

(2003) 08 AHC CK 0057
In the Allahabad High Court
Case No : C.M.W.P. No. 4803 of 1990

East India Transformer and Switchgear (P.) Ltd.	APPELLANT
Vs	
State of U.P. and Others	RESPONDENT

Date of Decision : 25-08-2003

Acts Referred:

Contract Labour (Regulation and Abolition) Act, 1970 — Section 10
Uttar Pradesh Industrial Disputes Act, 1947 — Section 4K

Citation : (2003) 6 AWC 4918

Hon'ble Judges : Rakesh Tiwari, J

Bench : Single Bench

Advocate : Satish Chaturvedi, for the Appellant; K.P. Agrawal, Arvind Kumar and B. Mariam and S.C., for the Respondent

Final Decision : Allowed

Judgement

Rakesh Tiwari, J.—Heard counsel for the parties and perused the record.

2. This writ petition has been filed by the Petitioner challenging the award dated 31.7.1989, passed by the labour court, Ghaziabad as well as the reference order dated 29.4.1985, passed by Respondent No. 1.

3. The brief facts of the case are that the Petitioner entered into a contract with one Shyam Narain Gupta, an independent contractor, through its labourers, who were directly employed by him and working under his control and supervision for execution of certain manufacturing operations in one of its Factories. The contractor applied for the licence under the Contract Labour (Regulation and Abolition) Act, 1987, to work as contractor in Petitioner's Company. The workers of the contractor accordingly left the factory after the contract work was over in March, 1984. For ready reference the order dated 28.5.1983 of the Dy. Labour Commissioner, U.P., Ghaziabad, granting licence and its terms and conditions is quoted below:

other language

4. It appears from record that some of the workers of Shyam Narain Gupta, the contractor, raised an industrial dispute against the Petitioner alleging that they were workmen of the company. Consequently, a reference was made by the State Government u/s 4K of the U.P. Industrial Disputes Act, 1947, to the Labour Court, Kavi Nagar, Ghaziabad.

5. The terms of reference under the U.P. Industrial Disputes Act, is as follows:

other language

6. The labour court by award dated 31.7.1989, decided the dispute in favour of the workmen, which was challenged by the Petitioner by means of this writ petition on the following grounds:

Ground No. 1:

(i) Whether the dispute at the instance of the contractor's labourers was at all sustainable?

7. A preliminary issue was framed in this regard, which is as under:

other language

8. According to the Petitioner, the preliminary issue was not correctly framed, as the case of the Petitioner had all alone been that the workman, whose case was referred for adjudication, had never been its employees and in fact, were employees of the independent contractor. Deciding the said issue, a finding has been recorded that burden to prove the preliminary issue, was upon the Petitioners, which they had failed to discharge by adducing any written or oral evidence and accordingly an additional issue was decided against the Petitioner. The finding is as under:

other language

9. It is submitted that paragraph Nos. 1 and 6 of the written statement clearly show that the Petitioner was only a principal employer under the Contract Labour (Regulation and Abolition) Act, 1970 and for practical purposes the workmen in dispute were the employees of M/s. Ghaziabad Fabricators and not the Petitioner. This being the position the preliminary issue was incorrectly decided.

Ground No. 2:

(ii) For deciding the aforesaid issue the burden was wrongly placed upon the Petitioner.

10. It is submitted that the burden of proof lies upon the parties, who asserts the claim. Since it was the case of the workmen that they were employees of the Petitioner and not of the contractor, the burden lay upon them to prove their case. It is further submitted that the labour court has committed a patent illegality by recording a finding, placing the burden upon the Petitioner. Hon''ble Supreme Court has recently held that contractor's workers cannot raise

industrial dispute. In support of the aforesaid provision reliance is placed on *Meritech India Limited v. State of U.P. and others* 1996 (74) FLR 2004 , in which the Court relied upon a judgment of the Apex Court in *Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd. and Another* , in which the Apex Court in paragraph 31 has held that:

Any party appearing before a labour court or Industrial Tribunal must make a claim or demur the claim of the other side and when there is a burden upon it to prove or establish the fact so as to invite a decision in its favour, it has to lead evidence. The obligation to lead evidence to establish an allegation made by a party is on the party making the allegation. The test would be, who fail if no evidence is led. It must seek an opportunity to lead evidence.

11. It is submitted that for deciding that the persons mentioned in the schedule were Petitioner's employees though the labour court has referred the number of documentary or the oral evidence filed by them and had also referred oral evidence but has not discussed any documentary evidence of Sri Phool Chand Yadav on the issue and thus the order passed by the labour court is not a speaking order, as the effect of each document and the oral evidence has not been discussed by the labour court.

12. It is further submitted by the counsel for the Petitioner that so far as the payment of wages is concerned, it is the liability of the contractor to make the contribution towards E.S.I. Under the Contract Labour (Regulation and Abolition) Act the status of the Petitioner, as Principal Employer is at the most that of a mere guarantor for payment of E.S.I. contribution. In case the contractor does not pay the E.S.I. contribution, the principal employer is liable to make good the deficiency, but no relationship of master and servant is proved or is created between the Principal Employer and the employee of the contractor for payment slips of E.S.I. produced by the workers.

13. It is contended that the documentary materials on record established the case of the Petitioner that the concerned workman were not its employees but of the contractors and by no stretch of imagination the Petitioner could have been held de facto or de jure their employer.

14. It is further submitted that the Labour Court has also committed a patent illegality by not allowing the Petitioner to lead evidence on merits after deciding the preliminary issue against the Petitioner which amounts to denial of reasonable opportunity to the Petitioner to defend its case and is in violation of all canons of principles of natural justice and fair play. The labour court illegally and without application of mind had answered the reference in favour of the workmen only because the Petitioner is said to have failed to prove the preliminary issue and accordingly the award is not sustainable. It is also submitted that the award also suffers from patent illegality as no finding has been recorded in connection with the work of the Petitioner that none of the workmen in dispute had completed 240 days in a calendar year and in absence

of any such finding their termination could not have been held to be illegal or unjustified.

15. It is urged on behalf of the Respondents that from the perusal of award, it is apparent that the Petitioner did not produce any evidence or witness before the labour court in support of their case and their case is a case of no evidence.

16. In paragraph 4 of the counter-affidavit, it is averred that it was for the Petitioner to have substantiated the allegation that 49 workmen in order of reference were not its employees, but in fact, were the employees of M/s. Ghaziabad Fabrications and since the employees did appear before the labour court and substantiate its claim, the labour court was left with no other alternative but to rely on the material that was placed before it on behalf of the workman to give an award.

17. The counsel for the Respondent has relied upon the following definition of the word "employer" in Section 2(g)(i) of the Act for the purpose that the Petitioner was the employer of the workmen in reference:

Employer" means in relation to any industry carried on by or under the authority of any department of the authority prescribed in this behalf, or where no authority is prescribed, the head of the department.

18. The question is under what circumstances the workmen employed by the contractor can be treated as employees of the original employer? The Apex Court dealing with this question in *Adhir Kumar Chowdhary v. State of West Bengal*, 1987 LabIC 1262 , made the following pertinent observations:

Now, where a contractor employs a workman to do the work, which he contracted with a third person to accomplish on the definition as it stands, the workman of the contractor would not without something more become the workman of that third person. Therefore, when the contract system was in vogue, the workman employed by the contractor were certainly not the workman of the Corporation.

19. A perusal of the reference order quoted in the body of this judgment would show that there was no reference made by the State Government whether the contract between the Petitioner and the contractor was a sham contract or a bona fide one. From the licence it appears that the contract of employees was for a limited period and their services came to an end on the work having been completed by the contractor. From the plain reading of the reference order and the documents on record, it appears that the labour court has decided the reference without applying its judicial mind. Until and unless the labour court on the basis of the evidence on record came to the conclusion that the contract between the Company and Shyam Narain Gupta was a sham contract, it could not have ordered for reinstatement of the workman with full wages. The appropriate Government in the case of the Petitioner company had not abolished the contract labour system.

20. In *Gujarat Electricity Board, Thermal Power Station, Ukai Vs. Hind Mazdoor Sabha and Others*, , after reviewing whole case law, the Apex Court held as under:

(ii) If the contract is a sham or not genuine, the workmen of the so-called contractor can raise an industrial dispute for declaring that they were always the employees of the principal employer and for claiming the appropriate service conditions. When such dispute is raised, it is not a dispute for abolition of the labour contract and hence the provisions of Section 10 of the Act will not bar either the raising or the adjudication of the dispute. When such dispute is raised, the industrial adjudicator has to decide whether the contract is a sham or genuine. It is only if the adjudicator comes to the conclusion that the contract is a sham, that he will have jurisdiction to adjudicate the dispute. If, however, he comes to the conclusion that the contract is genuine, he may refer the workmen to the appropriate Government for abolition of the contract labour u/s 10 of the Act and keep the dispute pending. However, he can do so if the dispute is espoused by the direct workmen of the principal employer. If the workmen of the principal employer have not espoused the dispute, the adjudicator, after coming to the conclusion that the contract is genuine, has to reject the reference, the dispute being not an industrial dispute within the meaning of Section 2(k) of the I. D. Act. He will not be competent to give any relief to the workmen of the erstwhile contractor even if the labour contract is abolished by the appropriate Government u/s 10 of the Act.

(iii) If the labour contract is genuine a composite industrial dispute can still be raised for abolition of the contract labour and their absorption. However, the dispute will have to be raised invariably by the direct employees of the principal employer. The industrial adjudicator, after receipt of the reference of such dispute will have first to direct the workmen to approach the appropriate Government for abolition of the contract labour u/s 10 of the Act and keep the reference pending. If pursuant to such reference, the contract labour is abolished by the appropriate Government, the industrial adjudicator will have to give opportunity to the parties to place the necessary material before him to decide whether the workmen of the erstwhile contractor should be directed to be absorbed by the principal employer, how many of them and on what terms. If, however, the contract labour is not abolished, the industrial adjudicator has to reject the reference.

(iv) Even after the contract labour system is abolished, the direct employees of the principal employer can raise an industrial dispute for absorption of the ex-contractor's workmen and the adjudicator on the material placed before him can decide as to who and how many of the workmen should be absorbed and on what terms.

21. It is obvious from the reading of the reference order that the dispute that was referred to the labour court was only whether the employer was justified in not giving work to the workers in the order of reference. In fact the contractor,

who is alleged to be the real employer of the contract workers, was not a party to the reference and, as such, the real industrial dispute was not referred and was not rightly decided after hearing all the parties concerned for the settlement/adjudication of the industrial dispute. In fact, complete reference has not been made by the State Government inasmuch as the contention of the Petitioner on the basic question for adjudication that the workers in the order of reference are the employees of the contractor or not was not referred, was the basic question for adjudication. The issue whether on a contractor engaging contract labour in connection with the work entrusted to him by a principal employer, the relationship of master and servant between him (the principal employer) and the contract labour emerges, was dealt with by the Apex Court in *Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc. etc.*, cannot be read as holding that when a contractor engages contract labour in connection with the work of the principal employer, the relationship of master and servant is created between the principal employer and the contract labour. It has been held that it cannot be said that by virtue of engagement of contract labour by the contractor in any work of or in connection with the work of an establishment, the relationship of master and servant is created between the principal employer and the contract labour.

22. The various provisions of U.P. Industrial Disputes Act and Rules framed thereunder show whether the State Government in any industrial dispute at any time, may refer the dispute to the labour court or the Industrial Tribunal, as the case may be. It is the duty of the labour court, who tried to adjudicate the dispute and not to give unfair advantage to any party.

23. From the reference it is apparent that the State Government had not referred the complete dispute between the parties to do justice between the parties and has referred only part of the dispute which gave unfair advantage to one of them, namely, the workers. Thus, to my mind all these questions require adjudication and the labour court could not have granted the relief to the workmen till the answer of all the questions.

24. M/s. Ghaziabad Fabrications was a necessary party to the dispute, but the State Government has, very conveniently not made it a party in the reference. The reference is, therefore, bad. There cannot be any adjudication of dispute without all the necessary parties being included in the order of reference and the reference is to complete and concise matter of dispute between all the parties. In absence of either complete reference being made or contractor having not been made a party to the reference is fatal. The industrial dispute in such cases cannot be said to have been adjudicated and between all the parties concerned bringing it to its logical end.

25. For the reasons stated above, the writ petition is allowed and the award dated 31.7.1989, passed by the labour court, Ghaziabad, is quashed. The matter is remanded back to the labour court for adjudication afresh in the light of the observations made in the body of this judgment. Before proceeding with the case

the State Government will add M/s. Ghaziabad Fabrications as a party in the reference and then shall adjudicate the dispute afresh after giving reasonable opportunity to all the parties concerned to lead evidence and hearing. No order as to costs.