
(2011) 09 DEL CK 0306

In the Delhi High Court

Case No : Letters Patent Appeal No. 422 of 2010

Subhash and Others

APPELLANT

Vs

Guru Teg Bahadur Hospital

RESPONDENT

Date of Decision : 15-09-2011

Acts Referred:

Industrial Disputes Act, 1947 — Section 17B

Citation : (2011) 8 AD 571 : (2012) LLR 16

Hon'ble Judges : Dipak Misra, C.J.;Sanjiv Khanna, J

Bench : Division Bench

Advocate : Manoj v. George, for the Appellant; Avnish Ahlawat, for the Respondent

Final Decision : Disposed Off

Judgement

Sanjiv Khanna, J.—This intra-Court appeal has been filed by the Appellants, who are 24 in number and are represented by a trade union. The Appellants have assailed the order dated 2nd June, 2010 passed by the learned single Judge allowing Writ Petition (Civil) Nos. 8594/2004 and 8616/2004, which were filed by the Respondent herein-Guru Teg Bahadur Hospital. By the impugned decision two awards both dated 4th February, 2004 in ID No. 93/1996 and ID No. 143/1996 have been set aside. By award dated 4th February, 2004 in ID No. 93/1996, the Industrial Adjudicator had held that the applicants, who were 26 in number, were direct employees of the Respondent and the contract between the Respondent and M/s Lakshmi Chand and Sons was sham and a camouflage. It was further directed that these employees should be regularised against the vacancies, which had arisen after termination of services of the Appellants and the balance/rest of the employees should be regularised as and when vacancy arise. ID No. 143/1996 was filed on behalf of 35 workmen and in the award dated 4th February, 2004, it was directed that Sushil Kumar, Subash I, Manoj, Bijender, Subash II, Raju, Ramesh Kumar, Rajesh, Pappu, Surrender, Deep Chand, Lalit, Bhim Sen, Sanjay, Rajeev, Sri Pal, Sanju, Ramesh, Subash III, Pradeep, Shammi

and Pinto were entitled to reinstatement with full back wages and continuity in service.

2. Learned Counsel for the Appellants has submitted that the decision of the learned single judge is contrary to law as there was no ground and reason to upset the finding of the Industrial Adjudicator that the contract between the Respondent management and Lakshmi Chand and Sons was sham and a camouflage. The writ Court was not sitting as an appellate forum and the written contract was never brought on record. Learned Counsel for the Appellants has also submitted that they had applied for information under the Right to Information Act, 2005 and Central Information Commission has recorded that the agreements/contracts between the Respondent management and Lakshmi Chand and Sons have not been located and the Public Information Officer has been directed to file a police complaint stating that the records have been stolen/lost and when this fact was discovered. He has drawn our attention to the order dated 25th April, 2011 passed by the Central Information Commission that there was a possibility that the file between the Respondent management and the Lakshmi Chand and Sons was never opened. He further submits that the recruitments in Class IV were made in 1999 and 2000 as has been admitted in the information provided under the Right to Information Act. Reliance is placed on *International Airport Authority of India Vs. International Air Cargo Workers' Union and Another*, and observations in *Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc. etc.*, .

3. To begin with, reference may be made to the two decisions relied upon by the Appellants. Paragraph 107 at page 56 of the above citation in the case of *Steel Authority of India Limited (supra)* reads as under:

107. An analysis of the cases, discussed above, shows that they fall in three classes: (i) where contract labour is engaged in or in connection with the work of an establishment and employment of contract labour is prohibited either because the industrial adjudicator/court ordered abolition of contract labour or because the appropriate Government issued notification u/s 10(1) of the CLRA Act, no automatic absorption of the contract labour working in the establishment was ordered; (ii) where the contract was found to be a sham and nominal, rather a camouflage, in which case the contract labour working in the establishment of the principal employer were held, in fact and in reality, the employees of the principal employer himself. Indeed, such cases do not relate to abolition of contract labour but present instances wherein the Court pierced the veil and declared the correct position as a fact at the stage after employment of contract labour stood prohibited; (iii) where in discharge of a statutory obligation of maintaining a canteen in an establishment the principal employer availed the services of a contractor the courts have held that the contract labour would indeed be the employees of the principal employer.

4. Paragraphs 35 to 37 at page 327 of the above citation in the case of *International Airport Authority of India (supra)* read as under:

35. As noticed above, SAIL did not specifically deal with the legal position as to when a dispute is brought before the industrial adjudicator as to whether the contract labour agreement is a sham, nominal and merely a camouflage, when there is no prohibition notification u/s 10(1) of the CLRA Act.

36. But where there is no abolition of contract labour u/s 10 of the CLRA Act, but the contract labour contend that the contract between the principal employer and the contractor is sham and nominal, the remedy is purely under the Industrial Disputes Act. The principles in Gujarat Electricity Board continue to govern the issue. The remedy of the workmen is to approach the industrial adjudicator for an adjudication of their dispute that they are the direct employees of the principal employer and the agreement is sham, nominal and merely a camouflage, even when there is no order u/s 10(1) of the CLRA Act.

37. The industrial adjudicator can grant the relief sought if it finds that contract between the principal employer and the contractor is sham, nominal and merely a camouflage to deny employment benefits to the employer and that there is in fact a direct employment, by applying tests like: who pays the salary; who has the power to remove/dismiss from service or initiate disciplinary action; who can tell the employee the way in which the work should be done, in short, who has direction and control over the employee. But where there is no notification u/s 10 of the CLRA Act and where it is not proved in the industrial adjudication that the contract was a sham/nominal and camouflage, then the question of directing the principal employer to absorb or regularise the services of the contract labour does not arise.

5. The short question which arises for consideration is whether the contract between the Respondent management and the contractor, namely, Lakshmi Chand and Sons, was sham and nominal, rather a camouflage and in fact the Appellants herein were employees of the Respondent.

6. The Appellants in their claim petitions in the two IDs had stated that they were employed as safai karamcharies by the Respondent management on temporary basis. After some time, they were placed under the contract system and were denied facilities of conveyance allowance, house rent allowance, etc. However, in the claim petition, no date of appointment was mentioned or stated. On the other hand, the Respondent management in their reply had stated that the Appellants were not their employees. The Appellants were employees of Lakshmi Chand and Sons, 65/57, New Rohtak Road, New Delhi-5, a contractor employed with the Respondent for providing cleaning services. After working for 2-3 months, the Appellants started claiming their right to permanent absorption and employment directly under the Respondent hospital.

7. In the affidavit by way of evidence, however, Sushil Kumar had stated that he had been working in the Respondent hospital since 1st March, 1993. However, he was not given any appointment letter or other facilities though appointment was on permanent basis and after some time he was placed under the contract

system and deprived of all benefits, which he was entitled to.

8. The learned tribunal accepted the contention and stand of the Appellants in ID No. 93/1996, inter alia, recording that the contract between the Respondent management and the contractor-Lakshmi Chand and Sons was not produced and it has to be held that the same was a camouflage and sham contract for the name's sake. For giving the above finding, the Industrial Adjudicator relied upon the fact that the Respondent management in their written statement had admitted that the contract was given to keep some part of the hospital neat and clean and the work assigned was of continuous and permanent nature. He had also observed that some posts of sweeper had fallen vacant but these had been filled up by outsiders or third parties and not by offering employment to the Appellants.

9. The aforesaid findings recorded by the Industrial Adjudicator have been rightly interfered and not accepted by the learned single Judge on the ground that the Industrial Adjudicator had made an error in the decision making process. In ID No. 143/1996, Sushil Kumar on cross-examination had stated as under:

Management is a Govt. concern. I appeared in person before medical supdt., who was at that time making recruitments for various posts. I had come to know about it from reliable source. I had made application for the purpose, but I do not have copy of the same with me. I do not remember name of Medical Supdt. It is wrong that I did not appear before Medical Supdt. nor made application in writing for employment. My name was not regd. with any Employment Exchange. It is wrong that I was employed by contractor M/s Lakshmi Chand & Sons, 65/57, new Rohtak Road, New Delhi-5. It is wrong that contractor was making payment of salary to me. I was made payment by mgt. on plain voucher and I cannot produce any salary slip. I do not know if deduction of PF was made from my salary. (vold.) paid by mgt. Ad card Ex. WW1/4 does not bear any postal stamp or stamp of management. It is wrong that letter Ex.WW1/1, WW1/5 & WW1/7 were never sent. I do not know English.

(emphasis supplied)

10. The Respondent had also placed on record correspondence exchanged between them and Lakshmi Chand and Sons pursuant to which the latter was awarded the contract for cleaning and upkeep of a portion of the hospital. The Respondent in their evidence before the Industrial Adjudicator had categorically stated that the Respondent management had never paid any salary or wages to any of the Appellants. The Respondent had awarded sanitation work to Lakshmi Chand and Sons and charges were paid by them to the said concern. The Appellants were never appointed through any process of selection and the Respondent hospital being a Government hospital has to take sanction from the Government for filling permanent vacant posts or create an additional post. Thereafter, these posts have to be advertised and a selection procedure has to be followed. As per the prescribed selection procedure, the candidate must be

registered with the Employment Exchange. The Respondent being a Government hospital, all payments made have to be recorded. It was further pointed out that the Lakshmi Chand and Sons was no longer a contractor for sanitation work and the hospital was taking sanitation services from its own employees. The deponent, a witness of the Respondent hospital, was cross-examined by the Appellants. In the cross-examination, he has stated that the Appellants were never appointed by the management and he could not state whether they were employees of the contractor.

11. The learned single Judge is correct in recording the finding that there was no dispute that at the time of termination, the Appellants were employees of the contractor. The non-production of contract, therefore, by itself was not material and relevant. The question was whether the said contract and employment of the Appellants with the contractor was merely a camouflage and a make belief. The Appellants had contended that they were initially employed directly by the Respondent management. This was the core and the edifice of the claim made by the Appellants. The Industrial Adjudicator did not examine and answer this material and relevant question and went on other aspects. The learned single Judge examined the said aspect and the evidence on record and came to the conclusion that there was no evidence at all to show, establish and give a finding that the Appellants were initially directly employed by the Respondent management. There is no appointment letter, pay slip and proof of payment by the Respondent to the Appellants. The Appellants did not ask the Respondent management to produce their accounts or give the name or details of persons from whom payments were received. The witness of the management was not cross-examined on the said aspect. The Respondent is a Government hospital and whatever payments were/are made have to be accounted for, vouched and recorded. They are subjected to audit both internal and external. Even if ad hoc/casual employees were/are appointed, procedure has to be followed and thereafter payments are recorded and made to the ad hoc/casual employees. There is no material and evidence to prove and establish initial direct employment between the Appellants and the Respondent. Once it is held that there is no ground or material to hold that the Appellants were initially directly appointed as temporary/casual workers by the Respondent-management, the claim of the Appellants that the subsequent contract between the Respondent-management and the contractor Lakshmi Chand and Sons is sham and camouflage has to fail and has to be rejected. The learned single Judge, therefore, is right in exercising the power of judicial review and setting aside the two awards.

12. Pursuant to awards, the Appellants herein had filed applications u/s 17B of the Industrial Disputes Act, 1947 and they were directed to be paid last drawn wages or minimum wages, whichever were higher. The learned single Judge has directed refund of the minimum wages in excess of the last drawn wages. Having heard learned Counsel for the parties, we feel that the Appellants should not be directed to refund the payments made to them u/s 17B of the Industrial Disputes

Act. Direction of the learned single Judge to this extent is set aside. The appeal is accordingly disposed of. There will be no order as to costs.