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(2020) 02 GAU CK 0033

In the Gauhati High Court

Case No : Writ Petition (C) No. 5094 Of 2014

Subansiri Lowr H.E. Project Constract Basis Workers Union And 2 Ors — APPELLANT

Vs

National Hydroelectric Powr Corporation Ltd. And 18 Ors — RESPONDENT

Date of Decision : 28-02-2020

Acts Referred:
Industrial Disputes Act, 1947 — Section 11, 12, 12(3)
Contract Labour (Regulation And Abolition) Act, 1970 — Section 7, 9, 10, 10(1), 10(i), 16, 17, 18, 19, 20, 21
Constitution Of India, 1950 — Article 14, 16

Citation : (2020) 02 GAU CK 0033

Hon'ble Judges : Nelson Sailo, J

Bench : Single Bench

Advocate : P Kalita, R K D Choudhury

Final Decision : Dismissed

Judgement

1. Heard Mr. S.N. Sarma, the learned Senior Counsel assisted by Mrs. A. Bhattacharya, the learned counsel for the petitioners. Also heard Mr. P.K.

Tiwari, the learned Senior Counsel assisted by Mr. R.K. Dev Choudhury, the learned counsel for the respondent Nos. 1 to 11. None appears for the

respondent Nos. 12 to 19 though they have filed counter affidavit.

2. The petitioner No. 1 is the Subansiri Lower H.E. Project Contract basis Workerâ??s Union (the Union) and the petitioner Nos. 2 & 3 are its

President and General Secretary respectively. The Union is registered under the Trade Union Act, 1926 under registration No. 2216 dated 18.08.2007

and comprises of about 300 numbers of workers as its members.

3. The case of the petitioners is that the Government of India initiated a Hydro Electric Project at lower Subansiri river (The Project) for generation of

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2,000 Megawatt electricity by investing several crores of rupees and accordingly, various employees under the National Hydro Electric Power

Corporation Limited (NHPC) (Respondent No.1), which is a Government of India enterprise, were employed under its supervision. According to the

petitioners, since the inception of the Project, the respondent authorities engaged about 300 workers in technical and non-technical permanent posts on

contractual basis from time to time for rendering service under the respondent No. 1.

4. On 11.09.2006, a Memorandum of Settlement (MoS) was arrived at under Section 12(3) of the Industrial Disputes Act, 1947 (Act of 1947)

between the management of the Project and the workman engaged on contract basis. The purpose of the MoS was for sorting out various demands

raised by the members of the Union, which included enhancement of wages and seeking permanent employment amongst others. As per the MoS, it

was agreed that a Committee will be formed to make a recommendation for increase in the rate of wages. The Committee will comprise of 3

representatives each from the management and from the workers. Further, the Committee will resolve the issue on or before 05.10.2006. In respect

of the issue regarding permanent employment of the existing workers, the same was to be submitted in another platform and to be decided later on.

Thereafter, on 12.07.2010 at the instance of the Assistant Labour Commissioner (Central), Ministry of Labour and Employment, Government of India,

a Memorandum of Understanding (MoU) was reached between the General Secretary of the Union and the NHPC Contractors Association,

Gerukamukh in the presence of NHPC on the demand with regard to providing of bonus as per the Payment of Bonus (Amendment) Ordinance,

2007. Thereafter, a meeting was held in the Office of the Assistant Labour Commissioner (Central) Guwahati on 10.11.2010 on a dispute regarding

non-payment of bonus to the contractual workers engaged in the establishment of NHPC, Gerukamukh. However, the issue could not be settled and

therefore, it was resolved that the matter be taken up before higher authorities. The members of the petitioner Union having rendered services for

about 10 to 12 years on contractual basis were legitimately expecting that their services would be regularized in terms of the MoS arrived at on

11.09.2006 against various technical and non-technical permanent post, which were lying vacant. With such expectation, they were paying their

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statutory dues like bonus and provident fund. However, to their surprise, the respondent NHPC vide Communications dated 08.08.2014, 11.08.2014,

12.08.2014, 19.08.2014 and 20.09.2014 [Annexure 6 (1) to (10)] informed the contractors, who are arrayed as respondent Nos. 12 to 19 in this writ

petition that the contract work was going to expire on 30.09.2014 and in view of various issues, due to which there was much delay in the execution of

the project, the work will not be extended beyond the given date. It was further indicated that NHPC has taken a decision that the contract work may

be awarded to potential bidders through open tender only if the construction work of the project is resumed. Apprehending that their services will be

terminated from 30.09.2014, the petitioners are before this Court through the instant writ petition.

5. The parties have exchanged quite a number of pleadings between them and the same may be summarized hereunder.

6. The respondent Nos. 1 to 11 have filed their affidavit-in-opposition on 19.11.2014 with a preliminary objection that the writ petition is liable to be

dismissed due to non-joinder of necessary parties. It is contended that the members of the petitioner Union are contract laborers engaged by various

contractors and therefore, there being no employer and employee relationship between the members of the petitioner Union and the respondent

NHPC, grievance, if any, will only lie against the contractors, who have employed the members of the petitioner Union. On merits, stand taken is that

the members of the petitioner Union cannot claim to be engaged continuously as contract labourer through the contractor as it is the absolute

prerogative of the contractor to choose the workers to be engaged for contract work as and when contract is awarded/work order is given to the

contractor. It is further contended that the writ petition is filed without any cause of action and that the respondents do not have any malafide/oblique

motive to defeat any rights of the laborers of the contractors by inviting electronic bids through open tenders dated 01.09.2014, 02.09.2014 and

04.09.2014 [Annexure- 7 (1) to (6)] for various running and maintenance works related to the project instead of giving work orders to various

contractors for the same work. They also contend that the project is languishing for more than two and half years and the present bottle necks and

impasses related to the project have not yet been resolved. Therefore, it was only through the impugned Communications that the contractors were

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informed that the contract works related to the running and maintenance of the project may be awarded to potential bidders only through open tender

if the construction work of the project is resumed. In so far as the MoS dated 11.09.2006 is concerned, it was denied that the same was on the issue

of permanent employment of the members of the Union. There was also no commitment on the part of the Principal employer either as per the MoU

dated 12.07.2010 or the Meeting Minutes dated 10.11.2010 for reimbursement of bonus to the contractors. It was thus contended that the writ petition

being without any merit, it should be dismissed.

7. After the preliminary submission of the maintainability of the writ petition for non-joinder of parties was filed in the above manner, the petitioners

filed a Miscellaneous Application i.e., MC. No. 3458/2017 seeking the impleadment of the respondent Nos. 12 to 19 i.e. the contractors working for

NHPC. The Miscellaneous Application was allowed vide order dated 27.04.2015. That is how the respondent Nos. 12 to 19 are impleaded in the writ

petition.

8. The respondent Nos. 12 to 19 filed their affidavit-in-opposition on 01.11.2017 contending inter alia that they have no knowledge about the

engagement of about 300 numbers of employees by the NHPC as contended by the petitioners. According to them, they are contractors under the

NHPC and the NHPC deploys the labourers and distributes them amongst the contractors as per the labour orders. The employers of the laborers are

the NHPC and the same can be seen from the experience certificates issued by the Officers of the NHPC. It is therefore up to the NHPC to decided

whether the services of the members of the petitioner Union was to be regularized or not. It was also admitted by the respondent Nos.12 to 19 in the

affidavit that the NHPC directed them to vacate their work force from the NHPC colony.

9. The affidavit-in-opposition of the respondent Nos. 12 to 19 was responded to by the NHPC by filing an affidavit-in-reply on 31.01.2018. In the said

affidavit, a preliminary submission is taken that the respondent Nos. 12 to 19 are the contractors who have been awarded the works by the respondent

Nos. 1 to 11 for carrying out various running and maintenance works, field works and up-keeping of guest house, field hostel etc. and the members of

the petitioner Union are engaged by the respondent Nos. 12 to 19 for execution

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of the awarded works. They are paid wages as prescribed by the

appropriate Government and being the employer, they have obtained individual personal accident insurance for the members of the Union while

depositing EPF contribution and it is therefore clear that the respondent Nos. 12 to 19 are the employer. Further, it is due to the stay order passed on

25.09.2014 that the respondent Nos. 1 to 11 are extending the contract through the respondent Nos. 12 to 19 by issuing work orders. They further

contend that the petitioners themselves have admitted that they are employed by the contractors and therefore, it can be seen that there is an

employer-employee relationship between the petitioners and the respondent Nos. 12 to 19. The respondents concerned also deny that some of the

certificates annexed by the petitioner, such as Annexures â?" 2(2), 2(7), 2(8), 2(9) and 2(10) have been issued by the officials of the NHPC. In so far

as the meeting dated 10.11.2010 is concerned, the respondent Nos. 1 to 11 attended the same in the capacity of Principal employer and there was no

commitment on the part of the Principal employer for reimbursement of bonus to the contractors. There was also admission on the part of the

respondent Nos. 12 to 19 in the MoU dated 12.07.2010 that it is the respondent Nos. 12 to 19, who have engaged the laborers and members of the

petitioner Union.

10. The petitioners on 09.03.2018 filed an additional affidavit to show that the petitioner Union comprise of 278 employees under the NHPC and

enclosed a copy of the list of workers containing the details of each of the workers working in different Division/Section is enclosed in the affidavit.

The respondent Nos. 1 to 11 on 06.04.2018 filed an affidavit-in-reply to the additional affidavit filed by the petitioners on 09.03.2018. In the said

affidavit, the NHPC denied having employed members of the petitioner Union and also denied that they are serving for the last 14 to 16 years in as

much as the construction work of the Project started only in the year 2005 after forest clearance for the Project was granted by the Ministry of

Environment & Forest in the year 2004. Besides this, the work had come to a grinding halt since the month of December, 2011 due to various

agitations. Therefore, they contend that the petitioners have no vested right to claim service absorption under the NHPC.

11. The petitioners against the affidavit-in-reply of the respondent Nos. 1 to 11

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filed an affidavit-in-opposition on 16.05.2018 denying the statements

made in the affidavit-in-reply. They also stated that as directed by the Court on 19.04.2018, they submitted representation before the Executive

Director of NHPC on 07.05.2018, expressing the grievance of the Members of the Union. However, the same was rejected by the NHPC stating that

there was no employee â?" employer relationship between the Members of the Union and the NHPC as they were never engaged by them.

12. The respondent Nos. 1 to 11 again filed an affidavit on 14.08.2018 to bring on record the subsequent developments. The respondents in the

affidavit contended that the representation filed by the petitioners on 07.05.2018 was considered and was rejected by a speaking order on 12.06.2018.

Furthermore, as permitted by the Court, vide order dated 19.04.2018, the respondent Nos. 12, 13, 14, 16 and 17 in terms of the Notice Inviting Tender

(NIT) concerned were awarded works vide separate letters, all dated 02.07.2018.

13. Against this affidavit dated 14.08.2018, the petitioners filed an affidavit-in-reply on 16.08.2018, stating that all the Members of the Union are

working in the establishment of the Principal employer and entitled to be treated as regular employee but the respondent authorities in order to

frustrate the claim of the petitioners, illegally designated them as contract laborers. The contractors are mere sham and camouflage. In support of

their claim that they were employed under the NHPC and against permanent vacancies for the last several years, the petitioners have also annexed

certificates issued by the NHPC officials in this regard.

14. Against the affidavit filed by the petitioners on 16.08.2018, the respondent Nos. 1 to 11 filed an objection by way of an affidavit on 06.09.2018.

The said respondents objected to the introduction of new documents by the petitioners stating that instead of presenting their narrative as a counter to

the narrative of the respondents in respect of the subsequent developments during the pendency of the case, the petitioners introduced new documents

from Annexure â?" 30 to 60, which had nothing to do with the narrative of the respondents in respect of the subsequent developments. These new

documents were introduced by the petitioners to strengthen their case and for projecting a narrative that the contract workers are in complete control

of management of NHPC and they work under its supervision and therefore, they will have to be treated as employees of the Principal employer. It

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was therefore prayed by the respondents that the new documents introduced by the petitioners may not be taken into consideration. However, if it is

to be considered, the respondents may be given an opportunity to controvert the same by way of an affidavit.

15. The objection of the respondent Nos. 1 to 11 dated 06.09.2018 was again countered by the petitioners by filing counter-affidavit on 12.09.2018.

The petitioners contended that by filing the additional documents, they have only revealed the true state of affairs, which otherwise was suppressed by

the respondent Nos. 1 to 11 with regard to the nature of their employment.

16. Considering the rival stand taken by the parties, this Court vide order dated 13.09.2018 allowed the introduction of new documents in the counter-

affidavit of the petitioners dated 16.08.2018 and also gave liberty to the NHPC to file their rejoinder affidavit against the same.

17. As permitted, the respondent Nos. 1 to 11 filed their reply affidavit against the affidavit of the petitioners dated 16.08.2018 on 06.10.2018. By the

said affidavit, the respondents made a clarification to the documents annexed as Annexure â?" 30 to 60 in the affidavit of the petitioners dated

16.08.2018, stating that the employees concerned were engaged by the contractors concerned and that they were not in any manner the employees of

NHPC. The information pertaining to contract laborers, including their EPF account numbers was sought from each of the project of the NHPC by

the management for the purpose of creating a portal â??Contract Labor Payment Management System (CLPM)â?? for monitoring compliance of

labor payment and other benefits to the contract labourers under the Contract Labour (Regulation & Abolition) Act, 1970 (Act of 1970).

18. Against the affidavit of the respondent Nos. 1 to 11 dated 06.10.2018, the petitioners filed a rejoinder affidavit on 09.10.2018, disputing and

denying the statements made by the respondent concerned in their affidavit dated 06.10.2018.

19. Mr. S.N. Sarma, the learned Senior Counsel appearing for the petitioners submits that as per Section 7 of the Act of 1970, every principal

employer of an establishment to which the Act applies shall, within such period as the appropriate Government may, by notification in the Official

Gazette, fix in this behalf with respect to establishments generally or with respect to any class of them, make an application to the registering officer in

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the prescribed manner for registration of the establishment. He further submits that as per Section 12 under Chapter â?" IV of the Act of 1970, no

contractor to whom the Act applies, shall undertake or execute any work through contract labour except under and in accordance with a licence

issued in that behalf by the licensing authority. The license may also contain such conditions including, the hours of work, fixation of wages and other

essential amenities in respect of contract labour as the appropriate Government may deem fit to impose in accordance with the rules. The learned

Senior Counsel by further referring to Section 20 of the Act of 1970 submits that if any amenity required to be provided under Sections 16, 17, 18 or

19 for the benefit of the contract labour employed in an establishment is not provided by the contractor within the time prescribed thereof, such

amenity shall be provided by the principal employer within such time as may be prescribed. He further submits that as per Section 21 of the same Act,

the contractor shall be responsible for payment of wages to each worker employed by him as contract labour and such wages shall be paid before the

expiry of such period as may be prescribed. The principal employer shall nominate a representative duly authorized by him to be present at the time of

disbursement of wages by the contractor and it shall be the duty of such representative to certify the amounts paid as wages. In case the contractor

fails to make payment of wages within the prescribed period, the principal employer shall be liable to make payment of wages in full or the unpaid

balance due, as the case may be and recover the same from the contractor.

20. The learned Senior Counsel referring to the MoS made between the Management of the NHPC and the Workmen on contract basis before the

Labour Officer, Lakhimpur on 11.09.2006 (Annexure-3) submits that after prolonged discussion by both the parties, it was resolved that the dispute be

settled as per the terms of settlement. The terms of settlement was that the Management agreed to follow the provisions contained in the Notification

No. ACL43/2004/8407 dated 01.09.1984 except the rate of wages, both the parties agreed to form a committee, whose recommendation will be

complied in letters and spirit. The committee will be formed with 3 representatives each from the Management and from the workers. For resolving

the issue, a timeline of 05.10.2006 was fixed as the outer limit. Further, the issue of permanent employment of the existing workers was to be

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submitted in other platform, to be decided later on. Mr. S.N. Sarma, the learned Senior Counsel draws the attention of the Court to Section 11 of the

Act of 1947 and submits that the procedure and powers of Conciliation Officers, Boards, Courts and Tribunals have been provided therein. He

submits that Section 12 of the Act of 1947 provides for the duties of the Conciliation Officers. He also refers to Section 18 of the same Act and

submits that a settlement arrived at by agreement between the employer and workman otherwise than in the course of conciliation proceeding shall be

binding on the parties to the agreement. Section 19 of the same Act provides for the period of operation of settlement and awards.

21. The learned Senior Counsel further refers to the Minutes of the Meeting held in the Officer of the Assistant Labour Commissioner (Central),

Guwahati on 10.11.2010 (Annexure -5). He submits that the meeting was attended by the Members of the petitioner Union, management of NHPC

and representatives of the Contractors Association. After a prolonged discussion, as no settlement could be arrived at, the issue regarding the payment

of bonus to the workers, it was resolved that the same may be taken up with the higher authorities for decision in due course and further progress of

the case to be intimated to the Assistant Labour Commissioner.

22. By referring to the affidavit-in-reply filed by the respondent Nos. 1 to 11 on 31.01.2018 against the affidavit-in-opposition of the respondent Nos.

12 to 19, the learned Senior Counsel submits that the manner in which the work order has been issued by NHPC is without following any

transparency. Referring to the work orders annexed to the said affidavit as Annexure â?" 1(a) to 1(e), he submits that no open tender was floated by

the NHPC for allotting the works. It was only after filing of additional affidavit by the writ petitioners that the respondent NHPC has claimed to allot

works after issuing tender notice. The respondent NHPC in order to avoid its liability has only claimed to be the Principal employer and not the direct

employer of the Members of the petitioner Union. However, from the affidavit filed by the respondent Nos. 1 to 11 on 14.08.2018, whereby, the letter

of award has been annexed, it can clearly be made out that the same contains total wages, overhead charges and contractor commission. Further, the

NIT itself would go to show that the tender is not open to everyone but only to those registered contractors, who are registered at Subansiri Lower

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H.E. Project and possessing a valid registration certificate with NHPC. Therefore, it is only a sham contract and the respondent Nos. 1 to 11 are not

merely the Principal employer but the actual employer. In support of his submissions, the learned Senior Counsel relies upon the following authorities:-

1) Silver Jubilee Tailoring House & Ors. Vs. Chief Inspector of Shops & Establishments & Anr. (1974) 3 SCC 498

2) Gujarat Electricity Board, Thermal Power Station, UKAI, Gujarat Vs. Hind Mazdoor Sabha & Ors. (1995) 5 SCC 27

3) Secretary, HSEB Vs. Suresh & Ors. (1999) 3 SCC 601

4) Bharat Heavy Electricals Ltd. Vs. State of Uttar Pradesh & Ors. (2003) 6 SCC 528

5) Chennai Port Trust Vs. Chennai Port Trust Industrial Employees Canteen Workers Welfare Association & Ors. (2018) 6 SCC 202

6) Judgment & Order dated 29.09.2016 in W.A No. 96/2013 (ONGC & Anr. Vs. Union of India & 2 Ors.)

7) Official Liquidator Vs. Dayanand & Ors.(2008)10 SCC 1

8) Bachhaj Nahar Vs. Nilima Mandal & Ors. (2008)17 SCC 491

9) Steel Authority of India & Ors. Vs. National Union Water Front Workers & Ors. (2001)7 SCC 1

10) State of Orissa & Anr. Vs. Mamata Mohanty (2011)3 SCC 436

11) Balwant Rai Saluja & Anr. Vs. Air India Limited & Ors. (2014)9 SCC 407

23. Mr. P.K. Tiwari, the learned Senior Counsel appearing for the respondent Nos. 1 to 11 by referring to the prayer made in the writ petition submits

that the petitioners have challenged the communications made to the contractors, annexed to the writ petition as Annexure â?" 6(1) to Annexure â?

6(9) and the NITs annexed at Annexure â?" 7(1) to Annexure â?"7(6). Considering the fact that the petitioner Union comprises of Skilled and

Unskilled workers, they cannot be said to have any grievance against the impugned communications. The writ petition is not maintainable, inasmuch

as, it is a proxy writ petition filed at the behest of the private contractors, who are arrayed as respondent Nos. 12 to 19 in the writ petition. He submits

that it is a lis between NHPC and the private contractors and therefore, the petitioners have no role to play. The nature of dispute does not show any

legal prejudice. Pursuant to the permission granted by this Court to go ahead with the NIT, works have already been allotted and therefore, no cause

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of action survives. He further submits that the subsequent development i.e., the award of work has not been challenged and therefore, the writ petition

cannot be maintained. He also submits that the works have been allotted to all the private respondents, except the private respondent Nos. 15, 18 &

19.

24. The learned Senior Counsel submits that vide letter dated 19.04.2018, the petitioners were permitted to file representation for regularization of their

service. The representation, which was then filed by the petitioners have been dismissed. For that reason, a new cause of action has arisen and the

writ petition has become infructuous. The relief as on date cannot be granted as the writ petition has become infructuous.

25. Mr. P.K. Tiwari, the learned Senior Counsel submits that from the contents of the writ petition itself, more particularly paragraph No. 26 of the

writ petition, the petitioners themselves have clearly admitted that they are engaged by the private contractors and not by the NHPC. The MOS

arrived at on 11.09.2006 does not give any right to the petitioners to be regularized. Likewise, the MOU dated 12.07.2010 (Annexure-4) and also the

Minutes of the Meeting dated 10.11.2010 does not reveal the commitment of the NHPC to either regularize the service of the members of the

petitioner Union or to pay them bonus. He submits that the NHPC is only a Principal employer. Mr. P.K. Tiwari, the learned Senior Counsel submits

that as per Section 7 of the Act of 1970, every Principal employer of an establishment to which the Act applies has to be registered. The NHPC is

only a registered company under the said Section. He also refers to Section 9 of the same Act, which provides for the effect of non-registration. He

submits that Section 9 provides that no Principal employer of an establishment, to which the Act applies, shall employ contract labour in the

establishment after the expiry of the period prescribed. Further, the learned Senior Counsel submits that Section 10 of the Act of the 1970 provides for

prohibition of employment of contract labour. As per the said provision, notwithstanding anything contained in the Act, an appropriate Government

may after consultation with Central Board or as the case may be, a State Board, prohibit by Notification in the Official Gazette employment of

contract labour in any process, operating or other work in any establishment. In the present case, no such prohibition has been notified by the

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appropriate Government. In support of this submission, Mr. P.K. Tiwari, the learned Senior Counsel relies upon the following authorities:-

1) Air India Statutory Corporation & Ors. Vs. United Labour Union & Ors. (1997) 9 SCC 377

2) Steel Authority of India & Ors. Vs. National Union Water Front Workers & Ors. (2001) 7 SCC 1

3) APSRTC & Ors. Vs. G. Srinavas Reddy & Ors. (2006) 3 SCC 674

4) State of Karnataka & Ors. Vs. Umadevi (3) & Ors. (2006) 4 SCC 1

5) State of Karnataka & Ors. Vs. M.L. Kesary & Ors. (2010) 9 SCC 247

6) National Fertilizers Limited & Ors. Vs. Somvir Singh (2006) 5 SCC 493

7) State of Orissa & Anr. Vs. Mamata Mohanty (2011) 3 SCC 436

8) Anil Lamba & Ors. Vs. Govt. of NCT & Ors. 2017 0 Supreme (Del) 761

9) Balwant Rai Saluja & Anr. Vs. Air India Ltd. & Ors. (2014) 9 SCC 407

26. I have heard the submissions made by the learned counsels for the parties and I have perused the materials available on record including the

authorities relied upon. The learned counsels have made elaborate submissions on the respective issue raised by them. As may be noticed, the case of

the petitioners is that the Government of India initiated a Hydro Electric Project at lower Subansiri river for generation of 2000 Megawatt electricity

by making huge investment. The respondent No. 1 which is Government of India enterprise engaged a large number of workforce on contract basis

both technical and non-technical workers through the respondent workers. It is the case of the petitioner that there were various issues like the

demand for increase in the rate of their wages and the upliftment of the condition of their services under the project. In fact, a Memorandum of

Settlement was arrived at and signed between the Management and the workman engaged under the contract basis before the Labour Officer, North

Lakhimpur and Conciliation Officer on 11.09.2006. As per the terms of settlement, the parties agreed to form a Committee for increase of rate of

wages whose recommendation will be complied in letters and in spirit. Besides this, it was provided that the Management will consider introduction of

medi-claims scheme amongst the workers and will ensure compliance of CPF amongst the workers. The Management will also take proper action in

case of alleged illegal dismissal of workers as per the Board of Government

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inquiry. Apart from such details, the issue regarding permanent

employment of the existing workers will be submitted in other platform, to be decided later on. Thereafter, on 12.07.2010, at the instance of the

Assistant Labour Commissioner (Central), Ministry of Labour and Employment, Government of India, a Memorandum of Understanding was reached

between the General Secretary of the Union and the NHPC Contractors Association in the presence of NHPC on the demand with regard to

providing of bonus as per the Payment of Bonus (Amendment) Ordinance, 2007. Subsequent thereto, a meeting was held in the office of the Assistant

Labour Commissioner (Central) Guwahati on 10.11.2010 on a dispute regarding non-payment of bonus to the contractual workers engaged in the

establishment of NHPC. However, the matter could not be solved and it was decided that the same should be taken up before the higher authorities.

When the matter rested at that, the impugned communication to the contractors concerned were issued stating that the contract work was going to

expire on 30.09.2014 and it was decided that the work shall not be extended any further and the contract work may be awarded to potential bidders

through open tender only if the construction work of the project is resumed. Thereafter, the respondent NHPC Limited invited bids through open

tender on 1st, 2ndand 4th of September, 2014 for various running and maintenance of works related to the project instead of giving work order to

various contractors for the same work. Aggrieved with such action, the petitioners are before this Court through this writ petition.

27. As may be seen from the foregoing paragraphs, much has been stressed by the parties on the issue of absorption and permanency of the work

force under the project. The worker Union is before this Court with the following prayers:-

â??In the premises aforesaid it is therefore prayed that Your Lordship may graciously be pleased to admit the petition, call for the record

and issue a rule calling upon the respondents to show cause as to why a writ in the nature of mandamus and/ or certiorari and/ or any other

appropriate writ/ order or direction shall not be issued for cancellation and/ or withdrawal of termination letters Annexure-6(1) to

Annexure 6(9) and 6 nos. of NITs Annexure 7 (1) to Annexure 7 (6) and after going through the cause or causes that may be shown make

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the rule absolute and further be pleased to pass any other order or orders as Your Lordship may deem fit and proper.

And

Pending disposal of the instant writ petition, Lordship may be further be pleased to stay the operation of termination letters, Annexure 6(1)

to Annexure-6(9) and NITs Annexure 7 (1) to Annexure 7 (6) and further be pleased to pass any other order or orders as your Lordship

may deem fit and proper. â??

28. From the above abstract, it may be seen that the petitioners have sought withdrawal of the termination letters and also the notice inviting e-tender.

According to them, they have been discharging their duties in connection with the administrative job of the respondent authorities for the last 10 to 12

years continuously without any break and though they are employed through contractors. That inviting of NIT afresh will be detrimental to their

interest and may amount to replacing the earlier adhoc appointee by a new adhoc appointee. They also contended that their engagement by the

respondent authorities have never been termed as irregular or illegal appointment and as such, they have been rendered continuous service, their right

to be absorbed as permanent employees against permanent vacancies under the public sector enterprise have legalized. The said contention however

has been refuted by the respondent NHPC by stating that the members of the petitioners Union have never been engaged by them and that no

employer-employee relationship exists between the members of the petitioners Union and the NHPC. They contend that the contractors concerned

are the ones who have employed/engaged the members of the petitioners Union and therefore, the NHPC only being a principal member has no

responsibility to consider their regularization/ absorption under the Project.

29. In the light of the projections made, some of the authorities relied may be noted. In the case of Mamata Mohanty & Anr. (Supra), the Apex Court

on the issue with regard to appointment/employment without advertisement held that no person can be appointed even on temporary or adhoc basis

without inviting applications from eligible candidates. The equality clause under Article 16 requires open advertisement to enable all eligible persons to

compete on merit. The Apex Court also held that relief which is not claim cannot be granted. Paragraphs 35, 36 & 55 of the said decision may be

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abstracted below for ready perusal â?

â??35. At one time this Court had been of the view that calling the names from employment exchange would curb to certain extent the

menace of nepotism and corruption in public employment. But, later on, it came to the conclusion that some appropriate method consistent

with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling

for applications and all those who apply in response thereto should be considered fairly. Even if the names of candidates are requisitioned

from employment exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates

from the open market by advertising the vacancies in newspapers having wide circulation or by announcement in radio and television as

merely calling the names from the employment exchange does not meet the requirement of the said article of the Constitution.

36. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting

applications from all eligible candidates. If any appointment is made by merely inviting names from the employment exchange or putting a

note on the notice board, etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the

mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being

considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal

appointment mandatory compliance with the said constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16

requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit.

55. Pleadings and particulars are required to enable the court to decide that rights of the parties in the trial. Thus, the pleadings are more

to help the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may

adduce appropriate evidence on the said issue. It is a settled legal proposition that â??as a rule relief not founded on the pleadings should

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not be grantedâ?. Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and

issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ.â??

30. Further, the Apex Court in the case of Umadevi (3) & Ors. (Supra) held that temporary, contractual, casual or daily wage employees do not have

the legal right to be made permanent unless appointed in terms of the relevant rules or in adherence to Article 14 and 16 of the Constitution. Although,

the Apex Court carved out an exception that those who have work for 10 years or more in duly sanctioned post but not under the cover of order of

the Court or of Tribunal may be considered for regularization as a one-time measure and that such process should be set in motion within six months

from the date of the Judgment. Having regard to this decision and the facts in the present case, it may be seen that though the petitioners claim that

they have been in employment though on contract basis for more than 10 to 12 years and in a sanctioned post, there is no material available to show

that they are working against sanctioned post. The testimonials issued to them by some of the officials of the NHPC goes to show that the same was

issued for a specific purpose such as for opening of Bank Accounts.

31. In the case of Gujarat Electricity Board, Thermal Power Station, Ukai, Gujarat (Supra), the Apex Court held that the remedy of the workmen is to

raise a proper industrial dispute for appropriate reliefs. Even when dispute is raised, the Government should make the reference within two months of

the receipt of the dispute and the industrial adjudicator should dispose of the same as far as possible within six months thereafter. It was however

observed that engaging contract labour instead of direct employee is due to monetary advantage by reducing their expenditure. The economic growth

of a country is not to be measured only in terms of production and profits but has to be gauged primarily in terms of employment and earnings of the

people. In other words, man has to be the focal point of development. Accordingly, subject to meeting their requirement of the Contract Labour

(Regulation and Abolition) Act, 1970, the undertaking concerned were recommended to discontinue contract labour and absorb as many of the labour

that was feasible as direct employees. It was also recommended that both Central and State Government should appoint a Committee to investigate

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establishments in which contract labours are engaged and where under the relevant provisions of the Act, contract labour system can be abolished.

32. In Chennai Port Trust (Supra), the employees employed by the Port Trust who work round the clock in shifts to run and maintain the activities of

Port Trust. They were provided with the facility of canteen. The canteen was running since the year 1964 and a large number of employees were

employed to run the canteen. The employees working in the canteen formed an Association known as â??Chennai Port Trust Industrial Employees

Canteen Workers Welfare Associationâ?. They filed the writ petition before the High Court seeking a direction to the authority to treat the employees

working in the canteen to be regular employees of the Chennai Port Trust and pay them all the benefits at par with the regular employees. The claim

was proposed by the Port Trust contending that they have no control over the activities of the canteen including its employees and secondly, the

question as to whether the canteen employees are to be treated as employees of the Chennai Port Trust or not was a question of act and therefore,

writ petition was not the effective remedy to decide this question. Therefore, according to them, the issue should be raised before the Industrial

Tribunal for adjudication. The writ petition was however allowed by the Single Judge of the High Court and the intra court appeal filed before the

Division Bench of the Court by the Port Trust was also dismissed. On further appeal before the Apex Court, the Apex Court dismissed the appeal and

upheld the decision of the High Court by holding that the decision of Indian Petrochemicals Corporation Limited and Another Vs. Shramik Sena &

Ors. (1999) 6 SCC 439 was rightly relied upon by the employee and that it was too late in a day to entertain the submission that the matter should be

taken to the Industrial Tribunal/Labour Court for adjudication. It may however be noticed that large number of workers/ employees were said to have

been employed by the Port Trust to work round the clock in shifts to run and maintain the activities of the Port Trust. The facts in the present case

however is that the NHPC in categorical terms have denied employing the members of the petitioner Union directly. According to them, it is the

contractors who have employed them and therefore, the role of the NHPC is only that of a principal employer.

33. The Apex Court in the case of Steel Authority of India Ltd. & Ors. (Supra) held that Section 10 of Contract Labour (Regulation and Abolition)

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Act, 1970 neither expressly or by necessary implication, provides for automatic absorption of contract labour on issuing a notification by the

appropriate Government under sub-section (i) of Section 10, prohibiting employment of contract labour in any process, operation of other work in any

establishment. Consequently, the principal employer cannot be required to order absorption of the contract labour working in the establishment

concerned. On issuance of prohibition notification under Section 10 (1) of the said Act prohibiting employment of contract labour or otherwise, in an

industrial dispute brought before it by any contract labour in regard to conditions of service, the industrial adjudicator will have to consider the question

whether the contractor has been interposed either on the ground of having undertaken to produce any given result for the establishment or for supply

of contract labour for work of the establishment under a genuine contract or is a mere ruse/ camouflage to evade compliance with various beneficial

legislations so as to deprive the workers of the benefit thereunder. If the contract is found to be not genuine but a mere camouflage, the so-called

contract labour will have to be treated as employees of the principal employer who shall be directed to regularize the services of the contract labour in

the establishment concerned subject to the conditions as may be specified by it for that purpose.

34. In the case of Balwant Rai Saluja & Anr. (Supra), the Apex Court held 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. By applying the above test, it can only be seen that the members of the petitioners Union are

paid their wage or remuneration through the Contractors engaged by the NHPC. The same is evident from the documents annexed by the NHPC in

their affidavit-in-reply filed on 31.01.2018.

35. Thus, upon due consideration of the rival submissions, I am of the considered view that the petitioners have not made out any case for

regularization/absorption of their service and more particularly, having regard to the nature of the prayer made, a relief which is not sought for cannot

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be granted. Also the materials available on record is not sufficient to show that there is a master servant relationship between the petitioners and the

HPCL. In that view of the matter, I do not find the necessity to dwell upon the other cited authorities. Thus, the writ petition is found to be without

merit and the same is accordingly dismissed. No cost.

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