LAWS(BOM)-2018-6-140

HIGH COURT OF BOMBAY

Coram : S.C.Gupte J.

Decided On : June 06,2018

Appeal Type : Writ Petition 3376 of 2017

Final Verdict : Petition dismissed

Appellants :

Prabha Engineering Pvt Ltd

Vs.

Respondents :

Sarva Mazdoor Sangh And Ors

Advocates :

A.V.BUKHARI,BURHAN V.BUKHARI,KETAKI REGE,B.D.Birajdar,S.B.Bhatagunaki

Equivalent Citation :

LAWS(BOM)-2018-6-140, LLR-2018-0-828

Referred Judgement :

GUJARAT ELECTRICITY BOARD,THERMAL POWER STATION,UKAI,GUJARAT VS. HIND MAZDOOR SABHA, [1995 1 CURLR 967] [REFERRED TO]

WORKMEN OF NILGIRI COOP.MKT. VS. STATE OF TAMIL NADU, [2004 1 CURLR 802] [REFERRED TO]

Referred Act :

CONSTITUTION OF INDIA, ART.226, ART.227

INDUSTRIAL DISPUTES ACT, 1947, S.10

HeadNote :

(1) Constitution Of India :: ART.227 - Power of superintendence over all courts by the High Court,ART.226 - Power of High Courts to Issue certain writs

(2) Industrial Disputes Act, 1947 :: S.10 - Reference of disputes to Boards, Courts or Tribunals

JUDGMENT :

S.C. Gupte, J.

(1.) Heard learned Counsel for the parties. Rule. Rule taken up for hearing forthwith, by consent of

Counsel.

(2.) This petition seeks to challenge an award passed by the Industrial Tribunal at Mumbai in a reference under Section 10 of the Industrial Disputes Act ("Act").

(3.) The Petitioner is an engineering company manufacturing automobile parts. Respondent No.1 is a trade union representing workmen engaged by the Petitioner through contractors purportedly under the Contract Labour (Regulation and Abolition) Act, 1970. Respondent Nos.2 to 4 are said to be licensed contractors through whom workmen are engaged. The dispute in the present petition concerns employment of about 31 employees engaged by the Petitioner through Respondent Nos.2 to 4. The agreements for supply of contract labour, under which these workmen were employed purportedly as contract labour and were working for various periods between 8 to 15 years, were not renewed in the year 2004 by the Petitioner. At that stage, on or about 6 September 2004, Respondent No.1 Union sent demand letters to the Petitioner demanding that 31 employees engaged by the Petitioner through Respondent Nos.2 to 4 be treated as direct and permanent employees of the Petitioner from the dates of their respective appointments and all benefits be given to them as in the case of other permanent/regular employees working in the Petitioner establishment. The demands were referred to the conciliation officer. Upon failure of conciliation proceedings, the matter was referred by the State Government to the Industrial Tribunal at Mumbai. It was the case of the Respondent union before the Industrial Tribunal that the contracts for supply of labour purportedly entered into between the Petitioner and Respondent Nos.2 to 4 were sham and bogus and that for all purposes and intents, these 31 employees were entitled to be treated as direct and permanent employees with effect from the dates of their respective appointments and getting all service benefits including wages as in the case of permanent employees of the Petitioner. On the other hand, it was the case of the Petitioner and Respondent Nos.2 to 4 that the workmen were employees of the contractors; they were paid wages, and supervised, by the latter; and there was no masterservant relationship between the Petitioner and the workmen. Both sides led oral and documentary evidence. The Industrial Tribunal, in its impugned order, declared that these alleged contractual employees be treated as direct employees of the Petitioner from the dates of their appointment and all benefits, including wages and allowances as in the case of permanent employees of the Petitioner, be extended to them. Being aggrieved by this award, the Petitioner has approached this court under Articles 226 and 227 of the Constitution of India, assailing the impugned award.

(4.) At the outset, Mr.Bukhari, learned Senior Counsel appearing for the Petitioner, raises certain legal objections concerning the impugned award. Learned Counsel submits that the services of these 31 workmen were terminated as far back as on 31 December 2004 and that on the date of the reference, neither of these workmen was in the employment either of the Petitioner or of any of contractors, i.e. Respondent Nos.2 to 4. Relying on the judgment of the Supreme Court in the case of Oshiar Prasad vs. Employers of Sudamdih Coal Washery of M/s.Bharat Coking Coal Limited, Dhanbad, Jharkhand, 2015 4 SCC 71 , learned Counsel submits that there was, in the premises, no industrial dispute in existence on the date of the reference and accordingly, the reference was misconceived and incapable of being answered in favour of the Respondent union. In Sudamdih Coal Washery's case, the

employment of the workmen was terminated sometime in December 1979. The reference was applied for by the concerned workmen sometime after November 1994, that is to say, nearly 15 years after the concerned workmen ceased to be in the employment. The Supreme Court held that under Section 10 of the Industrial Disputes Act, the appropriate Government is empowered to make a reference only when "industrial dispute exists" or "is apprehended between the parties". The court noted that it was an admitted case that the services of the appellants before the court and others at whose instance the reference was made were terminated long before the making of the reference; these workers were neither into the services of the contractor nor the principal employer on the date of making of the reference; and accordingly, no industrial dispute existed or was apprehended in relation to the Appellants' absorption in the services of the principal employer on the date of making of the reference. The court noted that it was a settled principle of law that absorption and regularisation in service could be claimed or granted only when the contract of employment subsisted and was in force; once such contract came to an end either by efflux of time or as per the terms of contract or its termination by the employer, then in such event, the relationship of employer and employee came to an end and no longer subsisted except for the limited purpose of examining the legality or correctness of its termination. The court, in other words, was of the view that since the appellants' services were terminated, whether rightly or wrongly, long back, the question of their absorption or regularisation in the services of the principal employer, which was the claim before the court, did not arise; this issue could not have been gone into on its merits for the reason that it was not legally possible to issue any direction to absorb/regularise any of the applicants so long as they were not in the employment. The fact situation of our case is completely different. In our case, the demand for regularisation and absorption of workmen was made admittedly during the subsistence of the contract of employment. On 6 September 2004, when the notice of demand was issued by the Respondent union, all 31 employees were admittedly in the employment. Even when the conciliation proceedings took place, these workmen were working at the Petitioner's undertaking. During the pendency of the conciliation proceedings, their services came to be terminated on 31 December 2004. In fact, their respective terminations were also made the subject matter of separate industrial disputes in respect of which separate references were made and separate awards were declared. These awards form part of the subject matter of the companion petitions, which are placed along with the present petition. Section 10 of the Industrial Disputes Act provides for reference of a dispute or any matter appearing to be connected with or relevant to the dispute to a tribunal for adjudication. The subject matter of the reference in the present case was the demand which the union had raised on the company vide their letter dated 6 September 2004. It is this dispute, which is referred in the schedule of the order of reference. On the date when this dispute was raised and the machinery under the Industrial Disputes Act was invoked, all 31 employees were very much in employment and their absorption or regularisation in the service of the Petitioner was a live dispute which needed to be referred. In any event, the subsequent termination of the employees forms but a part of the very dispute in connection with their absorption or regularisation or is a fallout of the same and can very well be referred as a matter in connection with and relevant to the dispute. There is, accordingly, no substance in the objection raised by Mr.Bukhari.

(5.) The second objection of Mr.Bukhari is that in the face of the fact that there was no employeremployee relationship between the Petitioner and any of these 31 workmen and no other permanent workmen of the company had supported the demand for the dispute raised by the Respondent union in connection with regularisation or absorption of these 31 employees as direct employees of the Petitioner, the reference was not maintainable. Learned Counsel submits that it is only the permanent workmen of the Petitioner, who can raise an industrial dispute as defined under Section 2(k) of the Industrial Disputes Act. The present reference not having been sponsored or supported by any of the permanent workmen, was not maintainable. Learned Counsel relies on the judgment of the Supreme Court in the case Gujarat Electricity Board, Thermal Power Station, Ukai, Gujarat vs. Hind Mazdoor Sabha, 1995 1 CurLR 967 in this behalf. There is, in the first place, nothing in Section 2(k) of the Industrial Disputes Act to suggest that disputes or differences between employers and workmen referred to therein require any sponsorship, espousal or support of permanent workmen. The Respondent union went before the industrial adjudicator on the express footing that there was an employeremployee relationship between 31 workmen, whose cause it espoused, and the Petitioner. This was on the footing that though the workmen were purportedly engaged as contract labour under agreements for supply of labour entered into by the Petitioner with Respondent Nos.2 to 4 herein, the agreements were sham and bogus and that for all purposes and intents, the workmen were direct employees of the Petitioner or, in any event, were to be treated as such. In other words, the dispute raised was between the Petitioner as an employer and the workmen as direct workmen of the Petitioner engaged through sham and bogus contracts with socalled contractors. This dispute is squarely covered under the definition of an industrial dispute in Section 2(k) of the Industrial Disputes Act. The judgment of the Supreme Court in the case of Gujarat Electricity Board, referred to by Mr.Bukhari, is beside the point. Though, as in the present case, an application was made in that case under Section 10 of the Industrial Disputes Act for absorption or regularisation of workmen on the ground that the agreement for supply of contract labour, under which the workmen were purportedly engaged, was sham and bogus, the employer's argument before the court was that the application in effect sought abolition of contract labour in a process, operation or other work in the employer's establishment. It was submitted that under Section 10 of the Contract Act, exclusive jurisdiction was vested in the appropriate government to prohibit contract labour after following the procedure laid down therein. In the backdrop of these contentions, the Supreme Court laid down the following law. If the contract is sham or not genuine, the workmen of the so called contractor can always raise an industrial dispute for declaring that they were always the employees of the principal employer and for claiming benefits of service as such. When such dispute is raised, it is not a dispute for abolition of contract labour but a dispute concerning sham and bogus character of the contract and resulting direct employment of the concerned workmen. Provisions of Section 10 of Contract Labour Act do not bar raising or adjudication of such dispute. When such dispute is raised, the Industrial Adjudicator has to decide whether the contract is sham or genuine. If the adjudicator comes to the conclusion that the contract is sham and not genuine, he has jurisdiction to adjudicate the dispute. If, however, he comes to the conclusion that the contract is genuine, the only course left to him was to refer the workmen to

the appropriate government for abolition of contract labour under Section 10 of the Contract Labour Act and keep the dispute pending in the meanwhile. This latter course can be followed only if the dispute is espoused by the direct workmen of the principal employer. The rationale for such proposition is fairly clear. So long as contract labour, which is genuine and not nominal, sham or bogus, is not abolished and further the concerned workmen are not absorbed or regularised after such abolition, they can never claim to be workmen of the principal employer. Since they are not workmen of the principal employer, till such eventuality occurs, the dispute between them and the principal employer can never be termed as an existing dispute between an employer and his workmen. This law has no application to a case where workmen were purportedly engaged through a contractor whose contract for supply of labour is sham or bogus and who came before the industrial adjudicator with a case that they were always direct employees of the principal employer or entitled to be treated as such. As the Supreme Court itself has clarified in Gujarat Electricity Board's case referred to above, such dispute is clearly an industrial dispute within the meaning of Section 2(k) of the Industrial Disputes Act and nothing stated in Section 10 of the Contract Labour Act comes in the way of such dispute.

(6.) Mr.Bukhari next submits that the industrial adjudicator in the present case has ordered regularisation or absorption of the concerned employees without having come to a finding that the contract under which they were engaged was sham or bogus. There is no substance whatsoever in this submission. The entire basis on which the reference was made and parties made submissions before the industrial adjudicator envisages a clear case of sham and bogus character of the contract. The impugned award of the Tribunal opens with this central question. It proceeds to discuss every piece of evidence and scrutinise every argument advanced before it with a view to answer this central question. At the end of this discussion, the Industrial Tribunal holds that the concerned workmen, for all intents and purposes, were always workmen of the Petitioner. The only implication that follows from this conclusion is that the contract of supply of labour, under which they were engaged, was merely nominal and not a genuine contract. The industrial adjudicator does not have to say in terms that the contract was sham and bogus. That is merely a slogan. If, in fact, he comes to a conclusion that the concerned workmen were direct employees of the principal employer and not of the contractor, he effectively holds that the contract was sham and bogus. There is, accordingly, no substance in this submission.

(7.) It is next contended that the Industrial Tribunal has not taken into account undisputed facts of the case. Learned Counsel submits that extensive oral and documentary evidence led in this behalf by the employer as well as the contractors was disregarded by the Industrial Tribunal. Learned Counsel submits that, on the other hand, the only evidence led on behalf of 31 employees was the evidence of a lone employee, who did not have authority to depose on behalf of the others. The impugned award of the Industrial Tribunal shows a detailed analysis of the entire evidence led before it. In the first place, the award notices that the so called agreements for supply of contract labour entered into between the parties showed that labour was to be engaged under them for the regular and perennial work at the factory. The agreement between the Petitioner and Muthu Contractor (Respondent No.3) makes it clear that the contract envisaged engagement of services of an agency "for the purpose of providing

services in fabrication from time to time at their factory", whilst the contract between the Petitioner and Kale Contractor (Respondent No.2) was "for the purpose of providing services in assembly work from time to time in their factory". The contract with the third contractor, namely, Aloos Contractor (Respondent No.4) was for providing services in material handling. In other words, the stand taken by the Petitioner and its contractors before the Industrial Tribunal that these workmen were engaged only in the work of unskilled jobs, like shifting of materials, loading, unloading and similar work was clearly contrary to the contemporaneous documents executed between the parties. The Industrial adjudicator has considered this vital aspect in its order. The management witness in his evidence was unable to indicate any material to show that these workmen carried out the work of loading, unloading, etc. Accordingly, in its impugned order, the Industrial Court notes that all 31 employees worked in the factory of the Petitioner on shop floor with the help of machinery of the latter. It is not in dispute that they worked with other permanent employees of the Petitioner. They worked continuously for years together without any break. In other words, their work was in the nature of perennial work of production of wiper motor and automobile motor parts, which was the business of the Petitioner. Apart from this central aspect, the Industrial court noted, whilst discussing the issue of supervision, that it was borne out by the record that the three contractors, who claimed that they used to visit the shop floor every day, were unable to give any account of the nature of work carried out by the concerned employees; they did not know the name of the supervisor of the Petitioner; there was no evidence furnished by them that these employees worked under the control or supervision of the contractors and not of the Petitioner. There was no production card or work card of the employees produced by the contractors. Even the witness of the Petitioner feigned ignorance as to the identity of the supervisor and the nature of work carried out by these 31 employees. In the circumstances, considering the nature of the work, for which they were engaged, the Industrial Tribunal rightly came to the conclusion that these 31 employees were all working under the direct control and supervision of the officers and supervisors of the Petitioner. The Industrial Court also noted that by virtue of agreement with the union, some of the casual employees of the Petitioner were made permanent. There was substantial evidence to show that the Petitioner was habitually engaging contractors or casual workers for regular work of its production and assembly line. In the light of all these circumstances, the Industrial Tribunal held that the concerned workmen were entitled to be treated as permanent employees of the Petitioner, with all the benefits following such permanency. There is no infirmity with this discussion of the Industrial Tribunal or the conclusions arrived at on its basis. Mr.Bukhari submits that the Industrial Tribunal has not in terms dealt with written documents, such as wage registers, bills, etc. It is axiomatic that in a case where there is a sham and bogus case of contract labour, written documents, such as wage registers, bills, etc., will always be that of the contractors. These documents, by their very nature, have to be in support of the so called agreements for supply of contract labour. In a case where the ingredients of the engagement of workmen show that the concerned workmen were in fact working for all purposes and intents as direct employees of the principal employer on the various tests laid down by the court, such as the control and organisation tests, the length of service, the extent and nature of work, the nature of establishment, the right to reject, etc., the fact that the documents

concerning wages or attendance are of the contractor, assumes no significance.

(8.) Mr.Bukhari lastly submits that the Industrial Tribunal has based its decision in the present case merely on the control and organisation tests. Learned Counsel, relying on the case of Workmen of Nilgiri Coop.Mkt. vs. State of Tamil Nadu, 2004 1 CurLR 802, submits that these tests are not the only factors which can be said to be decisive in a case such as this. There is no quarrel with the proposition. As noticed by the Supreme Court in the case of Nilgiri Coop. Market, the question as to whether the contract before the court is a contract of service or contract for service and whether the concerned employees are direct employees of the contractor is always a vexed question and there is no easy answer to it. There is no hard and fast rule in this behalf nor it is possible to lay down any such rule. The question in each case has to be answered having regard to the facts of the case and no single test, be it control test or organisation test or any other test, has been held to be determinative for deciding on the jural relationship of employer and employee; the industrial adjudicator must take into consideration collective circumstances which bear on the subject. By way of illustration, the court has indicated various factors, such as the identity of the appointing authority and the pay master, the extent of control and supervision exercised by the contractor as opposed to the principal employer, the length of service, the nature of the job, i.e. whether professional or skilled or unskilled, the nature of establishment and the right to reject, etc. as broad yardsticks. Most of these aspects, it is fairly clear, are satisfied in the present case. The record of the case bears out that it is the Petitioner, who had complete and pervasive control and supervision over the concerned employees. The nature of the job shows skilled work in the assembly line of the Petitioner enterprise and part of the main business of the Petitioner. The right to reject the work of every individual employee clearly belonged to the Petitioner. On all these counts, the impugned award of the Industrial Tribunal is in order and no fault can be found with the adjudication within the parameters of Article 226 or 227 of the Constitution of India. Learned Counsel for the Petitioner is unable to point out any significant circumstances, besides the wage register and bills, etc., on which, as per any of the tests laid down by the Supreme Court, the conclusion should be otherwise. The view of the Industrial Tribunal is clearly a possible view, which is supported by evidence. There is no irrelevant material which is taken into account and no relevant or germane material is disregarded. The award does not warrant any interference.

(9.) The impugned award, in the premises, need not be disturbed save and except the operative order in the case of 5 of these 31 employees. It is not in dispute that these 5 employees, namely, Prakash B. Dhadve, Vijay N. Parab, Santosh S. Ghogle, Shamal B. Sonawane and Jayashri L. Tawde, have already settled their disputes with the Petitioner and left. There is no locus for the Respondent union to espouse their cause, in the premises. Learned Counsel for the Respondent Union has no comments to offer in this behalf. In the premises, the impugned award, insofar as it orders regularisation or absorption of these five employees, needs to be varied.

(10.) Accordingly, Rule is discharged and the petition is dismissed. The impugned order dated 31 October 2015 is confirmed save and except the answer of reference in favour of five out of thirty one employees, whose names are listed out in the foregoing paragraph. In the case of these five employees the reference stands rejected. No order as to costs.

(11.) At the request of learned Counsel for the Petitioner, this order is stayed for a period of six weeks from today.