

(2014) 07 DEL CK 0314

In the Delhi High Court

Case No : LPA 408/2013, CM APPL. 9309/2013, LPA 391/2013, CM APPL. 9111/2013, LPA 392/2013, CM APPL. 9114/2013, LPA 394/2013, CM APPL. 9126/2013, LPA 395/2013, CM APPL. 9134/2013, LPA 396/2013, CM APPL. 9137/2013, LPA 397/2013, CM APPL. 9141/2013, LPA 398/2013, CM

Gopal

APPELLANT

Vs

Bharat Sanchar Nigam Ltd.

RESPONDENT

Date of Decision : 03-07-2014

Acts Referred:

Contract Labour (Regulation and Abolition) Act, 1970 — Section 10
Industrial Disputes Act, 1947 — Section 17B, 2(oo), 25F, 25-F, 25-G

Citation : (2015) 213 DLT 325 : (2014) 143 FLR 1085 : (2014) 4 LLJ 285

Hon'ble Judges : P.K. Bhasin, J;J.R. Midha, J

Bench : Division Bench

Advocate : Bijender Singh, Advocate for the Appellant; Raavi Birbal, Advocate for the Respondent

Judgement

J.R. Midha, J.—The appellants have challenged the judgment dated 20th March, 2013 whereby the learned Single Judge has set aside the award passed by the Central Government Industrial Tribunal-cum-Labour Court (hereinafter referred to as "CGIT"):

Factual matrix

2. The facts of all the appeals are common and, therefore, the facts in LPA 408/2013 are being noted herein.

3. Gopal, appellant in LPA 408/2013 (hereinafter referred to as the appellant) issued a notice of demand dated 10th September, 2002 to the respondent in which he claimed to be continuously working with the respondent since July 1994 on the post of Guard at a salary of Rs. 2,650/- per month. The appellant sought reinstatement with backwages.

4. The conciliation proceedings were held before the Assistant Labour Commissioner. The respondent in its reply before Assistant Labour Commissioner, denied having ever employed or terminated the appellant and stated that the various functions of the department were carried out through the contractor.

5. Upon failure of the Conciliation proceedings, the Central Government referred the following industrial dispute to the learned CGIT:

Whether the termination of services of S/Shri Harinder Singh, Security Guard w.e.f. of 01.09.2002, Gopal, Security Guard w.e.f. 01.09.2002, Narender, Security Guard w.e.f. 01.02.2002, Bhagat Singh, Security Guard w.e.f. 01.09.2002, Roop Ram, Security Guard w.e.f. 01.09.2002, Tejveer, Security Guard w.e.f. 01.09.2002, Sanjay, Security Guard w.e.f. 01.09.2002, Satveer Singh, S/o. Shri Hari Ram, Guard and Shri Sher Singh, S/o. Shri Harchanda Nagar, Guard w.e.f. 01.09.2002 by the management of BSNL, Faridabad is just and legal? If not, to what relief the workmen are entitled.

6. In the claim statement dated 1st April, 2004, the appellant reiterated that he was employed with the respondent's since July 1994 as a Security Guard at a monthly salary of Rs. 2,650/- and was terminated on 1st September, 2002; the respondent did not provide him any appointment letter, attendance card or wages slip; ESI and PF were deducted but the ESI card and the PF slip were not provided to him; and he was terminated on 1st September, 2002 without any written order and was told that the contract has been given to Anuradha Security Services.

7. The respondent in its written statement reiterated that they never appointed the appellant and as such, there was no employer-employee relationship between the parties. It was further stated that BSNL had not even been created in 1994 when the appellant claimed to have joined the respondent. It was further stated that the security personnel were hired through the contractor.

8. The appellant, in his evidence by way of affidavit, reiterated the contentions mentioned above. However, in cross-examination, the appellant contradicted his date of employment set up in the demand notice and statement of claim i.e. July 1994 and deposed that he was engaged in 1996 but he did not remember the month. The appellant denied being employed through three security contractors, namely, Laxman Security Agencies, Keshav Security Services and Anuradha Security Services who had provided the security according to the respondent.

9. The respondent's AGM (Legal) in his evidence by way of affidavit deposed that the appellant was neither employed nor terminated by the respondent and there was no employer-employee relationship between the parties. The witness further deposed that BSNL was not even created in 1994 and at that time only Department of Telecom was in existence. The witness further deposed that nobody was appointed without following the rules. The witness further deposed that the respondent was required to engage security personnel from DGR's sponsored agency in terms of the office memorandum dated 1st February, 1999

issued by the Department of Public Enterprises, Defence Ministry circular dated 26th April, 2001 and BSNL memorandum dated 3rd April, 2002.

10. The learned CGIT passed a common award dated 4th December, 2006 holding the appellants to be the employees of the respondent; the termination to be illegal; and the contract between the respondent and the contractor to be sham. The learned CGIT directed reinstatement of the appellants with 50% backwages w.e.f. 1st September, 2002.

11. The learned Single Judge allowed the writ petition of the respondent and set aside the common award of CGIT on various grounds inter alia that there was no employer-employee relationship between the parties and the issue as to whether the contract between the respondent and the contractor was sham, was not even referred to the learned Tribunal. The learned Single Judge held the finding of the learned CGIT to be without jurisdiction. However, the learned Single Judge granted relief to the appellants to the effect that wages u/s 17B received by them after termination to be treated as compensation.

Submissions on behalf of the appellant

12. Learned counsel for the appellants could not dispute that the issue as to whether the contract between the respondent and the contractor was sham and bogus, was not at all referred to the learned Tribunal. It was however submitted that the real dispute between the parties was whether the workmen were the employees of the contractor or of the respondent though the reference made to the learned CGIT did not directly address this issue. The reference made by the Central Government is suggestive of issues and is simply framed to give direction to the Tribunal in regard of the dispute. The onus to prove the contract was on the respondent who did not discharge the same and therefore, the learned CGIT was justified in holding the alleged contract to be sham and camouflage. The learned CGIT did not make any jurisdictional error by holding the relationship between the respondent and the appellants to be sham and camouflage. Reliance was placed on G.M. ONGC, Shilchar Vs. ONGC Contractual Workers Union, .

13. The appellant proved the copies of the attendance sheets before the learned Tribunal to prove the relationship whereas the respondent failed to produce the alleged contract with the contractor on record and therefore, the learned CGIT was justified in awarding reinstatement with back wages.

14. The learned Single Judge while exercising the review jurisdiction could not set aside the award of the Industrial Tribunal. Reliance was placed on Harjinder Singh Vs. Punjab State Warehousing Corporation, .

15. The learned Single Judge ignored the non-compliance of Sections 25-G and 25-N of the Industrial Disputes Act which lay down the procedure for retrenchment of the workmen. Reference was made to Mohan Lal Vs. Management of Bharat Electronics Ltd., and Harjinder Singh v. Punjab State Warehousing Corporation (supra).

16. The Ld. Single Judge erred in placing reliance on Keshav Security Services Ltd. v. Union of India, 2006(2) CTLJ 101 (Del) and Ashok Kumar v. The State, W.P. (C) Nos. 9438-42/2004 decided on 20.12.2006.

Submissions on behalf of the respondent

17. There was no employer-employee relationship between the appellant and the respondent/BSNL and, therefore, the claim of the worker/appellant was not maintainable. The respondent being a government organization cannot make any appointment without issuing appointment letters and without following due process of law. The appellants have not been able to show any proof of appointment such as appointment letter, salary, etc. Reliance was placed on Workmen of Nilgiri Coop. Mkt. Society Ltd. Vs. State of Tamil Nadu and Others, .

18. The issue as to whether the contracts between the respondent and the contractor was sham and camouflage, was neither pleaded nor the same was referred to in the terms of reference. The appellant never pleaded before the CGIT that the contract was sham and camouflage. The learned CGIT could not have decided the issue beyond the terms of reference. Reliance was placed on Mukand Ltd. Vs. Mukand Staff and Officers" Association, , Ashok Kumar v. The State, (supra) and Chhathoo Lal Vs. The Management of Goramal Hariram Ltd. .

19. That the whole case of the appellants in the claim before the CGIT was that they were illegally terminated by BSNL. The onus to prove the employer-employee relationship was on the appellants who failed to prove the same. They did not produce any proof of appointment letter, salary, etc. The respondent is a government organization. It cannot make any appointment without following due process and without issuing any appointment letters.

20. Since there was no employer-employee relation, there cannot be any termination. Further, the plea of contract being sham and camouflage was not taken by the appellant anywhere in the claim statement. Neither the same was stated in the terms of reference so referred. Though the terms of reference did mention the name of the contractor, it did not mention anywhere that the contract was sham and camouflage. The terms referred are self explanatory as to the nature of dispute referred.

21. Vide an office memorandum which was issued by the Department of Public Enterprises, which was followed by Defence Ministry"s circular dated 26th April, 2001, BSNL was required to engage security personnel from Director General Resettlement (DGR) sponsored agencies. One of the contractors, Keshav Security Services had approached this Court to inter alia assail the decision to discard open tender system and to draw the security services from DGR sponsored agencies.

22. Since there is no prohibition notification u/s 10 of the Contract Labour (Regulation and Abolition) Act, 1970, there was no bar in engaging contract labourers.

23. Even otherwise the workers have been given adequate compensation as per Section 17B of ID Act.

Discussions on the contentions raised

24. The first question which arises for consideration is whether there was employer-employee relationship between the appellant and the respondent? The appellant claims to have joined the respondent in July 1994 at the post of the Guard but has no proof of appointment such as appointment letter, salary slip etc. The respondent disclosed in its written statement that BSNL was not even created in 1994. Despite that the appellant deposed in his evidence by way of affidavit that he joined in July 1994 which is not possible. However, in cross-examination, the appellant stated that he joined in 1996. The appellant has also not given the particulars of the places of posting from 1994 to 2002. The respondent being a Government Corporation, cannot appoint any person without issuing proper appointment letters and cannot make payments without a salary slip. We, therefore, hold that there was no employee-employee relationship between the appellants and the respondent.

25. The next question which arises for consideration is--whether the issue as to "whether the contracts between the respondent and the security agencies were sham or camouflage" was referred by the Central Government to the learned CGIT. We have referred to the pleadings of the parties and find that the issue as to whether the contract between the respondent and the security agencies was sham/camouflage neither arose out of the pleadings nor it was referred by the Central Government to the learned CGIT. The case of the appellant in the notice of demand as well as the claim statement was that the appellant joined the respondent in July 1994 on the post of Guard at a monthly salary of Rs. 2,650/- per month and was terminated on 1st September, 2002 without any written order. The respondent's case was that they never employed the appellant and there was no employer-employee relationship between the parties. It was further pleaded that since there was no relation of employer-employee, the question of termination would not arise. There is no averment either in the notice of demand or the claim statement that the contract between the respondent and the security agencies was sham and camouflage. The reference of the Central Government is clear as to whether the termination of appellant was just and legal. The reference further clearly records that the appellant had been employed through the security contractors but no reference was made as to the legality of the contract between the respondent and the contractors.

26. In *Mukand Ltd. Vs. Mukand Staff and Officers' Association*, , the Supreme Court held that the Labour Court cannot travel beyond the terms of the reference. Relevant portion of the judgment is reproduced as under:

36. We, therefore, hold that the reference is limited to the dispute between the Company and the Workmen employed by them and that the Tribunal, being the creature of the reference, cannot adjudicate matters not within the purview of

the dispute actually referred to it by the order of Reference.

27. With respect to the appellants' contention that even if the question relating to the validity of the contract between the respondent and the service contractors was not referred by the Central Government to the learned CGIT, the Industrial Tribunal had jurisdiction to consider the issue. We do not agree with this submission in view of the judgment of Ashok Kumar v. State (supra) in which this Court held that the Labour Courts/Tribunals cannot travel beyond the term of reference. This Court further held that if no reference has been made to the Labour Court for determining whether the contract was sham or camouflage, the Labour Court could not have entered into this issue to hold that the contract was sham and camouflage. Relevant portion of the said judgment is reproduced hereunder:

5. I consider that this argument of the counsel of the petitioner must fail. The petitioners, before Conciliation Officer as well as before the appropriate Government, did not raise any dispute about the contract being sham and camouflage. They rather claimed that they were direct employees of the management and did not claim that they were employees of the contractor. It is now settled law that where the workmen claim that the contract between principle employer and contractor was sham and camouflage, they have to raise an industrial dispute to that effect and it is industrial adjudicator who, after going through the evidence and the terms and conditions of the contract and other circumstances has to decide whether the contract between principal employer and the contractor was sham and camouflage. If the Industrial Adjudicator comes to conclusion that the contract was sham and camouflage, the industrial adjudicator can order the absorption of the workman by the principal employer. Similarly in a case where the workman considered that though they were contractor's employees but the contract labour system should be abolished, they have to approach the appropriate Government u/s 10 of the CLRA Act and it is the jurisdiction of the appropriate Government to consider the demand of the workman and after taking into account the parameters, as laid down u/s 10 of the CLRA Act, issue a notification of abolition of the contract labour system in the industry/establishment in respect of specific jobs. The Tribunal or the High Court cannot exercise powers u/s 10 of the CLRA Act. This power vests with the Government.

7. It is obvious that the workmen in this case did not raise correct dispute and did not approach the appropriate Government with the contentions that the contract was sham and camouflage or that the contract labour system should be abolished. They got referred a dispute that they were the employees of the management and were not being regularized. This claim was found false. The Labour Court had no alternative but to dismiss the claim. It is settled law that the Labour Courts/Tribunals cannot travel beyond the term of reference. If no reference had been made to the Labour Court for determining whether the contract was sham and camouflage, the Labour Court could not have entered

into this issue and decided whether the contract was sham and camouflage.

(Emphasis supplied)

28. In *Chhathoo Lal v. Management of Goramal Hariram Ltd.* (supra), this Court again held that since the workmen had not raised the contention that the contract between the management and the contractor was sham, Labour Court could not have gone into the question. This Court further held that the Labour Court is a creation of the reference and therefore, cannot go beyond the terms of the reference. Relevant portion of the said judgment is as under:

8. In the present case the workman had not raised any contention that the contract entered into between the contractor and the management was a sham. In fact the contention of the workman was that he was an employee of the respondent. The Labour Court could not have gone into the question whether the contract was sham or not because no such reference was made to the Labour Court. The reference made to the Labour Court was that whether the services of the petitioner were illegally terminated or not and the contention of the petitioner was that he was a direct employee of the respondent. I consider that the petitioner should have initially raised a proper dispute. He should have come up with clean hands and submitted that he was an employee of the contractor and the contract should be declared as sham and camouflage and he should be considered as an employee of the principal employer. He did not disclose the true facts and taking a false plea stood in the way of referring the proper dispute to the Labour Court. It is settled law that the Labour Court is a creation of the reference and the Labour Court cannot go beyond the terms of reference except that the questions incidental to the dispute and those, who go to the root to the jurisdiction of Labour Court can be decided by the Labour Court while deciding a reference.

9. The contention of the counsel of petitioner that the Labour Court could not have gone into the questions of relationship of employer-employee does not stand the scrutiny of law. The issue of relationship of employer-employee goes to the root of the jurisdiction of the Labour Court and is incidental to the issue raised by the petitioner that he was illegally terminated by the respondent. If he was not an employee of the respondent there could have been no question of his illegal termination the question of his illegal termination would arise only if he was an employee of the respondent.

10. In *A.P.S.R.T.C. and Others Vs. G. Srinivas Reddy and Others*, , Supreme Court held that if the respondents wanted the relief of absorption they will have to approach the Industrial Court and establish that the Contract Labour System was only a ruse/camouflage to avoid labour law benefits to them. Where the workmen do not approach the Court with correct reference and true facts, workmen cannot later on turn around and say that now they should be considered as workmen through the contractor and they should be deemed to be the employees of the management because contract was sham and camouflage.

(Emphasis supplied)

29. We do not agree with learned counsel for the appellants that the judgment of *Ashok Kumar v. State* (supra) does not apply to the present case because the employee failed to prove the relationship of employer-employee whereas the appellant has successfully proved the relationship. In the present case also, the appellant could not prove the employer-employee relationship. This case is squarely covered by *Mukand Ltd. v. Mukand Staff* (supra), *Ashok Kumar v. State* (supra) and *Chhathoo Lal v. Management of Goramal Hariram Ltd.* (supra).

30. We do not agree with the appellants that *Keshav Security Services v. Union of India* (supra) referred to by the learned Single Judge is not relevant to the issue. The said judgment is relevant to show that BSNL was permitted to engage security personnel from Direct General Resettlement (DGR) sponsored agencies. By the office memorandum dated 1st February, 1999 of Department of Public Enterprises, Ministry of Industry; Defence Ministry circular dated 26th April, 2001 and BSNL memorandum dated 3rd April, 2002, all BSNL establishments have to engage security personnel from DGR's sponsored agency only.

31. The appellant's contention that the Writ Court while exercising review jurisdiction, could not have set aside the award of learned CGIT, is misconceived. We do not find any infirmity in the exercise of the writ jurisdiction to set aside an award of the learned CGIT on the ground that issue of the contract between the respondent and its contractors to be sham and camouflage, was not even referred to it. Reference in this regard may be made to *Mukand Ltd. v. Mukand Staff* (supra).

32. With respect to the appellants' contention that the learned Single Judge ignored the non-compliance of Sections 25-G and 25-N of the Industrial Disputes Act, we are of the view that the aforesaid provisions would come into play only after the relationship of employer-employee was proved. Since the appellant could not prove the relationship of employer-employee, the question of application of Section 25-G and 25-N of the Industrial Disputes Act would not arise.

33. The appellant has relied upon *Mohan Lal v. Management of M/s. Bharat Electronics Ltd.* (supra) in which the appellant therein employed with Bharat Electronics Ltd. as a Salesman was terminated during the period of his probation. The appellant raised an industrial dispute which was referred to the Labour Court for adjudication. The Labour Court upheld the removal during the extended period of probation and held that it would not constitute retrenchment within the meaning of Section 2(oo) and section 25F of the Industrial Disputes Act. The Supreme Court held that:

the termination of the appellant's temporary service does not fall under any of the expected or excluded categories and the termination is thus for a reason other than the expected category. Therefore, it would be retrenchment within the meaning of the word as defined in Section 2(oo).

Where prerequisite for valid retrenchment as laid down in Section 25-F has not been complied with, retrenchment bringing about termination of service is ab initio void.

This judgment does not help the appellant because there was no dispute with respect to the employer-employee relationship in that matter whereas the basic dispute in the present case relates to the employer-employee relationship between the parties. Section 25F would not apply since we have held that there is no employer-employee relationship between the parties.

34. The appellant has also relied upon *Harjinder Singh v. Punjab State Warehousing Corporation* (supra) in which the term of the appellant therein working with Punjab State Warehousing Corporation as Water Charge Motor Mate was challenged. The management later issued a notice for retrenchment which was also challenged. The Labour Court directed reinstatement with 50% backwages on the ground of violation of principle of "last come first go". The Supreme Court upheld the award of the Labour Court. This judgment does not help the appellant as there is no employer-employee relationship between the parties in the present case and therefore, Section 25F of the Industrial Disputes Act cannot be resorted to.

35. The appellant has next relied upon *General Manager, Oil and Natural Gas Commission, Silchar v. Oil and Natural Gas Commission Contractual Workers Union* (supra) in which the workers were held to be the employees of ONGC as the wages were being paid by ONGC; there was no contractor appointed by ONGC; ONGC used to supervise and allot works to individual workers; ONGC took disciplinary action and called for explanation from the workers and therefore, it was held that there was relationship of master and servant. In the present case, the appellant could not produce any evidence whatsoever to prove the relationship of employer and employee either with the respondent or within the contractor and therefore, this judgment would not help the appellant.

36. We agree with the respondent that the respondent being a government organization cannot make any appointment without issuing appointment letter and without following the due process of law and therefore, the appellants' contention that they were appointed without issuance of any appointment letter does not appear to be true. We also agree with the respondent that irregular appointees have no right to post as held in *A. Umarani Vs. Registrar, Cooperative Societies and Others*, , *Accounts Officer (A and I) APSRTC and Others Vs. K.V. Ramana and Others*, and *Indian Drugs and Pharmaceuticals Ltd. Vs. Workman, Indian Drugs and Pharmaceuticals Ltd.*, .

37. We agree with the respondent that the onus to prove the relationship of employer-employee was on the appellant as held by the Supreme Court in *Workmen of Niligiri Coop. Mkt. Society Ltd. v. State of Tamil Nadu* (supra). The appellant could not produce appointment letter or any other document to show the relationship of employer and employee. The document relating to the

attendance sheet is not sufficient to prove the relationship of employer and employee as the worker, through the contractor, would be posted at different places and would not become the employee of all the places where they are posted.

Conclusion

38. On careful consideration of the rival contentions of the parties, we are of the view that the appellants have not proved the relationship of employer and employee. The appellants have not produced any document to prove the employment. The respondent being a Public Sector Undertaking cannot employ any person without issuance of appointment letter and maintaining proper records of the wages. We agree with the learned Single Judge that the issue as to whether the contract between the respondent and the contractors were sham and camouflage, was not even referred to the learned Tribunal. The learned Tribunal was, therefore, clearly in error in giving a finding with respect to the same.

39. We do not find any infirmity in the impugned judgment and agree with the findings of the learned Single Judge. We also note that the appellants have received wages in the range of Rs. 3,00,000/- u/s 17B of the Industrial Disputes Act which is treated as compensation and the appellants are therefore not liable to return the same. This is sufficient compensation to the appellants.

40. There is no merit in the appeals which are hereby dismissed.

41. Pending applications also stand dismissed.