
(2004) 08 KL CK 0048
In the High Court Of Kerala
Case No : O.P. No's. 23640 of 1999

West Fort Hospital

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 06-08-2004

Acts Referred:

Industrial Disputes Act, 1947 — Section 2

Citation : (2004) 3 KLT 139 : (2004) 3 LLJ 1017

Hon'ble Judges : M. Ramachandran, J

Bench : Single Bench

Advocate : V.R. Kesava Kaimal and N.M. Madhu, for the Appellant; K. Ramesh and Thomaskutty, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

M. Ramachandran, J.—By order dated 13.12.1995, the Government had referred the following issue for adjudication to the Industrial Tribunal, Palakkad (2nd respondent herein):

"Whether the termination of 6 workers namely, M.T. Mary Devassy, T.M. Mariamma, K.S. Vasanthi Smt.V.N. Radha, Omana Xavier and K.K. Lilly is justifiable?If not what relief they are entitled to?"

2. The Tribunal, by Award dated 8.3.1999 in I.D. No. 3 of 1996, has overruled the objection of the management-Hospital viz., that being contract workmen the dispute was not maintainable. The claim of the management that in any case they were entitled to invoke the provisions of Sub-clause(bb) of Section 2(oo) of the Industrial Disputes Act (for short "the Act") also has been rejected. It is pointed out that they had no complaint against the workers regarding the performance of their duties. Since their services were terminated without giving them notice and compensation or assigning any reasons, there was no compliance with Section 25F of the Act. Therefore, it was a case of clear retrenchment violating the mandatory provisions. Consequently, it was held that

the workmen deserved the normal relief of reinstatement with back wages and other benefits.

3. The above finding has been challenged by the management of the hospital, pointing out that the "Award is illegal and ultra vires" According to Mr. Madhu, learned counsel for the petitioner, the Tribunal had overlooked that there was only an agreement with an association and there was no direct contract with the workmen and the agreement was operative for a period of 11 months only. There was non-renewal of the agreement and the proceedings, as if it was a contract of employment, were unwarranted. It was a case where, according to them, right had been exercised bona fide and as per a contract, but the relevant aspects had been thoroughly overlooked. Interference was sought for, on these and other contentions urged.

4. I may examine the rival contentions that have been raised as the parties had drawn my attention to principles, as explained by decisions of various High Courts and the Supreme Court.

5. Ext.P1 is the contract on which reliance had been made by the petitioner-management. It was produced as Ext.M1 before the Tribunal. The management had produced muster rolls, wage registers, salary sheets and vouchers. There was not much of any documentary evidence produced by the workmen. They heavily depend upon the oral evidence that had been supplied on their side. The Manager of the Hospital was examined as a witness for the Hospital.

6. The contention of the petitioner-management could be summarised as following:

Finding the need for engaging personnel for attending to the cleaning work available in the hospital and nursing home, an agreement had been entered into with a party "M/s. Mary's and Company". They had offered to give the work force. Ext.P1 is the agreement. The first party to the agreement is the Director of West Fort Hospital, Thrissur Dr. P.P.Mohanan. Mary's and Company is represented by eight persons, who are signatories to the agreement. The workmen, whose cause had been adjudicated by the Tribunal, are respondents 3 to 8 and they are signatories to Ext.P1 as well.

7. The salient features of the agreement were as following:

(i) Three persons were to work in the Washing Section, another three persons were to work in the Hospital cleaning and one in the Nursing School.

(ii) On all days, seven persons as above were to attend the work and were to meet the Nursing Superintendent in the morning and get instructions as to the work to which they were to be deputed.

(iii) In case the work turned out by them were not satisfactory, and the management so pointed out, personnel were liable to be changed. If no fresh supply was there, the agreement was to stand terminated.

(iv) For the work as above, a total amount of Rs. 5500/- was payable by the management to the company every month.

The agreement was for a period of 11 months from 9.2.1994. Only on consensus between the parties, the agreement was liable to be renewed. Smt. M.T. Mary is the first signatory and altogether eight persons have signed in the agreement, as representing the second party.

8. As could be found from Ext.P2 Award, the claim of the workmen was that their services were terminated effective from 28.12.1994 without assigning any reasons. It was claimed that they had requested for payment of statutory benefits and this constituted as the reason for termination. However, from the very inception, the case of the management was that they were contract employees and the arrangement ceased on the expiry of the agreement executed by them.

9. In the rejoinder, controverting the contentions of the management, it seems that the employees had urged that they had put their signature on some documents as required by the management without knowing the contents thereof. But, they were sure that they had never worked on contract basis. These were the basic facts presented by the parties before the Tribunal.

10. The first question posed by the Tribunal was as to whether the workers could be considered as "workmen" within the meaning of Section 2(s) of the Act. According to him, when the management took up such a contention, it was the duty of the Tribunal to lift the veil and find the real position. (I may note here that even though Ext.P1 produced before this Court may show that there was no signature of the first party to the agreement, in paragraph 6 of the award, when the facts of the case had been adverted to, the Tribunal has stated that Ext.M 1 produced before it is signed by the management and 8 persons). The Tribunal, therefore, had examined the genuineness of Ext.P1. The case of the Hospital was that Ext.P1 was the basis of the engagement, as agreed between the parties. The workmen had stated that capitalising their ignorance, without knowing details, their signatures had been obtained in certain papers. Later on they had shifted from the stand and pleaded about signature in blank sheets.

11. After assessing the situation, the Tribunal held that "therefore it may be true that Ext.M1 is an agreement executed by eight persons as claimed by the management".

12. But without stopping here, the Tribunal had posed a further question as to whether Ext.M1 is a contract of service or a contract for service. Relying on Dharangadhra Chemical Works Ltd. v. State of Saurashtra 1957 (I) LLJ 447, the Tribunal was of opinion that the real test for deciding whether contract is of employment or not is to find out whether the agreement was for personal labour of the person engaged and if that be so, whether the contract was one of employment and whether the work was "time work" or "piece-work". Tribunal came to the conclusion that Ext.M1 was for personal labour. It had been further

held that the terms of the agreement, (referred to earlier in paragraph 6), indicate that the persons were working under the direct control and supervision of the management. The Clause relating to replacement, according to the Tribunal, showed that there was disciplinary control over the persons. Therefore, it was recorded that Ext.M1 is sufficient to hold that there existed master-servant relationship between the management and the workers concerned, and they were working on contract of service and not on contract for service. Therefore, the Tribunal had come to the further conclusion that they were workmen coming u/s 2(s) of the Act, and therefore there was no infirmity in the reference order. As a result the workers were entitled to invoke the provisions of the I.D. Act.

13. In these premises, the Tribunal had found that there was uninterrupted employment of more than 240 days, though they had worked in the establishment for only 11 months. Thus, they had "continuous service" as defined u/s 25B of the Act. On such finding, and on the basis that the work was of a regular nature, and the employees were not shown as guilty of any lapses, the Tribunal held that it was a case where it would not have been possible for the petitioner to rely on Sub-clause(bb) of Section 2(oo) of the Act. When the workmen were engaged for cleaning and washing works, which are perennial and permanent in nature, and when there was direct supervision, such a plea could not have been entertainable, according to him. In other words, for all purposes Ext.P1 was to be ignored, and it did not in any manner bind the employees nor stood against their rights to claim regular employment.

14. It is evident that the Tribunal has gone into these aspects in a most elaborate manner. According to the Tribunal, Sub-section (bb) of Section 2(oo) of the Act could be applied only when the work available to be given is of casual or temporary nature, which could be completed within a specified period. According to him, the only exception might be that if there were temporary hands employed against permanent posts, as a prelude to comply with the recruitment rules for regular engagement, such engagement might have been permissible, and perhaps also when a person was engaged on probation against a permanent post. Only in such cases, the management could have resorted to the exception provided under the Act. Since, in the present case, it was not the contention of the management that engagement was on a stop-gap arrangement or as probationers, they were disabled to engage persons on contract basis.

15. Certain facts appear to be beyond dispute. The workmen have, in unambiguous terms, referred to the termination effective from 28.12.1994. That presupposes automatically that this had been on the expiry of 11 months of the date of Ext.P1 agreement. Therefore, we have to assume that agreement has been accepted by the parties and acted upon. Moreover, the Tribunal has entered a definite finding that the agreement has been executed by 8 persons, as claimed by the management.

16. If that be so, the entire colour of the case, according to me, has to change. The plea of the management from the very inception was that the dispute was

not maintainable. This was because the persons who raised the dispute were not their employees and there was no employer-employee relationship, as is normally understood. When Ext.P1 is a reality, the management has jural relationship with only Mary's and Company and whether A or B had been employed, as nominated by the above said company, was insignificant. It is further to be noticed that only 7 out of the 8 signatories, referred to in Ext.P1, were to be employed at a time. There was also a stipulation that the said company had obligation to withdraw a person, whose work was not found up to the mark. Thus, the 8 persons, who were signatories to Ext.P1 agreement, were a real entity as a group. It is the settled position that there can be a partnership as between persons, even without a formal written deed. The persons concerned, who had raised the dispute, have not taken the Court into confidence for divulging the details of their working arrangement and even have attempted to disown the agreement. It is clear that they were not particularly fastidious about speaking the truth. We have an entity behind Ext.P1, (in this case the group themselves) who was to be recognized as a contractor, who was authorised and entitled to supply employees for the work in the establishment. Therefore, the management was justified in taking a stand that Mary's and Company was acting as a contractor and so long as the entry of the employees concerned were through this agency, they had no direct employer-employee relationship, as is normally understood. Control test or essentiality test automatically had no application.

17. Further, the Tribunal need have adverted to whether there was contract of employment or contract for employment albeit the contentions, only when such an issue was specifically referred for adjudication, say its justifiability or ethics. It is not as if contractual employees are never engaged in an establishment. The presence of the Contract Labour (Regulation and Abolition) Act indicates that such arrangements were there, in the running of an establishment, and it was to be on acceptable terms. For their own reasons, the hospital authorities might have thought of engaging workmen on contract basis for peculiar reasons that might be available in the industry. However, without sufficient materials, in any case, to decry the arrangement and call it mala fide or illegal, was unwarranted. If the issue was directly the lis, the parties could have adduced materials for or against the argument, subject to jurisdiction of the Tribunal to adjudicate on the issue. The Tribunal is a creature of the statutes, and has to confine enquiry with respect to the issues referred for adjudication. In appropriate cases, ancillary matters also may be subjected to examination, but that is not to be confused with unbridled jurisdiction. Therefore, the basic finding that the persons concerned were entitled to be recognised as workmen suffers from a jurisdictional error and the award is vitiated for this reason.

18. As referred to earlier, mostly engagement of employees is in the discretion of the employer, since what is being run is a commercial venture and in the best possible manner the establishment expenditure, especially in respect of wages, is to be controlled. If in their wisdom or discretion, the management had thought of

employing workmen, on contract basis, for works pertaining to watch and ward, security, laboratory work, gardening, cleaning, canteen facilities etc., or the like, it would not have been possible to jump to a conclusion that such action, perhaps for self preservation, was ab initio objectionable and all such engagements always were required to be on regular basis alone. In fact, that will be interfering with the right of administration and inhibition of freedom of pursuing a profession. There may be cases where, to avoid liabilities in respect of regular workmen, engagement on casual, contractual or temporary basis might be permissible, legally and validly.

19. That such a person may be regularly working in the hospital, with the equipments, and is compensated, do not ipso facto be reason for holding that he is to be considered as belonging to the establishment, as an employee. Of course, if such specific issues were referred for adjudication, perhaps in appropriate cases, it would have been possible for the authority to enter into a finding. Also there may be instances of statutes containing specific (artificial) definitions, treating such persons as belonging to the establishment for conferment of certain benefits. But that is not the case here under the I.D. Act. Definitely in this case, according to me, the Tribunal has crossed limits of the enquiry. Though the workmen had attempted to claim, as gatherable from the evidence that had been tendered by WW1, that individual payments were made, it has to be noticed that the documentary evidence and the evidence tendered by MW1 was wholly otherwise. It has been practically overlooked. Ext.P1 agreement provided for payment of a lump sum amount of Rs,5,500/- towards the contract premium every month. The acceptable evidence is to the effect that such payment was made to the representative body of the employees engaged, which could be understood as a partnership. It was at the discretion of the said body that distribution of payments were being made. There is nothing to indicate as to whether there was uniformity in payment even, or the management had any say in the matter. I am sure that if the employees had any idea of claiming regular employment, the engagement would not at all have resulted.

20. I may at this juncture also advert to certain provisions in the Indian Partnership Act. The arrangements brought in by Ext.P1 appears to be a payment to a group, which is a partnership, when we examine the features of partnership as coming u/s 4 of the Act. That the details were not supplied to the Tribunal by the employees will not come to their advantage.

21. So viewed, it could be held that the Tribunal has examined the issue divorced of the real facts which had been presented. When Ext.P1 settlement is found as one which had been entered into by the parties, the enquiry should have been confined to the jural relations the parties had chosen for themselves and advertence to the principles of contract for employment or any other issues automatically had become irrelevant.

22. Section 8 of the Act refers to a particular partnership, where a person may become a partner with another person in particular adventures or undertakings.

u/s 11, determination of rights and duties of partners could be on the basis of contract express or implied by a course of dealing, and in the face of Ext.P1 it is idle for the workmen (respondents in this case) to continue to agitate that there was no such arrangement. The finding in this regard, as against the petitioner, is therefore liable to be vacated. If the agreement was with individual workmen, on a contract, it would have been possible for them to claim benefits like minimum wages, because the engagement was direct. But when it is through the agreement with the contracting body, they can claim only the agreed payments alone.

23. Even though this may be sufficient to dispose of the Original Petition, by holding that the dispute was not sustainable and the Award a nullity, I may advert to the other aspects which have also been dealt with by the Tribunal, namely, the impact of Section 2(oo)(bb) of the Industrial Disputes Act. For a moment, we may understand the situation, as canvassed by the workmen, that they were engaged by the employer in a regular work of the establishment. But the fact remains that this was only because of Ext.P1. It was a term of the contract that the engagement was for a period of 11 months and thereafter only if there was mutual consent, the arrangements could have continued. Therefore, it is definite that the engagement was for a specified period alone. Tribunal was not prepared, however, to recognise this.

24. In support of the finding that Section 2(oo)(bb) has no relevance, reliance has been placed on the decision in Balbir Singh Vs. Kurukshetra Central Coop. Bank Ltd. and Another, . A Division Bench of the Punjab and Haryana High Court held that "Clause(bb), which is an exception, is to be so interpreted as to limit it to cases where the work itself has been accomplished and the agreement of hiring for a specific period was genuine. If the work continues the non-renewal of the contract on the face of it has to be dubbed as mala fide. It would be fraud in law if it is interpreted otherwise". The Tribunal had also adverted to a decision of the Bombay High Court of the same tenor, reported in Dilip Hanumantrao Shirke and others Vs. Zilla Parishad Yavatmal and others, . Observation accepted was that "to make appointments for specific periods did not absolve the management from complying with the conditions stipulated u/s 25F of the Industrial Disputes Act at the time the period of employment comes to an end." By the nature of the exception, Sub-section (bb) was to be strictly constructed, according to the Court, as it takes away certain rights of workmen which generally the class had been enjoying. The extensive manner in which the decision has been extracted in the Award shows that the Tribunal had rested the Award on the observations as above. The guiding principle of the decision appears to be that "it is always open to the Court adjudicating the dispute to examine each and every case in its proper perspective and to protect the workman against the abuse of the amended provision". But a general statement as above would have easily been understood as permit for transgressing the discretionary limits. The safer guide appears to be to lay down that the general rule was to see that the statute had not been violated, and interference only in exceptional case. This is because not

only the workmen were entitled to protection, but the employer also needed protection from the rigours of procedure.

25. It is precisely these areas that are referred to by Sub-section (bb) of Section 2(oo) of the Act. I do not think the judgments relied on by the Tribunal have laid down the correct law. In any case, I find it difficult to agree with the propositions that had been laid down by the Punjab and Haryana High Court as also the Bombay High Court in the decisions, which are referred to in the Award. It may be pertinent to note that the validity and presence of the amendment Clause have been upheld by various High Courts (See Ram Prasad v. State of Rajasthan (1992 Lab. I.C. 2139) and Terminated Full Time Temporary L.I.C. Employees Welfare Association v. Senior Divisional Manager 1993 I LLJ 1040.

26. As far as I could see, the amendment brought in to the section, by Act 49 of 1984, was with a specific purpose. When the Supreme Court in The State Bank of India Vs. Shri N. Sundara Money, followed by Hindustan Steel Ltd. Vs. The Presiding Officer, Labour Court, Orissa and Others, and Santosh Gupta Vs. State Bank of Patiala, , gave a wide meaning to the definition of "retrenchment" in the I.D. Act, the issue had come up before the Parliament. The ruling judgment, at the time of rendering of Sundaramoney's case was the one rendered in Barsi Light Railway Co. Ltd. v. K.N. Joglekar 1957 I LLJ 243, by a Constitution Bench of the Supreme Court. The accepted meaning of the word "retrenchment" was that it involved a circumstance where surplus labour was discharged. However, by a catena of cases, the Supreme Court had held that retrenchment has a wider connotation. Although it had been later on observed that the proposition might have been too widely worded, especially because of the said decisions, the Supreme Court found that the clock could not have been put back Management of Karnataka State Road Transport Corporation, Bangalore Vs. M. Boraiah and Another, . It was in this back drop that the Parliament had brought in the amendment by introducing a further exemption by way of Section 2(oo)(bb) of the Act. It purported to exclude from the ambit of the definition, certain termination by the following terms:

"(bb) termination of the service of a workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or"

The statement of objects and reasons for the amendment as found from Gazette date 2.5.1984 could be extracted herein below;

"(i) Difficulties have arisen in the interpretation of the expression "retrenchment". It is proposed to exclude from the definition of "retrenchment" as contained in the Act termination of the service of a workman as a result of the non-renewal of the contract of employment on its expiry and of the termination of such contract in accordance with the provisions thereof."

It is significant to note that the expression used is contract of employment.

Notwithstanding the position that a workman had been directly employed on a contract basis for the work of an establishment, it had been specifically provided that if the contract provided for a specific duration, the termination at the end of the period, which was automatic, could not have been considered as retrenchment. We have to understand the situation as is brought about because of the intervention of the Parliament. Even a beneficial interpretation in favour of the weaker section therefore should not violate the language of the section. According to me, the parameters prescribed by the Punjab and Haryana and the Bombay High Courts are without advertent to the above statutory prescription. The Court can interpret a provision in a statute, if there is ambiguity or absurdity, but I am certain that advertence to past practices, which were in vogue, or like circumstances, or the views of a Judge cannot permit a reading down of the provision, rendering it otiose or unworkable. A mischief had been sought to be cured by an amendment, and in an adjudication process, strict obedience to the plain meaning alone might be warranted. Even if the work was of a regular nature in a given case, there was hardly any prohibition in engaging personnel on contract basis and the employer could have successfully contended that a termination did not attract the formalities of a retrenchment, when the termination was the issue before the Tribunal. The only area of examination was whether the engagement was for a specified term. If the arrangement itself was to be subjected to attack, appropriate proceedings for such purpose could have been resorted to but such enquiry did not come within the scope of the present reference.

27. It is well known that in the matter of retrenchment, especially in a case where the employer is a large establishment, termination cannot be resorted to, at the mere volition of an employer. Normally, in a case of retrenchment, seniority of the category has to be borne in mind. Permission has to be obtained from Government, which itself could be subjected to further adjudication. However, in certain matters at least, an employer was sought to be given a free hand and it has to be accepted as a healthy trend for reasons which are obvious. Restrictions at every stage will strangle entrepreneurship. What the Tribunal finds is that if the engagement is for a work of regular nature, so long as the work exists, the contract of the employment is to be viewed with suspicion, and it is impermissible. The terms of the section, according to me, does not permit such a conclusion or interpretation. It has not been recognised that the petitioner herein was obliged to have a licence under the Contract Labour (Regulation and Abolition) Act, as there is no contract labour engaged beyond the permissible limit. Therefore, there was no illegality in the contract, and it would be a sin to allege that there were mala fides when the facts are evident that as an economic measure, in the interest of the establishment, a working arrangement had been attempted to. To direct that for the reason of such engagement, which is permitted by the law of the land, the petitioner has to suffer an award and has to engage persons, whom he had not even selected, may not be fair by any standards. This is with continuity of service and back wages, running to lakhs of

rupees. This might be an act in retrograde and does not at all appear to be equitable. I am almost sure that if the Hospital administration had even an inkling that such claims were likely to be raised, or the agreement would have been ignored, they would not have even thought of such engagement.

28. It is evident that the employer had arranged his affairs, as normally instructed as in consonance with law and as authorised by the Industrial Disputes Act. An employment for a term specified was permissible and could not have been illegal. This was done in consonance with the above authorised procedure. On the plea that the weaker section of the society is to be protected from exploitation, the basic contractual rights of the employer could not have been ignored. He is also entitled to equal protection of laws, as the Constitution mandates. A contrary stand will lead to distrust of the rule of law.

29. Therefore, I find that the Tribunal has relied on circumstances, which are not acceptable or permissible. The true and correct perception of the statutes has been overlooked. The reasoning given for reinstatement also is found, to be feeble. When even direct employment could have been resorted to by contractual terms, the engagement of contractor's workmen also was permissible on agreed terms.

30. Sri. Ramesh, counsel appearing for the workmen, thereupon submitted that there was a contention raised by the workmen that Ext P1 was a forged document, and blank papers were got signed In view of the award, it Has not been possible for them to attack this part of the finding.

31. However, the contention appears to be without any basis. There was no plea that blank papers had been signed by the workmen. The plea was that they have signed papers without understanding or appreciating what had been written in them. further, only because of Ext.P1 the Tribunal has found that there was a contract for employment and the findings of the Tribunal are on this presumption. Although I have found that the reasoning of the Tribunal was not sustainable, there is nothing to show that while making a finding on Ext.P1 the Tribunal had erred. The contention is therefore repelled.

32. Consequently, the Original Petition is allowed. The dispute was hot maintainable and the Award, in any case, requires to be set aside It should be understood that the Award therefore never conferred any benefits on the workmen concerned. Parties are to suffer then costs.