervise

and control the work done by the employee not only in the matter of directing what work the employee is to do but also the manner in which he shall do his work....."

17. In Silver Jubilee Tailoring House v. Chief Inspector of Shops and Establishments (supra), the Supreme Court, while reiterating the supervision and control test, broadened its amplitude by making the following observations:

"The right to control the manner of work is not the exclusive test for determining the relationship of employer and employee. It is also to be considered as to who provides the equipment. It might be that little weight can nowadays be put upon the provisions of tools of minor character as opposed to plant and equipment on a large scale. But so far as tailoring is concerned, the fact that sewing machines on which the workers do the work generally belong to the employer is an important consideration for deciding that the relationship is that of master and servant:

Apart from this, when the employer has the right to reject the end product if it does not conform to the instructions of the employer and direct the worker to restitch it, the element of control and supervision is also involved."

18. In that case, the Supreme Court considered whether tailors, who were engaged on piece rate basis, could be treated as workmen. While rejecting the employer''s plea that the tailors could not be treated as workmen because they were free to take work from other tailoring establishments, their Lordships of the Supreme Court observed as under:

"The fact that the employees take up the work from other tailoring establishments and do that work in the shop in which they generally attend for work and that they are not obliged to work for the whole day do not militate against their being employees of the proprietor of the shop where they attend for work."

19. The proposition laid down in the last mentioned judgment was reiterated in Shining Tailors Vs. Industrial Tribunal II, U. P., Lucknow and Others, in the following words:

"Tailors working on piece rate basis in a big tailoring establishment are workmen of the owner of the establishment. Every piece rated workman is not an independent contractor. Piece rate payment meaning thereby payment correlated to the production is a well-recognised mode of payment to industrial workmen. The employer''s right to reject the end product if it does not conform to the instruction of the employer speaks for the element of control and supervision. So also right of removal of the workman or not to give the work has the element of control and supervision. The right of rejection coupled with the right to refuse work would certainly establish master-servant relationship."

20. In Madurai General Workers'' Union (by secretary) Vs. Brinda Textiles Handloom Factory (by sole proprietor) and Others, , a learned single Judge of Madras High Court held that even though the workers, who were engaged in weaving section of

the factory, were paid on piece-rate basis, they were covered by the definition of workman because they were required to adhere to the quality of cloth prescribed by the management of the factory; they were required to work for fixed hours; they were given weekly holidays and in this manner, the management exercised supervision and control over their work.

21. Having noticed the tests laid down by the Courts for determining whether an employee, who is paid on piece rate basis, can be treated as a workman within the meaning of Section 2(s) of the Act, we may now advert to the facts contained in the pleadings of the parties. While the appellants averred that they were engaged at Bhiwani and Panipat centres established by the Corporation and they used to work under the supervision and control of the management of the Corporation, the latter controverted the same and alleged that they were engaged purely on contract basis. One of them, i.e., petitioner No. 25 was working on part-time basis. It was also alleged that due to failure of the writ petitioners to meet the targets, the Corporation had suffered huge loss necessitating closure of the two centres. In our opinion, the hollowness of the stand taken by the Corporation is exposed by the fact that the management had entered into a settlement with the representatives of the workmen u/s 12(3) of the Act. This could not have been possible unless the workers were treated as workmen within the meaning of Section 2(s) of the Act. A careful reading of the settlement shows that the Corporation had amicably resolved the dispute relating to payment of rates of wages and production targets. The workmen had agreed to call off the strike w.e.f. August 18, 1989 and resumed the work with effect from that date. Both the parties agreed that a Committee be constituted to fix the production targets. It was also decided that the workers shall achieve the production norms given by the Committee. If any workman failed to achieve the target, then the management was given freedom to initiate disciplinary action against him. It was also agreed that if the management is unable to provide work to the workmen and some time is wasted beyond the control of the workmen, then the wages for that period will be paid to the workmen. It was further agreed that while fixing the piece rate wages, the minimum rate of wages payable by the Government shall be acceptable to both the parties and whenever there was any increase in the minimum wages by the State Government, the piece rate wages shall be proportionately increased and paid to the workmen. It was also agreed that the workers shall report at the factory and work honestly and sincerely in a disciplined manner and the management shall not victimise any worker. In the agenda item prepared for 81st meeting of the Board of Directors of the Corporation, it was mentioned that the Corporation has been paying lay off compensation to 46 weavers in view of settlement dated August 17, 1989 and the total amount of compensation paid was Rs. 2.5 lacs per year.

22. All these show that the appellants were working under the direct control and supervision of the Corporation. They were also under the disciplinary control of the management. It is beyond comprehension as to how the Corporation could exercise

disciplinary control over the appellants, if they were not its employees or did not work under its control. Unfortunately, the learned single Judge overlooked the most important document, i.e., settlement (Annexure P. 3), the fact that the appellants were paid lay-off compensation from 1993 and that they were under the disciplinary control of the Corporation. Therefore, the finding recorded by him that the appellants are not workmen cannot be sustained.

23. The plea of the Corporation that the appellants were engaged on purely contract basis, even if accepted as correct, cannot deprive them of the status as workman u/s 2(s) of the Act because no evidence has been produced before the Court to show that they had freedom to work according to their choice and the management did not exercise supervision and control on their work and conduct.

24. In the result, the appeal is allowed. The order of the learned single Judge, is set aside and the case is remanded for decision on merits.

25. Since the matter is already 10 years old, we direct that the writ petition be listed for hearing before the single Judge on October 25, 2004.