SUPREME COURT OF INDIA

Sarva Shramik Sangh

Vs.

Indian Oil Corporation Ltd.

C.A.No.2423 of 2009

(R V Raveendran Lokeshwar S.Panta JJ)

13.04.2009

JUDGEMENT

R.V.RAVEENDRAN, J.

The appellant union represents the canteen workers of the contractor engaged by Indian Oil Corporation Ltd. (`IOC' for short) for running its canteen at its Western Region Marketing Division at Mumbai. The appellant union filed W.P.No.1267/1999 in the Bombay High Court on behalf of the said workers seeking the following reliefs: (i) a direction to the Central Advisory Contract Labour Board and Union of India to hold an investigation under section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 ('CLRA Act' for short), on its application dated 29.12.1998 and make an order abolishing the contract labour system in regard to workmen in the canteen of Marketing division of IOC; and (b) a direction to IOC to absorb/regularize the services of the said workers. The writ petition was dismissed for want of prosecution on 11.11.2003.

2. Thereafter the appellant again approached the High Court in W.P.No.853/2004 contending that the contracts between IOC and the canteen contractor was sham and bogus and seeking a direction to the Union of India to make a reference of the dispute raised by them in regard to the demand for permanency of the canteen workers to the Industrial Tribunal. The High Court vide order dated 22.4.2004 disposed of the said writ petition with a direction to the Central Government to consider and dispose of the request for reference with a further direction to maintain status quo in regard to concerned workmen till disposal of the reference application. In pursuance of it conciliation proceedings were held and the Assistant Labour Commissioner (Central)-III, Mumbai, sent a Failure of Conciliation Report dated 2.9.2004, Government of India by order dated 21.12.2004 refused to make a reference of the dispute under section 10(1) of the Industrial Disputes Act, 1947 (`ID Act' for short).

The Labour Ministry of the Government of India was of the view that the dispute, prima facie, was not fit for adjudication, as "the workmen in respect of whom the dispute was raised were not appointed by the management of IOC but were engaged by the contractor holding a valid and legal contract."

3. The said order was challenged by the appellant in W.P.No.

1673/2005 seeking a mandamus to the Government of India to refer the dispute raised, to the Industrial Tribunal for adjudication. The appellant contended that the central government had

usurped the power and function of the Industrial Tribunal, by deciding the very issue that required to be referred to and decided by the Tribunal. The said writ petition was dismissed by the High Court by the impugned order dated 19.8.2006 on the following two grounds : (i) The appellant had earlier filed WP No.1267/1999 for abolition of contract labour in the canteen in the establishment of IOC. The said earlier petition (W.P.No.1267/1999) was dismissed on 11.11.2003 for non-prosecution and attained finality; and once having sought the relief of abolition of contract labour, the appellant was estopped from seeking any other relief by contending that the contract was sham and not genuine. (ii) The order dated 21.12.2004 of the appropriate government did not suffer from any infirmity or arbitrariness, when examined with reference to the principles laid down by this Court in Avon Services Production Agencies (P) Ltd. v. The Industrial Tribunal [1979 (1) SCC 1]. The said order is challenged in this appeal by special leave.

4. The contentions urged by the parties give rise to the following questions for determination :

(i) whether in view of the stand taken by the appellant in WP No.1267 of 1999 , the appellant was estopped from taking a different stand in the subsequent writ petition (WP 1673/2005).

(ii) whether the decision of the central government refusing reference requires interference.

Re : Question (i)

5. The appellant submits that the contract labour can take the plea that the contract between the principal employer and the contractor is sham and bogus and that they are, in law, the employees of IOC and not of the contractor; and that alternatively they can plead without prejudice to the first plea, that assuming the contract is genuine, the contract labour system should be abolished under Section 10 of the CLRA Act. On the same principle, the contract labour can, on the plea that the contract between principal employer and the contractor is sham and nominal, first claim the relief that contract labour system should be abolished and they should be absorbed; and if such relief is refused or found to be inappropriate, then seek a declaration that they are really the direct employees of the principal employer.

6. On the other hand, the first respondent-IOC contended that the appellant cannot be permitted to take contradictory and inconsistent stands. It is submitted that the prayer in the first writ petition was on the assumption that there was a valid contract between IOC and the canteen contractor and the workers were in fact the employees of the contractor, and that the contract labour system for the canteen in the establishment of IOC (marketing department) should be abolished under the CLRA Act and that after such abolition, the workers should be absorbed as employees of the IOC. It is contended that having taken such a specific stand in the first petition, the appellant cannot in the second petition take a plea that the contract entered between the IOC and the canteen contractor was sham and bogus and that the canteen workers were really the employees of the IOC. Strong reliance was placed on the following observations of this Court in Steel Authority of India Ltd. v. Union of India [2006 (12) SCC 233, for short referred to `SAIL-II'] :

"The workmen whether before the Labour Court or in writ proceedings, were represented by the same union. A trade union registered under the Trade Unions Act is entitled to espouse the cause of the workmen. A definite stand was taken by the employees that they had been working under the contractors. It would, thus, in our opinion, not lie in their mouth to take a contradictory and inconsistent plea that they were also the workmen of the principle employer. To raise such a mutually destructive plea is impermissible in law. Such mutually destructive plea, in our opinion,

should not be allowed to be raised even in an industrial adjudication. Common law principles of estoppel, waiver and acquiescence are applicable in an industrial adjudication."

7. On an examination of the pleadings in W.P.No.1267/1999 and W.P.No.1673/2005, we find that the issues for consideration, the parties to the cause, the cause of action and the reliefs claimed were all different in the two cases. In the first petition, relief was sought under the Contract Labour (Regulation & Abolition) Act, 1970 for abolition of contract labour system in the operation of canteen in the marketing establishment of IOC and for absorbing the canteen workers as employees of IOC. In the second petition, relief was sought under the Industrial Disputes Act, 1947 for making a reference under sec. 10(1)(c) to the Industrial Tribunal to decide whether the contract between IOC and the canteen contractor was sham, nominal and a mere camouflage to avoid extension of labour law benefits to the workers in question, and whether the canteen workers were the direct employees of IOC.

8. The assumption that the appellant had taken inconsistent stands in the two writ petitions is not correct. Even in the first writ petition, the appellant had contended that though the contractors changed from time to time, the workers in the canteen remained the same with continuity of service; that IOC had mala fide and illegally kept the workers as contract labour in order to keep them in a permanent state of insecurity and to deny them the wages and privileges available to permanent workers; that IOC was actually controlling, and supervising the canteen; and that only as a camouflage, the contractor was shown as running the canteen to create a pretence that the workmen of IOC were the workers of the contractor, when in fact they were the employees of IOC. In short, the appellant had contended that the contract was sham and nominal, in the first petition. Even in the second writ petition (WP No. 1673/2005) the contention was that the contract was sham and a camouflage to avoid extending benefits of regular employees to the canteen workers.

Therefore, the High Court committed a serious error in assuming that in the first writ petition, the appellant had conceded that the contract between the IOC and the canteen contractor was valid and genuine and that in the second writ petition the appellant had taken a contrary stand that the contract was sham and a camouflage.

9. The stand of the appellant and the workers was always consistent. But before the decision of a Constitution Bench of this Court in Steel Authority of India Ltd. v. National Union Waterfront Workers [2001 (7) SCC 1, for short referred to as `SAIL-I), it was thought that the appropriate relief available was to seek an investigation and abolition of contract labour under the CLRA Act and consequently seek absorption. Therefore the prayer was made with reference to the CLRA Act in the first petition. In SAIL-I rendered on 30.8.2001, this Court held that even if there was an order under section 10 of CLRA Act prohibiting contract labour in any process or operation, there would be no automatic absorption of the contract labour by the principal employer. It was also held that it is always open to the contract labour to urge that the contract was sham and nominal by raising an industrial dispute under the ID Act and such dispute will have to be decided by the industrial adjudicator and not by the High Court; and if on enquiry, the industrial adjudicator found that the contract was sham and merely a camouflage for denying labour law benefits to the workers in question, it could declare so and hold that the contract labour were really the direct employees of the principal employer. When it became clear after the constitution bench decision in SAIL-I that if the case of the workmen is that the contract between the principal employer and the contractor was sham and merely a camouflage to deny benefits to the workers, then they could raise a dispute and approach the industrial adjudicator, the appellant sought a reference of the dispute to the industrial adjudicator, and when such a reference was refused, rightly approached the High Court by way of

second writ petition. This means that the appellant had prayed for a particular relief in the first writ petition, and when such relief was found to be inappropriate and the law was clarified in SAIL-I, on the same fact raised a dispute which was the proper remedy, and as the dispute was not referred to the Industrial Tribunal, approached the High Court seeking a direction to the Central Government for making a reference. There is thus neither inconsistency nor any estoppel.

10. The assumption that there is an absolute bar on inconsistent pleas being taken by a party, is also not sound. What is impermissible is taking of an inconsistent plea by way of amendment thereby denying the other side, the benefit of an admission contained in the earlier pleading. Mutually repugnant and contradictory pleas, destructive of each other may also not be permitted to be urged simultaneously by a plaintiff/petitioner. But when there is no inconsistency in the facts alleged, a party is not prohibited from taking alternative pleas available in law. Similarly, on the same facts, different or alternative reliefs can also be claimed. When the case of the workers is that the contract was sham and nominal, they could seek a relief that they should be declared as the direct employees of the principal employer; and if that contention failed and it is found that the contract was valid, then they can seek issue a direction to the Central Government to consider their representation for abolition of contract labour. Similarly where the workers contend that the contract between principal employer and the contractor was sham and merely a camouflage to deny them the benefits of labour laws, and if their prayer for relief under CLRA Act is rejected, they can then seek relief under the ID Act. The contention of IOC that on account of the dismissal of the first petition, the second petition for a different relief was barred either by principle of res judicata or by principle of estoppel is liable to be rejected.

11. We will next consider whether the decision in SAIL-II relied on by the respondents, is in any way applicable. That decision related to a dispute raised by the contract labour employed by VISL (an unit of SAIL) for prohibition of employment of contract labour in the process/operation in which they were employed and they should be absorbed as regular permanent employees of VISL. The state government referred the said dispute to the Tribunal under section 10 (1)(c) of the ID Act. Before the Labour Court, VISL contended that as the matter related to regulation and abolition of contract labour, governed by the provisions of the CLRA Act, there could be no reference of the dispute to the Labour Court for adjudication under section 10(1)(c) of the ID Act. It was also submitted that as the state government had not issued any notification prohibiting employment of contract labour in terms of section 10 of the CLRA Act, the contract labour did not have a legal right to claim absorption.

11.1) At that stage, presumably to get over the said objection regarding maintainability, the workmen filed an additional claim statement alleging that the contract entered into between VISL and the contractor was sham and bogus and they should be deemed to be the direct employees of the management. The Labour Court held that the dispute referred was whether the contract workers who were employed in the particular nature of contract work were justified in demanding absorption as regular employees; that the said dispute pre- supposed that the employees were contract workers under the contractors and the question therefore was whether the contract labour system should be abolished and contract workers had to be absorbed by the principal employer; that the employees who sought absorption by VISL were contract labour was evident from the averments made in the claim statement; and that the only remedy available to them was to file writ petition seeking a direction to the central government to take a decision under section 10 of CLRA Act to prohibit employment of contract labour. The Labour Court held that the question under reference related to abolition of contract labour and as the said question could be decided only by appropriate Government under section 10 of the CLRA Act, the dispute was not maintainable under ID Act.

Therefore the Labour Court made an award holding that the reference was not maintainable.

11.2) The said award of the Labour Court was challenged in the High Court. A learned single Judge allowed the writ petition and directed the Union of India to treat the writ petition as a petition submitted by the Union raising an industrial dispute in terms of section 2(k) read with section 12(1) of the ID Act as also under the provisions of CLRA Act. The learned Judge further directed the central government to refer the said dispute to the Industrial Tribunal. The appeal filed against the said judgment of the learned Single Judge was dismissed by a division bench. Aggrieved thereby SAIL approached this Court.

It is in that background this Court held that the workmen having taken a definite stand that they were working under the contractors, and as the dispute that was referred was one which arose under the CLRA Act, the workmen could not, by amending the claim statement filed before the Labour Court, take a contradictory and inconsistent plea that the contract between VISL and the contractor was sham and bogus and they were the direct employees of VISL. This Court observed that it was impermissible to raise such mutually destructive pleas in law, having regard to the principles of estoppel, waiver and acquiescence which were also applicable in industrial adjudication.

11.3) We have referred to the factual situation in detail to demonstrate that the said observations made in the context of the peculiar facts of that case, where the reference by the state government under the ID Act was in regard to a specific dispute that they were employees of the contractor and that after prohibiting the contract labour system under section 10 of the CLRA Act, they should be absorbed as direct employees of VISL. This court therefore held that in such a reference under ID Act, raising a contention that the contract between VISL and the contractor was bogus and sham and that they were direct employees of principal employer contradicted the case on the basis of which the reference was sought and reference was made, and the two contentions being mutually destructive, such a plea which would destroy the very reference could not be permitted to be raised. The decision in SAIL-II is therefore of no assistance to the respondents. What was held to be impermissible in SAIL-II was raising inconsistent and mutually destructive pleas in the same proceedings. It does not bar a particular relief being sought in a writ petition, and when it is found that such a relief was inappropriate, then seeking appropriate relief in a different proceedings.

11.4) The facts are completely different here. The issue in the first writ petition was with reference to section 10 of CLRA Act. The issue in the second petition was whether the dispute (relating to their claim that they were the direct employees of IOC) should be referred under section 10(1)(c) of the ID Act. The decision in SAIL II will not therefore apply. When the parties are different, issues are different, reliefs are different, the question of either res judicata, or finality of proceedings, acquiescence or estoppel will not arise.

Re : Question (ii)

12. It is true that making a reference under section 10(1) of the ID Act is within the discretion of the appropriate government. Referring to the unamended section 10(1) of ID Act this court in State of Madras v. C.P.Sarathy [1953 (4) SCR 334], laid down the following principles:

(i) The government should satisfy itself, on the facts and circumstances brought to its notice, in its subjective opinion that an `industrial dispute' exists or is `apprehended.

(ii) The factual existence of a dispute or its apprehension and the expediency of making reference

are matters entirely for the government to decide.

(iii) The order making a reference is an administrative act and it is not a judicial or a quasi-judicial act.

(iv) The order of reference passed by the government cannot be examined by the High Court in its jurisdiction under art 226 of the Constitution to see if the government had material before it to support the conclusion that the dispute existed or was apprehended.

12.1) The opening words of section 10 of ID Act "if any industrial dispute exists or is apprehended the appropriate government may"

were replaced by the words "where the appropriate government is of the opinion that any industrial dispute exists or is apprehended it may at any time" by Act 18 of 1952. The issue was thereafter again considered in Rohtas Industries Ltd. v. SD Agarwal [AIR 1969 SC 707]. After referring to the propositions in Sarathy, this Court held :

"This interpretation of s 10(1) is based on the language of that provision as well as the purpose for which the power in question was given and the effect of a reference. That decision cannot be considered as an authority for the proposition that whenever a provision of law confers certain power on an authority on its forming a certain opinion on the basis of certain facts, the courts are precluded from examining whether the relevant facts on the basis of which the opinion is formed had in fact existed."

(emphasis supplied)12.2) The amended section 10 was considered in Western India Match Co. v. Western India Match Co. Workers' Union [1970 (1) SCC 225]. This court, again, after referring to the observation in Sarathy that the order of the government is an administrative function, observed thus :

".....the government cannot go into the merits of the dispute, its function being only to refer such a dispute for adjudication so that the industrial relations between the employer and the employees may not continue to remain disturbed, and the dispute may be resolved through a judicial process as speedily as possible."

12.3) In State of Bombay v. K.P. Krishnan [1961] 1 SCR 227, this court referred to the scope of section 10(1) thus :

"Section 10(1) provides that where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it may at any time by order in writing refer the dispute to one or the other authority specified in clauses (a) to (d). This section is of basic importance in the scheme of the Act. It shows that the main object of the Act is to provide for cheap and expeditious machinery for the decision of all industrial disputes by referring them to adjudication, and thus avoid industrial conflict resulting from frequent lock-outs and strikes. It is with that object that reference is contemplated not only in regard to existing industrial disputes but also in respect of disputes, which may be apprehended. This section confers wide and even absolute discretion on the Government either to refer or to refuse to refer an industrial dispute as therein provided. Naturally this wide discretion has to be exercised by the Government bona fide and on a consideration of relevant and material facts."

This court clarified that the writ court can direct the government to reconsider whether a reference

should be made or not after leaving out the relevant and extraneous considerations.

12.4) In Bombay Union of Journalists & Ors. v. The State of Bombay & Anr. [1964] 6 SCR 22, this court once again discussed the scheme of reference and observed:

"... section 10(1) confers discretion on the appropriate Government either to refer the dispute, or not to refer it, for industrial adjudication according as it is of the opinion that it is expedient to do so or not ... in entertaining an application for a writ of mandamus against an order made by the appropriate Government under s. 10(1) read with s. 12(5), the Court is not sitting in appeal over the order and is not entitled to consider the propriety or the satisfactory character of the reasons given by the said Government. ... It is no doubt desirable that the party concerned should be told clearly and precisely the reasons why no reference is made, because the object of s. 12(5) appears to be to require the appropriate Government to state its reason for refusing to make a reference, so that the reasons should stand public scrutiny; but that does not mean that a party challenging the validity of the Government's decision not to make a reference can require the court in writ proceedings to examine the propriety or correctness of the said reasons."

This court however made it clear that if the appropriate government refuses to make a reference for irrelevant considerations, on extraneous grounds or acts mala fide, a party would be entitled to move the High Court for a writ of mandamus.

12.5) This position was reiterated in Hochtif Gammon v. State of Orissa [1975 (2) SCC 649]. In Hochtif Gammon, this Court observed thus:

"The executive have to reach their decisions by taking into account relevant considerations. They should not refuse to consider relevant matter nor should take into account wholly irrelevant or extraneous consideration. They should not misdirect themselves on a point of law. Only such a decision will be lawful. The courts have power to see that the executive acts lawfully. It is no answer to the exercise of that power to say that the executive acted bona fide nor that they have bestowed painstaking consideration. They cannot avoid scrutiny by courts by failing to give reasons. If they give reasons that they are not good reasons, the courts can direct them to reconsider the matter in the light of relevant matters, though the propriety, adequacy or satisfactory character of those reasons may not be open to judicial scrutiny. Even if the executive considers it inexpedient to exercise their powers they should state their reasons and there must be material to show that they have considered all the relevant facts."

12.6) Thereafter the matter came up for consideration in Avon Services (supra) relied upon by the High Court. In Avon Services, this Court reiterated the principles thus:

"Section 10(1) confers a discretionary power and this discretionary power can be exercised on being satisfied that an industrial dispute exists or is apprehended. There must be some material before the Government on the basis of which it forms an opinion that an industrial dispute exists or is apprehended. The power conferred on the appropriate Government is an administrative power and the action of the Government in making the reference is an administrative act. The formation of an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it any the less administrative in character. Thus the jurisdictional facts on which the appropriate Government may act are the formation of an opinion that an industrial dispute exists or is apprehended which undoubtedly is a subjective one, the next step of making reference is an administrative act. The adequacy or sufficiency of the material on which the opinion was formed

is beyond the pale of judicial scrutiny. If the action of the Government in making the reference is impugned by a party it would be open to such a party to show that what was referred was not an industrial dispute and that the Tribunal had no jurisdiction to make the Award but if the dispute was an industrial dispute, its factual existence and the expediency of making a reference in the circumstances of a particular case are matters entirely for Government to decide upon, and it will not be competent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no material before Government on which it could have come to an affirmative conclusion on those matters.

Merely because the government rejects a request for a reference or declines to make a reference, it cannot be said that the industrial dispute has ceased to exist..... The industrial dispute may nonetheless continue to remain in existence and if at a subsequent stage the appropriate government is satisfied that in the interest of industrial peace and for promoting industrial harmony it is desirable to make a reference, the appropriate government does not lack power to do so under s 10(1), nor is it precluded from making the reference on the only ground that on an earlier occasion it had declined to make the reference."

12.7) In Ram Avtar Sharma vs. State of Haryana [1985 (3) SCC 189], this Court considered a refusal by the government as it found that the services of the employee were terminated only after charges against him were proved in a domestic enquiry, that this Court held that a clear case of grant of writ of mandamus was made out on the ground of the following reasoning:

"The assumption underlying the reasons assigned by the Government are that the enquiry was consistent with the rules and the standing orders, that it was fair and just and that there was unbiased determination and the punishment was commensurate with the gravity of the misconduct..... The reasons given by the Government would show that the Government examined the relevant papers of enquiry and the Government was satisfied that it was legally valid and that there was sufficient and adequate evidence to hold the charges proved. It would further appear that the Government was satisfied that the enquiry was not biased against the workmen and the punishment was commensurate with the gravity of the misconduct charged. All these relevant and vital aspects have to be examined by the Industrial Tribunal while adjudicating upon the reference made to it. In other words, the reasons given by the Government would tantamount to adjudication which is impermissible. That is the function of the Tribunal and the Government cannot arrogate to itself that function. Therefore if the grounds on which or the reasons for which the Government declined to make a reference under Section 10 are irrelevant, extraneous or not germane to the determination, it is well settled that the party aggrieved thereby would be entitled 10 move the Court for a writ of mandamus. It is equally well settled that where the Government purports to give reasons which tantamount to adjudication and refuses to make a reference, the appropriate Government could be said to have acted on extraneous, irrelevant grounds or grounds not germane to the determination and a writ of mandamus would lie calling upon the Government to reconsider its decision."

12.8) In Telco Convoy Drivers Mazdoor Sangh vs. State of Bihar [1989 (3) SCC 271], this Court held that while exercising power under section 10(1) of the Act, the function of the appropriate government is an administrative function and not a judicial or quasi- judicial function. In performing this administrative function the government cannot delve into the merits of the dispute and take upon itself the determination of the lis, which would certainly be in excess of the power conferred on it by section 10 of the Act. However, there may be exceptional cases in which the state government may, on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference.

But the government should be slow to attempt an examination of the demand with a view to declining reference and courts will always be vigilant whenever the government attempts to usurp the powers of the Tribunal for adjudication of valid disputes, and to allow the government to do so would be to render section 10 and section 12(5) of the Act nugatory. Where, as in the instant case, the dispute is whether the persons raising the dispute are workmen or not, the same cannot be decided by the government in exercise of its administrative function under section 10(1). When the dispute was whether the convoy drivers were employees or workmen of TELCO, that is to say, whether there was relationship of employer and employees between TELCO and the convoy drivers, the Deputy Labour Commissioner and/or the state government was not justified in holding that the convoy drivers were not workmen and accordingly, no reference could be made. When it is found that the dispute should be adjudicated by the Industrial Tribunal and the state government had persistently declined to make a reference under section 10(1) despite chances given by High Court and Supreme Court to reconsider the matter, the court would direct the government to make a reference of the dispute to the appropriate industrial tribunal. The principles were reiterated in Sultan Singh vs. State of Haryana [1996 (2) SCC 66 and Secretary, Indian Tea Association vs. Ajit Kumar Barat [2000 (3) SCC 93].

13. Thus it can safely be concluded that a writ of mandamus would be issued to the appropriate government to reconsider the refusal to make a reference, where (i) the refusal is on irrelevant, irrational or extraneous grounds; (ii) the refusal is a result of the appropriate government examining the merits of the dispute and prejudging/adjudicating/determine the dispute; (iii) the refusal is mala fide or dishonest or actuated by malice; (iv) the refusal ignores the material available in the failure report of the Conciliation Officer or is not supported by any reason.

14. This case is squarely covered by the decisions in Ram Avtar Sharma and Telco Convoy Drivers Mazdoor Sangh. The state government has examined the merits of the dispute and has refused to make the reference on the ground that the workers were not the employees of IOC, when the very dispute that required reference was whether the workers should be considered as the employees of IOC.

15. In view of the above we allow this appeal and direct the Central Government to reconsider the matter in the light of the observations above and take an appropriate decision on the request for reference of the dispute to the Industrial adjudicator. As and when the state government makes the reference, it is for the Industrial Tribunal to consider the dispute on merits, on the basis of materials placed before it, uninfluenced by the observations of the High Court or this Court.