

(2009) 07 JH CK 0031
In the Jharkhand High Court

Bharat Coking Coal Limited	Vs	APPELLANT
Their Workmen and Another		RESPONDENT

Date of Decision : 01-07-2009

Acts Referred:

Constitution of India, 1950 — Article 226
Contract Labour (Regulation and Abolition) Act, 1970 — Section 10, 12, 23, 25, 7
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16

Citation : (2010) 2 LLJ 131

Hon'ble Judges : Ajit Kumar Sinha, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Ajit Kumar Sinha, J.—The present writ petition has been preferred for quashing the Award dated 13.3.2001 of the Central Government Industrial Tribunal No. 1, at Dhanbad in Ref. No. 230/94.

2. The facts in brief are set out as under: On 4.8.92, the Secretary of the Bihar Colliery Kamgar Union raised an industrial dispute alleging arbitrary stoppage of work of Shri Sohar Vishwakarma and others by the Management of Amlabad Colliery. It was stated that they were stopped from work from December, 1991 and they continued working since 1980. The Conciliation Officer vide its letter dated 27.4.93 gave its reply that there was no workman named as Sohar Vishwakarma in the manpower roll of Amlabad Project / Mine and as such there was no question of stoppage of his work. It was also submitted that there was no employer-employee relationship and the named workman was actually employed by a contractor M/s. Electro Mech Corporation who was engaged by the Management purely on contractual basis as and when required for temporary nature of job of repairing machineries. The said contractor was also engaged for installation and commissioning of Koepe Winder and for repairing of machineries etc. on contractual basis. The conciliation, however, failed and the appropriate Government by reasons of its order dated 31.8.1994 referred the dispute for

adjudication to the Central Government Industrial Tribunal No. 1, at Dhanbad and the reference is quoted as under:

Whether the demand of Bihar Colliery Kamgar Union that Sri Sohar Vishwakarma and 9 others (as per list annexed) should be treated as employees of Amlabad Colliery of M/s. B.C.C. Ltd. is justified? Is so, to what relief the persons concerned are entitled to?" After considering the entire pleadings, evidence on record and the facts and the deposition of the witnesses the learned Tribunal vide its impugned Award dated 13.3.2001 answered the reference in favour of the Union Respondent No. 1, directing absorption of the concerned persons as permanent employees of M/s B.C.C. Ltd., which is sought to be challenged in the present writ petition.

3. The main contention raised by Sri Anup Kumar Mehta, the learned Counsel for the petitioner is that the Tribunal has committed serious and apparent error of facts and law and the Award of the Tribunal was perverse and liable to be set aside. It is further submitted on behalf of the petitioner that there was no employer-employee relationship and thus the direction for absorption was on the face of it illegal and unsustainable since the employee concerned were employed by the contractor M/s. Electro Mech Corporation, Asansol. It has further been submitted that there is already a permanent and surplus labour and the company is sick and the enquiry in terms of Section 16(1) of the Sick Industrial Companies (Special Provisions) Act is pending before BIFR and thus the Award of absorption / employment is liable to be set aside.

4. It has further been submitted that the Tribunal committed serious error of law in holding that the respondent workmen have completed more than 240 days in a calendar year and even assuming but not admitting they had completed 240 days in a calendar year, that by itself does not give any right to be absorbed in view of the settled law. It has further been contended by the learned Counsel for the petitioner that the workmen have neither pleaded nor proved that the engagement of the contract is against the prohibited nature of job by issuing notification u/s 10(1) of the CLRA Act and no evidence was produced nor any finding has been given that the contract was ruse, sham or a camouflage. No finding of fact has been recorded by the learned Tribunal in its award. It has further been contended that even in the SAIL case reported in Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc. etc., it was held that there cannot be any automatic absorption of contract labour engaged in a prohibited category of job as laid down in para-125(5 & 6) by the Hon''ble Supreme Court, unless the labour court/ Industrial Tribunal gives a finding that the contract was ruse, sham or camouflage.

5. The learned Counsel for the petitioner has further referred to and relied upon a judgment reported in Municipal Corporation of Greater Bombay Vs. K.V. Shramik Sangh and Others, to submit that it is only the labour court who can return the finding on this issue as to whether the contract was sham or ruse or

camouflage and in absence of any finding the award is illegal.

He has also referred to and relied upon a case reported in Dena Nath and others Vs. National Fertilisers Ltd. and others, which has been reiterated by the Hon''ble Supreme Court in SAIL(Supra) judgment at para-96 to submit that the effect of non registration and lack of license will lead to prosecution as provided u/s 23 and 25 of the CLRA Act and the same has been explained in para-105 of the Constitution Bench Judgment in SAIL matter(Supra).

6. The learned Counsel for the respondent has stated that the judgment reported in A.P.S.R.T.C. and Others Vs. G. Srinivas Reddy and Others, and Secretary, State of Karnataka and Others Vs. Umadevi and Others, applies to service jurisprudence and not to labour/industrial disputes. The respondents have further submitted that they have been performing permanent nature of jobs under the control and supervision of the petitioner Management. It has also been contended that the contract was ruse, sham and thus, a camouflage and thus, they were entitled to be absorbed as per the law laid down in Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc. etc., . The learned Counsel for the respondent further submits that the work was perennial in nature and the workman had completed 240 days of work in a calendar year.

The learned Counsel for the respondent has further relied upon paragraph-107 of the SAIL judgment which is quoted as under:

107. An analysis of the cases, discussed above, shows that they fall in three classes: (i) where contract labour is engaged in or in connection with the work of an establishment and employment of contract labour is prohibited either because the industrial adjudicator/court ordered abolition of contract labour or because the appropriate Government issued notification u/s 10(1) of the CLRA Act, no automatic absorption of the contract labour working in the establishment was ordered; (ii) where the contract was found to be a sham and nominal, rather a camouflage, in which case the contract labour working in the establishment of the principal employer were held, in fact and in reality, the employees of the principal employer himself. Indeed, such cases do not relate to abolition of contract labour but present instances wherein the Court pierced the veil and declared the correct position as a fact at the stage after employment of contract labour stood prohibited; (iii) where in discharge of a statutory obligation of maintaining a canteen in an establishment the principal employer availed the services of a contractor the courts have held that the contract labour would indeed be the employees of the principal employer.

7. I have considered the rival submission, the pleadings and the case laws cited. Before dealing with the merits of the matter, it is relevant to quote the relevant portion of the judgment of SAIL Case as reported in Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc. etc., . The Constitution Bench of Hon''ble Supreme Court in para-125, sub-para

3,4,5 & 6 has held as under:

(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.

(4) We overrule the judgment of this Court in Air India case 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 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.

(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 thereunder. 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.

And at para-126 it held as under:

126. We have used the expression "industrial adjudicator" by design as determination of the questions aforementioned requires enquiry into disputed questions of facts which cannot conveniently be made by High Courts in exercise

of jurisdiction under Article 226 of the Constitution. Therefore, in such cases the appropriate authority to go into those issues will be the Industrial Tribunal/Court whose determination will be amenable to judicial review.

8. It will be evident that the ratio of the Judgment as laid down in sub-para 5 & 6 will apply to cases where there is issuance of prohibition notification u/s 10(1) of the CLRA Act. Likewise, the Hon''ble Supreme Court also held at para-126 that the High Court cannot decide disputed questions which requires enquiry in exercise of its writ jurisdiction under Article 226 of the Constitution of India and the appropriate authority to decide will be the Industrial Tribunal/labour Court since it will have to deal with the disputed facts and evidence to come to the conclusion as to whether the contract labour for work of the establishment was under a genuine contract or is a mere ruse/camouflage to evade compliance of various beneficial legislations so as to deprive the workers of the benefit thereunder. Thus, it was imperative and binding on the Industrial Tribunal/Labour Court to give a finding based on evidence as to whether the contract was sham, ruse and or a camouflage.

The aforesaid issue was also considered earlier in the case of Gujarat Electricity Board, Thermal Power Station, Ukai Vs. Hind Mazdoor Sabha and Others, (ii) which has been reiterated by the Hon''ble Constitution Bench (Supra).

9. In a recent Judgment an identical issue came up for hearing in N.T.P.C. and Others Vs. Badri Singh Thakur and Others, and the Hon''ble Supreme Court after considering all the earlier judgments reiterated the same even in cases where no prohibition notification has been issued u/s 10(1) of CLRA Act and while upholding the order of the learned Single Judge set aside the order passed by the Division Bench. The Hon''ble Supreme Court while reiterating the view taken by the SAIL Judgment as well as Municipal Corporation of Greater Bombay Vs. K.V. Shramik Sangh and Others, held at para-19 as under:

19. Now, we proceed to consider the validity and correctness of the impugned judgment and order in the light of judgment of the Constitution Bench in SAIL case. The High Court held that the work entrusted to the members of the Union continued to be basically the work of the Corporation itself of perennial nature; the Corporation has chosen to carry out the work under the so-called system of labour contract without complying with the provisions of the CLRA Act and as such the labour contract was a camouflage. We must state here itself that the Union in the writ petition alleged that the labour contract was a sham and the Corporation specifically denied it in its counter-affidavit but the High Court did not go into this question and did not record a finding that the labour contract in the present case was a sham or a camouflage considering the material on record; even otherwise, this being a serious and disputed fact in terms of the Constitution Bench judgment aforementioned, the High Court could not have appropriately adjudicated on the issue exercising jurisdiction under Article 226 of the Constitution. It appears to us that the High Court proceeded to conclude that the labour contract was not genuine and the workers of the Union were

employees of the Corporation because the Corporation and the contractors did not comply with the provisions of the CLRA Act. Conclusion that the contract was a sham or it was only a camouflage cannot be arrived at as a matter of law for non-compliance with the provisions of the CLRA Act but a finding must be recorded based on evidence, particularly when disputed by an industrial adjudicator as laid down in various decisions of this Court including the Constitution Bench judgment in SAIL. The cases on which the High Court placed reliance were the cases where finding of fact was recorded by the Labour Courts on evidence....

10. Thus, it has been conclusively held in the aforesaid Judgment that in both situations that is on issuance of prohibition notification u/s 10 of CLRA Act and/or of cases in which no notification of prohibition has been issued that by itself cannot entitle or give a right to the workmen for automatic absorption. The reliance to para-107 of Steel Authority case by the learned Counsel for the respondents is also misplaced since those are cases where notification u/s 10 of CLRA Act was issued and it was found that the labour contract was a sham or a camouflage. Even in these paragraphs it is reiterated that the absorption is not automatic but it is subject to the aforesaid situation and a finding has to be arrived at by the Industrial Court based on evidence. On perusal of the impugned award, I find that there is no finding with regard to the fact that the contract was ruse, sham or a camouflage nor any evidence has been rendered to substantiate it before the learned Tribunal.

In the instant case, neither there is any finding with regard to nature of the contract and as to whether it was a camouflage or sham nor there is any pleading or finding that any prohibition notification was issued u/s 10(1) of the CLRA Act.

11. The learned Tribunal clearly erred in holding that in absence of Registration Certificate and non issuance of license u/s 7 and 12 of the CLRA Act will result in absorption/regularization. The aforesaid finding of the Tribunal is an error of law. The Hon"ble Supreme Court in SAIL (supra) case and in Municipal Corporation of Greater Bombay Vs. K.V. Shramik Sangh and Others, and A.P.S.R.T.C. and Others Vs. G. Srinivas Reddy and Others, has clearly held it to the contrary. It was also specifically held at para-72 that in absence of Registration Certificate and License as required under Sections 7 & 12 of the CLRA Act with the respondent undertakings and the contractor concerned respectively, the workmen concerned do not become the direct employees and instead the remedy is provided by way of prosecution under Sections 23 and 25 of the CLRA Act.

12. The learned Tribunal has further erred in holding that merely on completing 240 days in a calendar year the workmen were entitled to be absorbed. This issue is no more res-integra and the law declared by the Hon"ble Supreme Court reported in Secretary, State of Karnataka and Others Vs. Umadevi and Others, even though rendered by the Constitution of India in service jurisprudence equally apply to industrial disputes and at para-39 while considering the case of

the petitioner's company itself in Bhurkunda Colliery it was held that the court cannot direct absorption or regularization or make the worker permanent. The same view was also considered in Gangadhar Pillai Vs. Siemens Ltd., ; Indian Drugs and Pharmaceuticals Ltd. Vs. Workman, Indian Drugs and Pharmaceuticals Ltd., ; Hindustan Aeronautics Ltd. Vs. Dan Bahadur Singh and Others, .

In the aforesaid judgment it has been held that merely because the workmen have worked continuously for more than 240 days in a calendar year, no right of absorption/ regularization follows.

13. The learned Tribunal further committed an error in holding that since the control and supervision was of the management and thus the workmen were entitled to absorption. In a recent judgment the Hon'ble Supreme Court in International Airport Authority of India v. International Air Cargo Workers' Union case (C.A. No. 2244 of 2002) held as under:

Merely because the contract labour work is under the supervision of the officers of the principal employer, it cannot be taken as evidence of direct employment under the principal employer. Exercise of some control over the activities of contract labour while they discharge their duties as labourers, is inevitable and such exercise is not sufficient to hold that the contract labour will become the direct employees of the principal employer.

14. This Court also had occasions to consider similar issues in 2004(1) JLJR 227, 2004(1) JLJR 76 and Employer in relation to Management of Balihari Colliery of BCCL Vs. The Presiding Officer, Central Government and Industrial Tribunal No. II and Another, wherein on the pleading of the petitioner company with regard to surplus manpower and also the fact that the petitioner was registered with BIFR and sick company this Court while relying on SAID judgment it directed that the workmen therein will be given preference if otherwise found suitable by relaxing their age as and when regular vacancy and regular employment of workmen takes place.

15. Considering the aforesaid facts and circumstances of the case, I find that the Award dated 13.3.2001 is erroneous, illegal and against the settled law as laid down by the Hon'ble Supreme Court. This writ petition is accordingly allowed and the Award dated 13.3.2001 passed by Central Government Industrial Tribunal No. 1, at Dhanbad in Ref. No. 230/94.19 is hereby quashed. However, the petitioner is directed to give preference to the workmen by relaxing their age as and when regular vacancy and regular appointment takes place.