
(2010) 06 DEL CK 0005

In the Delhi High Court

Case No : Writ Petition (C) 8594 and 8616 of 2004

Guru Teg Bahadur Hospital

APPELLANT

Vs

Sushil Kumar and Others

RESPONDENT

Date of Decision : 02-06-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 17B, 25F

Citation : (2010) 06 DEL CK 0005

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Avnish Ahlawat, Latika Chaudhary, Simran and Nitesh Kr. Singh, for the Appellant; Anil Mittal and Ataul Haque, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—W.P.(C) No. 8594/2004 has been preferred by the petitioner, a hospital run by the Government of N.C.T. of Delhi, impugning the award dated 4th February, 2004 in I.D. No. 143 of 1996 of the Industrial Tribunal on the following reference:

Whether the services of the workmen as mentioned in Annexure "A" have been terminated illegally and/or unjustifiably (sic unjustifiably) by the management and if so, to what relief are they entitled and what directions are necessary in this respect

Names of 35 workmen were mentioned in Annexure "A" to the reference. The Industrial Tribunal in the award records that out of the 35 workmen (subject matter of reference) 10 were security guards and the others were working as sweepers in the petitioner hospital. The award further records that the security guards had also raised a dispute for regularization of their employment in the petitioner hospital and which was the subject matter of I.D. No. 142 of 1996, pending before the same Industrial Tribunal and also answered vide a separate award dated 4th February, 2004. The Industrial Tribunal answered I.D. No. 142 of 1996 for regularization of security guards against the security guards, holding

that there was no relationship of employer and employee between the petitioner hospital and the said security guards and since there was no such relationship, the security guards were not entitled to the relief of regularization. The Tribunal thus in the award in I.D. No. 143 of 1996, under challenge in W.P.(C) No. 8594/2004 held that there being no relationship of employer and employee between the petitioner hospital and the security guards, there was no question of any illegality of their termination. The award qua 10 security guards is thus against the security guards and in favour of the petitioner hospital. The award further records that the other workmen (subject matter of reference) namely the sweepers had also similarly raised a dispute for regularization of their employment in the petitioner hospital and which was the subject matter of I.D. No. 93 of 1996 pending before the same Tribunal and also decided vide separate award dated 4th February, 2004. The award in I.D. No. 93 of 1996 is against the petitioner hospital and in favour of the sweepers and holds the sweepers entitled to regularization of their services with the petitioner hospital. Consequently, the award in I.D. No. 143 of 1996 under challenge in W.P.(C) No. 8594/2004, qua sweepers is also against the petitioner hospital and in favour of the sweepers and holds the termination by the petitioner hospital of the services of the sweepers to be bad and directs the petitioner hospital to reinstate the sweepers with full back wages and continuity of service.

2. I may add that the award impugned in W.P.(C) No. 8594/2004 is in favour of only 22 out of the 26 sweepers who were subject matter of reference. It appears that the remaining sweepers subject matter of reference did not come forward to prove their claim and were held not entitled to any relief. Notwithstanding the same, the petitioner hospital in the present writ petition has impleaded even those sweepers as respondents who were not granted relief under the impugned award and who have also not challenged the award.

3. W.P.(C) No. 8616/2004 has been preferred by the petitioner hospital impugning the award in I.D. No. 93 of 1996 (supra) of regularization of the sweepers. The reference in the said industrial dispute was qua 26 sweepers.

4. Application u/s 17B of the I.D. Act was filed in W.P.(C) No. 8616/2004 and orders made thereon. It appears that even those sweepers who were not granted the relief of reinstatement in I.D. No. 143 of 1996 are also receiving payments u/s 17B of the I.D. Act.

5. The writ petitions were taken up for hearing out of their turn on the contention of the counsel for the petitioner hospital that the petitioner hospital, already strapped for funds was facing a heavy financial outflow on account of Section 17B payments. It was also the contention of the counsel for the petitioner hospital that there is an apparent inconsistency. It is urged that the respondent sweepers as well as the security guards aforesaid, before the Industrial Tribunal had made identical claims, led identical evidence and made identical arguments; however, the Industrial Tribunal vide the three separate awards aforesaid made on the same day, has held the security guards to be employees of the contractor

and not of the petitioner hospital but held the respondent sweepers to be employees of the petitioner hospital and not of the contractor as contended by the petitioner hospital; that on the same evidence inconsistent findings have been returned. It is further informed that the writ petition filed by the security guards, being W.P.(C) Nos. 9438-42/2004, challenging the award against them has also been dismissed by this Court on 20th December, 2006. It was urged that there is thus apparent illegality in the awards in favour of respondent sweepers impugned in the present writ petitions.

6. The petitioner hospital has placed on record the pleadings, evidence of the security guards as well as the award in I.D. No. 142 of 1996.

7. The Industrial Tribunal in the award in I.D. No. 93 of 1996 qua regularization of the respondent sweepers has found:

(i) That the case of the sweepers was that they were employed by the Medical Superintendent of the petitioner hospital on temporary basis but after sometime, were handed over to a contractor and came under the Contract Labour System depriving them of the minimum wages and all other allowances.

(ii) That the sweepers after being so handed over to the contractor made a complaint in this regard and also raised a dispute for their regularization claiming that the work being taken from them was of a perennial nature.

(iii) The petitioner hospital in its reply denied the existence of relationship of employer and employee between itself and the sweepers; denied that the sweepers were ever employed by the Medical Superintendent; claimed that M/s Laxmi Chand & Sons was the employer of the said sweepers; that the said M/s Laxmi Chand & Sons was the contractor of the petitioner hospital engaged to keep some part of the hospital neat and clean.

(iv) That the petitioner hospital neither gave/specified the date on which the said agreement was entered into with M/s Laxmi Chand & Sons nor gave any other particulars thereof nor proved the said contract.

(v) That the petitioner hospital had also admitted that M/s Laxmi Chand & Sons have been engaged for cleaning only a part of the hospital and for cleaning the remaining part of the hospital, regular employees were being employed by the petitioner hospital.

(vi) That the petitioner hospital had not denied specifically that it is not registered with the appropriate Government under the Contract Labour (Regulation & Abolition) Act, 1970 for engaging a contractor.

(vii) That the witness of the petitioner hospital also had not produced any record of M/s Laxmi Chand & Sons contractor or any bills raised by the said contractor and which should have been in the possession of the petitioner hospital.

(viii) That though the witness of the petitioner hospital had stated that there were no vacant posts of sweepers and the respondent sweepers had not fulfilled

the necessary requirement of registration with the Employment Exchange before getting employment in the Government Hospital but the work undertaken by the respondent sweepers did not require any skill.

8. The Industrial Tribunal thus held:

(a) That the work being taken from the respondent sweepers was of perennial nature.

(b) Non production of the contract with the contractor M/s Laxmi Chand & Sons by the petitioner hospital and/or non-furnishing any particulars thereof showed that the alleged contract is a sham and camouflage document and the contractor, if any, is a namesake. The petitioner hospital was held to have failed to establish that the respondent sweepers were working under the supervision of the contractor.

(c) Accordingly, the respondent sweepers were held to be the direct employees of the petitioner hospital and held entitled to regularization.

9. The Industrial Tribunal axiomatically, in the award in I.D. No. 143 of 1996 qua the sweepers held that the sweepers having been held to be the direct employees of the petitioner hospital and their termination being in violation of Section 25F of the ID Act and without any enquiry, was bad.

10. At this stage, the reasoning given in the award in I.D. No. 142 of 1996 qua regularization of security guards may also be noticed. The security guards in their claim petition, though claiming to be working for the petitioner hospital and claiming regularization, sought termination of the practice adopted by the petitioner hospital by engaging security guards through contractor (M/s Sentinel Security Services). The Industrial Tribunal held that, in the absence of a plea or a claim of the security guards of being the direct employees of the petitioner hospital and in the face of their admission of employment through the contractor M/s Sentinel Security Services and further admission that their names were not registered with the Employment Exchange and that they had no proof to show that they were employed with the petitioner hospital, no relationship of employer and employee between the petitioner hospital and the security guards was made out and they could not be granted the relief of regularization and that if they want the termination of the Contract Labour System, their remedy lay before the appropriate Government under the Contract Labour (Regulation & Abolition) Act, 1970 and not before the Industrial Tribunal.

11. It will thus be seen that it is not as if the case of the sweepers and the security guards was identical. While the sweepers claimed to have been first directly employed by the petitioner hospital and thereafter having been forced in the Contract Labour System, the security guards at no point of time claimed to be the direct employees of the petitioner hospital.

12. Yet, there are some inconsistencies in the award qua sweepers and security guards. While in the award qua the security guards, their non registration with

the Employment Exchange, non possession of any proof of employment with the petitioner hospital, non deduction of any fund from their salaries has been held to be against them, the same factors qua the sweepers have not been given any weightage.

13. The counsel for the petitioner hospital has also contended that the Industrial Tribunal in the face of admissions of the sweepers at the time of raising the dispute of working under the contractor (even if forcibly), erred in placing the onus on the petitioner hospital of establishing that the sweepers were engaged through the contractor. It is also contended that the petitioner hospital had not proved the contract, neither with M/s Sentinel Security Services qua the security guards nor with M/s Laxmi Chand & Sons qua the sweepers; notwithstanding the same, adverse inference has been drawn by the Industrial Tribunal for non production of the agreement with M/s Laxmi Chand & Sons regarding sweepers while upholding the employment of the security guards to be through M/s Sentinel Security Services. It is also urged that the Industrial Tribunal has illegally held that the petitioner hospital was required to be registered under the Contract Labour (Regulation & Abolition) Act for engaging the sweepers through a contractor. It is urged that there is no prohibition under the said Act for engaging sweepers through a contractor and thus no question of requiring any registration arose. It is urged that there is no basis for treating the contract with M/s Sentinel Security Services qua the security guards as valid while holding the contract with M/s Laxmi Chand & Sons qua the sweepers to be a sham or a camouflage. Reliance is also placed on the order dated 20th December, 2006 (supra) dismissing the writ petition of the security guards. The contention of the security guards was that the Industrial Tribunal erred in not holding the contract with M/s Sentinel Security Services to be sham and make-believe. This Court held that the security guards had not raised any dispute about the contract being a sham or a camouflage and without such plea, no such finding could have been returned. It was further held that the security guards had wrongly claimed to be the direct employees of the petitioner hospital and thus entitled to regularization and which claim was found to be bad.

14. The counsel for the respondent sweepers has drawn out the distinction in the claim petitions of the security guards and the sweepers. It is contended that the security guards had never claimed initial direct employment with the petitioner hospital. It is urged that if the petitioner hospital had produced the bills of the contractor, the names of the sweepers engaged through the contractor would have been mentioned in that. It is contended that adverse inference ought to be drawn against the petitioner hospital for non production of the bills; it is capable of only one inference that the names of the respondent sweepers did not find mention in the said bills. It is further urged that the petitioner hospital has failed to produce the contract with M/s Laxmi Chand & Sons or its bills before this Court also. It is also argued that the findings of the Tribunal are factual in nature and are not capable of interference in the writ jurisdiction. Reference is made to the counter affidavit filed listing out the judgment in support of the said

proposition.

15. The counsel for the petitioner hospital in rejoinder has referred to Manager, R.B.I., Bangalore Vs. S. Mani and Others, laying down that in the face of denial, the initial burden of proof is on the workmen to show that they had completed 240 days of service.

16. I am unable to accept the contention of the counsel for the petitioner hospital that the petitions are entitled to be decided in favour of the petitioner hospital solely on the ground of the inconsistent awards qua the security guards and sweepers and dismissal of the writ petition preferred by the security guards. As noticed above, there exist distinguishing features between the case set up by the security guards and by the respondent sweepers. The matter thus required to be considered is whether the award, holding the respondent sweepers to be employees of the petitioner hospital solely for the reason of the petitioner hospital having failed to produce the contract with M/s Laxmi Chand & Sons and/or bills raised by the said contractor, is perverse and/or capable of interference in the limited scope thereof by way of judicial review.

17. The relevant factors in this regard are, firstly the admission of the respondent sweepers that at the time of raising the dispute they had been forced into Contract Labour System and were employed through a contractor; secondly, their claim that prior thereto they had been employed directly by the petitioner hospital and which claim was denied by the petitioner hospital; and lastly the admission nevertheless of the petitioner hospital that the respondent sweepers were working in the petitioner hospital albeit through the contractor M/s Laxmi Chand & Sons.

18. In my view, the Tribunal totally misdirected the enquiry. The question for determination was not whether the respondent sweepers were then employed directly or through a contractor (in as much as that status was admitted), but whether the respondent sweepers were initially employed directly by the petitioner hospital and thereafter forced with a contractor, as contended by them. In the face of denial by the petitioner hospital of the respondent sweepers having been first employed directly, the initial burden to prove the said fact was on the respondent sweepers. How were the respondent sweepers expected to discharge the said burden. They could have examined witnesses who would have deposed that they had been working in the petitioner hospital since prior to the date of the agreement with M/s Laxmi Chand & Sons. No such witnesses were examined. There was no need for them to examine any witnesses to prove that they were working for the petitioner hospital after the contractor M/s Laxmi Chand & Sons has come in picture inasmuch as the said fact is admitted. The petitioner hospital as aforesaid is a Government concern. If the respondent sweepers had been in employment of the petitioner hospital and receiving wages from before, in the normal course they would have a pay slip or other document in proof of payment. No such pay slip has been proved. Even if there was no such pay slip, the respondent sweepers could have called for the accounts of the petitioner

hospital which would have contained entries of payments, if any, to them. No such attempt was made. It was put to the respondent sweepers in their cross-examination as to whether they were members of the union of the employees of the petitioner hospital; they answered in the affirmative but could not furnish any proof of being member thereof; no effort was made to examine any office bearer of the union to prove that they, as employees of the petitioner hospital, were members of the union since prior to the contract with M/s Laxmi Chand & Sons. Though the respondent sweepers in their claim petition itself had pleaded that they, inspite of initial direct employment, had been forced in the Contract Labour System but they neither gave any dates nor the particulars of the contractor through whom they were forced to work. They did not even say that the said contractor was anyone other than M/s Laxmi Chand & Sons.

19. The Supreme Court in *Bank of Baroda Vs. Ghemarbhai Harjibhai Rabari*, has held that the burden of proof that a claimant was in the employment of a management, primarily lies on the workman who claims to be a workman though the degree of proof so required would vary from case to case. Similarly, in *Workmen of Nilgiri Coop. Mkt. Society Ltd. Vs. State of Tamil Nadu and Others*, it was held that it is a well settled principle of law that the person who sets up a plea of existence of relationship of employer and employee, the burden to prove the same would be upon him.

20. As far as the petitioner hospital not producing the contract with M/s Laxmi Chand & Sons or the bills raised by the said contractor is concerned, in my view the same is of no relevance inasmuch as it was the admitted position that the respondent sweepers had been forced to work through the contractor. The said fact was thus not required to be proved by the petitioner hospital.

21. The aforesaid error committed by the Tribunal is such, which has resulted in the answer to the reference being misdirected and is capable of interference in the exercise of jurisdiction under Article 226 of the Constitution of India.

22. The findings of the Tribunal that the contract of the petitioner hospital with M/s Laxmi Chand & Sons is a make believe and a sham is also a finding beyond the reference. No such case was set up by the respondent sweepers. In the absence of the respondent sweepers setting up such a case, the Tribunal could not have returned findings thereon.

23. Resultantly, the writ petitions succeed. The award of the Tribunal in I.D. No. 93 of 1996 holding the respondent sweepers to be entitled to regularization is set aside/quashed. The award in I.D. No. 143 of 1996 holding the respondent sweepers to be the direct employees of the petitioner hospital and further holding the petitioner hospital to have terminated their employment is also set aside/quashed. The petitions having succeeded, the amounts, if any, received by the respondent sweepers in terms of the order u/s 17B of the I.D. Act, in excess of the last drawn wages are required to be refunded by them; they have also given undertaking to this effect. The respondent sweepers are directed to refund

the said amounts to the petitioner hospital within six months hereof. No order as to costs.