



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

901 WRIT PETITION NO. 2890 OF 1999

Keshav Namdeo Gaikwad

....Petitioner

VERSUS

Divisional Controller,
M.S.R.T.C.Ahmednagar & another

.....Respondents

.....

Mr. Mujtaba Gulam Mustafa, Advocate for the Petitioner

Mr. A. B. Dhongade, Advocate for Respondent No. 1.

CORAM : R. M. JOSHI, J.

DATE : 3rd JULY, 2024.

PER COURT :

1. Heard finally by consent of both sides.
2. Petitioner is complainant in complaint ULP No. 176/1990 filed before the Industrial Court, Ahmednagar and being aggrieved by judgment dated 16.12.1998 passed by the Industrial Court, Ahmednagar, has preferred this Petition.
3. Parties are referred to as complainant and Employer for the sake of convenience.

4. It is the case of the complainant that he was appointed as part time coolie to work for one and quarter hour a day with wages of Rs. 150/- on 05.10.1978. It is his contention that his work includes cleaning buses, loading and unloading the parcels, change destination boards etc. He claims that he has continuously worked with the employer for more than 240 days in a year and as such he is entitled for permanency. Since permanency is denied by the employer, complaint came to be filed before the Industrial Court.

5. Employer appeared before the Industrial Court and filed written statement at Exhibit C-2 wherein relationship of employer-employee is disputed. It is specifically claimed that the complainant is a licensed porter and there is agreement to that effect between the parties. It is however claimed that he was paid wages for fixed period and that he has licence to work as porter on bus stand for the remaining period as per his own desire. In view of the aforestated pleadings, learned Industrial Court framed issues. An additional issue was framed as to whether the complainant proves that there exists relationship as employee and employer.

6. Parties led evidence before the Court. The Court by passing impugned order has held that there is no employer employee relationship between them and hence complaint was dismissed.

7. Learned counsel for Petitioner-complainant submits that the Industrial Court has committed error in not taking into consideration evidence placed on record as well as admissions given by Respondent in written statement and also by the witnesses examined by the employer. He drew attention of the Court to the evidence of complainant wherein he specifically states about he working as porter and also describes the duties performed by him for the employer. It is submitted that even in the cross-examination he has maintained the stand that of not being a licensed porter which he used to be prior to his appointment from 05.10.1978. It is his submission that once the complainant proves employer and employee relationship, onus shifts on the employer to prove contrary. It is his submission that once the employer has taken a specific plea that the complainant was a licensed porter, the burden is on the employer to prove the said fact which the employer has failed in this case.

8. Learned counsel for Respondent opposed the said submission by contending that though it has come on record from written statement as well as from the testimony of witness of Respondent that complainant was working on the establishment of the employer, however, since the said work period was only restricted for one and quarter hour a day, he cannot be said to be a permanent employee of the employer. It is submitted that such back door entry is not permitted as held by the Hon'ble Supreme Court in case of State of Karnataka & others vs. Umadevi, **AIR 2006 SUPREME COURT 1806**.

9. Perusal of the impugned judgment shows that no other issue except issue of relationship of employee and employer, arose for consideration of Industrial Court. In this regard perusal of evidence led by complainant shows that he specifically deposed about nature of duties performed by him for the employer and the amount of wages paid to him. He was cross-examined by the learned counsel for employer wherein he maintained his stand that prior to his appointment from 05.10.1978, he was a licensed porter but not thereafter. As far as further cross-examination is concerned, it indicates that he was working in shifts with the employer and that

the muster record was maintained about the same. This evidence led by the complainant sufficiently shows that he has discharged the initial burden to prove employer-employee relationship. It is pertinent to note that it is the employer who maintains the record in respect of employment of the workmen. In such circumstances, it can never be expected from the workmen to lead documentary evidence in this regard. Once the complainant has discharged initial burden, onus is shifted on the employer to prove otherwise. More particularly, when the employer has taken a specific stand that the complainant was a licensed porter, it is incumbent on the part of the employer to lead positive evidence in this regard.

10. Perusal of evidence of witness examined by the Respondent shows that there is absolutely no evidence in order to conclude that the complainant was working as porter. Even in the written statement, the employer has taken a stand that the complainant was working on the establishment of employer for a period of one and quarter hour a day and thereafter he was working as licensed porter. This written statement also indicates that the employer-employee relationship has not been disputed by the Respondent/employer.

11. At this stage, it would be relevant to take into account definition of workman under Section 2(s) of Industrial Dispute Act, which reads thus :-

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 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 3[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.]

The workman therefore includes any person including an apprentice who is employed in any industry to do manual, unskilled, skilled, technical, operational or clerical and even supervisory work subject to wage limit for hire or reward. The definition therefore is wide enough to cover even a part time employee to be termed as workman. The terms of employment also need not be expressed but can be implied too. The Act does not differentiate part time, full time, daily wage, casual or regular workman. Specific exceptions are provided to bring any person out of definition of workman.

12. The Hon'ble Supreme Court in case of Devinder Singh vs. Municipal council, Sanaur, **2011 6 SCC 584**, has held in paragraph Nos. 12 to 15 as under :-

“12. Section 2(s) contains an exhaustive definition of the term “workman”. The definition takes within its ambit 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 and it is immaterial that the terms of employment are not reduced into writing. The definition also includes a person, who has been dismissed, discharged or retrenched in connection with an

industrial dispute or as a consequence of such dispute or whose dismissal, discharge or retrenchment has led to that dispute. The last segment of the definition specifies certain exclusions. A person to whom the Air Force Act, 1950, or the Army Act, 1950, or the Navy Act, 1957, is applicable or who is employed in the police service as an officer or other employee of a prison or who is employed mainly in managerial or administrative capacity or who is employed in a supervisory capacity and is drawing specified wages per mensem or exercises mainly managerial functions does not fall within the definition of the term “workman”.

13. The source of employment, the method of recruitment, the terms and conditions of employment/contract of service, the quantum of wages/pay and the mode of payment are not at all relevant for deciding whether or not a person is a workman within the meaning of Section 2(s) of the Act. It is apposite to observe that the definition of workman also does not make any distinction between full-time and part-time employee or a person appointed on contract basis. There is nothing in the plain language of Section 2(s) from which it can be inferred that only a person employed on a regular basis or a person employed for doing whole-time job is a workman and the one employed on temporary, part-time or contract

basis on fixed wages or as a casual employee or for doing duty for fixed hours is not a workman.

14. Whenever an employer challenges the maintainability of industrial dispute on the ground that the employee is not a workman within the meaning of Section 2(s) of the ct, what the Labour Court/Industrial Tribunal is required to consider is whether the person is employed in an industry for hire or reward for doing manual, unskilled, skilled, operational, technical or clerical work in an industry. Once the test of employment for hire or reward for doing the specified type of work is satisfied, the employee would fall within the definition of “workman”.

15. In *Birdhichand Sharma v. Civil Judge* this Court considered the question whether bidi rollers were workmen within the meaning of the term used in the Factories Act, 1948. The factual matrix of the case reveals that the workers who used to roll the bidis had to work at the factory and were not at liberty to work at their houses. Their attendance was noted in the factory and they had to work within the factory, though there was freedom of doing work for particular hours. They could be removed from service on the ground of absence for eight days. The wages were paid on piece-rate basis. After considering these facts, the Court held that the bidi rollers were workmen. The Court observed that

when the operation was of a simple nature and did not require supervision, the control could be exercised at the end of the day by the method of rejecting bidids which did not meet the required standard and such supervision was sufficient to establish the employer-employee relationship.

In the instant case, only contention of Employer is that complainant works for one and quarter hour and therefore he is not a 'workman'. There is no dispute made about the fact that complainant is paid wages for the said period. Evidence on record further shows that the work is done on establishment of Employer as provided by Employer. Thus, there remains no iota of doubt from evidence on record that the complainant is doing manual work for hire or reward. Quantum of wages or mode of payment would not determine the relationship between the parties. In absence of complainant being covered by exceptions provided to Section 2(s) of Industrial Dispute Act, it must be held that he is a workman within the meaning of this definition. There is absence of evidence to hold that he is a lincese porter.

13. As far as contention of learned counsel for Respondent about back door entry or right of complainant to get permanency is

concerned, stage has not come before the Industrial Court to decide the said issue. Thus, Industrial Court has not recorded any findings on merit in respect of the claim of complainant for seeking permanency. Complaint has been dismissed solely on the ground that there is no employer-employee relationship. In such circumstances, arguments advanced across the Bar by learned counsel for Employer about disentitlement of permanency to employee is premature. This issue will have to be decided by the Industrial Court by giving opportunity to both sides to lead evidence.

14. Having regard to the pleadings before the Industrial Court and evidence led by parties, there is more than sufficient evidence to hold that there exists employer-employee relationship between them. In such circumstances, impugned judgment passed by the Industrial Court would not sustain. By setting aside said order, Complaint ULP No. 176/1990 is relegated back to the Industrial Court for its decision on merit. Since the complaint is of the year 1990, the same be disposed of in accordance with law within a period of six months.

15. Petition disposed of in above terms.

(R. M. JOSHI)
Judge

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