

(2019) 11 DEL CK 0324

In the Delhi High Court

Case No : Civil Writ Petition No. 5168 Of 2005, Civil Miscellaneous No. 47971 Of 2019

Airports Authority Of India

APPELLANT

Vs

A.S. Yadav & Ors

RESPONDENT

Date of Decision : 28-11-2019

Acts Referred:

Constitution Of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 17B
Contract Labour (Regulation And Abolition) Act, 1970 — Section 10

Citation : (2019) 10 AD(Delhi) 447

Hon'ble Judges : Rekha Palli, J

Bench : Single Bench

Advocate : Vaibhav Kalra, Neha Bhatnagar, Varun Kalra, Dr.Kedar Nath Tripathy, Satish Yadav

Final Decision : Allowed

Judgement

Rekha Palli, J

1. The present writ petition preferred by the Airports Authority of India assails the award dated 08.11.2004 passed by the learned Labour Court-II,

New Delhi as also the corrigendum dated 07.02.2005 passed by the respondent no.13. Under the impugned award the learned Labour Court has, after

coming to the conclusion that the respondents were employees of the petitioner and had been illegally terminated w.e.f. 31.05.1993, directed the

petitioner to reinstate them with 10% backwages from the date of their termination.

2. The petitioner is a statutory body created under the Airports Authority of India Act, 1994 who on 24.08.1979, entered into an agreement with M/s

Ex Servicemen Air Link Transport Services Ltd. (hereinafter referred to as â??

EATS) for grant of license to run the services of retrieving passengers' luggage trollies at the Delhi Airport, which agreement was extended from time to time. As per the terms of this license, EATS was to be paid a fixed license fee and was required to engage atleast eight porters to carry out the work assigned to it. On 18.12.1986, in order to fulfil its contractual obligations, EATS engaged the respondents to work as Porters at the Airport. Subsequently in November 1992, the petitioner decided to engage a common agency for retrieval and maintenance of trollies as also baggage trolley advertisement. Pursuant thereto, when the petitioner's license agreement with EATS came to an end on 31.05.1993, the petitioner granted the license for provision of these services to M/s TDI (India) International Pvt. Ltd. Thereafter, M/s TDI (India) International Pvt. Ltd assumed charge on 01.06.1993 and engaged its own workforce to carry out the jobs assigned to it in terms of the licence. Consequently, the services of the respondent-workmen who had been engaged by EATS were terminated, whereupon they raised an industrial dispute against the petitioner, and not EATS. The reference in this dispute was made by the Central Government on 02.01.1995 in the following terms:

Whether Shri A.S. Yadav and 50 others (as per the list enclosed) were the workmen of the International Airport Authority of India? If so, whether the action of the Airport Director of IAAI, New Delhi in terminating their services w.e.f. 31.5.1993 is justified? If not, to what relief the workmen is entitled to?

3. Upon the reference being made, the respondents filed their claim before the Labour Court stating that they had been employed by EATS to render specific services for the petitioner, but due to the petitioner apprehending adverse consequences of their trade union activities, they had, under the garb of retrenchment, been terminated by EATS at the behest of the petitioner. They contended that even the termination of the petitioner's contract with EATS was mala fide and driven by an intent to curb the respondents' trade union activities. It was also urged that though the respondents had subsequently received an offer from the Executive Director of EATS to re-employ them in the post of Security Guard, they declined this offer on the ground that the same was made after the dispute had already been raised. The respondents, thereafter, led evidence wherein they reiterated that

though they had been appointed and paid their respective salaries by EATS, the same was at the behest of the petitioner.

4. On the other hand, in its written statement as well as the evidence led by it, the petitioner opposed the respondents' claim by contending that

once, as per their own stand, it was EATS which was the respondents' employer, no reference/claim was maintainable against the petitioner. By

relying on the respondents' admission in the demand notice dated 21.05.1994 of having been appointed by EATS, the petitioner contended that the

non-impleadment of EATS, which was a necessary party in the industrial dispute, was fatal as the dispute could not be decided without considering the

contractor's stand which was, admittedly, the real employer of the respondents.

5. Upon consideration of the submissions of the parties and the evidence led on record, the Labour Court has allowed the claim of the respondents by

holding that they were the petitioner's workmen and that their termination w.e.f. 31.05.1993 was not justified. The petitioner was, therefore,

directed to reinstate and regularise the respondents with 10% back wages w.e.f. 31.05.1993 after the Labour Court held that inter-alia the work being

performed by the respondents was of a perennial nature; the petitioner had engaged the respondents without obtaining requisite license for engaging

contract labour; the respondents were working under the control and supervision of the petitioner; evidently there was a master-servant relationship

between the petitioner and the respondents and that, therefore, the contract between the petitioner and EATS was a mere camouflage. In arriving at

its conclusion, the Labour Court relied on the decision of the Supreme Court in Indian Petrochemicals Corpn. Ltd. and Ors. Vs. Shramik Sena & Ors.

(1999) 6 SCC 439 and observed that the decision in Steel Authority of India Ltd. and Ors. Vs. National Union Waterfront Workers and Ors. (2001) 7

SCC 1 relied upon by the petitioner was not applicable to the facts and circumstances of the case.

6. The present petition impugning this Award was filed in March 2005 and has remained pending for the last 14 years, during which period some of

the respondents have continued to receive the benefits under Section 17B of the Industrial Disputes Act, 1947 (âID Actâ for short) since

01.03.2010, in accordance with the order dated 03.03.2011 passed by this Court.

7. In support of the petition, Mr. Vaibhav Kalra, learned counsel for the petitioner submits that the impugned Award is wholly perverse and the findings therein arise out of a complete disregard of the pleadings and evidence placed on record. He submits that once the respondent/workmen had repeatedly admitted their employment by EATS before the Labour Court, in their claim statement, evidence by way of affidavit as well as their cross-examination, there was no reason for the Labour Court to hold them as being employees of the petitioner. He further submits that the Labour Court has held the respondents to be employees of the petitioner by holding that the contract between the petitioner and EATS was a camouflage even though this plea had not been raised by the respondents. He submits that once the respondents had never set up any case before the Labour Court that the contract between the petitioner and EATS was a sham and a camouflage, the Labour Court could not have examined this aspect or given a finding in this regard. It is, therefore, his contention that the Labour Court has adjudicated the dispute on issues which had not been pleaded before it by the respondents in the first place. Without prejudice to his aforesaid submission that no plea regarding the contract being a sham had been raised by the respondents, he contends that even the reasons given by the Labour Court for coming to this conclusion are contrary to the ratio of various decisions of the Supreme Court. He submits that merely because the petitioner did not have any licence for engaging contract labour and the work being done by the respondents was perennial in nature, it could not be held that the respondents were the petitioner's employees. He submits that even if it were to be held that the petitioner did not have the requisite licence to engage contract labour, the petitioner could, at best, be prosecuted in accordance with the provisions of the Contract Labour (Regulation and Abolition) Act, 1970 but cannot be termed as being the real employer of the respondents.

8. Mr. Kalra further submits that the Labour Court, while holding that the respondents were employed by the petitioner as they were working under its direct supervision and not that of the contractor/EATS, has not only failed to appreciate the undisputed factual position but has also failed to discern whether the requisite factors to establish a direct employment between contract labour and the principal employer, as laid down by the Supreme Court

in its various decisions, were met in the present case. He submits that merely because the respondents were working under the control and supervision of the petitioner at the airport, could not be a ground to hold them as being the petitioner's employees when, admittedly, the right to regulate their employment and the ultimate supervision and control over their work was exercised by EATS. In support of his contention, Mr. Kalra places reliance on Steel Authority of India Ltd. (supra) and International Airport Authority of India Vs. International Air Cargo Workers' Union and another (2009) 13 SCC 374, He, therefore, prays that the writ petition be allowed.

9. On the other hand, learned counsel for the respondents supports the impugned order and submits that the Labour Court had, after finding that the contract between the petitioner and EATS was a sham, rightly concluded a master-servant relationship between the petitioner and respondents. The fact that the respondents had worked continuously for six years on the same job clearly indicated that there was a permanent need of trolley men to carry out the work at the airport and, thus, the Labour Court was justified in directing the petitioner to reinstate and regularise them. By placing reliance on the decision of the Supreme Court in Air India Statutory Corpn, vs. United Labour Union, (1997) 9 SCC 377, he submits that since, admittedly, the petitioner did not possess any licence to engage contract labour at its premises and the respondents had satisfactorily discharged their duties at the airport for the last six years, in accordance with the petitioner's directions, there is no reason for this Court to interfere with the findings of the Labour Court. He therefore, prays that the writ petition be dismissed.

10. I have heard the learned counsel for the parties and with their assistance perused the record.

11. The petitioner's entire case is that as per the respondents own averments in their demand notice, statement of claim and their evidence before the Labour Court, they had admitted that they were employed by EATS, which admissions have not been appreciated by the Labour Court while rendering its findings. In these circumstances, it would be appropriate to refer to the respondents' averments in these documents. Paragraphs 1 and 3 of the demand notice issued by the respondents to the petitioner on 21.05.1994 reads as under:

1. That the undersigned workmen were appointed by M/s Ex-Service Men's Airlink Transport Services Ltd. on various occasion for the post of Loader/Trolleyman and the alleged supervisors. The duties of the supervisors were always in the nature of workmen only but they were designated as supervisors.

.....

3. That in the month of May, 1993, the dispute arose between the workmen and the management with regard to the active role of the trade union made by the employees and the concerned workmen, which has created a doubt in the mind of the management that the workmen may ask for other benefits which are otherwise available to them by the existing rules and laws made for the purposes. The management was afraid and therefore a hasty action was taken by the management and have issued the retrenchment notices to almost 80 employees with a frivolous excuse that their contract with addressee no.3 has been terminated by the addressee no.3, therefrom the management has retrenched the permanent employees without following the procedure laid down for the purpose of retrenchment have retrenched the workmen concerned. Not only this, they have also misled the employees through their pet employees to opt a wrong forum and wrong person to sue for their rightful.

Further, in paragraphs 5 and 6 of their statement of claim dated 30.03.1995 filed before the Labour Court, the respondent-workmen averred as under:

5. That on 08.02.1995, the concerned workmen received a letter from the Executive Director of E.A.T.S. regarding the re-employment, which was duly replied by the concerned workmen, rejecting the said offer on the ground that the workmen were not the security Guards and are entitled for their reinstatement with full back wages and all other attendant benefits from the management E.A.T.S. who has retrenched them on the instigation of I.A.A.I. by their Director. The termination of contract between these two was with a malafide intention and in connivance with each other to curb the Trade Union Activities of the workmen concerned. The letter of offer for reemployment was issued only when the Hon'ble Conciliation Officer was pleased to admit the claim of the workmen concerned regarding their termination etc. which shows the malafide and connivance of EATS and IAAI.

6. That the termination of the service in the garb of retrenchment order of the confirmed concerned employees by the EATS in connivance with IAAI

and their Directors, is purely illegal, arbitrary and un-justified, as well as, against the rules of natural justice.â??

Subsequently, in paragraphs 8 and 11 of their evidence by way of affidavit dated 12.11.1998 filed before the Labour Court, the respondent workmen

admitted their termination by EATS, which reads as under:

â??8. That after receiving the retrenchment notices, the workmen filed a civil suit No. for injunction but the matter was dismissed as withdrawn as it

was not maintainable before the civil court, thereafter a Writ petition was filed before the Honâ??ble High Court of Delhi but the same was also

dismissed on the ground that alternate remedy is available to the workmen concerned before the Labour Court, therefore a Demand Notice dt. 21.5.94

was served upon M/s Ex Servicemen Airlink Transport Limited, Director General Management, International Airport Authority of India and to the

Labour Commissioner, the said demand notice is Exb. WW-1/.

11. That there was a conspiracy between the management and M/s EATS Ltd. to remove the workmen in the garb of retrenchment by means a

frivolous excuse of adjustment of services. The services of the workmen concerned were of permanent nature and cannot be retrenched on or

terminated on a frivolous ground of termination of any contract between the management and M/s EATS Ltd. All the concerned workmen are entitled

for reinstatement with full back wages and all other attendance benefits alongwith the continuity of services. The said retrenchment is illegal and

unjustified. All the workmen concerned are still unemployed. M/s EATS Ltd. to fix them for some services.â??

Even during the cross-examination of one Sh. A.S. Yadav as the workmenâ??s witness (WWA), engagement of the workmen by EATS was

admitted, the relevant extract thereof reads as under:

â??CROSS EXAMINATION 51 A

WWA SH. A.S. YADAV WORKMAN AS HIS OWN WITNESS:

ON SA:

Affidavit Exhibit WW1/1 is correct

It may be read as part of my evidence.

XXXX

Appointment letter to me was issued by EATS. We used to be paid by EATS our salary. The termination letters were also given by EATS. At that

time alternative posts were offered to us. The offers were given by EATS after two-three years we did not accept that offer.â??

12. The aforesaid averments show that the respondents consistently maintained a stand before the Labour Court, especially in their statement of claim

and their evidence by way of affidavit, that they were confirmed employees of EATS and that their services had been terminated by EATS, in

connivance with the petitioner. The respondents also claimed that since the work being carried out by them was perennial in nature, under the

immediate supervision of the petitionerâ??s officers, they should be treated as employees of the petitioner. However, interestingly, there is not even a

whisper in the respondentsâ?? claim or evidence before the Labour Court that the contract between the petitioner and EATS was a sham or a

camouflage.

13. In the light of this position emerging from the record that the respondents had specifically claimed being employed by EATS, which in turn had

been engaged by the petitioner to provide select services at the airport, it was neither open for the respondents to subsequently plead otherwise, nor

could the Labour Court hold the contract between the petitioner and EATS as a sham contract. In this regard, reference may be made to the decision

in Steel Authority of India Ltd. v. Union of India & Ors. (2007) 1 SCC (L&S) 630 wherein the Supreme Court reiterated that once a definite stand

had been taken by the employees before the Labour Court that they had been working under the contractor, it would not be open for them to take a

contradictory plea later on that they were also workmen of the principal employer.

â??26. In A.P. SRTC v. G. Srinivas Reddy [(2006) 3 SCC 674 : 2006 SCC (L&S) 577] this Court held: (SCC p. 682, para 11)

â??If the respondents want the relief of absorption, they will have to approach the Industrial Tribunal/Court and establish that the contract-labour

system was only a ruse/camouflage to avoid labour law benefits to them. The High Court could not, in exercise of its jurisdiction under Article 226,

direct absorption of the respondents, on the ground that work for which the respondents were engaged as contract labour, was perennial in nature.â??

27. It was further held: (SCC p. 682, para 12)

“The only remedy of the respondents, as noticed above, is to approach the Industrial Tribunal for declaring that the contract-labour system under

which they were employed was a camouflage and therefore, they were, in fact, direct employees of the Corporation and for consequential relief.”

Similar view has been taken in *KGSD Canteen Employees' Welfare Assn.* [(2006) 1 SCC 567 : 2006 SCC (L&S) 158].

28. 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 principal 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.”

In the present case, since the respondents had taken a specific plea that they were employees of EATS, they are precluded from subsequently urging

that they were direct employees of the petitioner.

14. I also find merit in the petitioner’s contention that merely because the Labour Court found that the petitioner had engaged the respondents as

contract labour through EATS without a licence for such engagement under the Contract Labour (Regulation and Abolition) Act, 1970 (‘CLRA

Act’ in short), the respondents could not be automatically treated as the petitioner’s employees. The provisions of the CLRA Act do not

contemplate creation of a direct employer-employee relationship between the principal employer and the contract labour merely because the principal

employer did not have a valid license for engaging contract labour under the Act. In my view, non-adherence of the provisions of the CLRA Act

could, at best, lead to prosecution of the petitioner’s responsible officers but could not be a ground to hold that the contract between the petitioner

and the EATS was a sham, especially in the absence of any such plea by the respondents.

15. I also find merit in the petitioner's contention that the Labour Court has failed to appreciate that the respondents were unable to establish that

they met the necessary criteria to be declared as direct employees of the petitioner, since neither was it their case that the petitioner was paying their

salaries nor was it their case that the petitioner had the power to initiate disciplinary action against them. I find that merely because the petitioner was

directing the manner in which work was expected to be carried out by the respondents, it could not imply that they were employees of the petitioner.

In this regard, reference may be made to paragraphs 37 to 39 of the decision in *International Airport Authority of India v. International Air Cargo*

Workers' Union and Another (supra) which reads as under:-

37. The industrial adjudicator can grant the relief sought if it finds that contract between the principal employer and the contractor is sham,

nominal and merely a camouflage to deny employment benefits to the employer and that there is in fact a direct employment, by applying tests like:

who pays the salary; who has the power to remove/dismiss from service or initiate disciplinary action; who has direction and employee the way in

which the work should be done, in short, who has direction and control over the employee. But where there is no notification under Section 10 of the

CLRA Act and where it is not proved in the industrial adjudication that the contract was a sham/nominal and camouflage, then the question of

directing the principal employer to absorb or regularize the services of the contract labour does not arise.

38. The tests that are applied to find out whether a person is an employee or an independent contractor may not automatically apply in finding out

whether the contract labour agreement is a sham, nominal and is a mere camouflage. For example, 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, if the salary is paid by a

contractor, if the right to regulate the employment is with the contractor and the ultimate supervision and control lies with the contractor.

39. The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/allotted/sent to

him. But it is the contractor as employer, who choose 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.â??

16. Therefore, as per the aforesaid decision, the Supreme Court laid down that when disputes regarding the existence of an employer-employee relationship arise in a claim raised by the workman, the Court adjudicating the dispute is required to examine as to (1) who pays salary to the workman,

(2) who possesses the power to initiate disciplinary action against him and

(3) whether the alleged employer has any control and supervision over the claimant workman. On an application of these considerations to the facts of

the present case, it is evident that as per the respondentsâ?? own averments before the Labour Court, they were paid their salaries by EATS, their

services had been terminated by EATS and, as per the contract between EATS and the petitioner, while the respondentsâ?? work was marginally

supervised by the petitioner, they worked chiefly under the supervision and control of EATS. Thus, the mere deputation of the respondents by EATS

to work as trolley men at the Airport, under the supervision of the petitioner, would not lead to the conclusion that they were under the genuine

supervision and control of the petitioner. Ultimately, the respondents continued to work under the supervision and control of EATS and failed to satisfy

the criteria of establishing an employer-employee relationship between themselves and the petitioner, even as per the decision in International Airport

Authority of India (supra). In these circumstances, the finding of the Labour Court holding them to be direct employees of the petitioner is wholly

perverse and cannot be sustained.

17. While arriving upon its findings, I find that the Labour Court had placed reliance on the decision in Indian Petrochemicals (supra) without

appreciating that in the said case, the Supreme Court was dealing with the claim of workmen who had been continuously and uninterruptedly

discharging duties at the premises of the principal employer, despite a change in

contractors from time to time. However, in the facts of the present petition, it was the respondents' own case that they had been engaged only by EATS and worked during the subsistence of the contract between the petitioner and EATS, whereafter the petitioner engaged a new contractor instead of EATS and the respondents were never re-employed in the petitioner's premises. On the other hand, even though the petitioner had rightly placed reliance on the decision in *National Union Waterfront Workers (supra)*, the Labour Court failed to correctly appreciate the effect thereof. The said decision, in fact, clearly laid down that even in cases where a notification under Section 10 of the CLRA Act is issued prohibiting employment of contract labour in any establishment, the said Act does not provide for automatic absorption of the contract labour. Thus, even if the petitioner did not have the license to engage contract labour, this sole ground could neither be used to hold that the contract was a sham, nor could the petitioner be directed to reinstate and regularise the respondents who, as per their own case, were employees of the contractor.

18. Before I conclude I may also refer to the decision of the Supreme Court in *Air India Statutory Corpn. (supra)*, relied upon by the learned counsel for the respondents, which decision was in fact one of the primary reasons for the findings of the Labour Court. I find that this decision, however, had already stood overruled by the Supreme Court on 30.08.2011 in *National Union Waterfront Workers and Ors.*, even before the impugned award came to be passed on 08.11.2004, which fact appears to have been overlooked by the Labour Court. Reference may be made to paragraph 125(4) of *National Union Waterfront Workers and Ors.* wherein the Supreme Court held as under:

“(4) We overrule the judgment of this Court in *Air India case [(1997) 9 SCC 377]* prospectively and declare that any direction issued by any industrial adjudicator/any court including the High Court, for absorption of contract labour following the judgment in *Air India case [(1997) 9 SCC 377]* shall hold good and that the same shall not be set aside, altered or modified on the basis of this judgment in cases where such a direction has been given effect to and it has become final.”

19. For the aforesaid reasons, the impugned Award cannot be sustained and is, accordingly, set aside. However, in the peculiar facts of the present

case, even though the respondents had filed affidavits before this Court undertaking to refund the differential amount between the last drawn wages and minimum wages in case the writ petition were to be allowed, it is directed that no recovery on this count shall be made by the petitioner from the respondent-workmen.

20. The writ petition is allowed in the aforesaid terms.