SUPREME COURT OF INDIA

Div. Manager, New India Assurance Co.Ltd.

Vs.

A. Sankaralingam

Civil Appeal no. 4445 of 2006

(Tarun Chatterjee and Harjit Singh Bedi)

03/10/2008

JUDGMENT

HARJIT SINGH BEDI, J.

1. The facts leading to this appeal are as under:

2. The respondent-writ petitioner (hereinafter called the‘workman') was appointed on 2nd January 1986 as a Sweeper-cum-Water Carrier in the Office of the Divisional Manager, New India Assurance Company Ltd., Trivandrum Road, Tirunelveli (respondent No.2 in the High Court) and herein called the "employer", on a monthly wage of Rs.130/-. He thereafter made a request that his services be regularized but was on the contrary, informed orally that he was not required to work with effect from 15th March 1989. He thereupon sought the intervention of the appropriate Government praying for his reinstatement, but conciliation efforts having failed, the matter was referred to the Industrial Tribunal for decision. The Tribunal in its award dated 10th September

1998 held that the claimant before it, was not a workman within the meaning of section 2(s) of the Industrial Disputes Act, 1947 (hereinafter called the "Act") as he had worked only as a part-time employee and that too on an ad-hoc basis. The Tribunal also observed that as the duty hours of the workman were only one or two hours a day for which he was paid a sum of Rs.150/- p.m., and as he was entitled to work elsewhere as well, revealed his status as such. The workman challenged the award of the Tribunal before the Madras High Court. The learned Single Judge held that the fact that the workman had worked from the years 1986-1989 and as per the oral evidence, he had worked in the office till 5' O clock had been admitted and it thus appeared that the finding that he was working only 2 hours a day was factually wrong. The learned Single Judge further held that the point for decision was not the workman's plea for regularization but as to whether his services had been wrongly terminated ignoring the procedure for retrenchment envisaged under Section 25F of the Act and as such, the retrenchment itself was bad in law. The Court relied on section 2 (s) and Section 2B of the Act to hold that these two definitions were not restricted in applicability to only full time employees as the all embracing tenor of the definition took within its ambit even part time employees. The learned Single Judge accordingly quashed the award of the Tribunal and ordered the re-instatement of the workman with full back wages and left the matter of regularization of service to be considered by the employer in accordance with law. This judgment was confirmed in appeal by the Division Bench. Dissatisfied with the judgment of the learned Single Judge, the employer is in appeal.

3. Shri Atul Nanda, the learned counsel for the appellant has first and foremost argued that the finding of fact arrived at by the High Court as to the status of the workman was incorrect inasmuch as that in the application filed by the respondent on 30th May 1989 praying that his service be regularized, he had identified himself as a part-time Sweeper-cum-Water Carrier and in this background to hold that he was working on full- time basis was contrary to the record. It has also been pointed that as per application dated 23rd September 1991 addressed to the appellant by the President of the District Committee for legal aid, the workman had been employed only as a part time Sweeper. It has further been submitted that the respondent was not entitled to the benefit of Section 25 F of the Act as he was not a workman within the meaning of Section 2(s) thereof as in common understanding, a day must include a full day's work and not a part time employment. He has in this connection referred us Shankar Balaji Waje vs. State of Maharashtra 1962 (Suppl.) (1) SCR 249 in which the scope of Section 79 of the Factories Act was under consideration to plead that as this provision was analogous to Section 25 B of the Act in so far as the requirement of 240 days of employment was concerned, the workman was not entitled to any relief. He has also pointed out that this Court in Uttaranchal Forest Hospital Trust vs. Dinesh Kumar (2007) 13 SCALE 499 and in Ram Lakhan Singh vs. Presiding Officer, Labour Court, Chandigarh 1989 Labour Industrial Cases 1650, had considered the status of a part-time Sweeper, (as in the present case) and had held that such an employee could not claim the benefit of Section 25 F of the Act.

4. As against this Mr. S.Guru Krishna Kumar, the learned counsel for the workman has submitted that the reference made to the Industrial Tribunal did not raise a question as to the part-time or full time employment of the workman and the learned Single Judge and the Division Bench having both held on facts in his favour, no interference was called for in this appeal. He has also urged that Section 2(s) which defined a "workman", and Section 25B which talked of `continuous service' did not make any distinction between a part-time and full time employee and if the Legislature intended

to draw a distinction between the two categories, the definition would have been in different and positive terms. The learned counsel has also pointed out that this Court in Shri Birdichand Sharma vs. First Civil Judge, Nagpur & Ors. 1961 (3) SCR 161 and in Silver Jubilee Tailoring House & Ors. vs. Chief Inspector of Shops & Establishments & Anr. (1974) 3 SCC 498, had conclusively held that there was absolutely no distinction between a full time and part-time employee and that a workman who was working part time would not lose his status as a workman if he was employed with more than one employer. It has also been submitted that preponderance of judicial opinion of various High Courts was in favour of the above proposition of law and has cited:

(a) Govind Bhai vs N.K. Desai (Gujarat High Court) 1988 Lab I.C. 505 (para 6)

(b) Yashwant Sinha Yadav vs. State of Rajasthan (Rajathan High Court) 1990 Lab I.C. 1451 (para 9 to 15)

(c) Rajaram Rokde & Bros. vs. Shriram (Bombay High Court) 1977 Lab I.C. 1594 (following the decision in Silver Jubilee case supra - paras 2 & 5)

(d) Dr. P.N. Gulati vs. Labour Court, Gorakhpur (Allahabad High Court) 1977 Lab I.C. 1088

(e) Simla Devi vs Presiding Officer 1997 (1) LLJ 788

(f) G.M. Telecom, Nagpur vs. Naresh Brijlal Charote & anr. 2001 LAB I.C. 2127 Bombay High Court (at para 11)

(g) Coal India vs. P.O. Labour Court 2001-II-LLJ 45 Delhi High Court (pat paras 7 and 8)

(h) Kailash Chand Saigal vs.Om Prakash & Ors.132 (2006) DLT 192 Delhi High Court (at paras 5 & 6)"

5. We have heard the learned counsel for the parties and gone through the record. It will be seen that the Single Bench and the Division Bench of the High Court have both on a consideration of the oral evidence as well as on the documentary record, given categorical findings of fact on admissions made in evidence that the respondent had worked till about 5 p.m. every day but even

otherwise we are of the opinion in the light of the various decisions of the High Courts and the Supreme Court, that a part time employee would be a workman as understood in Section 2(s) thereof and would have the benefit of Section 25F of the Act. It is also relevant that the reference made to the Industrial Tribunal was as under:

"Whether the claim of Sri A. Sankaralingam that he was an employee of New India Assurance Co. Ltd., from 2.1.86 to 15.3.89 as a Sweeper cum Water Carrier is correct. If so, whether the action of the management of New India Assurance Co. Ltd., in terminating his services w.e.f. 15.3.89 is justified? What relief, if any, to Sri A. Sankaralingam entitled to?"

6. From a perusal of the reference, it is evident that the question as to the status of the workman as a full time or part time employee was not in issue and the only dispute was as to whether he was a workman with the appellant employer or not. As already observed above, it has not been disputed before us that the workman had indeed been employed but the dispute is only with regard to his status as a full time or a part time employee.

7. In the light of the above decisions, the question for consideration, which has been hotly debated, is the status of a part time employee and as to whether such an employee falls within the definition of "workman". Section 2 (s) of the Act deals with the definition of "workman" whereas section 25B talks about "continuous service". Both these provisions are reproduced below:

"Sec.2(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

(iv) 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." Sec.25-B. Definition of continuous service.- For the purposes of this Chapter,_

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer –

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than -

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if theworkman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than –

(i) ninety-five days, in the case of a workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case."

8. A bare perusal of the two definitions would reveal that their applicability is not limited to only full time employees but all that is required is that the workman claiming continuous service must fulfill the specific conditions amongst others laid down in the two provisions so as to seek the shelter of Section 25F. Mr. Nanda's reliance on Uttaranchal Forest Hospital's case (supra) and Ram Lakhan's case (supra) is misplaced. In Uttaranchal Forest's case (supra) this Court made a passing reference to the status of a part time employee, but the main issue before the Court was as to whether the workman had, in fact, put in 240 days of service which would entitle him to the benefit of Section 25F of the Act. This is what the Court had to say:

"It is undisputed that the work of cleaning the hospital has been given to a contractor w.e.f. 17.8.1996. Materials were placed before the Labour Court to show that the workman was engaged for doing a part-time job and that he had worked for a few days in several months. The Labour Court itself on consideration of the documents and records produced noted as follows:-

"It is evident that the workman had worked in August 1996-16 days, July, 1996 – 30 days, May, 1996 - 30 days, April, 1996 – 30 days, March, 1996 - 29 days, February, 1996 - 29 days, January, 1996 31 days, December, 1995 -31 days, November, 1995 -20 days (full), October, 1995 - 19 days (full) September, 1995 - 25 days (full) @ Rs.35/- per day. In addition to this, in November, 1995 - 3 days, October, 1995 – 9 days @ Rs.20/- per day towards part time work and in September, 1995 - days part time @ Rs.5/- per day, had worked."

The basic difference between a person who is engaged on a part-time basis for one hour or few hours and one who is engaged as a daily wager on regular basis has not been kept in view either by the Labour Court or by the High Court. The documents filed clearly establish that the claim of having worked more than 240 days is clearly belied.

The stand of the appellant that the respondent was called for work whenever work was available, and as and when required and that he was not called for doing any work when the same was not available has been established. The Labour Court itself noted that the workman was engaged in work by others as he was working in the appellants' establishment for one hour or little more on some days. It is also seen from the documents produced before the Labour Court that whenever respondent was working for full period of work he was being paid Rs.35/- per day and on other days when he worked for one hour he was getting Rs.5/-."

9. In Ram Lakhan's case (supra), the issue did come up before this Court and while construing the scope of Section 2 (s) and Section 25B of the Act, this Court observed that a person working on a part time basis could not strictu sensu claim to be in continuous employment of the employer but the larger question as to whether such an employee could be a workman under Section 2(s) of the Act so as to claim benefit of Section 25F thereof was being left open for future discussion. As already held above on facts, we have endorsed the view of the High Court that the workman had, in fact, been working virtually on a full time basis till 5 p.m. and had worked continuously for more than 3 years from 2nd January 1986 to 15th March 1989.

10. On the contrary, the preponderance of judicial opinion that a workman working even on a part time basis would be entitled to benefit of Section 25F of the Act is clear from the various judgments which we have referred to above. In Silver Jubilee Tailoring House case (supra) which is a judgment rendered by a 3-Judge Bench of this Court, the question was as to whether the workers who were paid on piece-rate basis though working in the shop, were workmen in terms of Section 2(s) of the Act. That is what the Court had to say:

"11. The question for decision was whether the agrarians were workmen as defined by Section 2(s) of the Industrial Disputes Act of 1947 or whether they were independent contractors. The Court

said that the prima facie test to determine whether there was relationship between employer and employee is the existence of the right in the master to supervise and control the work done by the servant not only in matter of directing what work the employee is to do but also the manner in which he has to do the work. In other words, the proper test according to this Court is, whether or not the master has the right to control the manner of execution of the work. The Court further said that the nature of (sic) extent of the control might vary from business to business and is by its nature incapable of precise definition, that it is not necessary for holding that a person is an employee, that the employer should be proved to have exercised control over his work, that even the test of control over the manner of work is not one of universal application and that there are many contracts in which the master could not control the manner in which the work was done."

11. For arriving at this conclusion, the Supreme Court referred to various judgments of this Court including Birdichand Sharma's case (supra) but distinguished the judgment in Shankar Balaji Waje's case (supra) (rendered by two Hon'ble Judges) by observing that the workman who was claiming that status was not called upon to attend duties in the factory itself as he was permitted to take the tobacco from the factory owner and role the bidis at his residence at any time without any fixed hour of work and that there was absolutely no supervision of the so called employer over his work. In conclusion, the Bench observed in (paragraph 37):

"That the workers are not obliged to work for the whole day in the shop is not very material. There is of course no reason why a person who is only employed part time, should not be a servant and it is doubtful whether regular part time service can be considered even prima facie to suggest anything other than a contract of service. According to the definition in Section 2(14) of the Act, even if a person is not wholly employed, if he is principally employed in connection with the business of the shop, he will be a `person employed' within the meaning of the sub-section. Therefore, even if he accepts some work from other tailoring establishments or does not work whole time in a particular establishment, that would not in any way derogate from his being employed in the shop where he is principally employed."

12. It will be seen from a perusal of the aforequoted passages that the observations made therein clearly suggest that a workman employed on a part time basis but under the control and supervision of an employer is a workman in term of Section 2(s) of the Act, and is entitled to claim the protection of Section 25F thereof, should the need so arise. The fact that the workman was working under the control and supervision of the appellant employer is admitted on all sides.

13. We also find that the preponderance of judicial opinion in the High Courts is also to this effect. As a sample we reproduce passages from two such judgments. A Division Bench of the Punjab and Haryana High Court in Simla Devi's case (supra), has observed as under:

"A plain reading of the definition of "workman" does not exclude the part- time workmen from the

definition of "workman". Such exclusion cannot be read into it ipso-facto, except if it is expressly provided or implied that no other interpretation is possible, which is not the case in the case in hand. We find support for our view from the observations made by the Supreme Court in Birdhichand Sharma v. First Civil Judge, (1961-II-LLJ-86), wherein the Supreme Court in facts and circumstances of the case, found that the workers even doing the job at their home are still workmen. Thus we are of the considered view that a part-time workman shall fall within the definition of "workman" and the finding returned by the Labour Court that a part-time worker is not a workman, cannot be sustained. We may hasten to add that nothing has been pointed out that on any principle of equity, justice, good conscience or the technical interpretation of the definition of workman that a part-time workman cannot be termed as a workman is unknown to the industrial world."

14. Likewise in G.M. Telecom, Nagpur's case (supra), it has been observed thus:

"The definition of `workman' as given in the Act does not make any distinction between full time employee and part time employee. It does not lay down that only a person employed for full time will be said to be a workman and that the one who is employed for part time should not be taken as a workman. What is required is that the person should be employed for hire to discharge the work manual, skilled or unskilled etc. in any industry. If this test is fulfilled, a part time employee can also be said to be a `workman'. Now, if this test is applied to the present case, it can very well be said that respondent No.1, who was appointed as a part-time sweeper and was required to do manual and unskilled work is a `workman' within the meaning assigned to the said terms in the Act and as he worked for more than 240 days in a year, the provisions of Section 25F of the Act are applicable to the case in hand and as neither any notice, as contemplated under Section 25F of the Act, was served upon the respondent No.1 nor he was paid compensation in lieu of the said notice, nor was paid retrenchment compensation, it cannot be said that the provisions of Section 25F of the Act were duly complied with. It has been time and again held by this Court as well as by the Apex Court that the non-compliance of the mandatory provisions of Section 25F of the Act would render the termination of service void ab initio. I am fortified in this view by a decision of the Apex Court in the case in Mohanlal vs. Management of M/s. Bharat Electronis Ltd., (1981) 3 SCC 225."

15. Similar views have been expressed in two Single Bench decisions of the Delhi High Court Coal India Ltd. And Kailash Chand Saigal (supra), by a Single Judge of the Gujarat High Court in Govind Bhai's case (supra) and a Division Bench of the Rajasthan High Court in Yashwant Sinha Yadav's case (supra). We are in respectful agreement with these opinions as well.

16. The question as to whether a part-time workman would be covered within the definition in Section 2(s) of the Act and whether he would be entitled to the benefit of continuous service under section 25B and the benefit of Section 25F, is answered in favour of the workman- respondent. The appeal is accordingly dismissed.