(2012) 07 P&H CK 0200

High Court Of Punjab And Haryana At Chandigarh

Case No: C.W.P. No. 15146 of 2009 (O and M)

Ansal Properties and Industries Limited		APPELLANT
	Vs	
The Presiding Officer, Industrial Tribunal-cum-Labour Court-I, Gurgaon and Another		RESPONDENT

Date of Decision: July 18, 2012

Acts Referred:

- Industrial Disputes Act, 1947 - Section 2(oo)(bb), 2(s), 25F

Citation: (2013) 1 LLJ 570 : (2012) LLR 1146 : (2013) 1 SCT 314

Hon'ble Judges: Rajesh Bindal, J

Bench: Single Bench

Advocate: V.K. Sachdeva, for the Appellant; Ashwani Bakshi, Advocate, for the Respondent

Final Decision: Dismissed

Judgement

Rajesh Bindal, J.

The management is before this court impugning the award dated 6.4.2009, passed by Presiding Officer, Industrial Tribunal-cum-Labour Court-I, Gurgaon (for short, ''the Tribunal''), whereby respondent No. 2-workman was held entitled to reinstatement with continuity of service, however, relief for back wages was denied. Briefly, the pleaded facts are that the petitioner is engaged in the business of construction of buildings and developing colonies in the State of Haryana and other parts of the country. As the project at one place concludes, sometimes the employees are also shifted to other project. Respondent No. 2 submitted application dated 9.12.1994 seeking appointment for the post of Supervisor (Civil) with the petitioner-company. In terms thereof, he was offered appointment letter dated 10.1.1995 on temporary basis at a gross salary of Rs. 2,000/-per month w.e.f. 1.1.1995 to 30.6.1996 for a period of 18 months. After expiry of the aforesaid period,

the services of respondent No. 2 were to be terminated automatically. Extension in service could be made with the mutual consent of the parties on terms and conditions to be mutually agreed upon. The contract of employment could be terminated by either party by giving one month''s notice. Place of posting of respondent No. 2 at the time of appointment was at Sushant Lok, Gurgaon. As per the terms and conditions of the appointment letter, respondent No. 2 could be transferred to any other place of the company either in Delhi or outside Delhi. After accepting the terms and conditions, respondent No. 2 appended his signatures and joined his duty. Vide letter dated 18.7.1996, the period of temporary employment of respondent No. 2 was extended upto 30.6.1997. Subsequent thereto, vide letter dated 13.6.1997, the period was extended upto 31.12.1998. During this period, the petitioner had been getting increments and his salary incresed to Rs. 2,825/-per month. As the project where respondent No. 2 had been posted was completed, his services could be terminated, however, still with a view to accommodate him, he was directed to be transferred to a new project of the petitioner-company at Worli (Mumbai). Communication to that effect was issued on 28.7.1998. Respondent No. 2 was directed to report at Mumbai office. Railway tickets for journey of respondent No. 2 from New Delhi to Mumbai on 6.8.1998 were also annexed with the transfer letter. Though the transfer letter was served upon respondent No. 2, but he did not join the new place of posting, rather, issued a demand notice stating that his services were illegally terminated on 25.7.1998 without assigning any reason. As the matter could not be settled in conciliation proceedings, it was referred to the Tribunal where, on consideration of the matter, the Tribunal directed the petitioner-company to reinstate respondent No. 2 with continuity of service, however, claim for back wages was denied. It is this award, which is impugned before this court.

2. Learned counsel for the petitioner submitted that a perusal of appointment letter dated 10.1.1995, in terms of which respondent No. 2 was appointed on the post of Supervisor (Civil), shows that he had been appointed purely on temporary basis for a period of 18 months from 1.1.1995 to 30.6.1996. On the expiry of fixed period of appointment, his services were to stand terminated automatically. Extension, if any, could be made with mutual consent of the parties on the terms and conditions to be agreed upon. Either party was entitled to terminate the services with one month''s notice. The important clause was that respondent No. 2 could be transferred to any place throughout the country. After the initial period of appointment expired, respondent No. 2 was granted extension vide letters dated 18.7.1996 and 13.6.1997. He further submitted that in terms of the appointment letter, his initial salary was Rs. 2,000/-per month, which increased upto Rs. 2,825/-per month. Even if the letter granting extension of service to respondent No. 2 had not been proved on record, still his continuance in service beyond the period of initial appointment shows that he accepted the terms on which he was initially appointed and one of the important term being that his services could be transferred to any place in India. As the work

at Gurgaon had concluded, though in terms of appointment letter, services of respondent No. 2 could be terminated, but still to be generous, respondent No. 2 was transferred to a new project. There was no malafide. Transfer was strictly in terms of his appointment. In fact, it is a case of abandonment of service as respondent No. 2 having been transferred to Mumbai, failed to join the duty there.

3. It was further submitted that respondent No. 2 was appointed as a Supervisor (Civil). His duty was to supervise supply of construction material to the contractor. The Tribunal has gone wrong in observing that the petitioner had failed to discharge its burden to show what kind of duties were assigned to respondent No. 2 as he himself had admitted this fact. In terms of definition of ''workman'', as provided for in Section 2(s) of the Industrial Disputes Act, 1947 (for short, ''the Act''), any employee working on supervisory post cannot be termed as a workman, hence, he is not entitled to protection under the Act. Even otherwise, transfer of an employee from one place to another in terms of his appointment cannot be termed as an industrial dispute which could be referred to the Tribunal for adjudication. Even as per the provisions of Section 2(oo)(bb) of the Act, termination of services after the conclusion of contractual period of appointment cannot be said to be retrenchment. In support of his submissions, learned counsel placed reliance upon judgments of this court in C.W.P. No. 18601 of 2001-Shyam Lal v. State of Haryana and others, decided on 14.1.2009; C.W.P. No. 982 of 2009-Khem Chand v. The Presiding Officer-cum-Labour Court, U.T., Chandigarh and another, decided on 21.1.2009 and C.W.P. No. 13802 of 2004-M/s Eicher Motors Limited v. The Presiding Officer, Labour Court, U.T., Chandigarh and another, decided on 18.9.2009.

4. On the other hand, learned counsel for respondent No. 2 submitted that in fact, he had been working as Beldar with the petitioner-company since May, 1986. For the first time, he was issued an appointment letter in the year 1995. The terms used in the appointment letter itself show that it was with a view to come out of the purview of the Act. The designation of the post was evidently quite high, however, respondent No. 2 was being paid meager salary of Rs. 2,000/-per month as was being paid to him as Beldar. Respondent No. 2 had no choice but to sign on the dotted lines. It was a question of bread and butter. He had no bargaining power. Even as per the terms of the appointment letter, the extension beyond 30.6.1996 could be by mutual consent on terms and conditions to be agreed upon. No doubt, respondent No. 2 had been working upto 24.7.1998. It cannot be claimed by the petitioner that his terms and conditions as were originally agreed upon would continue to apply, once there is no document produced on record by the management to show that respondent No. 2 agreed to the same terms and conditions.

5. Merely because respondent No. 2 had been given the designation of Supervisor (Civil), he cannot be taken out of the purview of the Act. The nature of duties are to be seen. At the most, he was working on a clerical job as a Store Keeper, even as per

the case set up by the petitioner. A Supervisor means supervising the work of some co-workers as a team leader, which is missing in the present case. Mere words used in the appointment letter will not decide the nature of job. Actual duties performed by respondent No. 2 are to be seen. In the present case, though the management had raised this issue before the Tribunal, but no evidence was led to show as to what kind of duties were being performed by respondent No. 2 to bring him out of the purview of the Act to enable the Tribunal to hold that respondent No. 2 was not a workman. In support of his plea, reliance was placed upon Arkal Govind Raj Rao v. Ciba Geigy of India Ltd., Bombay, 1985-II LLJ 401. S. K. Maini v. M/s Carona Sahu Company Ltd. and others, 1994 (2) RSJ 710.

6. He further submitted that transfer of a low paid employee like respondent No. 2, who was getting a meager salary of Rs. 2,825/-from Gurgaon to Mumbai is nothing else but unfair labour practice. It was a ploy to justify termination of services of respondent No. 2. It is wrong to state that the work at Gurgaon or near Gurgaon was not existing as the petitioner-company was having number of projects going on in this area. The letter, vide which extension in service was allegedly granted, having not been proved on record and respondent No. 2 having continued in service after the expiry of initial contractual period would mean that there was no fixed term appointment as such and immediately Section 25F of the Act will come into the rescue of respondent No. 2 and provisions of Section 2(oo)(bb) of the Act will not be applicable. Repeated extension of service has also been held to be unfair labour practice in Bhikku Ram v. The Presiding Officer Industrial Tribunal-cum-Labour Court, Rohtak, 1995 Lab. I. C. 2448. He further submitted that the Tribunal had merely awarded reinstatement in service and denied back wages. Till date, neither respondent No. 2 has been taken back in service nor any wages have been paid.

7. In response to the contentions raised by learned counsel for respondent No. 2, learned counsel for the petitioner submitted that the submission made by counsel for respondent No. 2 that he had initially been appointed as Beldar in the year 1986 has no relevance after a fresh appointment letter was issued to him appointing him as Supervisor (Civil). For the purpose of decision of the case in hand, his present status was required to be considered.

8. Heard learned counsel for the parties and perused the paper book.

9. The first issue, which is required to be decided in the present petition, is as to whether respondent No. 2 was a workman or not, it would be appropriate to refer to the provisions of Section 2(s) of the Act defining ''workman'', which are as under:

2. Definitions.-In this Act, unless there is anything repugnant in the subject or context,

xx xx xx

(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 express 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

(iv) who, being employed in a supervisory capacity, draws wages exceeding ten thousand 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.

10. Learned counsel for the petitioner-management sought to rely upon the designation given to respondent No. 2 in the letter of appointment dated 10.1.1995, in terms of which he was Supervisor (Civil). The petitioner-management though produced the aforesaid letter of appointment before the Tribunal showing his designation as Supervisor (Civil), but did not lead any evidence to prove as to what kind of duties actually he was performing. He only sought to refer to the statement made by respondent No. 2 that initially he joined as Beldar but later on, he used to supervise supply of construction material to the contractor.

11. In S. K. Maini''s case (supra), Hon''ble the Supreme Court opined that for the purpose of determination as to whether an employee is workman or not, his principal nature of duties and functions are to be considered on the basis of material on record. It is not possible to lay down any strait-jacket formula. The designation of an employee is not of much importance and what is important is the nature of duties being performed by him. The determinative factor is the main duties of the employee and not some work incidentally done. If main work is of manual, clerical or technical nature, mere fact that some supervisory work is done by the employee, the employee will come within the purview of workman. Relevant paragraph 9 thereof is extracted below:

9. After giving our careful consideration to the facts and circumstances of the case and the submissions made by the learned counsel for the parties, it appears to us that whether or not an employee is a workman u/s 2(s) of the Industrial Disputes Act is required to be determined with reference to his principal nature of duties and

functions. Such question is required to be determined with reference to the facts and circumstances of the case and materials on record and it is not possible to lay down any strait-jacket formula which can decide the dispute as to the real nature of duties and functions being performed by an employee in all cases. When an employee is employed to do the types of work enumerated in the definition of workman u/s 2(s), there is hardly any difficulty in treating him as a workman under the appropriate classification but in the complicity of industrial or commercial organisations quite a large number of employees are often required to do more than one kind of work. In such cases, it becomes necessary to determine under which classification the employee will fall for the purpose of deciding whether he comes within the definition of workman or goes out of it. In this connection, reference may be made to the decision of this court in Burmah Shell Oil Storage and Distribution Company of India Ltd. Vs. The Burma Shell Management Staff Association and Others, . In All India Reserve Bank Employees Association Vs. Reserve Bank of India, , it has been held by this Court that the word ''supervise'' and its derivatives are not words of precise impart and must often be construed in the light of context, for unless controlled, they cover an easily simple oversight and direction as manual work coupled with the power of inspection and superintendence of the manual work of others. It has been rightly contended by both the learned counsel that the designation of an employee is not of much importance and what is important is the nature of duties being performed by the employee. The determinative factor is the main duties of the concerned employee and not some works incidentally done. In other words, what, is, in substance, the work which employee does or what in substance he is employed to do. Viewed from this angle, if the employee is mainly doing supervisory work but incidentally or for a fraction of time also does some manual or clerical work, the employee should be held to be doing supervisory works. Conversely, if the main work is of manual, clerical or of technical nature, the mere fact that some supervisory or other work is also done by the employee incidentally or only a small fraction of working time is devoted to some supervisory works, the employee will come within the purview of ''workman'' as defined in Section 2(s) of the Industrial Disputes Act.

12. In Arkal Govind Raj Rao''s case (supra), Hon''ble the Supreme Court opined that even if an employee had been given the designation of a Group Leader and had been assigned the duty to supervise work of coemployees as well, but considering his main duty, which was clerical in nature similar to the co-employees, the mere fact that incidentally he was also asked to look after the work of other members of the group to see that all three of them perform the duties efficiently to complete the task, such a workman cannot be considered to be performing supervisory duty to bring him out of the purview of the Act. The relevant paragraph thereof is extracted below:

8. The Labour Court then took note of the fact that in 1966 appellant was promoted as Assistant and that he was designated as Group Leader. Ex. 16/6 was referred to

as specifying the duties of the Group Leader of Group II. The Court concluded that the aforementioned document would show that the appellant was a Group Leader and that he accepted that position by putting his initials on the document. The inference drawn by the court from this document is that the work of Group Leader is undoubtedly mainly supervisory though he is also required to work himself. However, in view of the Labour Court at this stage the duty of the appellant became primarily supervisory. While it is true that the appellant was working as Group Leader and, therefore, over and above his work he also supervised the work of persons working in his group, it is erroneous to draw the inference that his duties became mainly supervisory. The definition of the expression workman hereinbefore extracted clearly shows that the person concerned would not cease to be a workman if he performs some supervisory duties but he must be a person who must be engaged in a supervisory capacity. Even as a Group Leader of Group II, the evidence produced would show that primarily he continued to work and perform the same duties which have been found to be clerical but along with other in the group he also incidentally looked after the work of other members of the group who were only two in number. It is, therefore, not possible to concur with the inference drawn by the Labour Court contrary to the record that while functioning as Group Leader of Group II, even though appellant was performing his clerical duty the incidental supervisory duties performed by him would make the appellant a person employed in supervisory capacity. Let it be recalled that in Group II over and above the appellant, there were only two other persons, namely, Shri Swami and Shri Sawant. The distinction drawn between the duties performed by Swami and Sawant and that of the appellant was that as Group Leader the appellant was to ensure that the work allotted to the Group is completed within the scheduled time. In other words, work distribution among three persons of a clerical nature would not cease to be clerical because one of the three is asked to see that all the three of them performed the duties efficiently to complete the task. The Labour Court completely misled itself and observed that since then the duties of the appellant became supervisory.

13. In the case in hand, the management had not produced any evidence to show what was the kind of duty assigned to respondent No. 2. Reliance is only sought to be placed on the statement made by respondent No. 2 that he had to supervise supply of construction material to the contractor. That itself was not sufficient to hold that in fact respondent No. 2 was working in supervisory capacity, hence, falling in exception to the definition of ""workman'' as provided for under the Act. The consistent view is that nomenclature/designation of the post will not determine the status of an employee. It is the actual duty discharged by him. In the present case, at the most, it can be termed to be clerical type of job with no managerial or administrative power.

14. In view of the aforesaid enunciation of law, it can safely be opined that respondent No. 2 in the present case was a workman, hence, application of

provisions of the Act cannot be disputed.

15. Now coming to the second submission made by learned counsel for the management that respondent No. 2 had been transferred strictly as per the terms and conditions of his appointment letter dated 10.1.1995. When respondent No. 2 was appointed for a fixed period of 18 months to expire on 30.6.1996, it was specifically mentioned in the appointment letter that his services are transferable to any place in India. As the workman was transferred from Gurgaon to Mumbai, the project at Gurgaon have been completed and respondent No. 2 having not joined at the new place of posting, it was in fact a case of abandonment. There is no question of termination of his services.

16. However, I do not find any merit in the submissions made by learned counsel for the petitioner to that extent. Though it is claimed by the management that respondent No. 2 was appointed as Supervisor (Civil) vide letter dated 10.1.1995, however, the fact remains that his date of appointment is 1.1.1995. The case set up by respondent No. 2 was that in fact he had already been working with the management since 1986 and that this appointment letter was issued to him specifying his designation as Supervisor (Civil) only to come out of the purview of the Act. The salary of respondent No. 2 and the composition thereof itself shows that it was at the level of a Beldar only and not for a Supervisor. The total emoluments were Rs. 2,000/-per month, which included salary of Rs. 1,120/-with House Rent Allowance of Rs. 500/-and Conveyance Allowance of Rs. 380/-per month. It is further mentioned in the appointment letter that service is extendable after the initial period of appointment on mutual terms, as agreed. There is no letter showing extension of service of respondent No. 2 proved on record by the management. It was sought to be claimed that even if there is no letter of extension of service produced on record by the management, but still as respondent No. 2 was working even after the expiry of the period of initial appointment, it shows that he agreed to the terms and conditions, which were initially fixed, however, the plea is totally misconceived. Once a case is sought to be set up by the management that extension of service beyond the period for which respondent No. 2 was initially appointed would be on the basis of terms and conditions, which were agreed upon between the parties, and those having not been produced on record, it cannot be claimed as a matter of right that same conditions will continue to apply, especially in the facts and circumstances of the present case where one of those terms and conditions is sought to be misused by the management by transferring a low paid employee, who was drawing salary of merely Rs. 2,825/-per month from Gurgaon to Mumbai. The facts of the present case in totality establish that the management in the present case had used devices somehow to dispense with the services of respondent No. 2. The court can always lift the veil and see the circumstances behind it.

17. The judgments referred to by learned counsel for the management are not relevant in the case in hand considering the fact that there being no extension letter

showing terms and conditions of the services of respondent No. 2 after the expiry of initial period of appointment, it cannot be said to be an appointment for fixed term. The terms and conditions as provided for in the initial letter of appointment also cannot be considered. For the reasons mentioned above, I do not find any merit in the present petition. Accordingly, the same is dismissed.