
(2012) 10 GUJ CK 0059
In the Gujarat High Court
Case No : S.C.A. No. 3203 of 2001

Oil and Natural Gas Commission	Vs	APPELLANT
Baldev Babaji Thakore and Others		RESPONDENT

Date of Decision : 03-10-2012

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2013) 138 FLR 482 : (2013) LLR 262

Hon'ble Judges : S.R. Brahmbhatt, J

Bench : Single Bench

Advocate : R.R. Marshall with Mr. Adil Mirza for Marshall and Associates, for the Appellant; H.K. Acharya, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

S.R. Brahmbhatt, J.—Heard learned counsels for the parties. The petitioner--first party employer in Reference (I.T.C.) No. 10 of 1998 from the Central Industrial Tribunal, Gujarat has approached this Court under Article 226 of the Constitution of India challenging the award and order dated 12.12.2000 directing the petitioner to treat the respondents workmen hereinabove, as petitioner's employees and not contractor's employees from 1.1.1998 and be given all the benefits accordingly.

2. The facts in brief leading to filing this petition as could be seen from the memo of petition deserve to be set out as under:

The petitioner is claiming to be the undertaking run under the auspices of Government of India and it is incorporated under the Companies Act, 1956. It is averred by the petitioner that the petitioner had given a contract to the contractor for running its canteen situated at its office called "Avani Bhavan", Chandkheda, Ahmedabad. The respondent workmen are employees of the contractor and they were engaged as such for working in the said canteen as such they were never employed by the petitioner. In the year 1996, the workmen

filed Special Civil Application No. 1903 of 1996 in the High Court of Gujarat seeking regularization of their services with the petitioner Corporation. The said petition came to be disposed of by this Court vide order dated 8.7.1996 directing the petitioner to move the appropriate forum i.e., Industrial Tribunal for redressal of the grievances. The workmen challenged the said order passed by the Single Judge of this Court before the Division Bench of this Court by filing Letters Patent Appeal, which also came to be disposed of vide order dated 3.9.1996. The dismissal of the Appeal by the Division Bench vide order dated 3.9.1996 was assailed in SLP in the Supreme Court, which came to be dismissed vide order dated 15.1.1997. The averments made in para-3 of the petition is sought to be explained by learned advocate for the workman that on account of inadvertence, may be it is projected as if the Letters Patent Appeal was filed by the petitioner Corporation, but the subsequent narration conclusively indicated that all through out from Special Civil Application, Letters Patent Appeal and Special Leave Petition, same were filed and persuaded by workmen only. The competent authority made a reference, terms whereof are set out in para-3, which are set out here below for ready reference:

Whether the contention of the Gujarat Labour Union that Shri Devkumar J. Assamee and 17 others (list given below) working in the Canteen at Avani Bhavan at ONGC, Chandkheda are the workmen of ONGC is proper and justified? If so, to what reliefs the said workmen entitled to and from what date?

The order of Reference was made on 19.1.1998. The Tribunal registered it as Reference (ITC) No. 10 of 1998. The statement of claim was filed. The written statement was filed. The evidences were adduced and ultimately, the Tribunal came to the conclusion vide award and order dated 12.12.2000 that the workmen were required to be ordered to be treated as employees of the petitioner Corporation with effect from 1.1.1998 i.e., when the matter was referred to the Tribunal and declared them to be entitled for all the consequential benefits on that basis. Being aggrieved and dissatisfied with this award and order, present petition is filed under Article 226 of the Constitution of India for the reasons stated in the memo of petition.

3. Learned advocate for the petitioner has invited this court's attention to the averments made in the statement of claim filed on behalf of the workmen and contended that the workmen themselves have averred that they were continued as contract employee and on account of various orders passed by the Courts, their employment came to be continued even though the contract was not available at times. This averments were not appreciated properly by the Tribunal and Tribunal has therefore, patently erred in holding that workmen were entitled to be treated as employees of the Corporation. The award is therefore, required to be quashed and set aside.

4. Learned advocate for petitioner has submitted that the judgment cited in respect of other matters including Reference No. 30 of 1988 are judgment prior to the judgments cited at bar of Supreme Court in this matter.

5. Learned advocate for the petitioner contended that the canteen in which the respondent workmen are said to have been engaged, can never be considered as part of regular employment or working of industrial unit or establishment of the employer. The workmen were admittedly engaged by the contractor in the canteen which was required to be run as statutory part or any statutory obligation on the part of employer. The canteen facilities, which were made available could not have been construed as creating any right in the employee engaged by the contractor to be treated as part of regular employment and receive benefits on that basis.

6. Learned advocate for the petitioner thereafter contended that Apex Court in number of cases held that even if the canteen is brought to be statutory obligation to be provided by the employer as it is in cases which are governed by the Factory Act, then also, the contract employees are not merely on that strength required to be treated as employees of the principal employer and therefore, the basic principle of law is unfortunately overlooked by the Tribunal and therefore, the order impugned is required to be set aside.

7. Learned advocate for petitioner invited this court's attention to the observation of the Apex Court in case of State of Karnataka and Others Vs. KGSD Canteen Employees Welfare Association and Others, and contended that the Tribunal was not justified in ordering regularization of the employees engaged by the contractor in a canteen run by the employer. The canteen, in the instant case, was not required to be run on account of any statutory obligation as submitted by the counsel hereinabove and when the canteen was not required to be run as a statutory obligation and yet it was run to facilitate the requirement of employees and staff, then, simply workmen working in the canteen had no right to work as an employees of the Corporation.

8. Learned advocate for the petitioner thereafter invited this court's attention to the decision of the Apex Court in case of Haldia Refinery Canteen Employees Union and Others Vs. Indian Oil Corporation Ltd. and Others, , and contended that even in a statutory canteen where a specific obligation is cast upon the employer establishment to provide canteen facility and when such obligation is being carried out, then in such case also, the employees engaged in such canteen would not on the mere strength thereof would be entitled to receive treatment of regularization, but they are required to be treated as employees and are entitled to receive protection and benefits enumerated under the Factory Act and they cannot enlarge their scope more than what is provided therein and ratio of the Apex Court when pressed into service to indicate that case of present petitioner is on a much more stronger footing as in the instant case, there exists no statutory obligation to provide canteen facility to its staff members.

9. Learned advocate for the petitioner thereafter invited this court's attention to the decision cited at bar in case of Hari Shankar Sharma and Others Vs. Artificial Limbs Manufacturing Corporation and Others, and contended that merely because a factory set up a canteen pursuant to its statutory obligation,

employees engaged in such canteen and engaged through an independent contractor do not become employees of the establishment.

10. Learned advocate for the petitioner thereafter contended that the attempt on the part of the canteen employees in such a situation when it is established on record that their employment was not as per the rules and regulations prevailing in the Corporation, their absorption would be not compulsory as the judgment of the Apex Court in respect of back door entrants are clear, which need not be very emphasized as in the present case, the employees workmen have never been employed by the petitioner nor they were recruited by the petitioner and in absence of contractor was working for sometime and their continued thereafter, should not have been considered as a right accruing in favour of the employees workmen so as to seek any benefits as given by the Tribunal under the order impugned. The order therefore, deserves to be quashed and set aside and petition is required to be allowed.

11. Learned advocate appearing for respondent workman has invited this courts attention to the fact that first petition was filed by the workmen being Special Civil Application No. 1903 of 1996 and it was persuaded upto Supreme Court by the Workmen and the counsel for petitioner has not produced anything on the record nor has his counterpart produced anything to indicate that workmen were continued in service in view of the court order and in absence of any prohibitory order granting the corporation to continue the employees, the petitioner Corporation cannot be permitted to argue that workmen were continued under some compulsory and mandatory order by the Courts.

12. Learned advocate for the respondent thereafter invited this court's attention to the observations of the Tribunal in the impugned order and contended that two witnesses namely Shri Barman, who was deposed at Exh. 23 on the part of the workman and one Shri Chandra Bhusan, was deposed at Exh. 18 on behalf of management, would clearly indicate that the Tribunal has considered most relevant aspects which are required to be considered for granting regularization to the workmen, as in absence of any specific submission, plea and argument that there exists no relationship of employee and employer, it would not have been possible for the Tribunal to hold differently. Learned advocate for respondent workmen laid heavy reliance upon the decision in case of Hindalco Industries Ltd. Vs. Association of Engineering Workers, and made specific emphasis on paras 22, 23 and 24 and contended that the real question before the Tribunal was as to whether the workmen were engaged and they were discharged duties as employees of the petitioner corporation and intermittent contractor was merely a device conveniently created for avoiding the benefits available to the workmen and one looks to the award and then it would become amply clear that the workman successfully proved their case qua they being employed by the petitioner Corporation and the employees--employer relationship was acquired. The contractor's in the form of Cooperative society of employees after its liquidation, continue the canteen facility by the Committee,

which is in-house committee formed by the Corporation and thereafter, after the court proceeding, intermittent one Shri Y.K. Patil, who has not been examined by anyone, though referred to quite a bit in the decision to indicate that the court order did not call for any interference as it was absolutely just and proper and it was rightly held that contractor's license was required to be produced, the agreement of contractor was required to be produced and in absence thereof, when the Tribunal came to the conclusion relying upon the fact that in similar cases, in the office of petitioner Corporation such employees like present respondent workmen did receive benefits of regularization after prolonged litigation in form of Reference I.T. No. 30 of 1980. All these factors, which have remained uncontroverted have been considered by the Tribunal for awarding benefit of regularization and same may not be disturbed by this Court under Article 226 of the Constitution of India and submitted that the petition is required to be dismissed.

13. The Court has perused the award and documents attached to the petition. The Court is of the considered view that before advertting to the rival contentions of the learned advocates for the parties, it is most expedient to set out few indisputable aspect emerging namely:-

(I) The petition being Special Civil Application No. 1903 of 1996 was admittedly filed by the workman straightway in the Court, with a prayer for seeking regularization in the service of the petitioner Corporation. The fact remains to be noted that this Court relegated the employees to the remedy under the I.D. Act vide order dated 8.7.1996. This order is not forming part of record by this Court nor has it been pointed out or even forming part of the record by any party.

(II) The LPA challenging the order of Single Judge of this Court was assailed by the respondent workmen as learned advocate for respondent has clearly stated it, which has not been controverted by other side and this order was confirmed by the Letters Patent Bench and LPA was dismissed by order dated 3.9.1996. This dismissal of Letters Patent Appeal was subject matter of challenge before the Supreme Court by the workmen and Supreme Court vide order dated 15.1.1998 did not disturb the order and ultimately, the reference made into existence in the form of Reference to the Competent Court, wherein, the terms of Reference is mentioned at petition para 3, which is set out hereinabove.

(III) At this stage, Shri Marshall, learned counsel invited this court's attention to the statement of claim, wherein, the workmen have averred that the workmen were protected under the High Court's order till the proceedings were challenged before the Tribunal under the I.D. Act.

(IV) The reference is made by the competent authority i.e., Government of India and competent authority i.e., Tribunal undertakes the task of examining the claim of workmen named the list accompanied with the order of Reference, which came to be made on 19.1.1998.

(V) The statement of claim and written statement were filed and rejoinder

version of the parties were also recorded.

(VI) In the award impugned, it has not become clearer as to whether there was any specific plea with regard to explicit employment of Corporation to have contract labour in the canteen run under its establishment. Though it is somewhere mentioned that "licence is being issued to provide tea and break-fast to the employees by using facility and premises of the corporation." But this averments seem to be an averment qua licence or permission to use the premises and they cannot therefore presumed to be the licence one which is required under the provisions of the Contract Labour (Regulation & Abolition) Act, 1970.

(VII) The entire award do not indicate that it was an attempt on the part of the employer to ever contend that the contract labour was permissible and the contractor was having licence to run contract labour under the provisions of the Contract Labour (Regulation and Abolition) Act, 1970. At this stage, it could be plausible submission that canteen facility was not being part of integral process of production and/or main activity. The contractor engaged for providing canteen facility could not have been classified to be one relegated under the provision of the Contract Labour (Regulation and Abolition) Act, 1970 and as such, contractor was not required to obtain licence as the work of providing canteen facility was entrusted to the contractor and when the contractor is in order to facilitate this work, employed workmen--manpower, then the benefits carried out by such contractor when it is not open being integrated followed under the provisions of the Labour Contract (Regulation and Abolition) Act, 1970 and contractor is not required to obtain the license as such. Be that as it may. The fact remains that from any angle there is no attempt or establishment or pleading to indicate that the running of canteen through contractor was either part of the activity, which would have been governed by the activities covered by Contract Labour (Regulation and Abolition) Act, 1970 or have been thereof so as to not requiring any license by the contractor, which is entrusted this work. This aspect is eloquently silent qua evidence of both the sides are concerned.

(VIII) In light of the aforesaid indisputable aspect with regard to non-invocation of the provisions of the Contract Labour Act, fact remains to be noted that the employees workmen were permitted to work in the canteen originally by the ONGC employees Cooperative Society, who was permitted to run canteen by providing factors/facilities enumerated in the award. After the said society wound up under the liquidation, the canteen activities did not come to an end. The said activities were continued. At this stage, it is required to be noted that no prohibitory orders in form of any interim order either is placed on record or pleaded, nor any attempt is made, except the averments made by the workman in statement of claim that their services were continued under the protection of the court's order. The workmen and employer has not produced any prohibitory order or any mandatory order enuring in favour of the workmen, which would compel the petitioner to continue the respondent workmen in service. In absence

of any contract, the society which was admittedly in existence, if it is wound-up under the provisions of law, then, the fact remains to be noted that the running of canteen by the in-house committee formed by the petitioner employer, ran the canteen and only after the litigation in the year 1996, one Shri Y.K. Patil was introduced as intermittent. The said Shri Patil is not examined by any one.

(IX) Shri Y.K. Patil is projected as if he was contractor, entrusted with the work of running canteen but no written contract entrusting this work to Shri Patil have been brought on record.

(X) The witness of the workmen namely Shri Mishra, who has been deposed at Exh. 18, has in unequivocal terms stated that the canteen was originally run by the Society. After the dissolution of the society, it was run by in-house committee. The statutory structure of it is not ascertained by anyone but it is clearly submitted that committee has no statutory status or competence to run canteen. It was merely a in-house committee and it has no constitution and same is not produced so as to prove anything otherwise by any party.

(XI) It is further averred and asserted that the wages were paid by the employer i.e. principal employer. The management witness has also admitted that workmen are paid at the rate of minimum wages. At this stage Shri Marshall, learned advocate for the petitioner has invited this court's attention to the testimony of Shri Barman and submitted that it is not disputed that witness has stated that after 1995 the wages are paid by the ONGC to the workmen and ONGC is paying the minimum wages but that should be made as a part of interim order which was passed and when contractor was not available, in the interregnum period, the wages have been paid directly by the employer--ONGC.

(XII) The testimony of the workmen's witness gone on record to show that in a similarly situated cases of other places, the workmen in the canteen were given benefits after prolonged litigation and when this question was put to management witness, he pleaded his ignorance. The reference being Reference No. 30 of 1980 was in respect of the employees of Vadodara.

(XIII) The management witness in his cross-examination has pleaded his ignorance and submitted that the court has granted protection to the employees in the year 1998 and has admitted that paraphernalia and equipments for running canteen are provided by the ONGC. The furniture in the canteen is provided by the ONGC.

(XIV) The testimony of the witness of management thus indicate that running of the canteen was continues but the managing of the canteen at the time entrusted to employees cooperative society, the working committee i.e. in-house committee and ultimately, one Shri Patil who has not been examined at all by either side nor has he been said to have been under written contract is made to nor any written agreement was made between the employer and said so called contractor.

(XV) The Tribunal has held that providing canteen facility may not be statutory obligation but in the given facts and circumstances the finding has been recorded that canteen was in working condition and canteen was containing all the facilities and it was catering to the need employees and staff members.

(XVI) The testimony of the witness so far as management is concerned, indicate that the management witness at Ex. 23 in his cross-examination has pleaded ignorance qua the rent if any being recovered from the contractor Shri Patil as it is mentioned that he does not know as to whether any rent is being collected for letting the premises within "Avani Bhavan" i.e. office premises. He has further stated that it is true that in canteen furnitures, vessels and other utensils have been supplied and provided by ONGC.

14. Against the aforesaid backdrop and factual indisputable aspect, question arose as to whether the award impugned is required to be interfered with in exercise of the jurisdiction conferred upon this Court under Article 227 of the Constitution of India. The petition is styled as having been filed under Article 226 of the Constitution of India but the following glaring aspects indicate that the petition cannot be treated as to one filed under Article 226.

(I) The parties before the Court are only the workmen. The concerned Tribunal i.e. The Central Industrial Tribunal is not made party, which is essentially required to be joined as party in light of the pronouncement of law by the Full Bench of the Court in case of (The) Bhagyodaya Co-operative Bank Limited Vs. Natvarlal K Patel and Another, . Moreover, the prayers though do refer to issuance of any writ or direction in nature of writ, but that in itself is not sufficient to being the challenge to lubric of Article 226 of the Constitution of India, so as to enlarge the scope of petition beyond Article 227. The Court is therefore of the considered view that this petition is required to be treated to have been filed only under Article 227 of the Constitution of India and averments and requirement of invoking Article 226 are conspicuously absent and therefore, the Court need not consider the petition and prayer and challenge as one filed under Article 226 also.

15. Having held that the petition is filed under article 227 of the Constitution of India only, now the Court has to examine the challenge to the award impugned bearing in mind the essential scope and limitation/restriction while examining the award under article 227 of the Constitution of India. The court need not go into the appreciation and re-appreciation of the evidences i.e., not permissible even if the petition would have been filed and termed as such under article 227 of the Constitution of India. The Court has to examine the fact that whether the award impugned is in any manner perverse order so as to require any interference under article 227 of the Constitution of India. The answer would be in "negative" as the Court is of the view that the petitioner has not demonstrated in any manner as to how and in what manner, the award impugned can be said to have resulted into miscarriage of justice and is suffering from any patent perversity so as to invoke any interference by this court under article 227 of the Constitution

of India.

16. The facts remain to be noted that there appears to be incorrect recording qua the testimony of the management witness as management witness has clearly stated that the premises called "Avani Bhavan" is not covered under the provisions of Factory Act and even in cross-examination he has adhered to his version. Despite this, the Tribunal has in para-7 at page-5 in Gujarati version submitted that the management witness informed that the office is registered under the Factory Act, though in the subsequent portion of the judgment, the Tribunal has rendered unequivocal finding qua its satisfaction that even if there exists any statutory obligation for providing canteen facilities, relying upon the decision of the Apex Court in case of Bimal Chandra v. Life Insurance Corporation reported in 1995 LIC 2064, the Court has said that in a case where the factum of providing canteen facilities is proved/established and paraphernalia is provided by the employer and when lack of any contract agreement is established and when the agreement is not produced or even attempted to be produced and when it is admitted by the witness of management that the employer was required to pay the wages to the employee even if on account of courts order, those factors would militate against the plea of rejecting reference and hence, it was ordered that benefits of regularization be accorded to the workmen.

17. The Court is of the considered view that learned advocate for the management is justified in submitting that in case if the employment of the workmen through an independent contractor in an activities, which is not even an ancillary activities of the organization then, the workmen did not engage through independent contractor, may have no right whatsoever to be regularized and those authorities cited in support thereof are absolutely on point, which he has canvassed at bar, but those authorities and submission is of no avail to the petitioner as in the instant case, the following glaring facts are required to be noticed namely:-

(I) The workmen have been said to be working in the canteen which is though not doing on legal obligation on the part of the employer, was brought about at the instance of management itself and canteen is functioned from and within the premises called "Avani Bhavan", which is admittedly not covered by the Factory Act but the fact remains to be noted that the creation of canteen to facilitate and catering the employees and staff members is established;

(II) The paraphernalia, furnitures and utensils and other facilities for running and managing and operating canteen is admittedly provided by the petitioner. These factors are required to be noted and appreciated in light of the observation made by the Apex Court in case of Hindalco Industries Ltd. (Supra) and more particularly para-24.

(III) The management witness has pleaded ignorance from very important and vital aspect which would have otherwise viewed altogether differently. The management witness has though asserted that canteen was running by one Shri

Patil, but he did not indicate anywhere that as and when Shri Patil and management entered into contract nor could he inform the Tribunal as to whether there exists any written contract. It is required to be noted that ONGC being limb of State, could not have hired any contractor without there being any written contract and in absence of any written contract, should weigh and is rightly been treated to have been weighed against the petitioner corporation.

(IV) In absence of any record qua releasing the rent or rent for the premises or any contract in this behalf also should weigh and has rightly been weighed by the Tribunal against the petitioner.

(V) The other point which weighed with the Tribunal is that in other office premises of the very same petitioner, the canteen employees have been given benefits of regularization may be after prolonged litigation but that litigation being Reference I.T. No. 30 of 1988 has not shown to be in any manner different and it has not been shown that the said decision and benefits occurred thereunder was not required to be made available to the present respondent workmen. As the witness merely pleaded ignorance qua any such adjudication though the decision in respect of employees protected under the order and award of Reference No. 30 of 1988 is not denied. The Court has gone ahead and held that facts of the case are akin to much over and granted benefits of regularization to the workmen as granted in Reference No. 30 of 1988.

(VI) It has remained undisputed that the facts of said Reference 30 of 1988 and these workmen were similarly situated persons and accordingly, Tribunal has awarded regularization to the workman as there were no distinctive features pointed out. In view of that, the award of the Tribunal is just and proper and this Court under Article 227 may not interfere with the award in any manner.

18. For the aforesaid reasons the petition being bereft of merits, deserves rejection and is rejected accordingly. Rule discharged. Interim relief stands vacated forthwith. No costs. At this stage, Shri Marshall, learned advocate appearing for the petitioner submitted that stay granted earlier be continued on the same terms and conditions for a period of 6 weeks from today. The request is opposed by learned advocate appearing for the respondent. The court is of the view that when such a request is made and when the matter is pending since 2001, the request is reasonable and therefore, stay granted by this court, which is vacated today, is ordered to be continued till 9.11.2012.