

(1998) 09 GAU CK 0043
In the Gauhati High Court
Case No : Civil Rule No. 5744 of 1997

ONGC Field Party Contingent Workers Association	APPELLANT
Vs	
ONGC Ltd. and Others	RESPONDENT

Date of Decision : 15-09-1998

Acts Referred:

Industrial Disputes Act, 1947 — Section 10(1), 12, 12(4), 12(5), 2A

Citation : (1998) 4 GLT 31

Hon'ble Judges : A.K. Patnaik, J

Bench : Single Bench

Advocate : A.K. Phukan, A. Dasgupta, M.K. Saikia, S. Das and S. Chakraborty, for the Appellant; B.K. Das, P.K. Roy, K.N. Choudhury, P.B. Choudhury and B.K. Sen, for the Respondent

Judgement

A.K. Patnaik, J.—In this application under Article 226 of the Constitution, the Petitioner has prayed for a direction on the Respondents to restrain themselves from introducing contract labour for contingent work and to allow contingent work to be performed by the members of the Petitioner-union and for quashing tender notice No. ER/MM/GSD/39/97-98 issued by the Deputy General Manager (MM), Exploration Business Group, ONGC, ERBC, Sibsagar, Assam and for a direction on the Respondents to enforce the certified standing orders relating to regularisation of contingent workers.

2. The facts briefly are that the Petitioner is a Trade Union registered under the Trade Unions Act, 1926 representing the interest of Field Party Contingent Works engaged under Oil and Natural Gas Corporation Limited (for short "ONGCL"). The case of the Petitioner-union is that the persons named in serial Nos. 1 to 115 in Annexure-A to the writ petition were engaged prior to 1994 as contingent workers during the period of field season every year and their work comprised of assisting the geophysical party for mobile exploration which include laying of cables, geophones and shot firing for exploration in order to collect seismic data. But since 1994, the persons named against serial Nos. 1 to 115 in Annexure-A to

the writ petition have been engaged not only during the filed season but also during off season and the said 115 persons have worked continuously without any break till July, 1997. The further case of the Petitioner-union is that the persons named against serial Nos. 116 to 223 in Annexure-A to the writ petition were engaged only for 7 to 9 months in a year since 1990 till August, 1997 as geo-physical field party contingent workers under ONGCL. A set of orders known as Certified Standing Orders for contingent employees of ONGCL governed the terms and conditions of employment of contingent workers under ONGCL. Clause 2(i) of the said certified standing order classified the contingent employees under the ONGCL as temporary and casual. A workman who had completed not less than 180 days of attendance in any period of 12 consecutive months and had been on the roll of ONGCL is categorised as a temporary worker. Clause 2(ii) of the certified standing order further provided that temporary workman who has put in not less than 240 days of attendance in any period of 12 consecutive months and possessed minimum qualification prescribed by the ONGCL may be considered for conversion as regular employee and clause 2(iii) provided that workman who is neither temporary nor regular shall be considered as casual workman. The case of the Petitioner-union is that since the persons named in Annexure-A to the writ petition were temporary workers who put in not less than 240 days of attendance during the period of 12 consecutive months and possessed minimum qualification as prescribed by ONGCL, they were entitled for conversion as regular employees. As per the said provisions in Clause 2(ii) of the certified standing order. But they were not regularised by the ONGCL. In the circumstances, the Petitioner-union raised an industrial dispute for regularisation of the workmen named in Annexure-A to the Writ petition and the Regional Labour Commissioner entrusted Assistant Labour Commissioner (Central) Dibrugarh to initiate conciliation proceeding for amicable settlement of the dispute. During the said conciliation proceeding, the dispute could not be settled and the Assistant Labour Commissioner (Central) Dibrugarh in this letter dated 27.10.97 to the Secretary to the Govt. of India, Ministry of Labour, New Delhi submitted a failure report stating therein that the management did not agree to the demand of the Petitioner-union. No orders have been passed thereafter by the Government of India, Ministry of Labour, New Delhi, on the said letter dated 27.10.97 of the Assistant Labour Commissioner (Central), Dibrugarh. In the meanwhile, the ONGCL published a notice in local English Daily on 11.11.97 inviting sealed tenders from the experienced bidders for providing seismic job service of geo-physical field parties in Assam Arakan Basin and Cachar Fold Belt for one field season between mid November to mid June extendable for one more field season. The case of the Petitioner-union is that by the said notice inviting tenders, the ONGCL is in fact trying to introduce contract labour system under which labourers would be provided on contract basis by the contractor to do jobs which were earlier performed by the persons named in Annexure-A to the writ petition. Aggrieved, the Petitioner-union has moved this Court in this writ petition for appropriate relief.

3. At the hearing A. Dasgupta, learned Counsel for the Petitioner, cited decisions of the Supreme Court in the case of Sankar Mukherjee and Others Vs. Union of India (UOI) and Others, and Gujarat Electricity Board, Thermal Power Station, Ukai Vs. Hind Mazdoor Sabha and Others, wherein the Supreme Court has deprecated the practice of management in employing contract labour even after 50 years of independence and has further observed that such practice by the management of employing contract labour when the workmen can be employed directly may bring about reduction of expenditure for the management but it amounts to unfair labour practice. Mr. Dasgupta relied on the paragraph 78 of the judgment of the Supreme Court in the case of Gujarat Electricity Board, Thermal Power Station, Ukai v. Hind Mazdoor Sabha (supra) wherein it has been held that economic growth is to be measured not only in terms of production and profit but also from the point of view of need to reduce unemployment which is the declared policy of the Government. According to Mr. Dasgupta, therefore, impugned notice inviting tender was liable to be quashed being contrary to the aforesaid law laid down by the Apex Court and the Petitioner-union is entitled to a direction on the Respondents to regularise the services of the workmen named in Annexure-A to the writ petition in terms of Clause 2(ii) of the certified standing orders inasmuch, as the said workmen have put in required number of 240 days of attendance for the period of 12 consecutive months as prescribed in the said clause of certified standing orders.

4. In reply to the aforesaid submission, Mr. P.B. Choudhury, learned Counsel for the Respondents, stated that the impugned notice inviting tender was only for one field season from mid November to mid June and that pursuant to the notice inviting tender, tenders were submitted and the contract was finalised in favour of a party and the execution of the contract is also already over. In this connection he pointed out that since an interim order was not granted by the learned single Judge in the present Civil Rule, the Petitioner filed a Writ Appeal before the Division Bench of this Court numbered as W.A. No. 16/ 98 but by judgment dated 12.3. 98, the Division Bench took note of the fact that the date for acceptance and opening of tender had already expired on 12. 12.97 and even the date 29.12.97 had already expired and the Division Bench chose not to interfere with the said notice inviting tender by way of an interim order and dismissed the appeal without making any comment on the merits of the Civil Rule. Mr. P.B. Choudhury further submitted that under the impugned notice the Respondents were not engaging any contract labourer as such and had only entrusted highly technical work of seismic job service to a contractor for the purpose of reducing cost of ONGCL and for meeting the quality of work. He produced before the Court a productivity chart to show how the entrustment of seismic job services to contractors has resulted in better productivity of ONGCL. Mr. P.B. Choudhury further referred to the averments made in different paragraphs of affidavit-in-opposition filed on behalf of the Respondent Nos. 1 and 2 to show that the very fact that the persons named in Annexure-A to the writ petition had been engaged for required number of 240 days during the period of 12

consecutive months and qualified for regularisation under Clause 2(ii) of the certified standing order had been disputed by the Respondents and according to Respondents some of the persons named in Annexure-A to the writ petition had only worked for a short spell of time and, therefore, they were not entitled to regularisation under Clause 2(ii) of the certified standing order. Mr. P.B. Choudhury further argued that the persons named in Annexure-A to the writ petition had been engaged seasonally and in non-technical jobs and the question of regularisation of such contingent workers under ONGCL did not arise. Finally Mr. Choudhury forcefully contended that the dispute between the Petitioner-union and the Respondents involved determination of factual questions and that according to Petitioner-Unions own case an industrial dispute has been raised and a failure report had been submitted. Since alternative remedy of reference of said industrial dispute to the appropriate tribunal was available to the Petitioner-union under the Industrial Disputes Act, 1947, this Court should not entertain this writ petition and instead direct the Petitioner-union to workout its alternative remedy under the Industrial Disputes Act, 1947. He cited the decisions of Calcutta High Court in the case of Omprakash v. Union of India 1997 LAB.I.C. 126, for the proposition that where an alternative remedy by way of reference under Industrial Disputes Act, 1947 was available and the writ petition did not avail the said alternative remedy, the Petitioner-union cannot switch over to proceeding under Article 226 of the Constitution before the High Court. Mr. Choudhury also referred to the decision of the Calcutta High Court in the case of Durgapur Projects Sramik Union and Ors. v. State of West Bengal and Ors. 1991 (1) CLR 74, the decision of the Bombay High Court in the case of Haridayanarayan Girija Imari v. State of Maharashtra 1990 (61) FLR 384 Bomb. and the decision of Bombay High Court in KTC Workers Union v. KTC Ltd. 1988 (ii) LLN 325 Bomb for his submission that at this stage only a direction can be given to the Government to pass orders under Sub-section (5) of Section 12 of the Industrial Disputes Act, 1947 either referring the dispute to the appropriate Tribunal or communicating the reasons for refusal of the Government to refer the dispute.

5. So far as challenge of the Petitioner to the impugned notice inviting tender is concerned, a bare reading of the notice inviting tender annexed to the writ petition as Annexure-1 would show that the notice inviting tender for providing seismic job services for geo-physical field parties in Assam Arakan basin and Cachar Fold belt was only for field season from mid November to mid June extendable to one more field season. Admittedly, the period from which the impugned notice inviting tender for the aforesaid work is already over. At this stage, therefore, the period for which the impugned notice inviting tender is already over and in fact the work described in the said notice inviting tender has been completed by the contractor who had been entrusted with the work, this Court cannot quash the impugned notice as prayed for by the Petitioner union. It is true as submitted by Mr. Dasgupta, learned Counsel for the Petitioner, that in the case of Sankar Mukherjee v. Union of India (supra) and in the case of Gujarat

State Electricity Board v. Hind Mazdoor Sabha (signa), the Supreme Court has deprecated the practice of management in engaging contract labour and has expressed the hope that the management will instead engage workmen directly even such engagement of workmen directly inceased the cost of the management. But these observations were made by the Supreme Court with a view to ensure that workmen are directly employed by the management in their establishments and give regular service so that unemployment problem which is prevelant in the country is reduced as much as possible. Viewed from this angle, the real demand of the Petitioner-union is that the workmen named in Annexure-A to the writ petition should be regularised in service in terms of Clause 2(ii) of the Certified Standing Orders of the ONGCL and till such regularisation they should be engaged by the ONGCL.

6. Clause 2(ii) of the Certified Standing Orders provides that temporary workmen who have put in not less than 240 days of attendance in any period of 12 consecutive months and possessed minimum qualification as prescribed by the ONGCL may be considered for regularisation as regular employee. The Petitioner-union will thus have to establish that temporary workmen in respect of whom regularisation is sought have already put in not less than 240 days of attendance in any period of 12 consecutive months. While the case of the Petitioner-union is that the workmen named in Annexure-A to the writ petition have put in the aforesaid 240 days of attendance in 12 consecutive months and were, therefore, entitled for regularisation as per provisions of the Certified Standing Order, the case of the Respondents in their affidavit-in-opposition is that the workmen named in Annexure-A to the writ petition have not completed 240 days of attendance in any period of 12 consecutive months and, therefore, were not entitled for regularisation as per the provisions of the Certified Standing Order. This dispute between the Petitioner-union and the Respondents is essentially a dispute involving questions of fact and cannot be resolved by this Court under Article 226 of the Constitution. It appears that an industrial dispute was raised by the Petitioner-union but the said industrial dispute could not be settled amicably in a conciliation proceeding and the Assistant Labour Commissioner (Central), Dibrugarh, sent a Mure report dated 27.10.97 to the Secretary to the Govt. of India, Ministry of Labour, New Delhi, but no decision has been taken by the Government of India on the said failure report. Sub-section (5) of Section 12 of the Industrial Disputes Act, 1947 provides as follows:

12(5) If, on a consideration of the report referred to in Sub-section (4), the appropriate Government is satisfied that there is a case for reference to a Board, (Labour Court, Tribunal or National Tribunal), it may make such reference, where the appropriate Government does not make such a reference it shall record and conununicate to the parties concerned its reasons therefor.

It is clear from the express language of Sub-section (5) of Section 12 quoted above that where the appropriate Government is satisfied on consideration of failure report submitted under Sub-section (4) of Section 12 of the Act tiat there

is a case for reference to a Board, Labour Court, Tribunal or National Tribunal, the appropriate Government may make such reference and where the appropriate Government does not make such reference, it should record and communicate to the parties concerned the reasons for not making such reference. In the instant case no reference was made by the appropriate Government. The reasons for not making reference have also not been communicated to the parties concerned as has been submitted by the learned Counsel for the Petitioner and Respondents. Although the Union of India represented by the Secretary to the Govt. of India, Ministry of Labour, New Delhi is unpleaded as Respondent No. 3 in this writ petition, no counter affidavit has been filed by the Respondent No. 3 stating as to what action has been taken on the said failure report submitted by the Assistant Labour Commissioner (Central), Dibrugarh.

7. Mr. Dasgupta, learned Counsel for the Petitioner, submitted that in such a situation this Court can exercise its power under Article 226 of the Constitution and direct the appropriate Government to make reference of the dispute between the parties to the appropriate Tribunal and he relied on the decisions of the Supreme Court in the case of *M.P. Irrigation Karamchari Sangh Vs. State of M.P. and Another*, and *Ram Avtar Sharma and Others Vs. State of Haryana and Another*, Mr. P.B. Choudhury, learned Counsel for the Respondents, on the other hand, submitted that on a joint reading of Sub-section (5) of Section 12 with Sub-section (1) of Section 10 of the Industrial Disputes Act, 1947, it would be clear that a reference can be made by the appropriate Government only if it is of the opinion that an industrial dispute exists or is apprehended and not otherwise and hence it is for the appropriate Government in this case to first form an opinion as to whether an industrial dispute exists or not between the workmen and the management which requires reference to the Tribunal. He further argued that in the cases of discharge, dismissal, retrenchment and termination of service of individual workman, dispute is deemed as an industrial dispute u/s 2A of the Industrial Disputes Act, 1947 and in such cases a direction can be straightway given to the appropriate Government to refer the dispute to the appropriate Tribunal. But where a dispute between the workmen and the management is not of nature prescribed in Section 2A of the Act, it is for the appropriate Government to form an opinion as to whether an industrial dispute exists or not and no direction as such can be given to the appropriate Government straightway by the Court to refer the dispute to the appropriate Tribunal. Regarding the decisions of the Supreme Court in the case of *M.P. Irrigation Karmachari Sangha v. State of M.P.* (supra) cited by Mr. Dasgupta, Mr. Choudhury submitted that the aforesaid decisions of the Supreme Court are in cases where the appropriate Government has refused to refer an industrial dispute to the appropriate Tribunal and the Court having come to the conclusion that the refusal was not correct in law directed the appropriate Government to refer the dispute to the appropriate Tribunal. On a reading of the aforesaid decisions of the Supreme Court cited by Mr. Dasgupta, I find that direction was

given by the Court only after the Government had refused to refer the industrial dispute to the appropriate Tribunal. In the instant case no orders have yet been passed by the Central Government on the failure report submitted by the Assistant Labour Commissioner (Central), Dibrugarh, refusing to refer the dispute or to refer the same to the appropriate Tribunal and communicated to the parties concerned and, therefore, the said decisions of the Supreme Court are not audiority for the proposition that a direction can be straightway given to the Government for reference of the dispute to appropriate Tribunal.

8. In the present case, however, while the Petitioner-union has raised an industrial dispute and the said industrial dispute ended up in a failure report dated 27.10.97 submitted by the Assistant Labour Commissioner (Central), Dibrugarh, the Respondents in their affidavit-in-opposition filed before this Court have not disputed that such an industrial dispute existed and in fact raised by the Petitioner-union and has ended up in a failure report. On the contrary, in paragraph 20 of the affidavit-in-opposition, the Respondents have stated:

20. With reference to allegations made in paragraph 16, it is denied that the Petitioner has no other alternative efficacious remedy as alleged. It is stated that the alleged dispute of the writ Petitioners is an industrial dispute within the meaning of Section 2(K) of the Industrial Disputes Act, 1947 and therefore the Petitioner is having the remedy under the Industrial Disputes Act, 1947.

9. Mr. Dasgupta, learned Counsel for the Petitioner, further submitted that pending adjudication of the industrial dispute in case the Government refers the industrial dispute to the Tribunal, the Respondents are under an obligation to engage the said workmen directly as contingent workers as they have been earlier engaged. In view of the said contention raised by Mr. Dasgupta, this Court on 27.8.98 passed orders calling upon the learned Counsel for the ONGCL to obtain instruction from the competent authority of the ONGCL in what manner the workmen named in Annexure-A to the writ petition can be engaged till their claim for regularisation is decided by the authorities under the Industrial Disputes Act, 1947. When the case was taken up for hearing today, Mr. P.B. Choudhury Counsel for the ONGCL, stated that ONGCL is prepared to engage the persons named in Annexure-A to the writ petition as far as practicable and as and when required and in accordance with the rules and the law pending adjudication of the dispute between the parties under the Industrial Disputes Act, 1947.

10. In the result, I dispose of this writ petition with the direction that the Respondent No. 3, namely the Secretary to the Govt. of India, Ministry of Labour, New Delhi, or the competent authority of the Central Government will pass orders under Sub-section (5) of Section 12 of the Industrial Disputes Act, 1947 on the failure report dated 27.10.97 of the Assistant Labour Commissioner (Central), Dibrugarh within a period of 2 months from the date of receipt of a certified copy of this judgment alongwith a copy of the writ petition including the said failure report dated 27.10.97 from the Petitioner-union and communicate

the said order to the parties concerned. I further direct that until orders are passed by the Central Government on the dispute between the Petitioner-union and the ONGCL and until the dispute if referred is adjudicated imder the Industrial Disputes Act, 1947, the ONGCL will, as and when required and as far as practicable, employ the said workmen named in Annexure-A to the writ petition directly in accordance with the Rules and the law which are applicable. It is needless to say that no opinion has been expressed in this judgment with regard to merits of the case either of the Petitioner-union or of, the Respondents on the question of regularisation of the workmen.