

(2011) 07 KL CK 0048

In the High Court Of Kerala

Case No : Writ Petition (C) No. 36839 of 2009 (Y)

H.N.L. Casual and Contract Workers" Centre

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 04-07-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Industrial Disputes Act, 1947 — Section 10(1), 12, 12(1), 2, 23

Citation : (2012) 132 FLR 163 : (2012) 3 LLJ 40

Hon'ble Judges : C.T. Ravi Kumar, J

Bench : Single Bench

Advocate : K.S. Madhusoodanan, for the Appellant; T.P.M. Ibrahim Khan, Asst. S.G. of India, for the Respondent

Judgement

C.T. Ravikumar, J.—The petitioner is a registered trade union working among contract and casual workers under the third respondent company viz., "Hindustan News Print Ltd." which is a subsidiary of "Hindustan Paper Corporation Ltd.". This writ petition has been filed mainly challenging Ext.P4 order of the second respondent and seeking issuance of a writ of mandamus commanding the second respondent to conciliate the industrial dispute raised in Ext.P3 petition in accordance with the provisions under the Industrial Disputes Act (for short "the I.D. Act"). As per Ext.P4, the second respondent declined to conciliate on the dispute of regularization of contract labourers in the third respondent establishment on the ground that the issue raised by the petitioner is not a subject-matter to be dealt with as an industrial dispute u/s 2(k) of the I.D. Act as the same constitutes only violation of the provisions of the Contract Labour (Regulation and Abolition) Act, 1970 (for short "the Act").

2. The contention of the petitioner is that there are about 200 contract workers employed through the fourth respondent for the third respondent establishment and out of which 35 contract workers are members of the petitioner union. It is further contended that they had been working in the third respondent

establishment since 1982-83 though the petitioner union was registered only in 2006. On 25.6.2008 a conciliation petition u/s 12 of the I.D. Act was moved before the second respondent on the issue of regularization of the contract workers working for the third respondent through the unlicensed petty contractor, the fourth respondent. When the petitioner union earlier sought information under the Right to Information Act from the second respondent as to the details regarding the licensed contractors from the third respondent, Ext.P2 information was given. In Ext.P2, the name of the fourth respondent was not included as a licensed contractor. It is in the said circumstances that the union relying on the decisions of the Hon'ble Apex Court in Secretary, Haryana State Electricity Board v. Suresh and others 1999 (81) FLR 1016 (SC) and in Gujarat Electricity Board, Thermal Power Station, Ukai Vs. Hind Mazdoor Sabha and Others, filed Ext.P3 conciliation petition dated 25.6.2008. The sum and substance of the contentions of the petitioner union is that the regularization of the contract labourers employed through unlicensed contractors through adjudicatory process under the I.D. Act is possible and permissible in terms of the decisions referred above. It is the further contention of the petitioner that in the light of notification No. GSR 336(E) dated 5.5.2008 issued in exercise of power u/s 39 of the I.D. Act in supersession of notification No. SO 556(E) dated 3.7.1998 the second respondent is empowered to act as Conciliation Officer in regard to the industrial disputes in Government of India Companies like the third respondent. After considering Ext.P3 conciliation petition the second respondent passed Ext.P4 order declining to conciliate for the reasons mentioned earlier. It is in the said circumstances that this writ petition has been filed with the aforesaid prayers.

3. The contention of the petitioner is that the action on the part of the second respondent in declining to conciliate on the dispute invites interference by this Court. Section 12 of the Act provides that no unlicensed contractor shall undertake or execute any work through contract labour. In view of the said provision, it is contended that the employment of contract labour for the third respondent through unlicensed fourth respondent contractor would enable such workers to take and stake a claim to be treated as workers under the principal employer. Relying on the decision reported in Gujarat Electricity Board, Thermal Power Station, Ukai Vs. Hind Mazdoor Sabha and Others, it is contended that in case the contract labourers became the employees of the principal employer in course of time the contract labourers could raise a dispute in accordance with the procedures under the I.D. Act and conciliation over such a dispute could not be declined by the conciliation officer. In such circumstances, the issue whether the concerned contract labourers are working under the principal employer or under the petty contractor would necessarily become a matter of dispute. At any rate, such a dispute cannot be treated as one relating abolition of contract labour but only as a dispute for securing the appropriate service conditions from the principal employer on the premise that the workmen concerned were always the employees of the principal employer. It is the further contention of the petitioner

that the effect and impact of employing unlicensed contractor was elaborately dealt with by the Hon'ble Apex Court in the decision reported in Secretary, H.S.E.B Vs. Suresh and Others etc. etc., , more particularly in paragraph 19 therein. Taking into account the facts and circumstances of the said case, it was held that contract system was mere a camouflage and there existed a real contractual relationship between the Board on one hand and the employer on the other hand. Relying on the said decision it is contended that the fourth respondent herein was only a name lender and, in fact, it would reveal that in the facts and circumstances of the case the employees were working for the third respondent and there existed a real contractual relationship between the third respondent and the concerned contract labourers who are members of the petitioner union.

4. Since they had worked for more than 240 days during the period of twelve calendar month preceding the date with reference to which calculation is to be made, in terms of the provisions under the I.D. Act they are entitled to seek absorption into the regular establishment. It is based on such contentions that the petitioner assails Ext.P4 whereby the second respondent declined to conciliate on the dispute raised as per Ext.P3.

5. Separate counter-affidavits have been filed on behalf of respondents 3 and 4. It is stated in the counter-affidavit filed on behalf of the third respondent that it is a wholly owned Government of India undertaking and it has got a factory at Newsprint Nagar, Velloor where besides its permanent workers various contractors on entrustment of works employ their own workmen. According to the 3rd respondent the fourth respondent is one such contractor. It is further stated therein that the claim of the petitioner regarding the right of the contract workers whom it represents based on Haryana State Electricity Board's case (supra) and Gujarat Electricity Board's case (supra) is totally misconceived and that the only consequence of violation of sections 7 and 12 of the Act as per the decision of the Hon'ble Apex Court in Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc. etc., is invitation of the penal provisions under sections 23 and 25 of the said Act. The mere violation of any provision of the Act or the Rules by the contractor or employer would not confer any right on the employees of the Contractor and, at any rate, on that count they could not be deemed as employees of the principal employer. That apart, it is stated that during the period from 30.4.2005 to 29.11.2006 the fourth respondent was holding a licence and the same was renewed upto 29.11.2007. Thereafter, the said licence was not renewed by the fourth respondent for a short period and later, it was renewed for the period commencing from 24.7.2008 and it is still in force. In short, the contention of the third respondent is that the contention that the fourth respondent is an unlicensed contractor is not true to facts. Virtually, by raising such contentions, the third respondent justifies the action on the part of the second respondent in declining to conciliate on Ext.P3 conciliation petition. According to the third respondent, the claim put forth by the petitioner union as per Ext.P3 would not

fall within the definition of "dispute" u/s 2(k) of the I.D. Act.

6. In the counter-affidavit filed by the fourth respondent he had refuted the contention of the petitioner that he got no licence under the Act. According to him, he took licence u/s 12(1) of the Act from the Assistant Labour Commissioner (Central) Thiruvananthapuram to run the contract entered into for the supply of labour to "Hindustan Newsprint Limited, the third respondent company, with effect from 1.11.2005, Ext. R4(1) is the licence obtained by him from the second respondent. Relying on Ext, R4(2) it is further contended that on 2.2.2006 the Assistant Labour Commissioner renewed the Ext.R4(1) licence and also had given sanction to increase the number of workers to be engaged from 222 to 246. According to him, he could not get it renewed before its expiry viz., before 31.10.2007. Since the said licence was not renewed in time he had to apply for a fresh licence to run the contract with effect from the expiry of the licence that was issued earlier and he obtained a fresh licence viz., Ext.R4(3) on 24.7.2008. Subsequently, explaining the reasons for the delay he had represented before the Assistant Labour Commissioner and later got, the licence renewed. Ext.R4(5) dated 24.7.2009 is the renewed licence.

7. Certain indisputable facts relevant for the consideration of the issues involved in this writ petition could be deduced from the rival contentions. Ext.R4(1) licence dated 30.11.2005 was issued to the fourth respondent by the Assistant Labour Commissioner (Central), Thiruvananthapuram u/s 12(1) of the Act and thereafter it was renewed. In paragraph 4 of the counter-affidavit the 4th respondent stated that its validity expired on 31.10.2007 (sic 30.11.2007) and he could not get it renewed for some reasons before the expiry of its validity. Thereafter he obtained a fresh licence viz., Ext.R4(3) on 25.7.2008. Later, as per Ext.R4(5) dated 24.7.2009 the Assistant Labour Commissioner renewed the original licence issued to the 4th respondent. Thus, evidently, during the period from 31.10.2007 to 24.7.2009 the licence originally granted to the 4th respondent remained unrenewed. True that, later, as per Ext.R4(5) the Assistant Labour Commissioner renewed the original licence. Prior to the issuance of Ext.R4(5) the 4th respondent applied and obtained a fresh licence u/s 12(1) of the Act on 25.7.2008, as is obvious from Ext.R4(3). Both the petitioner and the respondents rely on the aforesaid set of facts to canvass different propositions. According to the petitioner, evidently, from 30.11.2007 to 24.7.2009 Ext.R4(1) was not valid and in fact, it remained unrenewed. On account of the said position the contract workers who are members of the petitioner union accrued a right to claim that in the course of time they became the employees of the principal employer, that is, the third respondent company. To canvass the said position, the petitioner relied on the aforesaid decisions of the Hon'ble Apex Court and contend that in the light of the decision in Steel Authority of India Limited v. National Union Waterfront Workers (supra) the second respondent could not have declined to conciliate on the issue. Per contra, the respondents relied on the same decision to support and sustain Ext.P4 whereby the second respondent declined to conciliate on the claim for regularization of the contract labourers

who are members of the petitioner union in the third respondent establishment. Besides the above mentioned judgments of the Hon''ble Apex Court both sides relied on certain other decisions as well. I do not think it necessary to deal with such contentions raised by both sides in view of the order I propose to pass in this writ petition. It is a settled position of law that when a designated and duty bound authority is available to decide on an issue pertaining to a particular subject/dispute, at the first instance the said authority has to exercise that power and it is only appropriate in such circumstances for this Court to desist from deciding the dispute and leave it for the decision of such authorities. In that view of the matter the scope of consideration of the rival contentions has to be limited to one for examining whether the 2nd respondent was justified in declining to conciliate on Ext.P3 as per Ext.P4. In other words, the rival contentions cannot be considered and gone into for the purpose of deciding whether the claim of the petitioner in regard to the contract labourers'' right is sustainable or not.

8. GSR 336(E) dated 5.5.2008 issued in exercise of power u/s 39 of the I.D. Act in supersession of notification No. SO 556(E) dated 3.7.1998 clothed the second respondent to act as Conciliation Officer in respect of the industrial disputes under Government of India Companies. Admittedly, the third respondent is a Government of India Company. It was in the said circumstances that the petitioner union submitted Ext.P3 conciliation petition before the second respondent. Ext.P4 is the order passed by the second respondent thereon. Obviously, as per Ext.P4, the second respondent declined to conciliate on the said claim petition that carried a call for conciliation on the refusal for regularization of the contract labourers who are members of the petitioner union in the third respondent establishment. As per Ext.P4, the request for conciliation made as per Ext.P2 was declined as hereunder:-

With reference to the above, it is informed that the issue raised by your Union is not a subject-matter to be dealt with as an industrial dispute u/s 2(k) of the Industrial Disputes Act, 1947, as the same constitutes the violation of the provisions of Contract Labour (Registration and Abolition) Act, 1970 and as such the same has to be dealt with accordingly by your Union.

A bare perusal of Ext.P4 would reveal that the second respondent declined to interfere on forming the opinion that the issue raised by the petitioner union is not a subject-matter to be dealt with as an industrial dispute u/s 2(k) of the I.D. Act and the same constitutes only violation of the provisions of the Act. Apart from the said statement the second respondent had not assigned any reason for the said decision. When an authority is clothed with a power to conciliate that authority could decline to conciliate only if the issue raised by the parties would not form a subject-matter to be dealt with as an industrial dispute u/s 2(k) of the I.D. Act. At the same time, the party raised such an issue having a right to know as to the reasons that led the said authority to arrive at such a conclusion that is unpropitious to it. True that, a discretion is vested with the Conciliation Officer.

But, that discretion has to be exercised in accordance with law and at any rate, that cannot be based on his personal opinion. To show that the discretion has been properly exercised in accordance with law the authority is duty bound to assign the reasons. Absence of reasons suggests non-application of mind. In view of the absolute absence of any reason in Ext.P4 I have no hesitation to hold that the decision in Ext.P4 is to be treated as a decision taken with a closed mind without looking into the crucial question as to whether a dispute exists or not and if exists, what is its nature. In other words, the said authority has to identify the actual dispute to know its real nature. A vague statement that the subject-matter to be dealt with is an industrial dispute cannot be regarded as a proper exercise of the power and duty to conciliate rests on that authority. On that sole ground Ext.P4 is liable to be interfered with.

9. I am persuaded to interfere with Ext.P4 on another ground as well. The indisputable facts obtained in this case, noted above, are capable of construing in two ways. The contentions of the petitioner are that the 4th respondent had not obtained Ext.R4(1) licence renewed prior to the expiry of its validity and that it remained unrenewed for the period from 30.11.2007 to 24.7.2009. In this context, it is apposite to note that in Ext.P2 information passed on to the petitioner under the Right to Information Act regarding the licenced contractors engaged by the 3rd respondent the name of the 4th respondent was not included. So also, in the counter-affidavits filed by respondents 3 and 4 there is incongruity with respect to the date of renewal of the original licence. The contract labourers who are members of the petitioner union accrued a right to claim that, in the course of time, they became employees of the principal employer, namely, the third respondent company and that Exts. R4(4) and R4(5) are only mere camouflage to deny the said benefit to the contract labourers is the other contention raised by the petitioner. The learned Counsel appearing for the petitioner, in view of the admitted facts, relied on paragraph 97 of the judgment in Steel Authority of India Limited's case (supra) to contend that they are questions of fact and the same could be established by the contract labourers based on relevant and requisite materials in the Industrial Court or the Industrial Tribunal. Such an opportunity could be availed by the contract labourers only if a conciliation is attempted by the 2nd respondent based on Ext.P3 petition and in case of its failure, only if the 2nd respondent adheres to the mandatory follow up procedures. The relevant portion of the decision of the Hon'ble Apex Court in Steel Authority of India Limited's case (supra) relied on by the petitioner reads thus:-

.....It was noticed that in BHEL Workers Assn. v. Union of India,¹ Mathura Refinery Mazdoor Sangh through its Secretary Vs. Indian Oil Corporation Ltd., Mathura Refinery Project, Mathura and Another, and Dena Nath case 1992 (64) FLR 39 (SC) on the question - whether the contract labourers had become the employees of the principal employer in course of time or whether the engagement and employment of labourers through a contractor was a mere camouflage and a smokescreen - this Court took the view that it was a question

of fact and had to be established by the contract labourers on the basis of the requisite material in the Industrial Court or the Industrial Tribunal.

10. As already noticed, the respondents too, relied on the same decision to contend that the action on the part of the second respondent in declining to conciliate on the issue calls for no interference by this Court. In paragraphs 96 and 105 of the decision in *Steel Authority of India Limited's case* (supra) the Hon"ble Apex Court held thus:-

96. In *Dena Nath case* 1992 (64) FLR 39 (SC) a two-Judge Bench of this Court considered the question, whether as a consequence of non-compliance with sections 7 and 12 of the CLRA Act by the principal employer and the licensee respectively, the contract labour employed by the principal employer would become the employees of the principal employer. Having noticed the observation of the three-Judge Bench of this Court in *The Standard-vacuum Refining Co. of India Ltd. Vs. Its Workmen and Others*, and having pointed out that the guidelines enumerated in sub-section (2) of section 10 of the Act are practically based on the guidelines given by the Tribunal in the said case, it was held that the only consequence was the penal provisions under sections 23 and 25 as envisaged under the CLRA Act and that merely because the contractor or the employer had violated any provision of the Act or the Rules, the High Court in proceedings under Article 226 of the Constitution could not issue any mandamus for deeming the contract labour as having become the employees of the principal employer. This Court thus resolved the conflict of opinions on the said question among various High Courts. It was further held that neither the Act nor the Rules framed by the Central Government or by any appropriate Government provided that upon abolition of the contract labour, the labourers would be directly absorbed by the principal employer.

105. The principle that a beneficial legislation needs to be construed liberally in favour of the class for whose benefit it is intended, does not extend to reading in the provisions of the Act what the legislature has not provided whether expressly or by necessary implication, or substituting remedy or benefits for that provided by the legislature. We have already noticed above the intendment of the CLRA Act that it regulates, the conditions of service of the contract labour and authorizes in section 10(1) prohibition of contract labour system by the appropriate Government on consideration of factors enumerated in sub-section (2) of section 10 of the Act among other relevant factors. But, the presence of some or all those factors, in our view, provides no ground for absorption of contract labour on issuing notification under sub-section (1) of section 10. Admittedly, when the concept of automatic absorption of contract labour as a consequence of issuing notification u/s 10(1) by the appropriate Government, is not alluded to either in section 10 or at any other place in the Act and the consequence of violation of sections 7 and 12 of the CLRA Act is explicitly provided in sections 23 and 25 of the CLRA Act, it is not for the High Courts or this Court to read in some unspecified remedy in section 10 or substitute for

penal consequences specified in sections 243 and 25 a different sequel, be it absorption of contract labour in the establishment of principal employer or a lesser or a harsher punishment. Such an interpretation of the provisions of the statute will be far beyond the principle of ironing out the creases and the scope of interpretative legislation and as such, clearly impermissible. We have already held above, on consideration of various aspects, that it is difficult to accept that Parliament intended absorption of contract labour on issue of abolition notification u/s 10(1) of the CLRA Act.

11. Going by the decision in Steel Authority of India Limited's case (supra), true that, merely because the contractor or the employer had violated any provision of the Act or the Rules, this Court in a proceedings under Article 226 of the Constitution of India cannot issue any mandamus for deeming the contract labourers as having become the employees of the principal employer. As noticed hereinbefore, the contention of the petitioner union is that the contract labourers have become the employees of the principal employer in course of time and Ext.R4(4) or R4(5) cannot be taken as a reason to deprive the right accrued by the contract labourers consequent to the non-renewal of licence by the fourth respondent. Therefore, I am persuaded to uphold the said contention that such matters form question of facts and the contract labourers may establish the said facts by adducing relevant and requisite materials before the appropriate forum. Such an opportunity could be availed of only if a conciliation is attempted. Invariably, in this case, relying on the aforementioned set of facts the petitioner union representing the contract labourers contend that in the course of time the petitioners had become the employees of the principal employer. The third respondent, the principal employer, relying on the same set of facts contend that the said claim of the contract labourers is absolutely bereft of any basis. This, according to me, is a pointer suggesting the existence of a dispute. Necessarily, those questions could not be taken as matters totally unrelated to the factual aspects involved in the issue. In fact, those are questions of fact. Ultimately, the appropriate forum may have to decide, after appreciating the materials before it, whether the issues constitute an industrial dispute or they constitute only violation of provisions of the Act or Rules thereunder. However, such an endeavour cannot be made by this Court and such questions have to be considered, after appreciating the materials, by the appropriate forum. When there exists a dispute, on such a matter, taking into account the fact that as per notification No. GSR 336(E) dated 5.5.2008 issued in exercise of power u/s 39 of the I.D. Act and in supersession of notification No. SO 556(E) dated 3.7.1998 the second respondent is competent to act as Conciliation Officer, he is bound to conciliate on Ext.P3 petition in the manner provided under the I.D. Act. The vague statement that the issue constitutes only violation of the provisions of the Act and they did not constitute a industrial dispute u/s 2(k) of the I.D. Act in view of the facts involved in the case on hand, cannot be construed as a proper exercise of the power vested with the second respondent. In fact, it is not a mere power vested on the second respondent. It also casts a duty on the second

respondent. I am of the considered view that when once it is found that the rival contentions constitute a dispute the matter has to be left for the decision of the conciliation and the adjudicatory authorities under the I.D. Act. If I proceed to appreciate the contentions for the purpose of deciding the issues involved in the case on hand it would definitely amount to deciding the dispute involved in this case. Therefore, at this stage, this Court cannot go into those questions. Based on my finding that the rival contentions constitute a dispute the second respondent is bound to conciliate on the issue. In view of the said discussion on the issue, Ext.P4 is set aside. Consequently, there will be a direction to the second respondent to take appropriate steps based on Ext.P3 conciliation petition contemplated under the provisions of the I.D. Act. This shall be done expeditiously, at any rate, within a period of six weeks from the date of receipt of a copy of this judgment. It is made clear that this Court has not made any observation as to the merits of the rival contentions on the claim for regularisation of the contract labourers who are members of the petitioner's union.

12. The writ petition is disposed of accordingly.