

(1999) 03 AHC CK 0012
In the Allahabad High Court
Case No : C.M.W.P. No. 30613 of 1998

Elgin Mills Co. Ltd.

APPELLANT

Vs

Deputy Labour Commissioner and Others

RESPONDENT

Date of Decision : 27-03-1999

Acts Referred:

Uttar Pradesh Industrial Peace (Timely Payment of Wages) Act, 1978 — Section 3

Citation : (2000) 85 FLR 25 : (2001) 3 LLJ 132 : (1999) 2 UPLBEC 1147

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Final Decision : Allowed

Judgement

D.K. Seth, J.—A reference as to whether a workman represented by respondent No. 3 was the workman of the petitioner company or of the contractor and whether the said workman should be considered to be holding a post as given in the schedule and, if so from which date is pending before the learned III Labour Court, Kanpur. In the meantime, an application was made by these workmen under the provisions of U.P. Industrial Peace (Timely Payment of; Wages) Act, 1978. In the said proceeding an objection was taken by the petitioner that the same is not maintainable since the authority discharging jurisdiction under the Timely Payment of Wages Act, cannot enter into a dispute which is within the purview of the Industrial Tribunal or the Labour Court particularly when such a dispute is pending. According to Mr. V.B. Singh, learned counsel for the petitioner, it would be pre-empting the jurisdiction of the Labour Court and therefore the decision with regard to the character of the workmen since disputed by the petitioner employer was wholly without jurisdiction. According to him while discharging its; functions under the Timely Payment of Wages Act, the authority is supposed to decide, an existing right. It cannot determine a disputed question and enter into the determination of a right, which is not flowing from an existing, position. He had elaborated his argument and supported the same with various judgments cited by him.

2. Mr. B.N. Singh, learned counsel for the respondent on the other hand contends that in view of the Contract Labour (Abolition and Regulation) Act the employees of the contractor are employees of the principal employer and as such it does not require any determination. Therefore, the order passed by the authority under the Timely Payment of Wages Act is wholly within the scope and ambit of the Jurisdiction of the said authority. He had relied on some decisions which will be referred to at appropriate stage.

3. I have heard both the learned counsel at length.

4. In the impugned order, it has not been pointed out as to which kind of work the workmen used to perform. The Government Order dated April 24, 1990 prohibits employment or contract labour in the textile industries in respect of such operations of "processing and by such designation as mentioned in Schedule of the said Order. In Schedule 10, operations of processing and designations as specified respectively have been included. In the impugned order, it has not been pointed out that any of the workmen are within any of the 10 scheduled designations or operations. However, Mr. B.N. Singh draws my attention to the order of reference contained in Annexure 6, which indicates in its schedule the department as reeling (sic) department, which is item No. 2 of the said Schedule 10. This question is seriously disputed by Mr. V.B. Singh. He has drawn my attention to the various statements and documents on the basis whereof such dispute is being sought to be supported. Admittedly, this very question is pending determination before the Labour Court in the reference. Therefore, this question is to be determined by the Labour Court on the basis of the materials that might be produced by either of the parties. Simply on the basis of the reference or the indication made therein it does not seem to be material sufficient for this Court to come to a conclusion conclusively that the workmen were concerned with the particular department. Except the said order of reference, no material has been produced in this Court to support the contention of Mr. B.N. Singh to the extent that the workers were engaged in a department since been prohibited in Schedule 10. But then since the dispute is pending, if this Court exercises writ jurisdiction to determine the question it would be entering into disputed question of fact, that too without sufficient materials placed before it. In my view, such an exercise would be wholly unfounded on the principles on which the jurisdiction under Article 226 of the Constitution of India is exercised. Therefore, at this stage, it is not possible to contend or conclusively determine as to whether the workmen concerned are within the prohibited category according to Schedule 10 pursuant to order dated April 24, 1990 or not and cannot be decided on the basis of the materials placed before this Court. Therefore, there remains a contentious question to be determined by the Labour Court in the pending reference.

5. Now so far as the order impugned in this writ petition is concerned, now let us, examine as to whether the authority under the Timely Payment of Wages Act could assume jurisdiction to determine this question. The contention of Mr. B.N.

Singh that the dispute referred to is frivolous and prima facie baseless, and cannot be gone into at this stage because there exists no such material before this Court to come to such a finding. A perusal of the impugned order also does not show that the Labour Commissioner exercising his-jurisdiction under the Timely Payment of Wages Act adverted to such an exercise. While relying on paragraph 58 of *Air India Statutory Corporation, etc. Vs. United Labour Union and others* [overruled], Mr. B.N. Singh contended that it was held in the said decision that "policy of the contract labour in respect of works which are perennial in nature, the workmen employed through contract labour should be regularised and the wages and-payments to the contract labourers and the condition of their service with regard to welfare amenities through subsistence of a contract labour should also be provided by the employer." In the said judgment, it has been held that such employees should be absorbed on the basis of inter se seniority and in case of retrenchment, the principle of "last come first go" should be applied subject to his reappointment as and when vacancy arises. But this decision does not conclusively help Mr. B.N. Singh to the extent that this judgment does lay down that the contract labourers are to be treated as workmen of the mill. On the other hand, it treats such workmen as something different from the workmen of the mill. Whereas it provides for regularisation or reappointment and also considering the question of conditions of service and other amenities to be paid to them and they should be absorbed on the basis of inter se seniority as and when vacancy arises. Therefore the said judgment does not conclusively lay down that contract labour should be treated as a workman of the principal employer. On the other hand, provides that they are not workmen of the employer but should be given certain benefits by absorbing them or giving them appointment as workmen of the employer. Therefore, at this stage it cannot be said that the reference is frivolous or baseless. There are questions which are germane to the reference and are awaiting determination by the Labour Court. Thus the decision does not definitely point out that the contract labourers are treated as workmen of the mill. On the other hand points out that they should either be regularized or absorbed and if necessary, be retrenched on the principle laid down therein. Thus it requires some more exercise either by way of regularisation or absorption in order to treat them as regular workmen of the mill. Therefore, it cannot be conclusively concluded that there is no dispute subsisting with regard to the character of the alleged workmen as to whether they are workmen of the mill or not.

6. Then again the reference was made on the basis of the dispute raised by the workmen themselves. After having raised the dispute themselves, it is not open to them to describe the same as baseless or frivolous so long the reference is not so determined by the appropriate Court or the Tribunal or is withdrawn by the workmen. Once the workmen themselves raise a dispute it admits of the dispute and is stopped from contending the same as frivolous or baseless. It is he who would oppose the dispute, reference may say so but not he who raised the dispute.

7. The scope and ambit of the exercise of jurisdiction by the Labour Commissioner under the Timely Payment of Wages Act is confined to the determination that the workmen have not been paid the wages in time in admitted situation. Section 3 of the said Act makes it abundantly clear that the Commissioner cannot undertake determination of any disputed fact which requires investigation. He has to find out as to whether payment of wages which is admittedly due, is in default. If the very right or entitlement to wages are disputed, the Commissioner may look into the objections to the extent of its frivolity. If he is of the opinion that the objection on the face of it is frivolous or baseless then only he can entertain determination of the question of default. If the very root of entitlement or the basis or foundation of the right to wages is disputed and if it is not frivolous then, it is outside the scope, ambit and purview or the jurisdiction of the Labour Commissioner exercising power u/s 3 of the Timely Payment of Wages Act.

8. Here in this case, the workmen themselves had raised a dispute as to whether they are workmen of the Mill and if so since which date and on which post. This dispute is admittedly, pending in the reference before the Labour Court/Tribunal as mentioned hereinbefore.

9. Thus in view of such a dispute existing and having been referred to the Labour Court, any decision that might be taken in the proceedings before the Timely Payment of Wages Authority, would be prejudging the issues and pre-empting the reference which is otherwise impermissible. On the other hand, in the case of *Modi industries Ltd. v. State of U. P.* 1994 I LLJ 383 the Apex Court had held that the enquiry u/s 3 of the Timely Payment of Wages Act has a very limited scope and it exists only to find out whether the workmen who had put in their work, were paid their wages. It does not empower the Labour Commissioner to adjudicate entitlement of the workmen or as to whether the workmen are the workmen of the mill or not. These are, in fact, disputed and should be decided through appropriate proceedings before the appropriate forum. The Labour Commissioner is empowered to decide the question whether the objection is otherwise frivolous or prima facie untenable. The Labour Commissioner in this case has also not adverted to such a question. As observed earlier, the dispute cannot be said to be on the face of it, frivolous or prima facie untenable. In such circumstances, it would be wholly outside the scope and ambit of the jurisdiction of the Labour Court while exercising the power u/s 3 of the said Act to adjudicate the present dispute. Having gone through the impugned order, I do not find that the Labour Commissioner has come to a finding that the relation between the workmen and employer does not require any determination at all. Neither Mr. B.N. Singh has been able to show on facts that the workmen are the workmen of the Mill. On the other hand, he relies on the question of law in order to assert that the contract labourers are also employees of the principal employer. But the decision as referred to in the case of *Air India Statutory Corporation* (supra) does not help Mr. B.N. Singh to that extent as observed earlier.

10. Much reliance has been placed by Mr. V.B. Singh in the decision in the case of Modi Industries Ltd. (supra). In the said case, the Apex Court had observed as follows in 1994 I LLJ 383 at p. 387 of LLJ:

"It will thus be clear from the preamble, the statement of objects and reasons and the provisions of the Act that, firstly, the Act has been placed on the statute book to ensure timely payment of wages by the bigger establishments, the incidence of disturbance of industrial peace being greater in establishments on account of the default in payment of wages. Secondly, the Act deals with defaults in payment of the wage bill of all the workmen in payment of wages of individual workmen. That can be taken care of by the provisions of the Payment of Wages Act, 1936 which provisions are found inadequate to ensure timely payment of wages of the whole complement of workmen in an establishment. The object of the Act as stated above is not so much to secure payment of wages to individual workmen but to prevent industrial unrest and disturbance of industrial peace on account of the default. The inquiry u/s 3 being thus limited in its scope, the Labour Commissioner's powers extend only to finding out whether the workmen who have put in the work were paid their wages as per the terms of their employment and within the time stipulated by such terms.

The powers conferred on the Labour Commissioner u/s 3 of the Act are to prevent apprehended or present breach of industrial peace. That is why the inquiry contemplated is of a summary nature. The exercise of the said powers by the Labour Commissioner does not prevent either party from approaching the regular forum for the redressal of its grievance."

11. In the case of State of Uttar Pradesh and Others Vs. Basti Sugar Mills Co., Ltd., , it was observed as follows:

"The inquiry u/s 3 being thus limited in its scope, the Labour Commissioner's powers extend only to finding out whether the workmen who have put in the work were paid their wages as per the terms of their employment and within the time stipulated by such terms. If the Labour Commissioner is satisfied that the workmen, though they have worked and are, therefore, entitled to their wages, are not paid the same within the time, he has further to satisfy himself that the arrears of wages so due exceed Rs. 50,000/-. It is only if he is satisfied on both counts that he can issue the certificate in question. Under the Act, the Labour Commissioner acts to assist the workmen to recover their wages which; are admittedly due to them but are withheld for no fault on their behalf. He does not act as an adjudicator if the entitlement of the workmen to the wages is disputed otherwise than on frivolous or prima facie untenable grounds. When the liability to pay the wages, as in the present case, is under dispute which involves investigation of the questions of fact and or law, it is not the function of the Labour Commissioner to adjudicate the same. In such cases, he has to refer the parties to the appropriate forum."

The above observations lend support to the view which I have taken hereinbefore.

12. Mr. B.N. Singh on the other hand relied on a decision in the case of Management of Northern Railway Co-operative Society Ltd. Vs. Industrial Tribunal, Rajasthan, Jaipur and Another, . He had relied on a passage at p. 53 of LLJ which reads as follows:

"After expressing this view, the Court proceeded to examine this ground which was patent on the record and upheld the order of the Labour Court on that ground. In these circumstances, we consider that learned counsel for the respondents is justified in urging before us that the respondents are entitled to support the decision of the Tribunal setting aside the order of Kanraj even on grounds which were not accepted by the Tribunal or on other grounds which may not have been taken notice of by the Tribunal, while they were patent on the face of the record."

He relied on this passage in order to support his contention that if the objection is vague, in that event, it does not necessarily imply that the question has been disputed to the extent to take it away out of the scope and ambit of the jurisdiction, u/s 3 of the Timely Payment of Wages Act. But on facts, the said decision is distinguishable since in the present case, it was found that the dispute is not as vague as it was in the decision of Northern Railway Co-operative Credit Society (supra).

13. Mr. B.N. Singh then relied on a decision in the case of Surya Narayan Tripathi v. State of U.P. . He relied on the observation of this Court made in paragraph 15, wherein it was held by the Division Bench as follows:

"The power to issue writ of certiorari under Article 226 of the Constitution is not as a matter of course, rather it has to be exercised only in the event when some grave injustice has been done and the subordinate authority or the Court has committed an error of jurisdiction or error apparent on the face of record. In case by issuing a writ of Certiorari any illegal order may be restored, in that event also it would not be proper to exercise the extraordinary jurisdiction under Article 226 of the Constitution. In the present case even assuming that we take the view that the impugned order may be quashed which would not be justified under the circumstances of the case, nevertheless the fact would be that the earlier order in favour of the petitioner granting him permission to raise the construction or for development or for approving the map, would be resorted. But that order was passed on the basis of concealment of material facts and that would prejudice the respondent Nos. 3 and 4 who appear not to have been made parties to that proceeding, nor they were given any opportunity of hearing. It is also cardinal principle of rule of law that no order can be passed which could prejudice a party without informing him and affording him sufficient opportunity of hearing. In this view of the matter also we decline to grant the relief prayed for."

Relying on the said judgment. Mr. B.N. Singh wanted to contend that the present case is not a fit case for interference by this Court unless there is an error

apparent on the face of the record, or that there were some concealment of material facts. He also contends that the employer had sought to conceal certain material facts which he had pointed out by relying on the order dated April 24, 1990. On the fact of it, according to him, the objection raised by the employer is wholly frivolous. But then as I have observed earlier, it does not appear from the material placed on the record that the objection was wholly frivolous. Neither it is possible at this stage to determine that there were concealment of material facts by the employer, as has been contended by Mr. B.N. Singh. In the present case, it is not an error apparent on the face of record. But it is a question of absence of jurisdiction as has been held in the case of Modi Industries Ltd. (supra). The jurisdiction of the Labour Commissioner is confined to the extent as indicated hereinafter. If the Labour Commissioner proposes to enter into such disputed question on the face of the dispute raised by the employer to the extent that the workmen are not workmen of the employer, he would be trenching upon the jurisdiction of the Industrial Tribunal or the Labour Court, which is otherwise not within the jurisdiction or competence of the Labour Commissioner conferred by Section 3 of the said Act. Therefore, this decision also does not help Mr. Singh.

14. Mr. B.N. Singh then relies on the decision in the case of H. P. State Electricity Board v. K.R. Gulati 1991 (1) SLJ 41. A perusal of this decision indicates that this case is wholly distinguishable from the facts at hand. In the said case, question of promotion and its delay on the basis of HPSEB Recruitment Promotion Regulation for Ministerial Employees of the Board, 1972 vis-a-vis ad hoc promotion superseding the seniors were the questions involved. The ratio decided therein having been rendered to find out upon a different legislation on the basis of different facts, cannot be attracted to the present case.

15. Mr. B.N. Singh then relies on a decision in the case of Elgin Mills Limited Vs. Labour Court II and Others, In the said case a reference u/s was made referring an individual dispute which is otherwise amenable to Section 2-A of the Industrial Disputes Act was contended to be not available. But in the said case, it was held that the reference was valid and on such technical ground would not fail. The other question involved in the said case was as to whether employee of permanent job could be retrenched while retaining the junior. Having regard to the facts and circumstances of the said case, it was held that the employer had employed some employees giving temporary employment with works and were retrenched while juniors were retained and thus the employer was guilty of unfair labour practice. This decision also does not help Mr. B.N. Singh since in the present case the question involved is as to whether the Labour Commissioner had jurisdiction to determine the question since pending on reference before the Labour Court or whether it could have determined such dispute for the purpose of passing an order u/s 3 of the said Act. These questions being altogether distinct and different from the question involved in the decision cited, the ratio cited in the said decision cannot be attracted to the present case.

16. Mr. B.N. Singh then relied on the decision in the case of Dena Nath and

others Vs. National Fertilisers Ltd. and others, He relied on a passage at p. 295 of LLJ which reads as follows:

"The reference to the Labour Court/Industrial Tribunal could be as to whether it is necessary for the management to employ contract labour directly or indirectly, a question can as well be referred whether the engagement of contract labour was bona fide or it was a camouflage. In appropriate cases in industrial adjudication appropriate directions can be given to the principal employer in this behalf. This has been the subject matter of decision by the Tribunal/Labour Courts and by this Court also. The case of The Standard-vacuum Refining Co. of India Ltd. Vs. Its Workmen and Others, is a case on this point. It was a case where the workmen employed by an oil refinery demanded that the contract system of labour adopted by the company for cleaning maintenance of the refinery belonging to the company should be abolished and the said demand was referred for adjudication. It was found that the work for which the contract was given is incidental to the manufacturing process and is necessary for it and of a perennial nature which must be done every day and in these circumstances the Industrial Tribunal directed the Company to abolish the contract system of labour with effect from a particular date and to have the said work done through workmen engaged by itself. This direction was given in view of the fact that the work was of a permanent nature and the labour employed through contractor was receiving such less wages than the unskilled workmen of the company and they were not having any other benefits and amenities like provident fund, gratuity, bonus, privilege leave etc. On the award of the Industrial Tribunal the Supreme Court gave the finding that it was an industrial dispute as defined u/s 2(k) of the Industrial Disputes Act. In dealing with the question whether the Tribunal was justified in giving the directions for abolishing the contract system, the Supreme Court noted that industrial adjudication generally does not encourage employment of contract labour in modern times and it would be necessary to examine the merits of the dispute apart from general consideration that contract labour should not be encouraged, and that in any case, the decision should rest not merely on theoretical or abstract objection to contract labour but also on the terms and conditions of the contract labour and the grievance made by the workmen thereof. On facts the Supreme Court observed:

"It may be accepted that the contractor in the present case is an independent person and the system is genuine and there is no question of the company carrying on this work itself and camouflaging it as if was done through contractors in order to pay less to the workmen. But the fact that the contract in this case is a bona fide contract would not necessarily mean that it should be touched by the Industrial Tribunals. If the contract had been mala fide and a cloak for suppressing the fact that the workmen were really the workmen of the company, the Tribunal would have been justified in ordering the company to take over the entire body of workmen and treat it as its own workmen. But because the contract in this case was bona fide, the Tribunal has not ordered the company to take over the entire body of workmen. It has left to it to be decided

for itself how many workmen it should employ and on what terms and has merely directed that when selection is being made preference should be given to the workmen employed by the present contractor."

The Supreme Court also noticed that the industrial dispute was confined to the cleaning, maintenance of the plant, the work was incidental to manufacturing process and the work is necessary for it and was of a perennial nature, which must be done every day and such work is generally done by workmen in the regular employment of the employer and there should be no difficulty in having regular workmen for this kind of work. It noted that the matter would be different.

"If the work done was of an intermittent or temporary nature or was so little that it would not be possible to employ full time workmen for the purpose.

It would be noticed that after the aforesaid observations of the Supreme Court in the case of Standard Vacuum Refining Company (supra), the Parliament while giving power to the appropriate Government to prohibit employment of contract labour in any process or operation or other work in any establishment gave the guidelines in Clauses (a), (b), (c) and (d) of Sub-section (2) of Section 10, as noticed earlier, and guidelines are practically based on the guidelines given to the Tribunals in the aforesaid case of Standard Vacuum Refining Company by this Court. The Act as can be seen from the scheme of the Act merely regulates the employment of contract labour in certain establishments and provides for its abolition in certain circumstances. The Act does not provide for total abolition of contract labour but it provides for abolition by the appropriate Government in appropriate cases u/s 10 of the Act.

In the present case and the other connected Special Leave Petitions, no notification has been issued by the appropriate Government u/s 10 of the Act vis-a-vis the type of establishment with which we are concerned.

It is not for the High Court to inquire into the question and decide whether the employment of contract labour in any process, operation or in any other work in any establishment should be abolished or not. It is a matter for the decision of the Government after considering the matter, as required to be considered u/s 10 of the Act. The only consequence provided in the Act where either the principal employer or the Labour Court violates the provision of Sections 9 and 12 respectively is the penal provision, as envisaged under the Act for which reference may be made in Sections 23 and 25 of the Act. We are thus of the firm view that in proceedings under Article 225 of the Constitution merely because contractor or the employer, had violated any provisions of the Act or the rules, the Court could not issue any mandamus for deeming the contract labour as having become the employees of the principal employer. We would not like to express any view on the decision of the Karnataka High Court or of the Gujarat High Court (supra) since these decisions are under challenge in this Court, but we would place on record that we do not agree with -the aforequoted

observations of the Madras High Court about the effect of non-registration of the principal employer or the non licensing of the labour contractor nor with the view of Bombay High Court in the aforesaid case. We are of the view that the decisions of the Kerala High Court and Delhi High Court are correct and we approve the same."

The said decision also as indicated above does not help Mr. Singh. inasmuch as in the said case, whether there should be contract labour or the petitioner should be treated as a workman, was a matter pending before the Labour Court/Industrial Tribunal, where it was decided by the Labour Court/Industrial Tribunal that it was not a question as to whether such dispute could be decided by the authority under the Timely Payment of Wages Act. On the other hand, in the said case it was observed as quoted above.

17. Thus it appears that it is not a question which the High Court should inquire into and decide whether the employment of contract labour in any process, operation or in any other work in any establishment should be abolished or not. It is a matter for the decision of the Government after considering the matter, as required to be considered u/s 10 of the Act. Here it is contended that the appropriate Government had passed such an order. But as observed earlier by me that this question is also disputed and which is also a subject matter of pending reference, therefore as to whether the workmen fall within the category prohibited in Schedule 10 in the order dated April 24, 1990 has to be determined in the said reference, which is wholly outside the scope and ambit of this Court while discharging jurisdiction under Article 226 of the Constitution of India since it cannot decide disputed question of fact, that too, without sufficient material being placed before the Court. Whereas such question can be gone into by the Tribunal on the basis of material that would come through evidence that might be led by the parties themselves. Therefore, this decision also does not help us in the context of the present case so as to confer jurisdiction on the Labour Commissioner to decide such an issue.

18. Mr. B.N. Singh. then relied on a decision in the case of Air India Statutory Corporation v. United Labour Union, (supra). He had relied upon the paragraphs 8, 9, 21, 33, 57, 58, 59, 62, 64, 65 and 66 of the said judgment. A perusal of those paragraphs shows that it was related to the question as to how the contract labourers are to be treated. In the said case, as discussed hereinbefore, the Apex Court did not find that these contract labourers so engaged are employees of the principal employer. On the other hand, it had pointed out its anxiety for their regularisation or absorption as the case may be. Thus this decision does not conclusively lay down any principle to help Mr. Singh to the extent that there is no necessity to determine as soon as it is admitted that the workmen were contract labourers though they are not workmen of the principal employer or in other words, the principal employer cannot deny the contract labourers the status of workmen in its employment. Thus this decision also does not help us in the question involved.

19. For all these reasons, I am unable to persuade myself to agree with the contention of Mr. B.N. Singh.

20. On the other hand, as observed earlier that the decision that has been given by the Labour Commissioner has travelled beyond the scope and ambit of the jurisdiction conferred upon him u/s 3 of the Timely Payment of Wages Act. Therefore, this writ petition is to be allowed.

21. The writ petition thus succeeds and is, accordingly, allowed and the impugned orders so far it declares that the workmen were workmen of the employer, cannot be sustained and the same is accordingly quashed subject however, to the decision by the Labour Court or Tribunal. However it will be open to the parties to approach the Labour Court to include this claim in the reference as additional issue since incidental there to relating to the claim of and entitlement to wages for the relevant period as the case may be subject to the decision of the Labour Court/Tribunal and for expeditious disposal of the reference pending before it. If appropriate application is made, it is expected that the Labour Court would decide the reference as early as possible, preferably, within a period of six months from the date of making such an application before the Labour Court. Mr. V.B. Singh. submits that his client assures through him that his client will seek no adjournment in the proceedings before the Labour Court and any adjournment sought for by Mr. V.B. Singh's client would be included for the purpose of calculating six months and in that event, the matter may be decided ex parte. If the employees/workmen seek adjournment, the same would be excluded for the purpose of calculating six months as aforesaid. No cost.