

(1965) 04 PAT CK 0012

In the Patna High Court

Case No : Misc. Judl. Case No. 967 of 1961

Nandkumar Tewari and Another

APPELLANT

Vs

Ali Hasan and Others

RESPONDENT

Date of Decision : 28-04-1965

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 1966 Patna 127 : (1966) 2 LLJ 124

Hon'ble Judges : R.K. Choudhary, J;G.N. Prasad, J

Bench : Division Bench

Advocate : Ranen Roy, Tarni Prasad and R.N. Tewari, for the Appellant;
Rameshwar Choudhary, for the Respondent

Judgement

1. Petitioner No. 2 had taken a contract for construction of the Patna Burning Ghat from the Patna Improvement Trust in the year 1957 and petitioner No, 1 was his partner in the aforesaid contract work. By an agreement dated the 23rd of April, 1958, a copy of which is annexure "A" to the writ application, a sub-contract was given to Mathura-Mistry (respondent No. 3) for centring at the rate of Rs. 12-8-0 per hundred sq. ft., and it was also agreed that he would execute the work at the rate of 200 sq. ft. at the minimum per day. It is said that, in pursuance of the aforesaid agreement, respondent No. 3 engaged a few labourers under him who were his employees and workers. Respondent No. 3, however, did not fulfil his contract and the work done by his party, according to the petitioners, was most unsatisfactory and it did not cover up even the advance taken by him.

On the 25th of September, 1958, respondent No. 3 filed a petition before the Chief Inspecting Officer, Shops and Establishments. Office, Bihar, Patna, for settlement of his bill to the tune of Rs. 887.62 nP., as detailed in his petition, a copy of which is annexure "B" to the writ petition. That application was forwarded to the Inspecting Officer, who summoned the petitioners for a hearing on the 17th of October, 1958. When the petitioners appeared before him, they raised a

preliminary point that the matter was beyond the jurisdiction of any authority under the Bihar Shops and Establishments Act as the relationship between the petitioners and respondent No. 3 was that of a contractor and sub-contractor, and not of an employer and employee. The petitioners allege that, before the Inspecting Officer, respondent No. 3, in his evidence, admitted that he was a sub-contractor and for the purpose of executing the work he had employed several labourers under him. In view of the above submission made before him, the Inspecting Officer dropped the proceedings. A copy of the report of the proceeding made by him to the Chief Inspecting Officer, dated the 8th of December, 1958, is annexure "D" to the writ petition.

On the 29th of September, 1958, respondent No. 3 filed another petition under Sec. 28(1) of the Bihar Shops and Establishments Act (hereinafter referred to as "the Act") for a direction u/s 28(2) of the Act before the Assistant Labour Commissioner, who was the authority appointed under the Act for Patna. At the time of the hearing of this application, on the 15th of March, 1959, the petitioners again raised a preliminary objection that the provisions of the Act had no application to the case as there was no relationship of employer and employee between the parties, as found by the Inspecting Officer. On the 10th of May, 1960, the application was dismissed under Rule 22(10) of the Bihar Shops and Establishments Rules because of the absence of respondent No. 3. But it was again restored on the 27th of June, 1960, without giving any opportunity to the petitioners to be heard. The next date fixed in the case was the 10th of July, 1960, and it was then adjourned to the 16th of August, 1960, on which date the petitioners made an application for adjournment, but it was rejected and the case was decided ex parte. The Assistant Labour Commissioner allowed the claim of respondent No. 3 in toto and also awarded compensation of Rs. 10. He, however, did not decide the question raised by the petitioners about the want of jurisdiction in him to deal with the matter. The order of the Assistant Labour Commissioner was conveyed to the petitioners on the 8th of November, 1960, directing them to pay Rs. 897.62 nP. to respondent No. 3. The petitioners, thereafter, preferred a review application, which was ultimately dismissed. They then preferred an appeal before the Chairman, Industrial Tribunal, Bihar, Patna, the appellate authority under the Act, but the appeal was dismissed as time-barred. Being thus aggrieved, the petitioners have filed this writ petition under Article 226 of the Constitution for quashing the order of the Assistant Labour Commissioner (respondent No. 2) dated the 16th of August, 1960 and the directions contained therein. A copy of the memo under which the direction was sent to the petitioner is annexure "P" to the writ petition.

2. On a perusal of the order of the appellate authority, it is manifest that the appeal preferred before it was time-barred, and it has been rightly submitted on behalf of the respondent that the filing of a time-barred appeal amounted to no filing. It is thus clear that the remedy by way of appeal was not availed of by the petitioners. An objection has been raised on behalf of the respondent that, the petitioners having failed to avail of the remedy by way of appeal, the writ

application is barred. In reply to this argument, Counsel for the petitioners has submitted that where the impugned order has been passed by an authority in which there was total lack of jurisdiction, the nonavailability of the remedy by way of appeal could not bar the maintainability of the writ application. The argument advanced on behalf of the petitioners in this regard appears to be well founded and must be accepted as valid. In support of this contention, reliance has been placed by Mr. Ray on the Supreme Court decision in the *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, , in which the failure of the aggrieved party to avail of the remedy by way of appeal was held not to be a bar to a writ application because the Act under which the provision for appeal was made was itself held to be ultra vires.

He has also referred to a Bench decision of this Court in *Bibi Nazma Khatoon and Another Vs. R.P. Sinha, Custodian, Evacuee Properties and Another*, , in which it was held that where the want of jurisdiction complained of was based upon violation of some fundamental principles of justice, the non-availability of the alternative remedy by way of appeal or revision was no bar to the writ application. Only today, in *Rewati Kant Sinha v. State of Bihar*, (C. W. J. C. No. 135 of 1965) after considering various decisions for and against the above proposition, we have stated the law on the subject to be as follows:

"..... ordinarily where an alternative remedy is available to an aggrieved party and it is not availed of by him, he should not be permitted, as a rule of policy, prudence and discretion, but not as a rule of law, to pursue his remedy directly in the High Court under its writ jurisdiction, unless there be any exceptional circumstance in his favour to come direct to the High Court without availing of the alternative remedy. The High Court, while exercising the power under its writ jurisdiction, should give due and proper consideration to the failure of the aggrieved party to avail of the alternative remedy and it should interfere under its writ jurisdiction only if it feels that the aggrieved party had made out a special case for its interference and manifest injustice had been done to him."

3. If the provisions of the Act could not be applicable to the facts of the present case, then it is undoubtedly true that the authority prescribed under the Act will have no jurisdiction to deal with the matter; and if there is no jurisdiction in the authority concerned, it must be taken to be a special circumstance in the present case for maintainability of the writ application, even though the alternative remedy was not availed of. There is no dispute about the manifest injustice done to the petitioners, because if the authorities had no jurisdiction to direct them to pay any amount to respondent No. 3, they have to make such payment. The present case, therefore, in our opinion, comes within the purview of the rule of law as stated above by us. In our opinion, therefore, the present writ application is maintainable.

4. Mr. Choudhary, appearing for respondent No. 3, has urged that the relationship between the petitioners and respondent No. 3 was that of an employer and employee, and not of a contractor and a sub-contractor. In support

of this argument, he has relied on the definition of employee as given in Section 2(4) of the Act according to which, so far as it is relevant for the present purpose, "employee" means a person wholly or partially employed for hire, wages, including salary, reward or commission in, and in connection with, any establishment." The contention on behalf of the petitioners is that respondent No. 3 was not either wholly or partially employed for hire, wages or was to be given any salary, reward or commission; he was merely a sub-contractor to do certain work for which he had to be paid under the terms of the contract.

5. The question whether respondent No. 3 was an employee or a sub-contractor is a question of fact and ordinarily this Court does not go, under its writ jurisdiction, into questions of fact, unless the question involved is a question of jurisdictional fact. In the present case, the disputed question of fact is a question of jurisdictional fact, because the jurisdiction of the authorities under the Act is based on the fact if respondent No. 3 was an employee of the petitioners. The preamble of the Act states that it was enacted to provide for the regulation of conditions of work and employment in shops and other establishments and for certain other purposes. Therefore, in order to attract the provisions of the Act, the question must relate to work and employment. The work of a contractor and a sub-contractor cannot, by any stretch of imagination, be termed as work and employment. This Act, therefore, will have no application if the relationship between the petitioners and respondent No. 3 was that of a contractor and a sub-contractor. It has, therefore, to be decided by us as to what was the relationship between the parties.

6. In paragraph 2 of the writ application, it has been clearly stated that the petitioners had to give sub-contract to petty contractors and by an agreement dated the 23rd April, 1958 (annexure "A") a sub-contract was given to Mathura Mistry (respondent No. 3) for centering at the rate of 12 1/2 per (hundred) sq. ft. and it was also agreed that he would execute the work at the rate of 200 sq. ft. at the minimum per day. In paragraph 9 of the writ petition it has been stated that the Inspecting Officer examined Mathura Mistry who admitted before him that he was a sub-contractor and for the purpose of executing the work had employed several labourers under him. No counter-affidavit has been filed on behalf of respondent No. 3 to controvert these statements of the petitioners. They, therefore, must be accepted as correct. Reading the agreement, a copy of which is annexure "A" to the writ application, it is perfectly clear that it was nothing but a sub-contract. It reads as follows:

"Mathura Mistry wold Jadu Mistry, Sakin Asai, Thana Bhagwanpur, Zila Muzaffarpur halmokam Manpur thana Patna wo dera Sarikdar Ramjiwan Singh hal mokam Patna Kadamkun Pirmohani thekadar Dujra Burning Ghat uprokta mistri ko 12-8-0 saikra square feet saintering karne ka thika diya, Mistri ko pratidin kam se kam 200 square feet kam laiyar dena hoga nahi karne se kanunan karbai karna hoga.

Sd. Nandkumar Tiwari Thikedar 23-4-1958"

Even the application, a copy of which is annexure "B" to the writ application, which respondent No. 3 made before the Chief Inspecting Officer, Bihar for his claim, makes it perfectly clear that the claim was made on the basis of contract. In the second paragraph of that application, respondent No. 3 himself stated that he had taken a contract from Mr. Sanjiwan Singh (petitioner No. 2). The third item of the claim, as mentioned there, is "Charge amounting to contract Rs. 1777.62 nP.". Thus, on the own admission of the respondent No. 3 in annexure "B" as well as in his evidence quoted above, it is manifest that the relationship between the petitioners and respondent No. 3 was that of a contractor and sub-contractor. That being the position, the Act has no application to this case, and, as such, the orders passed by the authorities under the Act directing the petitioners to make payment to respondent No. 3 are ultra vires.

7. The result, therefore, is that, acting in exercise of the powers conferred on this Court under Article 227 of the Constitution, we set aside the order of the Assistant Labour Commissioner, the authority under the Act, dated the 16th of August, 1960 and the direction for payment contained in annexure "F" to the writ application, and allow the application; but there will be no order as to costs.