

(2015) 03 KAR CK 0342

In the Karnataka High Court

Case No : Writ Appeal Nos. 1980 and 2179 of 2010 (L-RES)

BEML Limited

APPELLANT

Vs

The President Mysore Division General Labour Association
and Others

RESPONDENT

Date of Decision : 12-03-2015

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2015) 2 AKR 769 : (2015) 3 KarLJ 447 : (2015) 4 KCCR 3053 :
(2015) LabIC 2674

Hon'ble Judges : K.L. Manjunath, J;R.S. Chauhan, J

Bench : Division Bench

Advocate : K. Kasturi, Senior Advocate for Kasturi Assts., for the Appellant; K. Subba Rao, for V.S. Naik, Advocates for the Respondent

Final Decision : Disposed off

Judgement

K.L. Manjunath, J.—These two appeals are preferred by the Bharat Earth Movers Ltd. [hereinafter referred to as BEML] and the Mysore Division General Labour Association [hereinafter referred to as the respondent-union], being not satisfied with the relief granted by a learned Single Judge in WP No. 35453 of 2003 dated 16-4-2010.

2. The writ petition was filed by the BEML, challenging the legality and correctness of the award passed by the industrial tribunal, Mysuru dated 22-4-2003 passed under Reference No. 107 of 2001, wherein, the tribunal has declared the workers engaged in the BEML canteen at Mysuru, as permanent workmen of BEML and they are entitled to wage benefits and other allowance including leave, overtime and welfare benefits on par with the permanent employees doing unskilled work, from the date of order of reference. The tribunal also held that the workers engaged in the BEML canteen at Mysuru are also entitled to 50% of the arrears of difference in the salaries etc., from the date of order of reference till the date of award.

3. When the matter was pending before the learned Single Judge, the respondent union gave up its contention to consider them as permanent employees of the BEML and are entitled for other benefits on par with the permanent employees.

4. The learned Single Judge allowed the writ petition of the BEML in part and set aside the award of the tribunal holding that the workers engaged in the BEML canteen at Mysuru not permanent workmen of BEML and therefore they are not entitled for the benefits, including leave and welfare benefits. However held that they are entitle for wages on par with permanent employees of BEML doing unskilled work with effect from 10-5-2001 up to 31-3-2010 and are entitled for regular salaries and allowances. The learned Single Judge reduced the arrears of difference in the salaries and emoluments from 50% to 40%.

5. The concurrent findings of the tribunal and the learned Single Judge are questioned by BEML. The respondent-union has filed the connected appeal being aggrieved by the reduction of the arrears of difference in the salaries and emoluments from 50% to 40%. Therefore, these two appeals are heard together.

6. We have heard Sri K Kasturi, learned senior counsel appearing for the BEML and Sri K. Subbarao, learned senior counsel appearing for the respondent-union.

7. Facts leading to these appeals are that: BEML is a public sector undertaking having one of its factories at Mysuru. In terms of the Factories Act, 1948, BEML is required to establish a statutory canteen. Accordingly, a canteen is established. It is the specific case of the respondent-union that from the date of inception of the canteen, the workers engaged in the BEML canteen at Mysuru are not getting the wages on par with unskilled workers of the BEML. Therefore, a dispute was raised. The matter was referred to the labour court by the state government by its order dated 20-1-1996 and later the same was transferred to industrial tribunal, Mysuru on the ground that the number of persons working in the statutory canteen was more than 100 on the date of reference.

8. Before the tribunal, both parties filed the claim statement. According to the workmen, the workers engaged in the BEML canteen at Mysuru are permanently working in the canteen and they are entitled for equal wages on par with the unskilled workers of the BEML. According to the union, the factory is providing them uniform, provident fund by remitting the amount deducted from their salary through the factory establishment and they are discharging the work from the date of inception of the canteen continuously. However, they have not been paid the wages on par with the regular employees of BEML. It is also the case of the respondent-union that though the workers engaged in the BEML canteen at Mysuru are working under the direct supervision and control of BEML, they have been considered as workmen under a contractor. According to them, the canteen is being run by the management of BEML under the guise of an agreement entered into between the management of BEML and the contractor. It is also the specific case of the respondent-union that for all practical purposes, the canteen

is under the direct supervision and control of the BEML.

9. BEML denied the relationship of master and servants between it and the workers engaged in the BEML canteen at Mysuru. According to it, the canteen is being run by a contractor and respondents are not employees of BEML, but they are employees of the contractor and it was further contend that reference was not maintainable and that the workers engaged in the BEML canteen at Mysuru are not entitled to claim any relief in the hands of the tribunal.

10. Based on the claim statements filed by the parties, the tribunal formulated the following issues:

"1) Whether B.E.M.L. Canteen workers are justified in demanding the equal wages and other facilities which are provided to the factory workers?

2) If so, what relief the workers are entitled to?"

11. In order to prove their respective contentions, both parties have let in evidence before the tribunal. On behalf of the respondent-union, one witness was examined by name Satish and relied upon ExW1 to 16. As against the evidence of workmen, on behalf of BEML, its personnel officer was examined as MW1 and he relied upon ExM1 to M17. The tribunal, after considering the evidence let in by both parties and the arguments advanced by them, answered issues 1 and 2 in the affirmative and accordingly granted relief to the workmen.

12. Aggrieved by the award, the management of BEML filed the writ petition. The respondent-union was satisfied with the award passed by the tribunal did not challenge the award passed by the tribunal. The learned Single Judge, after hearing the parties, allowed the petition in part, as stated supra. Therefore, both parties are before us.

13. The main contentions of Sri K Kasturi, learned senior counsel appearing for the BEML are that: The reference sent by the government of Karnataka to the labour court was bad in law, since BEML is a public sector undertaking governed directly by the central government. Consequently, the tribunal, without jurisdiction, has allowed the reference and the award passed by the tribunal is required to be set aside only on this ground. He also contends that the BEML did not engage any workers in its canteen run by a contractor. According to him, as per the Factories Act, 1948, BEML is required to set up a canteen for the benefit of its permanent employees and such canteen is being run by a contractor as per the agreements produced by BEML and in terms of the agreement, the contractor has engaged the services of members of the respondent-union and therefore under no stretch of imagination, the services of the workers engaged in the BEML canteen at Mysuru can be considered as employees of the BEML factory and therefore he contends that the award passed by the tribunal to pay wages on par with the unskilled workers of BEML is required to be set aside. He further contends that there is no evidence let in by the respondent-union that the workers engaged in the BEML canteen at Mysuru are discharging similar work to

that of unskilled labourers of BEML. When there is no evidence to the said effect, the tribunal has committed an error in directing the BEML to pay wages on par with the unskilled workmen of BEML. According to him, the nature of work being rendered by the unskilled workers in the factory is entirely different from the work being discharged by the workers engaged in the BEML canteen at Mysuru. Lastly, he contends that when the respondent-union has given up its claim to make the workers engaged in the BEML canteen at Mysuru as permanent employees of BEML, they cannot demand for equal wages on par with unskilled workers of BEML.

14. In support of his arguments, learned counsel for the appellant-BEML has relied upon the following judgments:

"* BALWANT RAI SALUJA and ANOTHER v. AIR INDIA LTD [2014 LLR 1009;

* HAL v. HINDUSTAN AERO CANTEEN K SANGH [2003-I-LLJ 494];

* INDIAN PETROCHEMICALS CORPORATION LTD v. SHRAMIK SENA [1999(2) LLJ 696];

* Workmen of The Food Corporation of India Vs. Food Corporation of India, AIR 1985 SC 670 : (1985) 50 FLR 442 : (1985) 2 LLJ 4 : (1985) 1 SCALE 344 : (1985) 2 SCC 136 : (1985) 2 SCR 1065 : (1985) 17 UJ 775 ; and

* R.K. Panda and Others Vs. Steel Authority of India and Others, (1994) 4 JT 151 : (1994) 2 SCALE 910 : (1994) 5 SCC 304 : (1987) SCC 314 Supp : (1994) 3 SCR 1034 : (1994) 3 SLJ 227 ;"

15. Per contra, Sri K Subbarao, learned senior counsel appearing for the respondent-union, submits that considering the evidence let in before the tribunal, when the tribunal on facts has given a finding as to how the workers engaged in the BEML canteen at Mysuru are to be considered as employees of BEML and when the said finding of the tribunal has been accepted by the learned Single Judge, this court, in exercise of its powers under Article 227 of the Constitution of India cannot lightly interfere with the award passed by the tribunal and the order passed by the learned Single Judge. According to him, the scope of judicial review under Article 227 is very limited. He submits that the respondent-union has let in voluminous evidence to show that how the workers engaged in the BEML canteen at Mysuru are to be considered as workmen of BEML and how the canteen is being run by the BEML. He submits that the persons engaged in the canteen are to be considered as employees of the factory, since they are under the direct supervision and control of the management of BEML. He further submits that the agreements relied upon by the BEML only show that it is only a camouflage to deny the legitimate rights of the workers and it is only a make-believe story to show that the canteen is being run by the contractor. According to him, the entire evidence let in by the parties reveal that the agreement entered into between the BEML and the contractor is only to see that none of the workers engaged in the canteen shall get equal

wages on par with the regular unskilled workers of BEML. According to him, from the date of inception of the canteen at BEML factory, Mysuru, the workers engaged in the canteen are working. They are getting uniform from BEML and the canteen is directly run under the supervision and control of BEML. BEML has appointed a manager to look after the canteen. By taking us through the evidence of the personnel officer of BEML, who has been examined as the management witness before the tribunal and the documents relied upon by the parties, he contends that the workmen have proved that they are working directly under the supervision and control of BEML and that they cannot be considered as employees of the contractor. According to him, the contractors are being changed from time to time, but these workers are not changed. He contends that BEML is deducting and remitting provident fund contributions from these workers. He further contends that the workers engaged in the BEML canteen at Mysuru have fulfilled the parameters laid down in para-25 of the decision of the Supreme Court in the case of INDIAN PETROCHEMICALS CORPORATION LTD [supra]. Relying upon the above judgment of the Hon'ble Supreme Court, he submits that the learned Single Judge has rightly dismissed the writ petition. It is also the case of respondent union that the workmen have fulfilled the terms and parameter contained in para-87 of the judgment of the Hon'ble Supreme Court in the case of BALWANT RAI SALUJA [supra]. He, submits that the appeal filed by the BEML is liable to be dismissed.

16. Sri Subbarao, learned senior counsel, further submits that when the matter was referred by the government to the labour court in the year 1996, there was no notification empowering the state government to send the reference for adjudication. However, in view of the subsequent delegation of power, the state government was empowered to refer the dispute. Therefore, he submits that, it is in view of the subsequent notification empowering the state government to send the reference, the learned Single Judge has restricted the relief of arrears of difference in the salaries and emoluments only from 2001, even though the reference is of the year 1996. In the circumstances, he contends that the contention of Sri K Kasturi, learned senior counsel appearing for BEML, that the reference itself was bad in law cannot be accepted. He further submits that even though the government had no power to refer the matter to the labour court, due to subsequent notification the government has got power to refer the matter the said defect has been cured and moreover, BEML is no way affected on account of the relief granted by the learned Single Judge, as the difference of arrears in the salaries and emoluments have been restricted from 2001 only even though the reference is of the year 1996. He further submits that when BEML has not raised the said point as a preliminary issue before the labour court, the appellant cannot be permitted to raise such an issue belatedly.

17. By way of reply, Sri Kasturi submits that even though the contention urged by BEML are not acceptable to this court, the workers engaged in the BEML canteen at Mysuru are not entitled to seek pay on par with the wages payable to regular unskilled workers of BEML. To support this contention, he has relied upon

the decision of the Supreme Court in the case of STATE OF HARYANA v. CHARANJIT SINGH [2006-I-LLJ 431].

18. Having heard the learned counsel for the parties, we have to consider the following points in this appeal:

"i) Whether the learned Single Judge has commuted an error in granting relief by modifying the award passed by the tribunal?

ii) Whether the order passed by the learned Single Judge requires to be interfered with?"

19. Following points are not in dispute in this case: BEML established its factory at Mysuru in the year 1984. Since then, a statutory canteen is provided in the factory. The contention of the respondent-union is that the workmen in the canteen are to be considered as workmen of the BEML and therefore they are entitled for the wages on par with the wages payable to unskilled workers in the BEML. The contention of BEML is that the workers in the canteen are not its employees and there is no master-servant relationship between the BEML and the workers in the canteen, as they were appointed by the contractor who runs the canteen. However, the respondent-union contends that the workers in the canteen are working directly under the control and supervision of the BEML, even though they have been called as employees appointed by the contractor. It is the further case of the respondent-union that the contractor of the canteen are being changed from time to time, but since the inception of the canteen the workers in the canteen are working under the BEML.

20. Though several judgments have been relied upon by the learned counsel for both parties, Sri K Kasturi, learned senior counsel appearing for the BEML, submits that if the respondent-union has proved its case that it satisfies the parameters laid down in para-25 of the judgment of the Hon"ble Supreme Court in the case of INDIAN PETROCHEMICALS CORPORATION LTD [supra] and par-87 of the decision of the Hon"ble Supreme Court in the case of BALWANT RAI SALUJA [supra], the other judgments need not be considered by this court. He, however, submits that the respondent-union has failed to fulfill the parameters prescribed in the aforesaid two judgments.

21. In order to appreciate the aforesaid contention, we feel it appropriate to reproduce the said two paragraphs in the aforesaid two judgments, as under:

"IPCL v. SHRAMIK SENA

25. Though the canteen in the appellant's establishment is being managed by engaging a contractor, it is also an admitted fact that the canteen has been in existence from inception of the establishment. It is also an admitted fact that all the employees who were initially employed and those inducted from time to time in the canteen have continued to work in the said canteen uninterruptedly. The employer contends that this continuity of employment of the employees, in spite of there being change of contractors, was due to an order made by the Industrial

Court, Thane, on November 10, 1994 wherein the Industrial Court held that these workmen are entitled to continuity of service in the same canteen irrespective of the change in the contractor. Consequently, a direction was issued to the management herein to incorporate clauses in the contract that may be entered into with any outside contractor to ensure the continuity of employment of these workmen. The management, therefore, contends that the continuous employment of these workmen is not voluntary. A perusal of the said order of the Industrial Court shows that these workmen had contended before the said Court that the management was indulging in an unfair labour practice and in fact they were employed by the Company. They specifically contended therein that they are entitled to continue in the employment of the Company irrespective of the change in the contractor. The Industrial Court accepted their contention as against the plea put forth by the management herein. The employer did not think it appropriate to challenge this decision of the Industrial Court which has become final. This clearly suggests that the management accepted as a matter of fact the respondent-workmen are permanent employees of the management's canteen. This is a very significant fact to show the true nature of respondents' employment. That apart, a perusal of the affidavits filed in this Court and the contract entered into between the management and the contractor clearly establishes:--

- (a) The canteen has been there since the inception of the appellant's factory.
- (b) The workmen have been employed for long years and despite change of contractors the workers have continued to be employed in the canteen.
- (c) The premises, furniture, fixture, fuel, electricity, utensils etc. have been provided for by the appellant.
- (d) The wages of the canteen workers have to be reimbursed by the appellant.
- (e) The supervision and control on the canteen is exercised by the appellant through its authorised officer, as can be seen from the various clauses of the contract between the appellant and the contractor,
- (f) The contractor is nothing but an agent or a manager of the appellant, who works completely under the supervision, control and directions of the appellant.
- (g) The workmen have the protection of continuous employment in the establishment.

BALWANT RAI SALUJA v. AIR INDIA LTD.

87. In terms of the above, the reference is answered as follows: The workers engaged by a contractor to work in the statutory canteen of a factory would be the workers of the said factory, but only for the purposes of the Act, 1948, and not for other purposes, and further for the said workers, to be called the employees of the factory for all purposes, they would need to satisfy the test of employer-employee relationship and it must be shown that the employer

exercises absolute and effective control over the said workers."

22. In order to appreciate the rival contentions, we have to consider the evidence on record. As rightly contended by Sri K Subbarao, learned senior counsel appearing for the respondent-union, the scope of re-appreciation of evidence in a writ appeal is very very limited. Even though we are not supposed to re-appreciate the entire evidence let in by the parties. Still, in order to appreciate the rival contentions, we have scanned the evidence.

23. At the first instance, we have noticed that for reasons best known to BEML, the contractor of the canteen has not been examined before the tribunal. BEML could have summoned the contractor and could also have summoned documents from the contractor to prove the relationship between the workers engaged in the BEML canteen at Mysuru and the contractor. One of the agreements entered into between the contractor and BEML is produced at ExM13 dated 8-10-1996, entered into between one N.S. Narayan and BEML, ExM14 is another agreement which was entered into on 8-9-1995 by the BEML with the very same person by name Narayan. In other words, each of the agreements are entered into for a period of 12 months only. As per the terms and conditions of these agreements, BEML is required to provide rent free building with kitchen and dining hall, kitchen equipments, catering materials including cups, plates, spoons etc., tables and chairs, in addition to furniture, fixtures and other kitchen equipments and catering materials etc to the contractor for the use in the canteen. The contractor is required to utilize those equipments and return the same in good condition after the period of his contract subject to usual wear and tear. The contractor is also required to supply food articles to the employees of BEML at the following rates, as per the agreement dated 8-10-1995:

Similarly, the very same terms and conditions have been incorporated in the other agreement dated 8-10-1996. In terms of this agreement, the contractor is required to supply food articles to the BEML employees at its factory at Mysuru, at the following rates:

24. By looking into the pith and substance of the agreements, except providing building and kitchen equipments, BEML is not required to provide anything. Still, the contractor is required to supply food articles at a reduced rate. Nowhere it is stated that the food to be supplied by the contractor shall be at a subsidized rate. But, contrary to these agreements, we have seen a register maintained by the BEML, which is marked as ExM1, a wage register for the year 2000-01, showing the details of the workers in the canteen. It is signed by the Manager (HRD), Equipment Division, Mysuru Complex, BEML, Belavadi, Mysuru. If the wages to the workers engaged in the BEML canteen at Mysuru are to be paid by the contractor and if the workers are the permanent workers of the contractor, we are unable to understand as to what made the BEML to maintain a wage register in respect of the workers engaged by a contractor in the BEML canteen at Mysuru?

25. In addition to this, we have also seen ExM2, muster roll for the year 2000-01. This register shows the details of the attendance of the workers engaged in the BEML canteen at Mysuru. If the workmen are not employees of the BEML, we are unable to understand why a muster roll shall be maintained by BEML in respect of the workers engaged in the BEML canteen at Mysuru?

26. Another document produced by the management is ExM7, which is a xerox copy of the employment/identity card in respect of N S Narayan, who is said to be the canteen contractor during the relevant period. In the description of the Identity Card at Sl No. 3, his designation is shown as "supervisor" in the canteen. If he is a contractor independently running the canteen, how he is shown as the supervisor working in the canteen of BEML?

27. We have also seen ExW15, which is a daily statement of store issues at the BEML canteen, Mysuru unit. This document discloses the commodities issued from the store of BEML to the canteen. A perusal of this document clearly shows that the canteen at the Mysuru factory of BEML is being run by the BEML and not by any contractor.

28. ExW1 is the provident fund statement of one Sathish, which discloses that provident fund contribution of this employee is deducted and remitted by the BEML. The workers engaged in the BEML canteen at Mysuru are also issued with identity badges. They have been marked as ExW6. ExW7 shows the change of weekly menu in the canteen, which indicate as to what types of foodstuffs are to be supplied to the employees of BEML in its canteen at Mysuru. This document discloses the different types of menu to be prepared by the canteen workers for supplying to the employees of BEML. BEML has also issued duty passes to the workers engaged in the BEML canteen at Mysuru and they have been produced at ExW12 series.

29. From the above documents, it is clear that the agreements entered into between the contractors and the BEML are only a make-believe story. It has also come in the evidence of the personnel officer of BEML, examined on behalf of BEML as MW1, that every day an officer would sit in the canteen to look after the management of the canteen on behalf of BEML. This shows that the entire supervision and control of the canteen is with the BEML and not under the control of the persons who are shown as contractors in the agreements. The personnel officer has also admitted in his evidence that the contractors are being changed from time to time, but the very same workers are working in the canteen. On the basis of the evidence let in by the BEML only, we have to hold that the workers engaged in the BEML canteen at Mysuru are directly appointed by BEML to work in its canteen at Mysuru under the control and supervision of BEML and therefore, they cannot be considered as employees of the canteen contractors. This aspect is proved by the action of the BEML by showing the contractor as supervisor in the canteen. When the contractor himself is working as supervisor of the canteen, he cannot be considered as the employer of the workers in the canteen.

30. Considering the evidence let in by both parties we are of the view that the case of the parties squarely falls within the parameters laid down in para-25 of the judgment of the Hon"ble Supreme Court in the case of INDIAN PETROCHEMICALS CORPORATION LTD [supra] and para-87 of the decision of the Hon"ble Supreme Court in the case of BALWANT RAI SALUJA [supra]. We are also of the view that the respondent-union has proved the parameters laid down in these judgments. In the circumstances, we are of the view that the learned Single Judge has not committed any error in holding that the respondent-union has proved its case to claim wages on par with the wages of unskilled workers of BEML.

31. In so far as the point raised by Sri K Kasturi, learned senior counsel appearing for the BEML, in regard to the maintainability of the reference is concerned, the reference is of the year 1996. In the year 1996, there was no notification empowering the state government to send the reference to labour court. However, subsequently, such a notification has been issued. If really BEML was keen on pressing the question of maintainability of the reference, in all fairness, it should have requested the tribunal to consider the said issue as a preliminary issue. Without raising such a preliminary issue before the tribunal in the beginning and having slept over the matter for a number of years, this court cannot appreciate such a contention at this juncture. Even if the tribunal has returned the reference on the ground that the government had no power to send the reference, due to issuance of a notification subsequently, the government could have sent the reference afresh. In such an event, the point now raised by the BEML could not have been available to it. In addition to this, though the reference is of the year 1996, relief has been granted to the respondent-union by the tribunal as well as the learned Single Judge not from the date of reference, but from 2001 onwards, as the state government has got power to send the reference in the year 2001. In these circumstances, the maintainability of the reference cannot be adjudicated at this length of time.

32. Having heard so, we are of the view that even though the respondent-union has given up its claim for regularization of the workers in the BEML canteen at Mysuru as permanent workers of BEML, when the court holds that they have to be considered as permanent workmen of BEML, the workers of the BEML canteen at Mysuru are entitled for all consequential benefits including the right to claim the status of permanent workmen of BEML on par with its unskilled workmen. Merely because a concession is shown by the respondent-union, it cannot be a ground for this court to reject the legitimate claim of the workers. Accordingly, we mould the relief.

33. In the light of aforesaid discussion, the other judgments relied upon by both parties are not required to be considered by us, since the respondent-union has proved its case on the basis of the parameter laid down in para-25 of the judgment of the Hon"ble Supreme Court in the case of INDIAN PETROCHEMICALS CORPORATION LTD [supra] and para-87 of the decision of the

Hon"ble Supreme Court in the case of BALWANT RAI SALUJA [supra]. Having held so, the workmen of the BEML canteen at Mysuru are entitled for equal wages on par with the permanent unskilled workers of the BEML, considering the hardship that would be caused to the BEML we reduce the arrears of difference in the salaries and emoluments to the workmen to 35%.

34. With the above modification, the order of the learned Single Judge is confirmed and both appeals are disposed of accordingly.