

(2006) 09 DEL CK 0240

In the Delhi High Court

Case No : LPA. No. 713 of 2006 and CMS 6180 and 6181 of 2006

Air India Limited

APPELLANT

Vs

Jagesh Dutt Sharma and Others

RESPONDENT

Date of Decision : 11-09-2006

Acts Referred:

Constitution of India, 1950 — Article 226

Contract Labour (Regulation and Abolition) Act, 1970 — Section 10, 10(1)

Industrial Disputes Act, 1947 — Section 10, 2

Citation : (2006) 133 DLT 93 : (2006) 111 FLR 859

Hon'ble Judges : Mukul Mudgal, J;Dr. S. Muralidhar, J

Bench : Division Bench

Advocate : Rajiv Shakdhar and Brijesh Anand, for the Appellant; S.P. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

S. Muralidhar, J.

CM. No. 6181/06(for delay)

For the reasons stated in the application, the delay in filing the appeal is condoned.

The application is accordingly allowed.

LPA. No. 713 of 2006 and CM 6180/2006(stay)

1. This letters patent appeal is directed against the impugned judgment dated 16.2.2006 passed by the learned Single Judge allowing Writ Petition (Civil) Nos. 1712-1715 of 2005 filed by the respondents, against the refusal by the appropriate Government to make an order of reference u/s 10 of the Industrial Disputes Act, 1947 ('ID Act'). The learned Single Judge has directed the Secretary, Ministry of Labour, Government of India, Respondent No. 6 herein, to make a reference of the dispute raised by the respondent workmen for

adjudication to the industrial adjudicator within a period of 12 weeks.

2. It appears that consequent upon the impugned judgment of the learned Single Judge, Respondent No. 6 passed an order dated 23.3.2006 making the reference of the industrial dispute to the Central Government Industrial Tribunal-cum-Labour Court, New Delhi-I ('Tribunal') and the case has been registered as I.D. No. 08/06. On 27.4.2006, the appellant filed the present appeal with the delay of 21 days.

3. The facts leading to the filing of the present appeal may be noticed. In exercise of the powers conferred u/s 10(1) of the Contract Labour (Regulation and Abolition) Act, 1970 ['CLRA'], the Ministry of Labour, Government of India issued a Notification dated 9.12.1976, prohibiting the employment of contract labour with effect from 1.3.1977 for sweeping, cleaning, dusting and watching all buildings owned or occupied by establishments in respect of which the appropriate government was the Central Government. It is not in dispute that this notification applied to the appellant Air India as well.

4. The validity of the above notification was upheld by the Hon'ble Supreme Court in Air India Statutory Corporation, etc. Vs. United Labour Union and others [overruled], . Consequently, the Hon'ble Supreme Court upheld the directions issued by the High Court directing Air India to absorb the workmen and "regularise their services with effect from the respective dates of the judgments of the High Court with all consequential benefits".

5. Following this, the respondents, claiming to have been engaged as contract labour in the establishments of the appellant, filed Writ Petition (C) No. 2052 of 1997 and Writ Petition (C) No. 6221 of 1998 in this Court seeking directions to the appellant herein to reinstate them and regularise their services. The appellant herein, which was the Respondent in the said writ petitions, filed its reply.

6. While the said writ petitions were pending, the decision in Air India Statutory Corporation (supra) was prospectively overruled by a Constitution Bench of the Hon'ble Supreme Court in Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc. etc., . The Hon'ble Supreme Court now held [SCC @ p. 62 para 125 (3)]:

(3) Neither Section 10 of the CLRA Act nor any other provision in the Act, whether expressly or by necessary implication, provides for automatic absorption of contract labour on issuing a notification by the appropriate Government under Sub-section (1) of Section 10, prohibiting employment of contract labour, in any process, operation or other work in any establishment. Consequently the principal employer cannot be required to order absorption of the contract labour working in the establishment concerned.

As regards the remedy available to the contract labour, the following directions were issued [SCC @ p. 63 para 125 (5) and (6)]:

(5) On issuance of prohibition notification u/s 10(1) of the CLRA Act prohibiting employment of contract labour or otherwise, in an industrial dispute brought before it by any contract labour in regard to conditions of service, the industrial adjudicator will have to consider the question whether the contractor has been interposed either on the ground of having undertaken to produce any given result for the establishment or for supply of contract labour for work of the establishment under a genuine contract or is a mere ruse/camouflage to evade compliance with various beneficial legislations so as to deprive the workers of the benefit there under. If the contract is found to be not genuine but a mere camouflage, the so-called contract labour will have to be treated as employees of the principal employer who shall be directed to regularise the services of the contract labour in the establishment concerned subject to the conditions as may be specified by it for that purpose in the light of para 6 hereunder.

(6) If the contract is found to be genuine and prohibition notification u/s 10(1) of the CLRA Act in respect of the establishment concerned has been issued by the appropriate Government, prohibiting employment of contract labour in any process, operation or other work of any establishment and where in such process, operation or other work of the establishment the principal employer intends to employ regular workmen, he shall give preference to the erstwhile contract labour, if otherwise found suitable and, if necessary, by relaxing the condition as to maximum age appropriately, taking into consideration the age of the workers at the time of their initial employment by the contractor and also relaxing the condition as to academic qualifications other than technical qualifications.

The operative declaration of the law was that while the contract labour could not claim automatic absorption in the establishment of the principal employer, they could still raise an industrial dispute before an the industrial adjudicator/Tribunal which was required to determine whether the contract for supply of labour was genuine or a mere camouflage to evade compliance with beneficial labour legislations. If the contract was found to be a sham, the principal employer could be directed to regularise the services of such contract labour subject to certain conditions as outlined in para 125 (6) above.

7. When the Writ Petition (C) No. 2052 of 1997 came up for hearing before a learned Single Judge of this Court shortly thereafter on 20.11.2001, the Court took note of the judgment in Steel Authority of India Ltd. (supra) and dismissed the writ petition as not being maintainable. However, the respondents herein were given liberty to approach the appropriate forum. A similar order was passed on the same day in Writ Petition (Civil) No. 6221 of 1998. Both orders were passed in presence of the counsel for the appellant Air India.

8. Thereafter, on 11.6.2002 and 9.9.2002 the respondents filed statements of claim before the Assistant Labour Commissioner praying for initiation of conciliation proceedings and for a direction to the appellant herein to reinstate them with full back wages and continuity of service "and also regularise the

services". It was stated that while Respondent Nos. 1 and 2 herein worked as contract labour in the appellant's establishment from 1.8.1994, Respondent No. 3 worked since 1.12.1995. Their services were terminated with effect from 1.3.1997. In case of Respondent No. 4, he too was not assigned duties after 1.3.1997 and that this amounted to termination. It appears that no decision was taken on this statement for some time. Thereafter on 14.1.2004, the Government of India, Ministry of Labour, made an order declining to make a reference of the dispute for adjudication to the Tribunal. The reason for such refusal was stated as under:

As per the decision of the Supreme Court in the case Steel Authority of India, the concerned contract Labour is eligible for regularisation only in those circumstances, if the related contract is sham/illegal for the work prohibited under the Contract Labour (Regulation and Abolition) Act. Such a claim has not been made by the Union. Hence no dispute is (sic) existed.

9. The respondents on 9.3.2004 filed a further application before the Assistant Labour Commissioner, New Delhi in which they specifically pleaded that "contract awarded to the Respondent No. 2 (Respondent No. 5 herein) was a sham contract which was void ab initio bearing no validity and/or sanctity in law, and the contract was a paper intermediary only." Air India filed a reply to this application as the matter was taken up for conciliation. By order dated 14.9.2004, the Assistant Labour Commissioner recorded a failure of conciliation. Thereafter, on 20.12.2004, the Government of India, Ministry of Labour reiterated the earlier decision dated 14.1.2004 declining to make a reference. It was stated that "no new grounds have been raised. No I.D. subsists."

10. On 27.1.2005, the respondents filed Writ Petition (Civil) No. 1712- 1715 of 2005 in this Hon"ble Court challenging the said order dated 20.12.2004 and seeking a mandamus to the Ministry of Labour to refer the dispute to the Tribunal. The learned Single Judge, while allowing the writ petitions by the impugned judgment, held as follows:

(a) The writ petitioners showed had specifically pleaded in their applications before the Assistant Labour Commissioner that despite the prohibition by Notification dated 9.12.1976 issued u/s 10 CLRA, the appellant Air India had continued to engage contract labour. Accordingly, the contract between the appellant Air India and the contractor (Respondent No. 5) was void ab initio and illegal and the same was a sham contract without any legal validity.

(b) The order dated 20.12.2004 of the Ministry of Labour rejecting the application of the respondents seeking a reference of the disputes to the Tribunal was prima facie contrary to the aforementioned specific pleas of the respondents. The order dated 20.12.2004 was vitiated on account of non- application of mind and a misreading of the case set up by the respondents.

(c) A mandamus would issue to the Government of India, Ministry of Labour to make a reference of the disputes raised by the writ petitioners (respondents

herein) for adjudication to the Tribunal within a period of 12 weeks.

11. We have heard Mr. Rajiv Shakdhar, the learned Senior Counsel appearing for the appellant. His submissions were as follows:

(a) The respondents were employed by the independent contractors as supervisors and not as labourers. Thus they were not entitled to raise an industrial dispute. Therefore, there was no question of making any reference of an industrial dispute for adjudication to the Tribunal at the instance of the respondents.

(b) The claims of the respondents had to be examined with reference to the law that was prevalent on the date of the claims. On the date that the claim was made i.e., 11.6.2002 and 9.9.2002, the law as explained in the decision of the Hon"ble Supreme Court in Steel Authority of India Ltd. was that the contract labour did not have any automatic right of absorption in the establishment. At present, there was no prohibition on the employment of contract labour in the appellant's establishment and as such the claims were themselves not maintainable.

(c) Steel Authority of India Limited required the contract labour to show, prima facie, that the contract under which they were employed was a sham contract or a camouflage to avoid the application of beneficial labour legislation. In the claims first made on 11.6.2002 and 9.9.2002 there was no specific averment made by the respondents to this effect. Such an averment was made only in the second application dated 9.3.2004. In those circumstances, no fault could be found with the order dated 14.1.2004 passed by the Ministry of Labour declining to make the reference.

(d) Since the foundation for a claim for making a reference of an industrial dispute to the Tribunal did not exist, the Ministry of Labour, had by the order dated 20.12.2004, rightly declined to make the reference.

12. Mr. S.P. Sharma, learned Counsel for the Respondents, pointed out that the applications filed in 2002 seeking a reference of the dispute were in continuation of the earlier plea made in 1997 itself in the two writ petitions filed in this Court by the respondents. In fact, the present applications were made pursuant to the liberty granted to the respondents by this Court, in the presence of the appellant herein, while dismissing the writ petitions. Therefore, the Appellant could not now oppose the reference of the dispute for adjudication by the Tribunal. At the stage of making a reference, the authority was not expected to examine the request minutely. It had only to be satisfied that there was a prima facie basis to refer the dispute for adjudication to the Tribunal. In view of the respondents having categorically averred in the application dated 9.3.2004 that the contract was a sham contract, the order dated 20.12.2004 was vitiated by non-application of mind inasmuch as it stated that that no new grounds had been raised. Finally it was pointed out that the impugned order of the learned Single Judge had been already implemented with Government having made a reference of the dispute to

Tribunal on 23.3.2006. The respondents had filed a claim statement there on 7.6.2006 and the Tribunal had fixed 24.10.2006 as the next date of hearing by which the appellant was to file its written statement. Accordingly, it was submitted that the impugned order did not call for any interference.

13. After considering the submissions of the counsel and the pleadings on record, we are of the view that there is no merit in this appeal. At the outset, it requires to be noticed that the appellant does not deny that the respondents were engaged through contractors at a time when the Notification dated 9.12.1976 was in force. The appellant however contends that the respondents were engaged as Supervisors and not as workmen. In its counter affidavit filed in September 1997 in this Court in Writ Petition (Civil) 2052 of 1997, the appellant Air India stated as follows:

Without prejudice to the above I say that the petitioners Mr. Jagesh Dutt, Salim and Yamin Khan were engaged as Supervisors by M/s Goyal Sparkling Enterprises, New Delhi, who were given the contract for sweeping and cleaning of premises at the I.G.I. Airport. Other than the petitioners, the aforesaid contractor had engaged one more persons as Supervisor i.e. Mr. Mehardin Khan. The petitioners and the other Supervisors were functioning as Floor Managers.

The petitioners, as other supervisors were drawing a higher basic pay as compared to workers actually doing the cleaning and sweeping jobs.

The petitioner's basic pay was Rs. 1870/- and the petitioners as other supervisors were not entitled to overtime compensation or washing allowances as given to sweepers and cleaners. It is pertinent to note that the Identity card issued to the petitioners clearly states their designation i.e. Supervisor.

I am advised to say that the petitioners, not being workmen are not contract labour and Therefore, are not covered by the Notification No. S 779 (E) dated 9th December 1976 annexed hereto as Annexure R-II and thus does not come under the purview of the judgment of the Hon'ble Supreme Court in Air India Statutory Corporation v. United Labour Union 1996 (9) SCA 70. The petitioners, Therefore, have no right to regularization, being outside the scope of the aforesaid notification.

14. The respondents in their initial application stated that their job "was to supervise the work of the cleaning, sweeping and dusting rendered by the sweepers and cleaners". However, in their application filed on 9.3.2004, the respondents explained that the word "Supervisors" did not correctly describe their actual work. The relevant paragraphs of application dated 9.3.2004 read as under:

3. That the said contract was specifically awarded by the Respondent No. 1 to the Respondent No. 2 for cleaning, sweeping and dusting work only (which by necessary implication included "supervision of contracted work for better hygiene"); but the terms of the said contract between the Respondent No. 1 and

Respondent No. 2 did never include the award for work for Supervision of Contract Labour.

4. That as a part of internal arrangement for the better performance of the cleaning, sweeping and dusting work, the Respondent No. 2 designated the applicant No. 1 to 4 as "Supervisor" to supervise the cleaning, sweeping and dusting work carried out by the sweepers and cleaners to ensure cleanliness and proper hygiene and to perform ancillary functions for the better execution of the contracted work as ADMITTED by the Respondent No. 1 (vide counter affidavit filed by the Respondent No. 1 in CWP nos 2052/97 and 6221 of 1998). A photocopy of the said counter affidavits are annexed as ANNEXURE 2.

5. That the applicants no 1 to 4 had never been assigned by the Respondents to perform any administrative or managerial work; and as such the applicants No. 1 to 4 were never employed mainly or otherwise in any `Supervisory capacity". The applicants No. 1 to 4 have neither `supervised the contract Labour" engaged by the Respondent No. 2 nor they ever performed such "supervision of work" in any administrative or managerial capacity.

6. That the applicant No. 1 to 4 were employed in the establishment of the Respondent No. 1 as "Supervisors" for the supervisory work to be performed within the meaning part of the definition of word `Workmen" u/s 2(s) of the Industrial Disputes Act, 1947.

15. Thus the respondents contend that though they were designated as `supervisors" they in fact worked as workmen within the definition of Section 2(s) of the ID Act. Thus the question whether the respondents were in fact employed as workmen or contract labourers or as supervisors as claimed by the appellant appears to be a disputed one which cannot be resolved but by an inquiry before the Tribunal. We are of the view that there was enough material on record to prima facie indicate the existence of an industrial dispute that required reference u/s 10 of the ID Act.

16. As regards the other question whether the contract under which the respondents were engaged was a sham or not, the fact remains that there was a prohibition on the engagement of contract labour by the appellant by a notification u/s 10 CLRA as on the date the respondents were engaged. The consequences flowing from the employment of such contract labour in the teeth of such a notification have been spelt out in the judgment of Steel Authority of India Ltd. If the factual position contemplated in that judgment is found to exist, the appellant cannot possibly avoid the consequences. Even if the initial claims made by the respondents on 11.6.2002 and 9.9.2002 did not specifically contain an averment that the contract was a sham contract, in para 16 of the application dated 9.3.2004 it was specifically pleaded as under:

16. That it is trite to say that consequent upon the Govt. of India notification dt. 9.12.77 and following decision of the Hon"ble Supreme Court in Air India Statutory Corporation, the contract awarded to the Respondent No. 2 was a

sham contract which was void ab initio bearing no validity and/or sanctity in law, and the contract was a paper intermediary only.

17. In the light of the above set of pleadings, it requires to be seen whether the government was justified in declining to make the reference. The scope of the power of the government u/s 10 of the ID Act is fairly well settled. First, in *Telco Convoy Drivers Mazdoor Sangh and Another Vs. State of Bihar and Others*, the Hon"ble Supreme Court explained the position thus (AIR, @ p.1567, para 13):

...It is now well settled that, while exercising power u/s 10(1) of the Act, the function of the appropriate Government is an administrative function and not a judicial or quasi judicial function, and that 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. See *Ram Avtar Sharma and Others Vs. State of Haryana and Another*, *M.P. Irrigation Karamchari Sangh Vs. State of M.P. and Another*, *Shambu Nath Goyal Vs. Bank of Baroda*,

Later a three-Judge Bench of the Hon"ble Supreme Court in *Rajasthan State Road Transport Corporation and Another Vs. Krishna Kant and Others*, adverted to this aspect in the following words (AIR, @ pages 1725-26):

It is not correct to say that the remedies provided by the Industrial Disputes Act are not equally effective for the reason that access to the forum depends upon a reference being made by the appropriate government. The power to make a reference conferred upon the government is to be exercised to effectuate the object of the enactment and hence not unguided. The rule is to make a reference unless, of course, the dispute raised is a totally frivolous one ex facie. The power conferred is the power to refer and not the power to decide, though it may be that the government is entitled to examine whether the dispute is ex facie frivolous, not meriting an adjudication.

18. Thus, at the stage of considering whether to refer a dispute u/s 10 ID Act, the Government is not expected to examine minutely whether there are precise pleadings as in a civil suit. In any event the above pleading in para 16 should be held to be sufficient compliance with the requirement of *Steel Authority of India Ltd.* The Government also perhaps did not account for the fact that the respondents had to seek the remedy under the ID Act consequent to an order of the learned Single Judge of this Court in the writ petitions filed by the respondents seeking regularisation. The appellant, having been a party to this order, could not possibly oppose the reference of the dispute for adjudication by the Tribunal. We are of the view that, in the above circumstances, the Ministry of Labour was in error in declining to make a reference. Clearly, there was sufficient material brought on record by the respondents after the order dated 14.1.2004 in support of the claim for making such a reference. Therefore, the refusal to make a reference by the order dated 20.12.2004, on the ground that no new grounds have been raised, was clearly erroneous.

19. It is not possible to accept the submission on behalf of the counsel for the appellant that since there is no prohibition on the employment of contract labour as on date, no justification exists for making any reference of a dispute to the Tribunal. The present dispute arose way back in April 1997 itself and the respondents have been pursuing their claims since then. It would be a gross denial of access to justice to keep the respondents running from pillar to post for nearly 9 years to have the dispute adjudicated and then to defeat that very right by adverting to certain changed circumstances that have intervened. It is nobody's case that the delay in having the dispute decided by the appropriate forum is attributable to any act of the respondents. The legal position was itself in a flux till 2001 when the decision in Steel Authority of India Ltd. was given. That decision has now enabled the respondents to approach the industrial tribunal for the redressal of their grievances. Consequently, the remedy under Article 226, which they had invoked in 1997 itself, became unavailable to them and they had to approach the Ministry of Labour for making a reference under the ID Act. Having shut the door of Article 226, it would be unfair and unjust to shut the door of the ID` as well. It has taken the respondents 9 years to even have the adjudication of their disputes commenced at the very first level. In this context, it would be useful to recall the words of the Hon"ble Supreme Court in H.D. Singh Vs. Reserve Bank of India and Others,

...It has been our sad experience to find employers trying to stifle the efforts of employees in their legitimate claims seeking benefits under the Industrial Law by tiring them out in adjudication proceedings raising technical and hyper-technical pleas. Industrial adjudication in bona fide claims have been dragged on by employers for years together on such pleas. It would always be desirable for employers to meet the care of the employees squarely on merits and get them adjudicated quickly. This would help industrial peace.

20. As we see it, the questions that would arise for determination before the Tribunal are whether engagement of contract labour was prohibited on the date that the respondents were engaged in the establishment of the appellant; whether their engagement was pursuant to a contract; was such a contract was genuine or a camouflage to avoid the implementation of any beneficial labour legislation and are the respondents entitled to any consequential relief in either event? The issue sought to be raised before us by the appellant as regards the nature of the work performed by the respondents at the relevant time and all other issues can be appropriately decided by the Tribunal on the basis of the evidence placed before it by the parties. These questions cannot, and ought not to be decided in proceedings under Article 226 of the Constitution. No prejudice whatsoever will be caused to the appellant if it participates in the proceedings before the Tribunal where it will have the opportunity of placing all the evidence it has in answer to the claim made by the respondents. In any event, the proceedings before the Tribunal are already underway. Considering that this is a dispute which is already over 9 years old, the proceedings before the Tribunal should be allowed to proceed without any delay.

21. For all of the above reasons, we find no infirmity in the judgment of the learned Single Judge. However, the Tribunal is directed to dispose of the reference expeditiously and not later than a period of one year from today. With this direction, the appeal is accordingly dismissed with no order as to costs.