Bhandari Builders Pvt. Ltd. vs M.K. Seth And Another on 7 December, 1987

Equivalent citations: 1988(15)DRJ77, [1989(58)FLR249], (1988)IILLJ5DEL, 1988RLR166

JUDGMENT

1. Bhandari Builders Private Limited has filed this writ petition under Articles 226 and 227 of the Constitution of India against the order dated 5th September, 1986 of Shri M. K. Seth, Authority under the Delhi Shops and Establishments Act, 1954. Facts leading to the filing of the present petition are that the petitioner, a private limited company, is engaged in various construction projects in India as well as outside India. At the relevant time, the petitioner company had a project for construction of certain buildings in Baghdad (Iraq). For the purpose of the said project, the petitioner required certain personnel and thus it issued an advertisement in the Hindustan Times, dated 28th August, 1982 inviting applications. At that time there was a vacancy in the accounts branch at the head office of the petitioner company in Delhi for which a candidate qualified as chartered accountant was required. Respondent No. 2, Shri S. S. Pushkarna, who is a chartered accountant, admittedly gave an application to the petitioner but he wanted to be appointed in the project of the petitioner at Iraq. It is an admitted case that later on the petitioner needed an officer in the accounts branch in its project at Iraq and respondent No. 2 was offered the appointment which was accepted by respondent No. 2 and on 1st October 1982, the necessary agreement was executed between the parties. Before that the petitioner obtained necessary visa on the passport of respondent No. 2 for Iraq by writing a letter dated 25th September 1982, to the Iraq Embassy. It is admitted case that respondent No. 2 joined at the project of the petitioner in Iraq on 7th October 1982, and he, however, had tendered a resignation which was accepted on 12th February 1983. So, in this way, respondent No. 2 remained employee of the petitioner at its project in Iraq for the period from 7th October 1982, to 12th February 1983. Respondent No. 2 was paid his dues at Iraq and respondent No. 2 executed a receipt in respect of the same that he has been paid his dues in full and final settlement of all his claims. This receipt is dated 22nd February 1983. Respondent No. 2 returned to India in February 1983, and on 30th July 1985, he instituted a claim petition before respondent No. 1, the authority appointed under the Delhi Shops and Establishments Act, 1954 in which he claimed Rs. 12,000 as wages for the month of September, 1982, Rs. 3,000 wages for the period from 16th February 1983, to 22nd February 1983, and Rs. 6,240 as cost of return air ticket from Iraq to Delhi and Rs. 27,000 as overtime wages for the period from 7th October 1982, to 22nd February 1983. So, in all, respondent No. 2 claimed Rs. 48,240. In this claim petitioner respondent No. 2 had averred that he worked at the head office of the petitioner at Delhi for the month of September 1982, and thus he is entitled to wages for that month. He also pleaded that he was supplied air ticket only on 22nd February, 1983, for return to India. Hence he is entitled to wages for the period from 16th February, 1983, to 22nd February, 1983, and that the petitioner was also liable to reimburse him with the cost the air ticket and that for the relevant period he had worked overtime, i.e., 10 hours every day while under the rules he was supposed to work 8 hours. So he claimed overtime wages. In the claim petition he had mentioned that he had been making oral

representation to the management with regard to his claim and ultimately it was only in July 1985, that the petitioner finally refused to make the payment of his dues and thus the claim was brought under Section 21 of the aforesaid Act.

2. This claim was contested by the petitioner on various grounds, inter alia, that the provisions of the said Act were not applicable to responded No. 2 as respondent No. 2 had never worked in Delhi and he was appointed for the project of the petitioner in Iraq and respondent No. 2 had rendered his services in Iraq on that project. It was further pleaded that the claim of respondent No. 2 was also barred by limitation as the claim ought to have been brought within one year from the time the alleged amount became due to respondent No. 2. On merits it was pleaded that respondent No. 2 had not rendered any service in India and had been working with the petitioner in Iraq and had not worked with the petitioner in September 1982, and that the employment agreement was executed on 1st October 1982, and, after the resignation of respondent No. 2 was accepted, respondent No. 2 is not entitled to any wages for the subsequent period. It was denied that respondent No. 2 had rendered any overtime work at Iraq. It was also pleaded that the petitioner would have been liable to pay the fare for return of respondent No. 2 form Iraq to Delhi if respondent No. 2 had rendered the service for the period mentioned in the contract but respondent No. 2 voluntarily resigned before the expiry of the term of the contract. So in terms of the contract he was not entitled to any air ticket from the petitioner. It was pleaded that respondent No. 2 owes Rs. 5,147 to the petitioner as the amount of income-tax paid by the petitioner on behalf of respondent No. 2.

3. Respondent No. 2 alone appeared in support of his case before the Competent Authority whereas, the petitioner examined one of its directors, Mrs. Mahinder Bakshi, and another employee, Shri N. K. Gupta. The Competent Authority has, vide the impugned order, given the finding that it has the jurisdiction to try the claim in as much as the head office of the petitioner company is located at Delhi. Unfortunately, the authority did not care to examine the provisions of the Act in order to see whether respondent No. 2 was covered by those provisions or not. Respondent No. 1 also gave the finding that respondent No. 2 is entitled to have salary of the period from 26th September 1982, to 30th September 1982, which comes to Rs. 2,306 and overtime wages to the tune of Rs. 27,000. Other claims of respondent No. 2 were declined.

4. Learned counsel for the petitioner has vehemently contended that the provisions of the aforesaid Act were not at all applicable and respondent No. 2 could not invoke the jurisdiction of respondent No. 1 for entertaining his claim. It has been argued that the petitioner had a project at Iraq which is a commercial establishment and as respondent No. 2 has rendered services as employee of the said establishment of the petitioner at Iraq and thus the said establishment is not covered by the provisions of the Delhi Shops and Establishments Act, 1954. Counsel for the petitioner made reference to various provisions of the Act to show that this Act was meant to apply to establishments working in Delhi and could not have any jurisdiction over the establishments which are beyond the territorial jurisdiction of Delhi. I will deal with this point first as it goes to the root of the matter. Counsel for respondent, on the other hand, has argued that respondent No. 2 was employed by the petitioner and thus became its employee, as understood by the definition of employee given in this Act, and as respondent No. 2 had rendered service in connection with the business of the petitioner, even though in Iraq, still respondent No. 2 is covered by the provisions of the Act. He has argued

that the office being run by the petitioner at Iraq could not be termed as an establishment as such office had no independent business of its own. He has argued that the provisions of the Act should be liberally construed so as to render benefits to the employees.

5. The Delhi Shops and Establishments Act, 1954 is a socialistic piece of legislation for ameliorating the service conditions of the employees working in shops, commercial establishments, places of public entertainment or amusement or other such establishments. This piece of legislation is enforced to stop the exploitation of the weaker sections of the society. In this highly competitive world, where there is a huge unemployment, the weaker section of the people who clamour for employment to earn their livelihood was prone to be exploited by the employers and in order to provide succour to such employees so that they should have decent working hours and also decent wages this particular Act was brought into existence for its application to the establishments in Delhi. Similar types of legislations have been promulgated in the different States as the subject is covered by the entry in the concurrent list on which both the States and Centre could legislate. Before I refer to the different provisions of this statute in order to understand as to whether the provisions of this Act are applicable to respondent No. 2 and the petitioner, it is necessary to keep the facts of this case in view. Annexure I-A is the copy of the application given by respondent No. 2 which makes it clear that respondent No. 2 wanted service only in a Gulf country. Annexure II is the letter dated 1st October 1982, issued by the petitioner offering the employment to respondent No. 2 to the post of Accounts Manager (Iraq Works). On that very date, employment contract was executed between the parties which is Annexure III. The perusal of this contract shows that respondent No. 2 was employed by the petitioner for its project at Iraq as 800 residential houses at Najaf in Iraq were to be constructed and which contract was to remain in force for a period of 12 to 15 months. Respondent No. 2 was put on a probation for three months and the contract was initially for 12 months. He was to be paid salary in Iraq Dinar I.D. 300 per mensem. He was to be provided free passage for going to Iraq and also for his return thereafter on completion of his service as per terms of the agreement. The contract could be terminated by either party by giving one month's notice or salary in lieu thereof. It was mentioned in the contract that respondent No. 2 is not in employment of the employer in India. It has also come out in the statement of respondent No. 2, copy of which is Annexure IX, that he had worked with the management of the petitioner at Iraq. It would show that there was regular office being maintained by the petitioner at Iraq which was being managed there by the officers of the petitioner. Counsel for respondent No. 2 also did not dispute the fact that the petitioner was having an office in Iraq to look after the project of construction of houses at that place. The admitted case of the parties is that respondent No. 2 was employed by the petitioner for being posted at the petitioner's office in Iraq for the performance of the petitioner's business. i.e. the construction of houses. The lower authority has gone wrong in giving the finding that respondent No. 2 had rendered any service at the head office of the petitioner at Delhi for a few days of September, 1982. He has misinterpreted the letter, copy of which is Annexure I-B, which was issued by the petitioner to Embassy of Iraq for getting the visa endorsed on the passports of his employees who were to be sent to Iraq for their construction project. This step was taken by the petitioner in connection with giving employment to respondent No. 2 in Iraq. It does not mean that respondent No. 2 was employed by the petitioner for working in its office at Delhi for any period. That finding of the lower authority being in conflict with the documentary evidence has to be set aside.

6. Now, coming to the vital point whether the provisions of the Delhi Shops and Establishments Act, 1954 were applicable to the case of respondent No. 2 we have to see various provisions of the Act. Section 1 clearly lays down that this particular Act applies to Union Territory of Delhi. Accordingly, the commercial establishment defined in Section 2(5) pertains to any premises wherein any trade, business or profession of any work in connection with or incidental or ancillary thereto is carried on. So there has to be a particular premises before the same could be termed as commercial establishment. Section 2(7) defines the employee as a person wholly or principally employed whether directly or otherwise and whether for wages (payable on permanent periodical contract, piece rate or commission basis) or other consideration, about the business of an establishment. Section 5 requires the registration of a particular establishment with the Chief Inspector. The registration certificate has to be permanently displayed at the establishment which will contain all the particulars mentioned in that Section. Section 8 deals with the hours of work to be performed by the employees of the establishment. It also mentions that atleast 3 days' notice must be given to the Chief Inspector if any person employed on overtime is to be entitled to any remuneration calculated by the hour. Then there are provisions for rest and meals, prohibition of employment of children and any employment of women beyond 9.00 p.m. in Sections 10 to 14 and closing hours of the establishments and close days in Sections 15 and 16. Sections 18 to 20 pertain to wages. Then Section 36 gives power to the Government to appoint Chief Inspector and other Inspectors. Section 37 enables the Chief Inspector or the Inspectors to inspect the establishments or their accounts in order to see that compliance with the provisions of the Act is being made. In case the establishment is not in Delhi it is not understood how the Chief Inspector or Inspector could perform his duties. Moreover, if an employee is working in a foreign country in an office of a particular person, obviously, the Chief Inspector or the Inspectors cannot have any supervision over that office and the employees working therein. There could be no intimation to the Chief Inspector in case any overtime work is to be taken from any employee.

7. The provisions of the Act leave no room for doubt that they are to apply to the establishments located in Delhi and not to any establishments working outside Delhi. Counsel for respondent No. 2 has vehemently argued that in order to term any particular office as an establishment it must be shown that the said office had its own independent business. I am afraid that no such ingredient is to be established. Only thing to be seen is whether a particular office is an establishment or not and in case that particular establishment is not in Delhi the provisions of this Act would not apply. The office which the petitioner was having in Iraq by itself can be termed as an establishment. It cannot be held that the mere fact that the business of the petitioner is being carried on from that office, so that the petitioner's office in Delhi could be treated as an establishment and not the petitioner's office at Iraq. It is evident that respondent No. 2 definitely worked in connection with the business of the petitioner which the petitioner is having in Iraq. The provisions of this Act came up for consideration in a case reported as Union Cooperative Society Ltd. v. R. K. Behl, 2nd (1976) 1 Delhi 862. In this case, a person was employed and was attached to head office of the employer at Delhi. He was transferred to Kanpur branch. Considering the provisions of the Act, this Court gave the finding that the branch office at Kanpur is to be taken to be an independent establishment and the provisions of the Delhi Act would not apply to such employee who had been transferred to the branch office in Kanpur. Counsel for respondent No. 2 tried to distinguish this case by pointing out that a branch office may be having a separate business and so could be treated as an independent

establishment. I do not think that this judgment can be distinguished on such a point. After all, the overall business is of a particular company which may have different offices at different places for running that business. It cannot be argued that each office where the business of the company is being run is not separate establishment for the purposes of legislation like the Delhi Shops and Establishments Act. Each premises where commercial activity of the nature given in the definition is carried on is to be treated as a separate establishment.

8. Counsel for the petitioner has cited India Cable Co. v. Their Workmen, (1962-I-LLJ-409), where the interpretation of the expression "industrial establishment", as appearing in Section 25-G of the Industrial Disputes Act, came up for consideration. It was held that the decisive elements in order to determine whether a particular branch of a company is an industrial establishment are the location of the establishment and its functional integrality. i.e., the existence of one code relating to the categories of workmen and their scales of wages. The expression "industrial establishment" has been used in order to empower the appropriate Government of the area where such an establishment exists to make a reference of dispute and under Section 25-G, if there takes place any retrenchment in an industrial establishment then the workmen who joined last are to be retrenched first. The contention was raised that the company having one business at different places should be termed as one industrial establishment which argument was not countenanced by the Supreme Court. Although the expression "industrial establishment" as interpreted in this judgment is in a different context yet the same principles can be applied in determining whether the particular establishment is independent establishment or not for the purpose of the provisions of the present Act. In the present Act, the definition of commercial establishment makes it clear that every premises where commercial activity is carried out is by itself an establishment. So the office, being run by the petitioner company at Iraq, whether respondent No. 2 was employed has to be treated as an independent establishment and that establishment being not located within the territory of Delhi, the Competent Authority under the Act had no power to entertain, the claim of respondent No. 2.

9. Counsel for respondent No. 2 cited B. P. Hira v. C. M. Pradhan, (1959-II-LLJ-397), in support of his contention that the provision of the present Act be constructed liberally and the definition of commercial establishment and employee should include the employees even though they are working outside Delhi in different offices of the petitioner. I have gone through the said judgment and find that the facts of the said case were totally different. While construing the provisions of the Factories Act, particularly Section 2 which defined "worker" for the purpose of the said Act which did not include the employees not working in the factory itself who were claiming overtime wages but Section 70 of the Act was interpreted to include such workmen as well so as to be entitled to have the overtime wages by virtue of Section 59 of the Factories Act. It was also mentioned that the factory premises are not covered by the definition of establishment appearing in the Bombay Shops and Establishments Act but by virtue of Section 70 the workers were held to be entitled to overtime wages even though they were working in such premises although they were not covered by the definition of worker given in the Factories Act. Nothing said in this judgment is of any help to respondent No. 2 in seeking benefits under the Delhi Shops and Establishments Act, because as discussed above, the provisions of this Act did not cover the case of respondent No. 2 at all.

10. Counsel for respondent No. 2 also cited Union of India v. G. M. Kokil (1984-II-LLJ-20). In this case also, the provisions of the Bombay Shops and Establishments Act, 1948 came up for consideration and it was held that the persons who may or may not be employed as workers within the meaning of Section 2(1) of the Factories Act yet being employed in connection with a factory would be entitled to the benefits of the Factories Act including of Section 59. That is not the point in issue in the present case. The question which is material for deciding the present case is whether respondent No. 2 was employed in any establishment of the petitioner in Delhi or not which, according to my discussion above, he was not. Hence, he was not covered by the provisions of the Delhi Shops and Establishments Act.

11. Counsel for respondent No. 2 also cited Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu, . This judgment is on a totally different aspect. Here a mother had obtained an order of custody of minor child from the English Court and father had brought the child to India. The mother filed the writ petition in India for getting the custody of the child. It was held that the order of the English Court directing custody of the child to the mother is binding. I do not understand how anything said in this judgment is of any help to interpret the provisions of the Delhi Shops and Establishments Act.

12. Then reference was made to Royal Talkies, Hyderabad v. Employees' State Insurance Corporation, (1978-II-LLJ-390). The Supreme Court considered the definition of employee appearing in Section 2(9) and giving it the widest scope, it was held that the person must be employed in or in connection with the work of the establishment in order to come within the definition "employee" and those words "in connection with the work of the establishment" were held to postulate some connection between what the employee does and the work of the establishment. It is argued before me that similarly respondent No. 2 should be held to be an employee as defined in the Delhi Shops and Establishments Act, and be given the benefits of the said Act. Counsel for respondent No. 2 forgets that it has to be proved that respondent No. 2 is an employee working in an establishment in Delhi before he could be given benefits of the provisions of the said Act. However, on the facts as have come out on record as discussed above, as the petitioner has his office at Iraq in which respondent No. 2 was employed and thus that office of the petitioner has to be treated as an establishment and the same being not located within the territories of Delhi, the provisions of the Act cannot be invoked for the benefit of respondent No. 2 even though these provisions are constructed liberally.

13. Finally, counsel for respondent No. 2 has cited Regional Director, Employees' State Insurance Corporation v. South India Flour Mills (P.) Ltd., (1986-II-LLJ-304). The question which arose for decision in the said judgment was whether a particular worker is to be treated as employee within the definition of Section 2(9) of the Employees' State Insurance Act, 1948. Nothing said in this judgment is of any help to respondent No. 2 for showing that he is an employee working in any establishment at Delhi. The order of the Competent Authority has to be set aside without jurisdiction.

14. On the question of limitation also, the authority has exercised its discretion without giving any cogent reasons. Respondent No. 2 had executed a receipt in full and final settlement of his claim in

1983. Even though legally he could not be bound by the contents of the said receipt in view of Section 24 of the Act, still he was legally bound to invoke the jurisdiction of the authority within one year when his claim arose against the petitioner but he invoked the jurisdiction belatedly in 1985. The convenient date was given in the claim petition in order to show that he has been making representations for about more than two years and ultimately he was verbally informed on 26th July 1985, that his claim is not to be accepted by the petitioner. Respondent No. 2 is an educated person. It is not possible that he would have slept over his rights on mere verbal assurances of some persons on behalf of the petitioner that his claim would be entertained and examined. So, reasons of respondent No. 2 for exercise of discretion in his favor for condensation of delay were, on the face of it, baseless. The claim of respondent No. 2 was hopelessly barred by time. A person who had knowingly executed a receipt recording full and final settlement of his claim would not have waited for more than two years to challenge that receipt and put up his claim under the Act.

15. In regard to the grant of overtime wages, there was only ipse dixit of respondent No. 2 that he has performed duty for 10 hours daily in Iraq. He never stated that any attendance register was being maintained in Iraq which could show that he had performed overtime duties. So there was no question of drawing any adverse inference against the petitioner for non-production of any such record. In case respondent No. 2 had rendered any overtime work he would have not failed to serve a notice in writing on the petitioner as soon as he returned to India if he was not in a position to put up his claim while in Iraq. Respondent No. 2 admittedly was head of the accounts department in that office of the petitioner in Iraq. So, it is not understood why he should have put in extra hours of work. If he had done so voluntarily, then he was not entitled to any overtime wages. There is no evidence that he had been directed by any one to work overtime. So, examining from any angle. I find that the impugned order cannot be supported in law. I allow the writ petition. I make the rule absolute and quash the impugned order passed by respondent No. 1. In view of the legal question involved I leave the parties to bear their own costs.