

(2004) 07 OHC CK 0016
In the Orissa High Court
Case No : Writ Petition (C) No. 6393 of 2003

Paradip Port Trust

APPELLANT

Vs

Their Workmen and Others

RESPONDENT

Date of Decision : 23-07-2004

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2004) 98 CLT 593

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Advocate : S.K. Padhi, D. Mohapatra, B.K. Sahoo, S.K. Mohapatra and G. Mishra, for the Appellant; Sujata Jena, G.B. Jena for Opp. Party. No. 1, Jagannath Das, Sanjat Das, Subhashree Mohanty for Opp. Parties 2 to 40, for the Respondent

Final Decision : Dismissed

Judgement

L. Mohapatra, J.—The Management of Paradip Port Trust is the petitioner in this writ application against the award passed by the Central Government Industrial Tribunal-cum-Labour Court, Bhubaneswar in Tr. Industrial Dispute Case No. 112 of 2001.

2. The Central Government by order dated 27.11.1996 referred three disputes for adjudication to the Tribunal. The references are quoted below :

"Whether the Management of Paradip Port Trust is justified in withholding their decision to sanction the leave for the period from 31.5,1995 to 29.9.1995 (122 days) and from 24.10.1995 to 30.10.1995 (7 days) to Sri Sudhakar Mantry, Sr. JE (Mechanical)? If not, to what relief the workman is entitled ?"

"Whether the Management of Paradip Port Trust is Justified in withholding and recovering the payment made to Sri Sudhakar Mantry, Sr. JE (Mechanical) in view of the award of the Industrial Tribunal and Paradip Port Trust Management's Office Order No. DM/FLD/P/Con/2/89, dated 1.6.1989 ? If not, to what relief the

workman is entitled?"

"Whether the claim of the union regarding 40 workers as per list enclosed should be treated as regular workers of Paradip Port Trust and paid regular wages at par with the similar workers of Paradip Port Trust Management ? If so, to what relief the workers are entitled and from which date?"

Sri S. K. Padhi, learned Senior Advocate appearing for the petitioner fairly submitted that the petitioner does not intend to challenge the award in respect of Item No. (i) and (ii) of the reference and this writ application be confined to the award in respect of Item No. (iii) of the reference.

3. So far as the item No. 3 of the reference is concerned, case of the opposite parties is that the aforesaid dispute relates to Demand No. 10 of Chatter of Demand dated 6.11.1995. Demand No. 10 is that 40 workers are in continuous employment in the Central Store of the Paradip Port Trust situated inside the prohibited area and they are continuously doing the job of loading, unloading and stacking of materials of the Central Store belonging to the Paradip Port Trust. Annual gate passes are issued to them to enter into the prohibited area where the Central Store is located and out of 40 workers 30 workers have been doing this work since 1975 and 10 workers are working since 1994. Their grievance in the demand relates to regularisation of their services in the Central Store and extension of consequential benefits as are given to regular workers of the Central Store. Further case of the workmen-opposite parties is, that they are discharging similar job as that of regular Khalasis and helpers working in the Central Store and therefore they are entitled to equal pay for the same nature of work. In order to deprive the aforesaid workers from the benefit, the petitioner is adopting unfair practice by treating them as contract labourers.

Case of the petitioner as spelt out in the written statement filed by it is that the Central Store under the Materials Management Department receives materials from the supplier or through their transporters. Loading and unloading of those materials are carried out by the labourers engaged by the supplier/transporters. Payments are also made to those labourers engaged for loading and unloading of the materials by the suppliers/transporters. Further case of the petitioner is that it is in no way concerned with the engagement of any labourer for loading or unloading of materials received in the Central Store. Therefore, according to the petitioner, disputants were never engaged directly by them for the purpose of loading and unloading of materials in the Central Store. Further stand of the petitioner is that gate passes were issued for the purpose of entering into the prohibited area and merely because gate passes were issued to them for entering into the prohibited area, it cannot be said that they are employees of the Paradip Port Trust.

4. The Tribunal on consideration of the statement of claim as well as written statement framed the following issues in respect of item No. (iii) of the reference :

(5) Whether it is legal and/or justified to continue those 40 workmen as irregular/casual/contract labour who have been engaged continuously in the work of loading, unloading and stacking of material/goods in the Central Stores of Paradip Port Trust for the last two decades ?

(6) Whether the above practice of Paradip Port Trust constitutes unfair labour practice and "Forced Labour" prohibited under ID Act and under Article 23 of the Constitution of India. ? -

(7) Whether the Port being an instrumentality of the Central Government can be permitted under the Constitution to act arbitrarily contrary to Articles 14, 16 read with Article 39(d) and Article 21 of the Constitution ?

(8) Whether those 40 workers are deemed to be the workers of Paradip Port or Contractor Labour under the Law ?

(9) Whether Sri Sudhakar Mantry and the 40 workers of Central Stores are entitled to the relief as prayed in the Statement of Claims read with the Schedule of reference.

The Tribunal clubbed issue Nos. 5, 6, 7 and 8 and on consideration of materials placed before it held that the workers have rendered service for a long period and are still continuing and the work being permanent and perennial in nature, the claim of the workmen for regularisation of service and payment of wages at par with permanent employees of the Paradip Port Trust is genuine and justified. So far as issue No. 9 is concerned, the Tribunal also held that the workmen are entitled for regularisation as well as wages at par with the permanent employees of the Paradip Port Trust.

Shri S. K. Padhi, learned senior Advocate appearing for the petitioner challenged the said finding of the Tribunal on the ground that the evidence placed before the Tribunal only indicate that those workmen were issued gate passes to enter inside the prohibited area, but they are not directly engaged for the work of loading and unloading and for doing such work payments are made by the supplier .on piece rate basis. It was further submitted that the work of stacking of materials is done by the regular labourers and those 40 workers are sometimes engaged by the Paradip Port Trust and they are paid for such engagement. Shri Padhi further submitted that those 40 workmen are neither direct nor indirect labourers of the Port Trust and their engagements being done by suppliers/transporters, claim for regularisation is not justified and to that extent finding of the Tribunal is liable to be set aside. In order to substantiate his submission learned counsel relied upon some decisions to show that there was no relationship of employer and employee between the petitioner-Paradip Port Trust and the aforesaid 40 workmen.

5. Shri Jagannath Das, learned senior Advocate appearing for the opposite parties contended that the Paradip Port Trust exercises some control over the activities of these workmen. Issuance of gate passes to these workmen for

entering into the prohibited area and working in the Central Store is only one of the examples of control over the workmen. He further submitted that these workmen for last several years have been doing the job of loading, unloading and stacking of materials inside the Central Stores. According to Sri Das, if those workmen are only engaged by the suppliers/transporters for loading and unloading of materials, there is no reason why those workmen also stacking materials inside the Central Store. The very fact that these workmen not only engaged for loading and unloading of materials but also stacking of materials inside the Central Stores under the instruction of Officer-in-charge but also carry materials from out of the Stores under the instruction of Officer-in-charge. Therefore, movement of these workmen inside the Central Store is controlled by management of Paradip Port Trust. Shri Oas also contended that the Paradip Port Trust as admitted has also engaged these workmen on several occasions for the very same work. On the basis of the above, it is contended by Sri Das that the management of Paradip Port Trust has substantial control over the employment of the disputants and therefore there is relationship of employer and employee between the Paradip Port Trust and those workmen.

6. On perusal of the respective cases of both parties and on consideration of the submissions made by both the counsels, the only question that requires to be decided is whether there is existence of relationship of employer-employee between the Paradip Port Trust and the above 40 workers.

The Apex Court in the case of Bharat Heavy Electrical Limited Vs. State of U.P. and Others, had laid down guidelines for finding out such a relationship. In the aforesaid reported case the respondents 6 to 19 were engaged as gardeners to sweep, clean, maintain and look after the lawns and parks inside factory premises and campus of the residential colony through the agency of Respondents 3 to 5. Their services were terminated on 1.12.1998. They raised industrial dispute before the Labour Court where the appellant before the Apex Court took a plea that the said Respondents 6 to 19 were never employed by it and therefore it was not liable to pay any amount of compensation for reinstatement in service. The Labour Court on consideration of the contentions of the parties and the facts placed before it passed an award directing the appellant therein to re-employ the Respondents 6 to 19 and also directed for payment of compensation if the award has not been complied with. Thereafter, the appellant approached the High Court by filing writ applications. The writ applications were disposed of and findings of the Labour Court were confirmed. After disposal of the writ applications the matter was brought to the Apex Court and on behalf of the appellant the following contentions were raised :

"(1) That the findings recorded by the Labour Court as affirmed by the High Court are perverse being contrary to the evidence placed on record.

(2) That the High Court committed a serious error in applying the test of control in relation the work of the respondents workmen having regard to the definition of "employer" contained in Section 2(i)(iv) of the Act as the work of the

respondent workmen was not part of the industry.

(3) That the respondent workmen had not worked for 240 days to complain violation of Section 6-N."

The Apex Court on consideration of the above contention as well as on consideration of some earlier decisions of the Apex Court held that whether the workman is an employee of the principal employer or not depends on facts and circumstances of the given case. The Apex Court further held that the relationship of employer-employee does not rest merely on the test of control. The other evidence and facts and circumstances of the case are also to be kept in mind in recording such a finding that there is existence of relationship of employer-employee. In the facts and circumstances of the case placed before it the Apex Court held that the Respondents 6 to 19 who had been engaged by contractor as gardeners to sweep, clean, maintain and look after the lawns and parks inside the factory premises and campus of the residential colony are the employees of the appellant therein. The Apex Court further held that their work need not be an integral part of the industry. In the aforesaid decision the Apex Court had taken note of an earlier decision of the same Court in the case of Hussainbhai, Calicut Vs. The Alath Factory Thezhilali Union, Kozhikode and Others, . In the case of Hussainbhai (supra) in Paragraphs 5 and 6 the Apex Court held as follows :

"The true test may, with brevity 7; be indicated once again. Where a worker or group of workers labours to produce goods or services and these goods or services are for the business of another, that other is, in fact, the employer. He has economic control over the worker's subsistence, skill, and continued employment. If he, for any reason chokes off, the worker is, virtually, laid off. The presence of intermediate contractors with whom atone the workers have immediate or direct relationship ex contractu is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, we discern the naked truth, though draped in different perfect paper arrangement, that the real employer is the management, not the immediate contractor. Myriad devices, half-hidden in fold of legal form depending on the degree of concealment needed, the type of industry, the local conditions and the like may be resorted to when labour legislation casts welfare obligations on the real employer based on Articles 38, 39, 42, 43 and 43-A of the Constitution. The Court must be astute to avoid the mischief and achieve the purpose of the law and not be misled by the Maya of legal appearance.

7. If the livelihood of the workmen substantially depends on labour rendered to produce goods and services for the benefit and satisfaction of an enterprise, the absence of direct relationship or the presence of dubious intermediaries or the make-belief trappings of detachment from the management cannot snap the real life bond. The story may vary but the inference defies ingenuity. The liability cannot be shaken off."

8. Learned counsel appearing for the opposite parties contended that the work is perennial and permanent in nature and 40 workers have been working in the Central Store of the Paradip Port Trust for long years and conduct of the Paradip Port Trust is not accepting them as permanent employees amounts to unfair labour practice and denial of right to life and livelihood with dignity. In support of such contention, learned senior counsel Sri Das placed reliance on some decisions. In the case of GSRTC v. Workmen of State Transport Corporation, reported in 1999 XI LLJ 1363, the Gujarat High Court held that denial of permanency and continued employment on casual or temporary basis notwithstanding existence of permanent work would amount to unfair labour practice and it is also denial of right to life and livelihood with dignity. A similar view has also been taken by the Apex Court in the case of Dhirendra Chamoli and Another Vs. State of U.P., as well as in the case of Chief Conservator of Forests and Anr. v. Jagannath Maruti Kondhare, etc., reported in 1996 LAB. IC 967,

9. On analysis of the aforesaid judgments it is clear that the relationship of employer-employee does not rest merely on the test of control and the Court is required to see the materials placed before it in order to arrive at such a conclusion. Apart from the above the Court has to see whether denial of permanency to such workers who have been working for years amounts to unfair labour practice or not. In the present case, specific stand of the opposite parties workers is that out of 40 workers, 30 workers are working since 1975 and ten are working since 1994 in the Central Store of the Paradip Port Trust. The first witness examined on behalf of the workers, namely Babaji Charan Behera in his deposition has stated that the Materials Manager is the head of the Central Store under whom there are other officers like Deputy Manager. Asst. Manager, Section Officer. Thirty workers including himself are working in the Central Store from the year 1975 and rest ten workers are working since 1994. He has further stated that all the 40 workers used to attend loading and unloading of materials in the Central Store and they used to receive payment at piece-rate basis. He has further stated that some payments are made by the Superintendent directly and some" payments are made through Contractor. This witness has proved several documents including attendance registers to prove the case of workers, Xerox copies of receipts were also filed as exhibit-6 series to show that they have received payments from the Central Store directly. In cross-examination this witness has stated that part-payment is sometime made by the Central Store and sometimes payment is received by the Superintendent from the Contractor and it is paid to the workers by the Superintendent. He has stated that he has never received payment from the contractor directly and the workers received payments after submission of vouchers to the Central Store. This witness admitted in cross-examination that the attendance registers (Ext. 2-series) had been prepared by him and not by the management of the Paradip Port Trust. Witness No. 2 examined on behalf of the workmen has stated in his deposition that fee is collected for issuance of gate passes to the workers. Prior to 1994 a

sum of Rs. 60/- was being charged for other casual labourers, whereas a sum of Rs. 10/- used to be charged from the said 40 workers. This witness has further stated that the articles which are unloaded by the labourers are the properties of the Paradip Port Trust and articles unloaded are kept by them in the godown with the help of regular Khalasis and helpers. In cross-examination, nothing has been brought out to show that the said workers were receiving wages from the contractor/transporter directly.

The first witness examined on behalf of the management of the Paradip Port Trust is the Asst. Engineer (Elect) who was posted in the Central Store in the year 1998. In his deposition he has stated that there is no relationship of employer-employee between the management of Paradip Port Trust and the aforesaid 40 workers are engaged by the supplier to supply materials to the management. He has further stated that wages of the said workers are paid by the supplier who engage them. In cross-examination this witness has stated that sometime services of the said workers is required by the Central Store and they are engaged by the Central Store for unloading materials of the management and after the materials are unloaded the above said 40 workers attend work of stacking of materials inside the Central Store. Similar is the evidence of witness No. 2 examined on behalf of the management.

10. On analysis of the aforesaid evidence placed before the Tribunal, the following facts emerge :

- (1) All the 40 workers are given gate passes to enter inside the prohibited area of the Paradip Port Trust where the Central Store is located.
- (2) The workers are used for loading, unloading of materials and are also used for the purpose of stacking of materials inside the Central Store.
- (3) On some occasions they have been engaged by the management of the Paradip Port Trust for doing such work and have been paid by the management directly for the said work.
- (4) The work in the Central Store is continuous and perennial in nature as all the materials required by the Paradip Port Trust are stored in the Central Store.
- (5) Out of 40 workers, 30 are working since 1975 and 10 are working since 1994.

11. So far as the effective control is concerned, there are three aspects which are not in dispute. First aspect is entry of the workers inside the prohibited area of the Paradip Port Trust. Unless gate passes are issued, no one can enter inside the prohibited area and therefore the management of Paradip Port Trust has control over entry of workers inside the prohibited area. There is evidence on record to show that all these 40 workers were being issued gate passes to enter inside the prohibited area and only on payment of some fees. Therefore, the management of the Paradip Port Trust has effective control with regard to entry into the prohibited area and there is no dispute that this control was exercised on all the 40 workers. The second aspect of the case is the nature of work executed

by the said workers. There is no dispute that these workers have been engaged for loading and unloading of materials inside the Central Store and there is no dispute that stacking of materials inside the Central Store is done by them. So far as loading and unloading are concerned, Sri Padhi, learned senior counsel appearing for the management may be correct in saying that the management may not have control over the same, but so far as stacking of materials inside the Central Store is concerned, the management has some control over the workers as; the workers cannot stack materials where ever they want. The third aspect is that admittedly the workers were paid wages on certain occasions by the management whenever they were engaged by the management and they have been doing so far past several years.

On consideration of all these materials placed before the Court, I am of the view that not only the management has effective control over the entry of workers into the prohibited area but also has effective control on the movement of workers inside the Central Store. There being, no dispute that the workers are working in the Central Store for past several years /".e. some workers from the year 1975 and some from 1994 and the Central Store is used for storage of materials belonging to the Paradip Port Trust, the work is perennial in nature. Now applying the principles laid down by the Apex Court and the Gujarat High Court as quoted above, it is clear that management of Paradip Port Trust has indulged itself in unfair labour practice by engaging 40 workers on casual basis for years without making them permanent.

12. I, therefore, do not find any reason to interfere with the findings of the Tribunal and accordingly there is no merit in the writ application and the same is dismissed.