

(2004) 04 BOM CK 0053

In the Bombay High Court

Case No : Writ Petition No. 1341 of 1996

Electronics Corporation of India Limited A Service Engineers
Union

APPELLANT

Vs

Electronics Corporation of India Limited and Another

RESPONDENT

Date of Decision : 02-04-2004

Acts Referred:

Industrial Disputes Act, 1947 — Section 2

Citation : (2004) 3 BomCR 699 : (2004) 101 FLR 880 : (2004) 3 LLJ 971 :
(2004) 4 MhLj 151

Hon'ble Judges : Nishita Mhatre, J

Bench : Single Bench

Advocate : S.K. Talsania and instructed by Mahesh Londhe, Sanjay Udeshi, for the Appellant; V.R. Walawalkar, instructed by Gordhandas and Fozdar, for the Respondent

Judgement

Nishita Mhatre, J.—This petition challenges the Award Part-II dated 18th August 1995 passed by the Industrial Tribunal, Bombay in Reference (IT) No. 44 of 1993 rejecting the Reference on the ground that the petitioner Union was not able to establish the master and servant relationship between the workmen represented by the petitioner and respondent No. 1 herein. The entire dispute has arisen on account of the services of the workmen represented by the petitioner Union being terminated. For the sake of brevity, the petitioner Union is referred to as "Union" and respondent No. 1 Company as "Company".

2. The entire reference was in respect of about 30 workmen involved in the dispute. The Union represent the employees who are called Retainers by the Company. These employees sought permanent absorption and other reliefs from the Company. The Company is engaged in the business of manufacturing and selling and servicing of electronic items mainly Televisions. Between the years 1972 and 1978, the Company engaged these 30 persons as Technicians initially on a contract basis for a period of four years. Some of these Technicians were then made permanent as Tradesman or Scientific Assistants or Assistant

Technical Officers. These 30 employees obtained employment after responding to an advertisement issued by the Company for calling Service Engineers on retainer basis. The employees were selected pursuant to a written test and oral interview. After selection, they were required to undergo practical training which was imparted by the Company for a period of three months. After the training period was completed, contracts were entered into between the Company and each of these 30 employees. According to them, the contract which labels each of them as "Retainer" was nothing but a paper arrangement between themselves and the Company who did not want to implement certain labour laws. Although the service contracts were treated as individual contracts, the Union has averred that the workmen were under the supervision of the Company and no independent decisions could be taken by these employees. The employees raised a demand for absorption in employment and for all other service conditions which were applicable to other employees. As this was not granted by the Company, the Union approached this Court under Article 226 of the Constitution by filing Writ Petition No. 2689 of 1983. This petition was dismissed as the petitioner had an alternate remedy in approaching the machinery constituted under the Industrial Disputes Act, 1947. Accordingly, the petitioner Union raised a dispute against the Company which was referred for adjudication before the Industrial Tribunal. This dispute pertains to the regularisation as well as certain other demands made by the Union on behalf of the employees including wage revision and other demands.

3. The Union filed their Statement of Claim justifying the demands made by them for regularisation of the employees and absorption and permanency wage rise, etc. The Union demonstrated that in fact these employees were always the workmen of the Company and had wrongly been treated as Retainers. It was emphasised in the Statement of Claim that the Company had direct control and supervision over these employees who were not able to take any independent decisions in respect of their work. The Company in its Written Statement contended that there was no contract of service between them and the employees since they were independent persons with whom the Company had entered into a contract for servicing of Television sets sold by them to the customers. It was contended that the industrial dispute referred was not maintainable as there could be no dispute between the Company and the employees known as Retainers. Evidence of one of the employees was led on behalf of all the 30 employees before the Industrial Tribunal. No evidence, oral or documentary, was led by the Company at all. On a consideration of the documents as well as oral evidence, the Industrial Tribunal by an Award rejected the Reference as not maintainable. The Tribunal came to the conclusion that the Retainers were individual who had entered into contracts with the Company for service of repairing the Television sets sold by the Company and that there was no master and servant relationship between the Company and the 30 employees. According to the Tribunal, the evidence clearly indicated that these 30 employees were merely contractors and there was no direct nexus of master and servant

between the said employees and the Company.

4. Mr. Talsania, learned Counsel appearing for the petitioner Union, submits that the Tribunal has misdirected itself while considering the issues raised before it. According to the learned Counsel, the Tribunal ought to have considered the fact that there was no evidence on record led by the Company to prove that the master and servant relationship did not exist between the concerned employees and the Company. The learned Counsel submits that the term "Retainer" was a misnomer for these 30 employees since all of them were bound by the supervision and control of the Company. He submits that every action taken by the concerned employees was with the consent or at the behest of the Company and the Union had through the evidence of their witness and other documentary evidence been able to establish that there was direct control and supervision of the Company on the services of the employees. He also urges that the contracts which were produced before the Tribunal indicated maximum control of the Company over these employees and there was no doubt that the employees were employed by the Company. He relies on the judgment in the case of Silver Jubilee Tailoring House and Others Vs. Chief Inspector of Shops and Establishments and Another, , Waman Ganpat Raut v. Cadbury-Fry (India) Pvt. Ltd. and Anr. 1980 (41) F.L.R. 156 , Ram Singh and Others Vs. Union Territory, Chandigarh and Others, and the judgment in C.O. No. 3304 (W) with CO. 9686 (W), Amallesh Majhi and Ors. v. Union of India and Ors. delivered by the Calcutta High Court.

5. Mr. Walawalkar, learned Counsel for the Company, submits that the Tribunal has come to a conclusion on the basis of facts proved before it that there was no master and servant relationship between the 30 persons and the Company. He submits that the Union could not agitate this dispute since there was no industrial dispute as defined u/s 2(k) of the Act. On a perusal of the contracts according to the learned Counsels the independent existence of these 30 persons can be deciphered. He submits that at each stage these 30 persons were required to pay for the components which they bought from the Company in order to install in the Television sets. They were also expected to pay for any expert advice which the Company might render to them for repairing any of the Television sets. According to the learned Counsel the onus was on the employees to prove that there existed a master and servant relationship and, therefore, the Tribunal had on the basis of facts before it come to a finding that such a relationship did not exist. The learned Counsel also submits that these persons were retained for a long period of time by the Company on the basis of the contracts entered into between them and the Company. The Union raised the demand in respect of permanency, absorption, regularisation and pay scales only in 1992 and the demand was extremely belated. He submits that no reasons have been set out as to why such a belated demand has been raised by the Union. According to the learned Counsel, the delay that the employees themselves were of the view that they were in fact Retainers and did not have a master and servant relationship with the Company. He relies on the judgment of

the Apex Court in Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra, and the judgment of the Calcutta High Court in Rallis India Ltd. v. State of West Bengal and Ors. 1983 (I) LLJ 293.

6. Before considering the present dispute, it is necessary to bear in mind that persons who were employed in Delhi by the Company on the basis of similar contracts had filed Civil Writ Petition No. 5008 of 1988 in the Delhi High Court seeking absorption in service. As no interim relief was granted the petitioners before the Delhi High Court preferred SLP (Civil) No. 5169 of 1989. The Apex Court by an order of 16th August 1989 directed that the contracts which were already terminated should be renewed on the same terms and conditions. The petitioners before the Court were permitted to work on the basis of such contracts. In respect of those contracts which had not ended, it was directed that the contracts would be renewed and the concerned persons would be permitted to work on the same terms and conditions. If there was any shortage of work, the Supreme Court directed that available work would be squally distributed amongst the Service Engineers who were the petitioners before the Court. The Apex Court also observed that there was no basis for the contention that the agreements in question were contracts of service. The Apex Court by this order disposed of not only the SLP but the Writ Petition before the Delhi High Court also.

7. A certain group of persons employed on contract basis in Mumbai preferred Writ Petition No. 523 of 1991 directly before the Hon'ble Supreme Court under Article 32 of the Constitution of India. The earlier order was clarified by the Supreme Court in this Writ Petition on 21st October 1991 by observing that the Supreme Court should not be understood as having pronounced either way on the question of whether the contract in issue was a contract of service or contract for service. According to the Supreme Court that would be for the High Court when the matter is taken up to consider all the relevant criteria. The petitioners in that Writ Petition were permitted to withdraw the same and to move the High Court under Article 226 of the Constitution of India. The petitioners, therefore, filed Writ Petition No. 689 of 1993 in this Court and prayed for absorption. However, as this Court was of the opinion that an industrial dispute should be raised, Writ Petition was dismissed and the petitioners sought a Reference for adjudication of their dispute before the Tribunal.

8. Before the Calcutta High Court, on 24th February 1998 the Writ Petition filed by some persons known as Service Engineers/Licensees/Retainers were filed for absorption as regular employees with the respondent Corporation. The Calcutta High Court after a considered judgment directed the respondent Corporation to regularise the petitioners on the same terms and conditions as they were allowed to work on the basis of the terms of the contract. The respondent Corporation was also directed to induct the petitioners in that case as regular employees of the respondent Corporation in regular cadres. The Court also directed the respondent Corporation to relax the higher age limit. All arrears payable were

directed to be paid by the Corporation by a particular date. The Calcutta High Court dealt with similar contracts as are referred to in the present Writ Petition.

9. On perusal of the contract which is annexed to the petition, it is seen that the so-called Retainers were to represent themselves as a licensed Engineers of the Company to the customers of the Company. The Agreement was entered into for a period of twelve months. The Company under the Agreement agreed to train the so-called Retainers for about 6/8 weeks. On a successful completion of the training, the Retainer was to be allotted Television sets to be maintained by him for a period of twelve months. These so-called Retainers were responsible for the maintenance of the Television sets and had to attend to the complaints received by the Company in respect of those sets. They were to represent the Company as a licensed Engineers of the Company. A minimum of 250 sets in a year was to be allotted to each Retainer. Each Retainer was to be paid certain amount per set from which he was expected to pay for the transportation and the cost of the components supplied by the Company, The Retainer was not permitted to charge any amount from the customers. Under one of the Clause of the Agreement, which it appears has been deleted in subsequent Agreement the Retainer was not permitted to service any other Television sets except the sets sold by the first respondent Company; nor was he permitted to enter into any agreement or associate himself directly or indirectly with any other person for repairing Television sets. The repairs to the Television sets were carried out by the Retainers by employing methods laid down by the Company. These Agreements entered into between the parties were renewed from time to time. The control over these persons become more apparent and strict as time went by. In fact, an agreement of 1981 indicates that the Retainers were expected to report for duty at a particular time everyday for submitting daily reports, collection of complaints, issuance of spares, etc. They were informed that they would be working under the administrative control of the Branch Incharge. The manner and method of carrying out repairs was also indicated in the contract. The Union has annexed letters indicating that these employees were transferred from one branch to another of the Company depending on the availability of the Television sets. Memos have been issued to these persons on account of absence. All these factors, in my view, would indicate that the Company did have and did exercise control over the employees represented by the Union.

10. The supervision of the Company on the jobs undertaken by the employees is also evidenced from the fact that the components which were to be utilised in the defective Television sets could be obtained only from the Company. The manner and method of carrying out repairs to the Television sets was monitored by the Company. The Company, for this purpose, has trained these 30 employees immediately after appointment. The appointment itself was pursuant to a written examination and oral interview. The fact that memos were issued for absence for a long period of time would also indicate that the Company exercised supervision and control over these 30 employees. The Company also expected each of these 30 employees to report for duty at the branch office every day in order to give a

daily report of the work undertaken by them, to collect complaints to be attended to the next day, to collect spare parts which were to be used for the defective Television sets. All these factors, in my view, indicate that there was supervision of the employees concerned. Once there is direct control and supervision over these 30 persons by the Company, it cannot be gainsaid that the master and servant relationship existed between these employees and the Company. The findings recorded by the Tribunal are contrary to the evidence on record. In fact, the Tribunal has ignored the oral evidence as well as the documentary evidence before it. The mere interpretation of the contracts entered into by the Company with these 30 employees would establish that there was a master and servant relationship between the two. Merely because the employees were expected to pay for the components or to pay for the travelling or for the cost of the bringing the Television sets to the factory of the Company for repairs in the event they were not able to carry out the repairs would not indicate that the Company had no control or supervision over these employees.

11. One of the indicia to demonstrate that the master and servant relationship exists is the existence of supervision and control. The Apex Court in the case of *Silver Jubilee Tailoring House (supra)* considered its previous judgments in the case *Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra*, *Shri Birdhichand Sharma Vs. First Civil Judge Nagpur and Others*, and observed thus :

"31. The fact that generally the workers attend the shop which belongs to the employer and work there, on the machines, also belonging to him, is a relevant factor. When the services are performed generally in the employer's premises, this is some indication that the contract is a contract of service. It is possible that this is another facet of the incidental feature of employment. This is the sort of situation in which a Court may well feel inclined to apply the "organisation" test suggested by Denning L.J. in *Stevenson Jordan and Harrison v. Macdonald and Evans* (1952) 1 TLR 101.

32. The further fact that "a worker can be removed" which means nothing more than that the employer has the liberty not to give further work to an employee who has not performed his job according to the instructions of the employer, or who has been absent from the shop for a long time as spoken to by the Inspector of Labour in his evidence, would be speak of control and supervision consistent with the character of the business.

33. That the workers work on the machines supplied by the proprietor of the shop is an important consideration in determining the nature of the relationship. If the employer provides the equipment, this is some indication that the contract is a contract of service, whereas if the other party provides the equipment, this is some evidence that he is an independent contractor. It seems that this is not based on the theory that if the employer provides the equipment he retains some greater degree of control, for, as already seen, where the control arises only from the need to protect one's own property, little significance can attach to the power of control for this purpose. It seems, therefore, that the important of the

provision of equipment lies in the simple fact that, in most circumstances, where a person hires out a piece of work to an independent contractor, he expects the contract to provide all the necessary tools and equipment, whereas if he employs a servant he expects to provide them himself. It follows from this that no sensible inference can be drawn from this factor in circumstances where it is customary for servants to provide their own equipment. - See Atiyah, P.S., "Vicarious Liability in the Law of Torts", p. 65.

34. Section 220(2) of the American Restatement, Agency 2d, includes among the relevant factors :

"(e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work".

The comment on the first part of this paragraph is in these words :

"Ownership of instrumentalities : The ownership of the instrumentalities and tools used in the work is of importance. The fact that a worker supplies his own tools is some evidence that he is not a servant. On the other hand, if the worker is using his employer's tools or instrumentalities, especially if they are of substantial value, it is normally understood that he will follow the directions of the owner in their use, and this indicates that the owner is a master. This fact is, however, only of evidential value". It might be that little weight can today be put upon the provisions of tools of minor character as opposed to plant and equipment on a large scale. But so far as tailoring is concerned, I think the fact that sewing machines on which the workers do the work generally belong to the employer is an important consideration for deciding that the relationship is that of master and servant.

35. Quite apart from all these circumstances, as the employer has the right to reject the end product if it does not conform to the instruction of the employer and direct the worker to restitch it, the element of control and supervision as formulated in the decisions of this Court is also present."

The Apex Court observed that the test of "control" has been whittled down progressively and "control" is no longer a determinate factor. There is no single test to distinguish between a contract of service and contract for service. In the present case, the employees were expected to repair Television sets, which, in my view, is a contract of service. The work of these employees was not totally disassociated from the Company. In fact, in most of the cases, they were expected to repair only such Television sets as were manufactured by the Company. They cannot be considered as independent contractor providing for service to the Company.

12. In the case of Ram Singh (supra), the Apex Court has considered what are the factors determining the employee-employer relationship. The Apex Court has observed that a pragmatic view must be taken and some of the tests to be considered are : (i) control; (ii) integration i.e. whether the employee has been

fully integrated in the employer's concern or is independent of it; (iii) power of appointment and dismissal; (iv) liability to pay remuneration and deduct insurance contributions; (v) liability to organise the work and supply tools and materials; (vi) nature of mutual obligations, and (vii) terms and conditions of contract between the parties. Similarly, in the case of Bharat Heavy Electricals Ltd. (supra), the test of "control" was considered to be important but not decisive. The Apex Court held that it is necessary to lift the veil and to look at the conspectus of factors governing the employment before any decision is reached on the master and servant relationship.

13. The learned Advocate for the Company relied on the judgment of the Calcutta High Court in the case of Rallis India Ltd. (supra). This decision relates to the burden of proof and it is held that when a Reference is made there is a presumption of the existence of an industrial dispute. For the purposes of rebutting the presumption, evidence is required to be adduced by the employer. The High Court held that the Tribunal had not erred in law by placing the burden on the Company to rebut the presumption that the persons concerned was a worker and the dispute was an industrial dispute. This judgment in my view, does not help the Company in any manner and in fact emphasises the fact that it was for the Company in this case to prove that there was no master and servant relationship between the Retainers and the respondent Company. In the case of N.C. John v. Secretary, Thodupuzha Taluk Shop and Commercial Establishment Workers' Union and Ors. 1973 L.I.C. 398, relied on by the learned Advocate for the Company, the Kerala High Court has held that the burden of proof is on the workmen to establish that the employer-employee relationship exists. Similarly, the Calcutta High Court in the case of Swapan Das Gupta and Ors. v. The First Labour Court of West Bengal and Ors. 1976 L I.C. 202, has held that where a person asserts that he was a workman of the company and it is denied by the company, it is for him to prove the fact and not the company to prove that he was not an employee of the company but some other person. In the case of W.G. Raut v. Cadbury-Fry (India) Pvt. Ltd. and Anr. 1980 (41) F.L.R. 156, the Division Bench of this Court has held that when the company raised a preliminary issue challenging the maintainability of the Reference and the competence of the Labour Court to try it, it is for the company to prove in the first instance that the cases falls within the exception of Section 2(s) of the Industrial Disputes Act, 1947. Unless it does so, the averments contained in statement of claim would be deemed to be accepted. The company having raised its preliminary issue and having challenged the competence, validity and maintainability of the Reference itself, it is for the company to make good its challenge in the first instance by evidence, oral and/or documentary. Thereafter, if at all, the burden would shift on the other side.

14. In my view, it was for the Company to establish that there was no master and servant relationship between the parties as, according to them, the petitioners were not "workmen" within the meaning of Section 2(s) of the Industrial Disputes Act, 1947. The Tribunal in fact had framed the first two Issues

thus :

"(1) Whether the party No. 1 Company proves that the service Engineers under reference are not covered by the definition of "workman" under the provisions of the I.D. Act, 1947. Hence, reference is not tenable?

(2) Whether the party No. 2 proves that, there exists employer/employee relationship between the company and service Engineers under reference, and if so, whether they are entitled for the relief as demanded by their letter dt. 22-6-1983?"

The Tribunal has answered the issues as under :

(1) In the affirmative.

(2) In the negative.

15. In my view, the Company has not discharged its burden either to show that the petitioners are not, workmen and that the employer-employee relationship does not exist.

16. The Tribunal has erred in its conclusion that no master and servant relationship existed. Hence, the Award is set aside. There exist a relationship between these 30 persons and the Company of master and servant. Rule made absolute. No order as to costs.

17. The parties shall appear before the Industrial Tribunal Bombay on 26th April 2004 for further hearing of the Reference.

18. Parties, including the Industrial Tribunal, to act on an ordinary copy of this judgment duly authenticated by the Personal Secretary of this Court.

19. Certified copy expedited.

20. Writ to go down forthwith.