
(2015) 07 MP CK 0021

In the Madhya Pradesh High Court

Case No : Writ Petition No. 2895 of 2009

National Fertilizer Ltd.

APPELLANT

Vs

Bhagwan Das Pal

RESPONDENT

Date of Decision : 06-07-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2015) 07 MP CK 0021

Hon'ble Judges : Sujoy Paul, J

Bench : Single Bench

Advocate : Nidhi Patankar, for the Appellant; B.P. Singh, Advocates for the Respondent

Final Decision : Allowed

Judgement

Sujoy Paul, J.—This petition filed under Article 227 of the Constitution challenges the award of the Labour Court passed in Case No. 25/A/ID Act,/2000 (Ref.). The Labour Court No. 1, Gwalior by said award answered the reference in favour of the workman and opined that termination of workman was not legal and justified. The workman was directed to be reinstated without back wages.

2. The brief facts necessary for adjudication of this matter are that, the workman was discontinued from service w.e.f. 23.10.1990. He assailed this action before this Court by filing W.P. No. 2257/90. After hearing both the parties, this Court by order dated 26.4.1996 allowed the petition with cost. The employer, feeling aggrieved by this, filed LPA No. 321/96. This LPA was decided by Division Bench by judgment dated 1.5.1999.

3. A plain reading of the order passed in W.P and stand of employer before W.P. shows that the Respondent (workman) contended that he was employee of petitioner, National Fertilizers Ltd. (NFL), whereas the stand of NFL shows that there was no employee- employer relation between it and the workman. In LPA, this court opined that this is a disputed question of fact and this aspect of

employee-employer relation cannot be determined in a proceeding under Article 226 of the Constitution. Accordingly, the order of Writ court was set aside and the workman was relegated to avail the remedy under the Industrial Disputes Act, 1947.

4. In turn, the workman raised the dispute which was ultimately decided by impugned award. Criticizing the award, Mrs. Nidhi Patankar, learned counsel for the petitioner, submits that in view of statement of claim filed by the workman himself before the Labour Court, it is clear that he was not engaged by the NFL. She placed heavy reliance on para 5 of the written statement wherein the workman himself contended that he has worked with the NFL from 1.2.1989 to 23.10.1990 but payment was made to him by M/s. Guard Well Securities Consultant, a private contractor. She contended that in view of the order passed in LPA aforesaid, it was obligatory on the part of the labour Court to frame the specific issue relating to existence of employee and employer relation between the NFL and the workman. She contends that in absence of framing this issue, the award is liable to be interfered with. In addition, she submits that findings of the Court below are perverse. The statement of management witness has not been considered at all. However, during the course of argument, she fairly contended that so far the objection of petitioner regarding competence of State Labour Court is concerned, said objection being devoid of substance is not required to be dealt with. In other words, she fairly admitted that in view of Central Government's notification referred in para 4 of the award dated 3.7.1998, the State Government became "appropriate Government" and, therefore, she is not pressing the point regarding competence of "appropriate Government" (State Government) and jurisdiction of the Labour Court. She submits that the Court below has not applied the necessary test for the purpose of determining master-servant relation. She relied on *Dena Nath and others Vs. National Fertilisers Ltd. and others*, AIR 1992 SC 457 : (1991) 4 JT 413 : (1992) LabIC 75 : (1992) 1 LLJ 289 : (1991) 2 SCALE 1081 : (1992) 1 SCC 695 : (1991) 2 SCR 401 Supp and *Anjaleem Enterprises Pvt. Ltd. Vs. Commissioner of Central Excise, Ahmedabad*, (2006) 194 ELT 129 : (2006) 1 JT 353 : (2006) 1 SCALE 314 : (2006) 2 SCC 336 : (2006) 1 SCR 400 : (2006) AIRSCW 409 : (2006) 1 Supreme 312 .

5. Per contra, Shri B.P. Singh, learned counsel for the workman supported the award. He submits that the Labour Court has not committed any error of law which warrants interference by this Court. By taking this Court to the findings of the award, it is contended that the alleged contract made through contractor was a sham contract. For all practical purposes, the workman must be treated to be workman of Director, Fisheries Terminal Division Vs. *Bhikubhai Meghajibhai Chavda*, AIR 2010 SC 1236 : (2009) 123 FLR 875 : (2010) 1 LLJ 3 : (2010) 157 PLR 243 : (2009) 13 SCALE 636 : (2010) 1 SCC(L&S) 1 : (2009) 15 SCR 761 : (2009) 6 SLR 632 : (2009) 10 UJ 4971 : (2010) AIRSCW 542 .

6. No other point is pressed by learned counsel for the parties.

7. I have heard the learned counsel for the parties at length and perused the original record.

8. A plain reading of the order passed by the Division Bench in LPA No321/96 makes it clear that this Court in clear terms opined whether contract is a camouflage or not cannot be gone into in a writ proceeding. Accordingly, the workman was given liberty to raise industrial dispute. Interestingly, in the statement of claim the workman contended as under:-

(Emphasis Supplied)

9. In turn, the employee NFL Ltd. filed written statement. In written statement, the employer specifically contended that the workman was employee of M/s. Guard Well Securities Consultant. His employment from 15.2.1988 to 31.1.1989 with the NFL Ltd. was specifically denied. Para 4 of the statement of claim of workman is relied upon in the written statement to contend that he was employee of the private contractor. Since payment was made by the private contractor, NFL cannot be held to be the employer. In para 6, a specific stand was taken that on the workman's working and condition of service, there was no element of control by the NFL Ltd. The Court below framed four issues as under:-

(i) Whether Court has jurisdiction to hear the dispute?

(ii) Whether termination of workman is illegal and unjustified?

(iii) Relief and cost.

Additional issue:-

(iv) Whether case suffers from non-joinder of necessary party? If yes, its effect?

10. In view of pleadings of rival parties, it is crystal clear that the factum of employment of workman was specifically denied by the NFL Ltd. The workman himself pleaded that he was getting wages from the contractor. The employer in no uncertain terms contended that there is no element of control on the working of the workman by NFL Ltd.

11. In the considered opinion of this Court, the High Court declined interference on workman's plea solely on the ground that question of "master-servant" relation cannot be gone into in a writ petition. For this reason and coupled with the fact that parties have taken diametrically opposite stand in relation to said relation before the Labour Court, it was obligatory on the part of the Labour Court to frame a specific issue in this regard. The Labour Court merely relied on Ex. P-1 and P-2, certificates issued by officers of NFL Ltd. In addition, the photocopies of attendance register (Annexure P-7) were also relied upon. On the basis of these documents, the court below opined that the workman was employee of NFL Ltd. The pay voucher was summoned by the Labour Court from the NFL Ltd. which were not produced by the employer and, therefore, adverse inference was drawn against the employer. However, the statement of claim itself shows that the workman admitted that he was getting wages from M/s. Guard

Well Securities Consultant. Thus, the record in relation to payment of wages must be with the said employer. Thus, if NFL Ltd. has not produced the documents relating to payment of the workman, adverse inference could not have been drawn mechanically against the NFL Ltd.

12. The question of employee-employer relation is dealt with by Supreme Court in catina of judgments. The Apex Court after considering previous judgments culled out the test for determining employee-employer relationship. These are summarized as under:-

- (i) who appoints the workers;
- (ii) who pays the salary/remuneration;
- (iii) who has the authority to dismiss;
- (iv) who can take disciplinary action;
- (v) whether there is continuity of service; and
- (iv) extent of control and supervision i.e. whether there exists complete control and supervision.

These aspects are required to be seen by the competent court for deciding the question of employee-employer relationship.

13. In Ram Singh and Others Vs. Union Territory, Chandigarh and Others, (2003) 8 JT 345 : (2004) 1 SCC 126 : (2004) 1 SLJ 395 , the Apex Court opined as under:-

"In determining the relationship of employer and employee, no doubt, "control" is one of the important test but is not to be taken as the sole test. All other relevant facts and circumstances are required to be considered including the terms and conditions of the contract. It is necessary to take a multiple pragmatic approach weighing up all the factors for and against an employment instead of going by the sole " test of control". An integrated approach is needed. " Integration" test is one of the relevant tests. It is applied by examining whether the person was fully integrated into the employer's concern or remained apart from and independent of it. The other factors which may be relevant are- who has the power to select and dismiss, to pay remuneration, deduct insurance contributions, organise the work, supply tools and materials and what are the "mutual obligations" between them.

Normally, the relationship of employer and employee does not exist between an employer and a contractor and the servant of an independent contractor. Where, however, an employer retains or assumes control over the means and method by which the work of a contractor is to be done, it may be said that the relationship between employer and employee exists between him and the servants of such a contractor. In such a situation the mere fact of formal employment by an independent contractor will not relieve the master of liability where the servant

is, in fact, in his employment. In that event, it may be held that an independent contractor is created or is operating as a subterfuge and the employee will be regarded as the servant of the principal employer. Whether a particular relationship between employer and employee is genuine or a camouflage through the mode of a contractor, is essentially a question of fact to be determined on the basis of the features of the relationship, the written terms of employment, if any, and the actual nature of the employment. The actual nature of relationship concerning a particular employment being essentially a question of fact, it has to be raised and proved before an industrial adjudicator. Para (16)."

14. In a recent judgment reported in *Balwant Rai Saluja Vs. Air India Ltd.*, AIR 2015 SC 375 : (2014) AIRSCW 6387 : (2014) 9 SCALE 567 : (2014) 9 SCC 407 , the Apex Court opined that to ascertain whether workers of contractor can be treated as employee of factory on whose premises they were working, Court must apply the test of complete administrative control. The relevant factors (reproduced hereinabove) were laid down in para 52 to 65 of this judgment which reads as under:-

"57. A recent decision by the Court of Appeal, in *JGE v. Portsmouth Roman Catholic Diocesan Trust*, Ward, L.J. while discussing the hallmarks of the employer-employee relationship, observed that an employee works under the supervision and direction of his employer, whereas an independent contractor is his own master bound by his contract but not by his employer's orders. Ward, L.J. followed the observations made by McKenna, J. in *Ready Mixed Concrete* case as mentioned above. *JGE* case, further noted that "control" was an important factor in determining an employer-employee relationship. It was held, after referring to numerous judicial decisions, that there was no single test to determine such a relationship. Therefore, what would be needed to be done is to marshal various tests, which should cumulatively point either towards an employer employee relationship or away from one.

58. *Short v. J. and W. Henderson Ltd.*, as cited in *Ready Mixed Concrete* case and in *JGE* case, was also referred to in the four-Judge Bench decision of this Court in *Dharangadhra Chemical Works Ltd. v. State of Saurashtra*. In *Dharangadhra Chemical Works* case, it was observed that: (AIR p. 268, para 14)

"14. ... the prima facie test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work...."

59. In *Ram Singh v. UT, Chandigarh*, as regards the concept of control in an employer-employee relationship, it was observed as follows: (SCC p. 131, para 15)

"15. In determining the relationship of employer and employee, no doubt, "control" is one of the important tests but is not to be taken as the sole test. In determining the relationship of employer and employee, all other relevant facts

and circumstances are required to be considered including the terms and conditions of the contract. It is necessary to take a multiple pragmatic approach weighing up all the factors for and against an employment instead of going by the sole "test of control". An integrated approach is needed. "Integration" test is one of the relevant tests. It is applied by examining whether the person was fully integrated into the employer's concern or remained apart from and independent of it. The other factors which may be relevant are - who has the power to select and dismiss, to pay remuneration, deduct insurance contributions, organise the work, supply tools and materials and what are the "mutual obligations" between them. (See Industrial Law, 3rd Edn., by I.T. Smith and J.C. Wood at pp. 8 to 10.)"

60. In Bengal Nagpur Cotton Mills case this Court observed that: (SCC p. 638, paras 9-10)

"9. In this case, the industrial adjudicator has granted relief to the first respondent in view of its finding that he should be deemed to be a direct employee of the appellant. The question for consideration is whether the said finding was justified.

10. It is now well settled that if the industrial adjudicator finds that the contract between the principal employer and the contractor to be a sham, nominal or merely a camouflage to deny employment benefits to the employee and that there was in fact a direct employment, it can grant relief to the employee by holding that the workman is the direct employee of the principal employer. Two of the well-recognised tests to find out whether the contract labourers are the direct employees of the principal employer are: (i) whether the principal employer pays the salary instead of the contractor; and (ii) whether the principal employer controls and supervises the work of the employee. In this case, the Industrial Court answered both questions in the affirmative and as on sequence held that the first respondent is a direct employee of the appellant."

61. Further, the above case made reference to International Airport Authority of India case wherein the expression "control and supervision" in the context of contract labour was explained by this Court. The relevant part of International Airport Authority of India case as quoted in Bengal Nagpur Cotton Mills case is as follows: (Bengal Nagpur Cotton Mills case, SCC pp. 638-39, para 12)

"12. "38. ... if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by a contractor, if the right to regulate the employment is with the contractor, and the ultimate supervision and control lies with the contractor.

39. The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise. In short, worker being the

employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor." (International Airport Authority of India case, SCC p. 388, paras 38-39)"

62. A recent decision concerned with the employer employee relationship was that of Nalco case. In this case, the appellant had established two schools for the benefit of the wards of its employees. The writ petitions were filed by the employees of each school for a declaration that they be treated as the employees of the appellant company on grounds of, inter alia, real control and supervision by the latter. This Court, while answering the issue canvassed was of the opinion that the proper approach would be to ascertain whether there was complete control and supervision by the appellant therein. In this regard, reference was made to Dharangadhra Chemical Works case wherein this Court had observed that: (Nalco case, SCC pp. 768-69, para 22)

"22. "14. The principle which emerges from these authorities is that the prima facie test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work, or to borrow the words of Lord Uthwatt at p. 23 in *Mersey Docks and Harbour Board v. Coggins and Griffith (Liverpool) Ltd.*, "The proper test is whether or not the hirer had authority to control the manner of execution of the act in question"." (Dharangadhra Chemical Works case, AIR p. 268, para 14)"

(emphasis supplied)

63. The Nalco case further made reference to *Workmen of Nilgiri Coop. Mktg. Society Ltd. v. State of T.N.*, wherein this Court had observed as follows: (Nalco case, SCC p. 771, para 27)

"27. "37. The control test and the organisation test, therefore, are not the only factors which can be said to be decisive. With a view to elicit the answer, the court is required to consider several factors which would have a bearing on the result: (a) who is the appointing authority; (b) who is the paymaster; (c) who can dismiss; (d) how long alternative service lasts; (e) the extent of control and supervision; (f) the nature of the job e.g. whether it is professional or skilled work; (g) nature of establishment; (h) the right to reject.

38. With a view to find out reasonable solution in a problematic case of this nature, what is needed is an integrated approach meaning thereby integration of the relevant tests wherefore it may be necessary to examine as to whether the workman concerned was fully integrated into the employer's concern meaning thereby independent of the concern although attached therewith to some

extent." (Workmen of Nilgiri Coop. Mktg. Society case, SCC p. 529, paras 37-38)"

64. It was concluded by this Court in Nalco case that there may have been some element of control with Nalco because its officials were nominated to the Managing Committee of the said schools. However, it was observed that the abovesaid fact was only to ensure that the schools run smoothly and properly. In this regard, the Court observed as follows: (SCC p. 772, para 30) "30. ... However, this kind of "remote control" would not make Nalco the employer of these workers. This only shows that since Nalco is shouldering and meeting financial deficits, it wants to ensure that the money is spent for the rightful purposes."

65. Thus, it can be concluded that the relevant factors to be taken into consideration to establish an employer-employee relationship would include, inter alia:

- (i) who appoints the workers;
- (ii) who pays the salary/remuneration;
- (iii) who has the authority to dismiss;
- (iv) who can take disciplinary action;
- (v) whether there is continuity of service; and
- (vi) extent of control and supervision i.e. whether there exists complete control and supervision.

As regards extent of control and supervision, we have already taken note of the observations in Bengal Nagpur Cotton Mills case, International Airport Authority of India case and Nalco case."

15. If the award of Labour Court is tested on the anvil of aforesaid principles, it will be clear that the Labour Court has not taken pains to frame an essential issue regarding employee employer relationship. The Court below has further failed to examine the question on the basis of the litmus test laid down by Supreme Court in catina of judgments. Accordingly, I find force in the argument of learned counsel for the petitioner that award needs to be disturbed on this count.

16. Apart from aforesaid, the original record of Labour Court shows that Shri Ishwar Singh, Marketing Manager of NFL Ltd. entered the witness box and deposed his statement on 4.9.1990. He stated that before recruiting the employees in NFL Ltd., advertisement is being published, candidature of eligible employees are invited and then only any appointment is made. In the present case, workman was not appointed by the NFL Ltd. and, therefore, no record in relation to workman is available with the NFL Ltd. He also supported the averments of the written statement. However, in the award, the Labour Court has not at all considered the statement of management witness. Thus, the

relevant piece of evidence has escaped notice of the Labour Court. Thus, the findings of the Labour Court is perverse in nature.

17. Shri B.P. Singh, learned counsel for workman relied on the judgment of Bhiku Bai(supra). The said judgment, in my opinion, is not an authority on the question of determining the test of master servant relationship. In the peculiar facts and circumstances of this case, the said judgment is of no help.

18. In view of aforesaid analysis, in my view, the award dated 4.3.2008 cannot be permitted to stand. The said award is accordingly set aside. The matter is remitted back to the Labour Court to frame the specific issue regarding existence of employee-employer relationship between the workman and NFL Ltd. Thereafter, the Labour Court shall record evidence on this issue expeditiously. I am not oblivious of the fact that workman has fought a long drawn battle in the corridors of the Court since his date of termination (1990). I deem it proper to direct the Labour Court to frame the issues and proceed to decide the matter on day today basis and decide it expeditiously, preferably within three months from the date of framing of aforesaid additional issue.

19. Petition is allowed. No cost.