

SUPREME COURT OF INDIA

General Manager (OSD), Bengal Nagpur Cotton Mills Rajnandgaon

Vs.

Bharat Lal

C.A.No.10605 of 2010

(R.V.Raveendran and A.K.Patnaik JJ.)

14.12.2010

JUDGMENT

R.V.Raveendran, J.

1. Leave granted. IA 5/2007 for bringing on record an additional document (certificate relating to employment of first respondent with another employer from 1985) is allowed.

Heard.

2. The appellant entered into a security service agreement dated 2.12.1975 with the second respondent, for its Mills premises, governed by the provisions of Contract Labour (Regulation & Abolition) Act, 1970 ('CLRA Act' for short). The first respondent was one of the persons appointed by the second respondent, and he was deployed for guard duties at the appellant's Mill on 15.12.1980. The second respondent discharged the first respondent from service on 27/28.7.1982. The appellant terminated the security service agreement with the second respondent on 16.8.1982.

3. Five years after his termination, in the year 1987, the first respondent filed an application under section 31(3) of the Madhya Pradesh Industrial Relations Act, 1960 (for short 'MPIR Act') for a declaration that his termination from service was illegal. He also sought a consequential direction to the appellant and second respondent to extend all the benefits which the employees of the appellant were being extended, from the date of termination, alleging that he was unemployed and without income. The appellant contested the claim and the second respondent remained ex parte. The Labour Court by order dated 28.10.1991 allowed the application in part and directed the appellant to reinstate the first respondent in his previous post and pay him all arrears. Feeling aggrieved, the appellant filed an appeal before the Industrial Court against the said award of the Labour Court. While admitting the appeal, the Industrial Court directed the appellant to comply with section 65(3) of the MPIR Act which required the employer to pay to the employee the full wages last drawn by him, during the pendency of the appeal.

4. The appellant issued a letter dated 25.2.1992 offering reinstatement from 30.12.1991 on a salary of Rs.1000/- per month, though he was getting only a salary of Rs.200/- from second respondent at the time of his disengagement. Shortly thereafter the appellant's mills were closed on 31.10.1992 and it was declared to be a sick industry by the Board for Industrial & Financial Reconstruction on 6.5.1993.

5. The Industrial Court heard and dismissed the appellant's appeal by judgment dated 19.5.2001. The Industrial Court held that after the CLRA Act came into force, it would not be possible to rely upon the definition of 'employee' under Section 2(13) of MPIR Act to contend that a workman employed by the contractor was a workman of the principal employer. The Industrial Court also held that first respondent was appointed by the second respondent. However it held that the agreement between appellant and second respondent was sham/nominal and the first respondent should be treated as a direct employee of appellant for the following reasons: (i) the appellant failed to establish by adducing necessary evidence that the salary of first respondent was not directly paid by it and that it was being paid by the second respondent and therefore it should be deemed that the appellant was directly paying wages to the first respondent; and (ii) the officers of appellant were assigning duties directly to the first respondent and therefore it should be deemed that he was working under the direct control and supervision of the appellant.

6. The appellant challenged the order of the Industrial Court by filing a writ petition in the High Court. The High Court by judgment dated 12.1.2006 dismissed the writ petition without examining the contentions of the appellant on merits, merely on the ground that the appellant did not comply with section 65(3) of the MPIR Act and the scope of interference under Article 226/227 was very limited. The said order is challenged in this appeal by special leave.

7. The appellant relied upon the decisions of this Court in *National Thermal Power Corporation v. Badri Singh Thakur*¹ where this court held that the provisions of CLRA Act would override the provisions of the MPIR Act and *Municipal Corporation of Greater Mumbai vs. K.V. Shramik Sangh*² where this court observed that merely because the principal employer and contractor have not complied with the provisions of the CLRA Act in regard to registration, the system of carrying out work through labour contract could not be termed as sham.

8. In this case, the Industrial adjudicator has granted relief to the first respondent in view of its finding that he should be deemed to be a direct employee of the appellant. The question for consideration is whether the said finding was justified. It is now well-settled that if the industrial adjudicator finds that contract between the principal employer and contractor to be sham, nominal or merely a camouflage to deny employment benefits to the employee and that there was in fact a direct employment, it can grant relief to the employee by holding that the workman is the direct employee of the principal employer. Two of the well-recognized tests to find out whether the contract labour are the direct employees of the principal

employer are (i) whether the principal employer pays the salary instead of the contractor; and (ii) whether the principal employer controls and supervises the work of the employee. In this case, the Industrial Court answered both questions in the affirmative and as a consequence held that first respondent is a direct employee of the appellant.

9. On a careful consideration, we are of the view that the Industrial Court committed a serious error in arriving at those findings. In regard to the first test as to who pays the salary, it placed the onus wrongly upon the appellant. It is for the employee to aver and prove that he was paid salary directly by the principal employer and not the contractor. The first respondent did not discharge this onus. Even in regard to second test, the employee did not establish that he was working under the direct control and supervision of the principal employer. The Industrial Court misconstrued the meaning of the terms 'control and supervision' and held that as the officers of appellant were giving some instructions to the first respondent working as a guard, he was deemed to be working under the control and supervision of the appellant. The expression 'control and supervision' in the context of contract labour was explained by this court in *International Airport Authority of India v. International Air Cargo Workers Union*³ thus:

“If the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by contractor, if the right to regulate employment is with the contractor, and the ultimate supervision and control lies with the contractor.

The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise. In short, worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor.”

Therefore we are of the view that the Industrial Court ought to have held that first respondent was not a direct employee of the appellant, and rejected the application of the first respondent.”

10. There is a yet another reason why the first respondent should be denied any relief as there is sufficient material to infer that he deliberately suppressed and misrepresented facts. The first respondent was careful enough not to disclose his address (either his residence or place of work) at any stage of the proceedings before the Labour Court or Industrial Court or the High Court or this Court. He all along gave his address as care of his counsel Sri Harish Chandra Rishi, Advocate, Rajnandgaon, Chattisgarh. In the application before the Labour

Court as also before the Industrial Court and the High Court, he asserted that he was unemployed. Even in the counter affidavit dated 29.4.2008 filed in this court, he stated that he is "suffering from unemployment and mental agony since 1987", thereby giving an impression that he has been continuously unemployed. The appellant has produced before us an employment certificate issued by the current employer of the first respondent. The appellant has stated that it could not earlier ascertain whether the first respondent was otherwise employed as it did not have his particulars as he was not its employee and his whereabouts were not known; and that only after the filing of the special leave petition, it could trace the place of employment of the first respondent and secure the particulars. The certificate produced is a communication dated 17/18.1.2007 from Western Coalfields Ltd., a Govt. of India Undertaking, Nagpur, addressed to the appellant, stating that the first respondent took up employment under Western Coalfields Ltd. on 5.6.1985 and that in January, 2007 he was working in Wani area in WCL in Maharashtra and was being paid a gross salary of Rs.12435/-. This has not been denied or controverted by the first respondent.

11. The proviso to section 65(3) of the MPIR Act makes it clear that if the employee had been otherwise employed and receiving adequate remuneration during the pendency of the appeal or subsequent periods, the court shall order that no wages shall be payable under section 65(3). As noticed above the first respondent approached the Labour Court only in the year 1987, five years after his disengagement by the second respondent. After he was disengaged in July, 1982, the first respondent took up employment with Western Coalfields on 5.6.1985 and has been earning a far larger amount than what he was earning earlier. Two years thereafter he approached the Labour Court. He continues to be employed with Western Coalfields during the pendency of this appeal. That is an additional ground to deny any backwages or direction to pay wages during the pendency of the litigation. It is also a ground to reject the claim on account of the deliberate suppression and misrepresentation.

12. In view of the foregoing, we allow this appeal and set aside the orders of the Labour Court, Industrial Court and High Court. Consequently the application of first respondent filed before the Labour Court, Rajnandgaon under Section 31(3) of MPIR Act stands dismissed.

¹2008 (9) SCC 377

²2002 (4) SCC 609

³2009 (13) SCC 374