

(2007) 08 BOM CK 0021

In the Bombay High Court

Case No : Writ Petition No. 1133 of 2006

Bhartiya Janata Kamgar Mahasangh Maharashtra

APPELLANT

Vs

Under Secretary and Another

RESPONDENT

Date of Decision : 07-08-2007

Acts Referred:

Constitution of India, 1950 — Article 226

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

Industrial Disputes Act, 1947 — Section 10, 10(1), 12(3), 12(4), 12(5)

Citation : (2007) 6 BomCR 591 : (2007) 115 FLR 796 : (2008) 1 LLJ 298 :
(2007) 5 MhLj 632

Hon'ble Judges : More R.V., J; Lavande A.P., J

Bench : Division Bench

Advocate : S.D. Thakur, for the Appellant; Anjali Joshi and S.V. Golwalkar, for the Respondent

Judgement

Lavande A.P., J.—Heard Mr. Thakur, learned Counsel for the petitioner, Mrs. Joshi, learned Counsel for respondent No. 1 and Mr. S.V. Golwalkar, learned Counsel for respondent No. 2.

2. Rule. By consent heard forthwith.

3. By this petition, the petitioner challenges the communication dated 16.2.2005 of respondent No. 1 by which the petitioner has been informed the decision of the Central Government taken u/s 12(5) of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act") not to make reference.

4. The petitioner- a trade union registered under the Trade Unions Act, 1926 claimed that seven workmen viz. 1) Sanjay Sheshrao Bobde, 2) Gajanan Narayan Ghatate, 3) Haribhau Bhimrao Kohle, 4) Sanjay Shriram Bhagat, 5) Shriram Somaji Bhagat, 6) Subhash Ajabrao Nawghare and 7) Vinod Manikrao Kadam were terminated by respondent No. 2 with effect from 23.12.2003 and raised dispute. The conciliation proceedings were held by Assistant Labour Commissioner (C-II) Nagpur. In the course of conciliation proceedings

respondent No. 2 denied relationship of employer employee in so far as seven workmen were concerned and claimed that the said workmen were engaged through contractor to do the job of house keeping and since the contractor was being changed annually the contractor used to bring his own workmen and as such there existed no employer employee relationship between the respondent No. 2 and the said workmen. The petitioner claimed that the said workmen were continuously engaged in the job of house keeping through various contractors with the sole intention to deny, their legitimate and statutory benefits and as such the contract under which the workmen were engaged from time to time was a mere camouflage and hence the workmen were deemed to be regular employees of respondent No. 2 and, therefore, entitled for reinstatement in the service of respondent No. 2. The conciliation officer submitted failure report dated 30th September, 2005 stating therein the respective claims made by the petitioner and respondent No. 2. After considering the failure report, respondent by communication dated 16.2.2005 informed the petitioner the decision of the Central Government not to make reference on the ground that workmen in respect of whom the dispute was raised were not appointed by the management of Hindustan Petroleum Corporation Ltd. - respondent No. 2.

5. Mr. Thakur, the learned Counsel appearing for the petitioner submitted that the decision of the Central Government and the communication dated 16.2.2005 deserves to be quashed and set aside inasmuch as respondent No. 2 could not have refused to make reference on the ground that seven workmen were not appointed by respondent No. 2. Mr. Thakur submitted that the function of the Appropriate Government u/s 10(1) of the Act is an administrative function and not judicial or quasi judicial function and while performing the said function the Government can not delve into the merits of the dispute and take upon itself the determination of the dispute which would certainly be in excess of the power conferred on the appropriate Government u/s 10 of the Act. In support of his submissions, Mr. Thakur relied upon the judgment of the Apex Court in *Telco Convoy Drivers Mazdoor Sangh and Another Vs. State of Bihar and Others*, . He further submitted that the dispute raised by the petitioner that the contract between the respondent No. 2 and the contractor in respect of seven workmen was sham and bogus contract entered into in order to deprive the said workmen of their legitimate and statutory benefits and the said dispute has to be decided by the Industrial Tribunal upon reference being made u/s 10(1) of the Act and it is not within the jurisdiction of the Appropriate Government to adjudicate the said dispute. In support of this submission, Mr. Thakur relied upon the Constitution Bench judgment of the Apex Court in *Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc. etc.*, . He further urged that the Appropriate Government assumed jurisdiction of the Industrial Tribunal and decided the dispute as to whether the contract between the contractor and respondent No, 2 was sham and bogus which could not have been decided having regard to the ratio laid down in the case *Steel Authority of India Ltd. {supra}*.

6. Mrs. Joshi, learned Counsel for respondent No. 1 left the matter to this Court.

7. Mr. Golwalkar, learned Counsel appearing for respondent No. 2, however, supported the decision of the Central Government not to make reference. Mr. Golwalkar submitted that since seven workmen were engaged by the contractor and not by the respondent No. 2 there was no employer employee relationship between the said workmen and respondent No. 2 and as such there was no Industrial Dispute which could have been referred to for adjudication u/s 10(1) of the Act by the appropriate government. According to the learned Counsel, the respondent No. 1 was entitled to decide whether the employer-employee relationship exists between the respondent No. 2 and seven workmen and on the basis of the material available the Appropriate Government was justified in coming to the conclusion that there existed no employer employee relationship between the respondent No. 2 and seven workmen. In support of his submissions, Mr. Golwalkar the learned Counsel relied upon the following Judgments.

1) The Secretary Indian Tea Association Vs. Ajit Kumar Barat and Others, .

2) (Arjun Narayan Patil and Ors. v. I.D.B.I. Bank Ltd. and Ors.) 2006(11) C.L.R. 215.

3) (Lakhtariya Premjibhai Narsinhbhai v. Union of India and Anr.) 2002(95) F.L.R. 8731.

8. We have carefully considered the sub: missions made by the learned Counsel for the parties and perused the records and the judgment to relied upon by the respective Counsel. It is well settled by catena of decisions of the Apex Court that the Appropriate Government exercises administrative function u/s 10(1) of the Act and the function is neither judicial nor quasi judicial. u/s 12(5) of the Act the Appropriate Government can refuse to make reference. On a consideration of report under Sub-section 4 of Section 12 of the Act if the Appropriate Government is satisfied that there is a case for reference to Labour Court or Tribunal as the case may be, it may make such reference. Where the Appropriate Government does not make a reference it has to record and communicate the reasons thereof to the parties concerned. No doubt, if on the basis of the material before the Appropriate Government the Appropriate Government comes to the conclusion that there is no industrial dispute and upon admitted facts the reference is not warranted the Appropriate Government would be within its jurisdiction to refuse to make reference and refuse to make reference by giving reasons in terms of Section 12(5) of the Act.

9. In the present case perusal of the records and more particularly failure report submitted by the conciliation officer discloses that according to the petitioner the contract entered into between the respondent No. 2 and the contractor was sham and bogus and was entered into only to defeat the legitimate claims of the seven workmen. According to the petitioner, since the contract was sham and bogus the seven workmen were deemed to be regular employees of respondent No. 2 and,

therefore, their termination was illegal. In the case of Telco Convoy Drivers Mazdoor Sangh (supra) the appellant raised dispute that 900 convoy drivers should be made permanent by the management and they should be given all facilities as were available to the permanent employees of Telco. The said demand proceeded on the basis that the convoy drivers were all workmen of Telco. The appropriate Government refused to make reference on the ground that there was no relationship of master and servant between the said convoy drivers and the Telco. The appellant challenged the action of the Government of refusing to make reference on the ground that the appellant had failed to satisfy that they were employed either by Telco or by Telco Contract Association. In this factual back ground the Apex Court while allowing the appeal filed by the Appellant Telco Convoy Drivers Mazdoor Sangh and another observed in paragraphs 13 and 14 as under;

13. Attractive though the contention is, we regret, we are unable to accept the same. 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, .

14. Applying the principle laid down by this Court in the above decisions, there can be no doubt that the Government was not justified in deciding the dispute. Where, as in the instant case, the dispute is whether the persons raising the dispute are workmen or not, the same cannot be decided by the Government in exercise of its administrative function u/s 10(1) of the Act. As has been held in M.P. Irrigation Karamchari Sangh case, there may be exceptional cases in which the State Government may, on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. Further, the Government should be very slow to attempt an examination of the demand with a view to declining reference and courts will always be vigilant whenever the Government attempts to usurp the powers of the Tribunal for adjudication of valid disputes, and that to allow the Government to do so would be to render Section 10 and Section 12(5) of the Act nugatory.

In Steel Authority's case (supra), the Apex Court in paragraphs 125(5) and 126 of the judgment observed thus;

125(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.

126. We have used the expression industrial adjudication. 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.

10. From a bare reading of the above paragraphs in Steel Authority of India's case it is clear that it is for the Industrial Tribunal/ Court to determine whether the contract entered into between the principal employer and the contractor 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 prescribed. It is, therefore, clear that the issue as to whether the contract is sham or bogus and whether the employees will have to be treated as employees of the principal employer can be only adjudicated by the Industrial Tribunal/ Court.

11. In the present case, The Central Government while refusing to make reference has decided that there is no relationship of employer employee between the workmen and respondent No. 2. We, therefore, find that the impugned communication dated 6.2.2005 by the respondent No. 1 informing the decision of the Central Government as well as the decision of the Central Government refusing to make reference on the ground that the workmen were not appointed by the management of the respondent No. 2 cannot be sustained and deserves to be quashed and set aside.

12. We shall now deal with the authorities relied upon by the learned Counsel for respondent No. 2. In Ajitkumar Barat's case (supra), the Apex Court set aside the judgment passed by the High Court directing the State Government to make a reference on the ground that the employee in respect of whom the reference was sought was not a workman. In the said judgment, the appropriate Government had refused to make reference on the ground that the employee was functioning as a Joint Secretary dealing with the legal matters and Court proceedings and as such could not satisfy the definition of workmen as laid down in Section 2(s) of the Act and considering the nature of the duties of the said employee he could not satisfy the definition of workman under the Act. In this

factual background, the Apex Court interfered with the judgment passed by the High Court by which the High Court directed the State Government to make reference. The facts in the present case are clearly distinguishable. In the present case 14 the respondent No. 2 has not disputed that the said seven persons are workmen but what is disputed is the employer employee relationship between them and respondent No. 2. Therefore, the judgment in Ajitkumar's case does not advance the case of the respondent No. 2. In so far as the judgment in the case of UDBI Bank Ltd. (supra) is concerned, the Division Bench of this Court upheld the order passed u/s 12(5) of the Act on the ground that there was settlement u/s 12(3) of the Act between the petitioners (workmen) and respondent No. 4 by which respondent No. 4 had agreed to offer employment. In this fact situation the Division Bench of this Court refused to interfere with the order passed by the appropriate government. The facts in the said case are clearly distinguishable and, therefore, do not help the respondent No. 2. In case of Lakhtariya Premjibhai Narsinhbhai (supra) the learned Single Judge of Gujarat High Court upheld the order passed by the Appropriate Government refusing to make reference on the ground that Appropriate Government had arrived at the finding that the person raising industrial dispute was not a workman on the basis of relevant material. Since the learned Single Judge found that the said finding was correctly arrived at it was held that no interference was called for against the order passed by the Appropriate Government refusing to make reference. The 15 facts in the said case are clearly distinguishable and, therefore, the judgment in the said case also does not advance the case of the respondent No. 2.

13. In view of the above discussion, we hold that the order dated 16.2.2005 deserves to be quashed and set aside and is accordingly quashed and set aside. The decision of the Central Government not to make reference of the dispute raised by the petitioner is quashed and set aside. The Central Government is directed to reconsider the matter in the light of the observations made above and pass appropriate order u/s 12(5) of the Act. Since the dispute pertains to the year 2003, the Central Government shall take appropriate decision within a period of three months from the date of communication of the order to respondent No. 1.

14. The petition is disposed of in the aforesaid terms. Having regard to the facts and circumstances of the case, the parties are directed to bear their own costs.