Kanpur Electricity Supply Co. Ltd vs Shamim Mirza on 7 November, 2008

Equivalent citations: (2009) 1 SCT 240, AIR 2009 SUPREME COURT 638, 2009 (1) SCC 20, 2008 AIR SCW 7802, 2009 LAB. I. C. 415, 2008 (14) SCALE 604, (2009) 3 SERVLR 361, (2008) 14 SCALE 604, (2009) 2 CAL HN 187, (2009) 120 FACLR 143, (2009) 1 LAB LN 121, (2009) 1 CURLR 1

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Bench: D.K. Jain, C.K. Thakker

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6585 0F 2008
(Arising out of S.L.P.(C) No. 7197 of 2006)

KANPUR ELECTRICITY SUPPLY CO. LTD. -- APPELLANT (S)

VERSUS

SHAMIM MIRZA -- RESPONDENT (S)

WITH

CIVIL APPEAL NO.6586 0F 2008
(Arising out of S.L.P.(C) No. 9586 of 2006)

JUDGMENT

D.K. JAIN, J.:

Leave granted.

2. Since a common issue is involved in both the appeals, these are being disposed of by this judgment.

3. The appeals are directed against two separate judgments rendered by the High Court of Judicature at Allahabad, upholding the Awards of: Labour Court (4) Kanpur in I.D. No.70 of 1997

and Industrial Tribunal (3) Kanpur in I.D. No.46 of 1997, collectively referred to as "the adjudicatory authority", whereby the appellant had been directed to reinstate the respective respondents - namely, Shamim Mirza and Manoj Srivastava, the two workmen, with full back wages and continuity in service.

4. The appellant-company was constituted by the U.P. State Government under Section 5 of the Electricity (Supply) Act, 1948 and was charged with several duties, as enumerated under Section 18 of the said Act, in relation to generation, transmission and distribution of electricity within the State. The appellant opened various cash centres in different divisions and sub-divisions for collection of electricity bills and for the said purpose, invited tenders for installation of Bradma Machines on contract basis. One such contract was awarded to M/s Vivek and Associates in the year 1995. Under the agreed terms and conditions, the machines were to be operated by the said concern, through its employees, for which it was to be paid Rs.175/- per day, per machine. The contract is stated to have continued till the year 1997.

5. Both the respondent-workmen raised an industrial dispute, alleging that their services had been illegally terminated by the appellant. Accordingly, the State Government referred, under Section 4K of the U.P. Industrial Disputes Act, 1947 (for short `the Act'), the following dispute i.e. I.D. No.70 of 1997 for adjudication:

> "Details of Industrial Dispute Whether removal/termination of services of the workman Shri Shamim Mirza, son of Shri Atiq Mirza, Cashier, w.e.f. 2.9.1996 by the Management is legal and justified? If not, to which relief/consequential benefits and from which date, the workman concerned is entitled to?"

(Except for change of name of the workman and date of termination of his services, the dispute referred in I.D. No.46 of 1997 was on similar lines.)

6. The case of the workmen in nutshell was that: they had been appointed as cashiers at two sub-stations when the appellant had adopted the policy of centralisation of all the 16-17 sub-stations for the purposes of collection of electricity bills; several new appointments were made for operating these new machines; before their appointment as cashiers, they were all given six months training for this work; apart from collecting the electricity bills, they were also depositing the cash so collected in the Treasury in Chief Office as per the instructions of the Assistant Engineer (D); suddenly their services were terminated without assigning any reason and without giving any notice to them whereas persons junior to them were still working on the posts of cashiers. Their plea was that since the termination of their services was in violation of the provisions contained in Sections 6N, 6P & 6Q of the Act, they were entitled to be reinstated with continuity in service and with full back wages.

7. In the written statement filed before the adjudicatory authority, the stand of the appellant - management was that there was no relationship of employer and employee between them and the applicants and hence the dispute was not an industrial dispute; the post of the cashier was a promotion post which could be filled up by promotion from the cadre of assistant cashier; the cash

centres were opened in various divisions and sub-divisions for the convenience of the consumers for depositing their electricity bills; tenders were invited for installing Bradma Machines in these centres on contract basis; the tender was awarded in favour of Vivek and Associates for the period from 1st July, 1995 to 30th June, 1996 which period was later extended upto 31st July, 1997 and that the contractor was responsible for the operation and upkeep of the machines, though the cash was to be handled by appellant's cashier or its duly authorised representative and, therefore, the question of applicants' employment with the appellant did not arise at all. In other words, the stand of the appellant was that the references in both the cases were factually and legally incompetent as the applicants were not "workmen" within the meaning of the Act.

8. Upon consideration of the evidence produced by both the parties, the adjudicatory authority formed the view that though no appointment letters had been filed by the workmen but it had come in evidence that before taking the work, letters were issued to them by an Assistant Manager of the appellant; though signatures of the applicants did not appear in any of the columns of Electricity Cash and Revenue (ECR) rolls but their designation as cashier had been mentioned on all these sheets and in some of the letters there were signatures of the Assistant Engineer; in the contract given to M/s Vivek and Associates for operating Bradma machines it had been mentioned that it would be the responsibility of the contractor to operate these machines at all the 16 sub-stations but the cash was to be handled by the cashier of the appellant only but the appellant had failed to prove that any of its other cashiers' had handled the job of cash collection. It finally concluded that on the basis of the documents submitted by the workmen and for lack of proper rebuttal to these documents, there was no ground to presume that the workmen were the employees of the contractor and it stood proved that, in fact, they were in the regular employment of the appellant as cashiers. Thus, it was held that the workmen having worked for more than 240 days, their termination without notice and payment of compensation as contemplated under Section 6N of the Act, was illegal.

9. Being aggrieved, the appellant filed writ petitions under Article 226 of the Constitution, which have been dismissed by the impugned orders. The High Court has held that the Labour Court/Industrial Tribunal having considered all the aspects of the matter in the light of the evidence on record, no interference in exercise of power under Article 226 of the Constitution was called for. However, while dismissing the writ petition arising out of I.D. No.46 of 1997, the High Court modified the Award to the extent that the workman in that case would be entitled to 50% of the back wages pursuant to the Award.

10.We have heard learned counsel for the parties.

11.Learned counsel appearing for the appellant strenuously urged that both the adjudicatory authorities as well as the High Court committed grave error by acting on factually and legally erroneous premise. It was submitted that it was a clear and definite stand of the appellant before the courts below that the workmen were never employed by the appellant and they were the employees of the contractor working on the Bradma Machines installed by him for collection of the electricity bills from the consumers; there was no privity of contract between the appellant and the workmen and, therefore, the provisions of the Act were not attracted at all. Learned counsel contended that

for determining the employer-employee relationship both the courts have failed to apply the test laid down by this Court in Ram Singh & Ors. Vs. Union Territory, Chandigarh & Ors.1 It was also submitted that having observed that the workmen had neither produced the letters of appointment nor the salary slips, the courts below committed a patent illegality in relying on the documents (2004) 1 SCC 126 signed by the staff of the appellant for internal use to return a finding that the workmen were the regular employees of the appellant, which had the effect of putting the onus on the employer to prove that the workmen were not his employees. Reliance was placed on Range Forest Officer Vs. S.T. Hadimani2 to support the plea that it is for the claimant to prove that he had worked for a particular management. Lastly, relying on Nagar Panchayat Kharkhauda Vs. Yogendra Singh3, learned counsel submitted that the courts below again erred in awarding back wages to the workmen in routine.

12.Per contra, Mr. R. Venkataramani, learned senior counsel appearing for Shamim Mirza, one of the workmen, supporting the decision of the High Court, submitted that apart from the fact that the evidence produced by the workman was sufficient to prove that he was discharging his duties as cashier and not as a Bradma Machine Operator, even the official records show that he was working as an employee of the appellant. Referring to the (2002) 3 SCC 25 (2005) 13 SCC 428 application of the workman - Shamim Mirza, before the Labour Court, inter alia, praying for summoning of some documents from the appellant, including ECR register, vouchers showing payment of salaries by the appellant to him, learned senior counsel vehemently argued that on appellant's failure to produce these documents, the adjudicatory authority was justified in drawing adverse inference against them. It was also urged that the service of the workman having been terminated much after the expiry of the period of contract of Vivek and Associates, it stands established that the workman was under the control of the appellant and not the contractor. Relying on Bank of Baroda Vs. Ghemarbhai Harjibhai Rabari4, learned counsel urged that the workman having produced more than prima facie evidence, no fault could be found with the findings of fact recorded by both the courts below in favour of the workman, this Court should be loathe to interfere.

13.Mr. Praveen Chaturvedi, learned counsel appearing for the other workman - Manoj Srivastava, in order to buttress his (2005) 10 SCC 792 argument that the respondent was under the administrative control of the appellant, invited our attention to an office note dated 26th July, 1994 (Ex.34) issued by the Managing Director of the appellant to some of its cashiers, which included the name of the respondent, threatening action against them for not depositing the cash amounts collected by them. He, thus, contended that the document proves, beyond doubt, the employer-employee relationship between the appellant and respondent.

14.Having considered the matter in the light of the material referred to and relied upon by the adjudicatory authority, in our judgment, the High Court was justified in declining to interfere in both the matters.

15.It is trite that the burden to prove that a claimant was in the employment of a particular management, primarily lies on the person who claims to be so but the degree of proof, so required, varies from case to case. It is neither feasible nor advisable to lay down an abstract rule to determine the employer-employee relationship. It is essentially a question of fact to be determined by having

regard to the cumulative effect of the entire material placed before the adjudicatory forum by the claimant and the management.

16.It is true that in the instant case, the workmen did not produce the letters of appointment as also their salary slips but they have been successful in adducing some contemporaneous documentary evidence, including ECR sheets bearing the signatures of the workmen and that of another senior officer of the appellant company (Ex.W-7, W- 10 to W-15), which shows that they were collecting cash on behalf of the appellant; depositing it in the van or central office of the appellant and were answerable to the officials of the appellant. In this regard, Clause 5 of the terms and conditions of the contract awarded to Vivek and Associates is also relevant, which provides as under:

> "You will be responsible for the operation of machines only. The cash handling is to be done by K.E.S.A., Cashier or a representative of K.E.S.A. duly authorised by Dy. C.A.O./Head Cashier."

17.It has come in evidence of the witnesses examined on behalf of the workmen that it was only the respondents who were collecting the cash and no other employee of the appellant. No evidence was led by the appellant in rebuttal. Furthermore, the appellant was called upon to produce the official records but they failed to do so, with the result the adjudicatory authority drew adverse inference against the appellant. In the light of the factual scenario as emerging from the evidence on record, we are convinced that the workmen had discharged the burden which lay on them to prove the employer-employee relationship with the appellant. It is also pertinent to note that in both the cases, evidence on record shows the engagement of the workmen was prior to the award of contract to M/s Vivek and Associates for the period starting 1st July, 1995. Workman Shamim Mirza claims to have joined the appellant on 13th June, 1995 while workman Manoj Srivastava claims to have joined on 17th June, 1994, which fact was not controverted by the appellant. On the contrary, this fact stands proved from Ex.34, an office note dated 26th July, 1994, containing the name of Manoj Srivastava as one of the defaulting cashiers. Workman Shamim Mirza has also placed on record a certificate dated 9th September, 1996 issued by Assistant Engineer, sub-station Kalyanpur, certifying that he had worked at the cash collection office in the capacity of a cashier with effect from 13th June, 1995 to 31st August, 1996 with honesty and hard labour. Other than this, he had also done good job on his directions at other places. The stand of the appellant on the said certificate was that this Assistant Engineer was not competent to issue such a certificate. Be that as it may, the said document does show that the workman did work with the appellant even prior to the award of the contract to Vivek and Associates.

18.Moreover, Shamim Mirza has also placed on record a copy of an office memorandum dated 5th May, 2007, issued by the appellant indicating that another cashier, namely, Kailash Verma, stated to be similarly situated and who had also obtained an award in his favour, the appellant had arrived into an agreement with him. The said person has been reinstated in service by the appellant on the post of a cashier in the pay scale of Rs.4200-100-6400 subject to his complying with certain terms and conditions imposed on him, which does prima facie show that the appellant has been adopting some sort of pick and choose policy.

19.As regards the rulings of this Court relied upon by learned counsel for the appellant, in our view, these are of little assistance to the appellant. All these cases deal with the question of regularisation of the services of workmen, in particular those who were engaged as daily wager or on contract or for specific period/fixed term, which is not the case here. It is manifest that the only dispute referred to the adjudicatory authority was in regard to the termination of the services of the workmen without following the procedure laid down in the Act.

20.In the light of the aforenoted factual matrix and the evidence on record, we are of the opinion that the courts below were justified in holding that both the workmen have established their claim of having worked with the appellant for more than 240 days as their employees. We find no reason whatsoever to interfere with the impugned judgments to that extent.

21.The next question for determination is whether the respondents are entitled to the back-wages for the period they were out of service?

22.It is true that once the order of termination of service of an employee is set aside, ordinarily the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. While dealing with the prayer of back- wages, factual scenario, equity and good conscience and a number of other factors, like the manner of selection; nature of appointment; the period for which the employee has worked with the employer etc.; have to be kept in view. All these factors are illustrative and no precise formula can be laid down as to under what circumstances full or partial back-wages should be awarded. It depends upon the facts and circumstances of each case.

23.In General Manager, Haryana Roadways Vs. Rudhan Singh5 a three-Judge Bench of this Court has observed that there cannot be a strait jacket formula for awarding relief of back-wages and an order of back-wages should not be passed in a mechanical manner. It has been held that a host of factors, like the manner and method of selection and appointment; the nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character; and the length of service, which the workman had rendered with the employer are required to be taken into consideration before passing any order for award of back-wages. [See: also Haryana State Electronics Development Corpn. Ltd. Vs. Mamni6; U.P. State Brassware Corpn. Ltd. & Anr. Vs. Uday Narain Pandey7 and U.P. SRTC Vs. Mitthu Singh 8] (2005) 5 SCC 591 (2006) 9 SCC 434 (2006) 1 SCC 479 (2006) 7 SCC 180

24.Bearing in mind the afore-noted broad parameters, we are of the opinion that the facts at hand do not warrant payment of back-wages to the respondents. In both the cases, though the respondents have succeeded in establishing that they were in the employment of the appellant when their services were terminated but nothing has been brought on record to show that they were selected through a regular recruitment process. It has also not been shown whether they were actually qualified for the post of a cashier. Besides, on their own showing they had worked with the appellant for about two years when their services were terminated. These circumstances, in our view, disentitle them from their claim for back wages. Accordingly, the orders of the High Court to the extent they affirm the directions of the adjudicatory authority with regard to the payment of

back wages are set aside.

25.Consequently, for the aforesaid reasons, both the appeals are allowed to the extent indicated above. However, in the circumstances, there will be no order as to costs. .....J. (C.K. THAKKER) .....J. (D.K. JAIN) NEW DELHI;

NOVEMBER 7, 2008.