

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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WP(C) NO.6776/2002

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Date of decision: 5th April, 2010

SH. ANIL KUMAR PRABHAKAR

..... Petitioner

Through: Mr. Naushad Ahmad Khan & Mr. Rajesh
Kumar Verma, Advocates

Versus

**TELECOMMUNICATIONS
CONSULTANT INDIA LTD. & ORS.**

.... Respondents

Through: Mr. Raaj Birbal, Sr. Advocate with Ms.
Raavi Birbal & Mr. Vivekanand Rana,
Advocates for R-1.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may
be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | YES |
| 3. | Whether the judgment should be reported
in the Digest? | YES |

RAJIV SAHAI ENDLAW, J.

1. The petitioner workman is aggrieved of the award dated 31st October, 2001 of the Labour Court answering the following reference:-

“Whether the termination of the services of Sh. Anil Kumar Prabhakar is illegal and / or unjustified and if so to what relief is he entitled and what directions are necessary in this respect?”

in favour of the respondent No.1 employer for the reason of the appointment of the petitioner workman being contractual within the meaning of Section 2 (oo)(bb) of the Industrial Disputes Act. It is the plea of the petitioner workman that his appointment with the respondent No.1 was not contractual and the said provision is not attracted.

2. The appointment of the petitioner was vide letter dated 5th November, 1983 of the respondent No.1, the relevant part whereof is as under:-

“Sub: Deputation of staff to Iraq for execution of TCIL’s project there – contract with M/s Thomson CSF

Shri A.K. Prabhakar, Diesel Engine Technician is required to proceed to Iraq in connection with execution of TCIL’s project there on 6-11-83. On reaching there, he will report to and deposit his passport with Shri R.P. Hans, Team Leader, TCIL, Baghdad, Iraq – P.O. Box No.1127, Tel. No.8871916 (off) 7748350 (Resi.).

The provisional rate of foreign DA payable to him in Iraq is US \$ 12.

This rate of DA is subject to revision by the Company as and when considered necessary. The payment of above mentioned DA to the official would be 60% in Indian currency and 40% in Iraqi Dinars.

The payment of DA during the period of leave abroad will be governed by the provisions contained in the office order No.TCIL/B/4/83/PER dated 11.04.83.

No DA will be admissible during the period of leave in India.

2. The deputation of the official is subject to the supplementary terms and conditions as are contained in Annexure-I (copy enclosed) for deputation abroad of the officers/officials of TCIL being sent abroad for the execution of TCIL’s project.

3. Prior Consent:

He should give an undertaking to the Company prior to their departure abroad that he agree to all terms and conditions of deputation as are contained in this letter including supplementary terms and conditions (Annexure I) and office orders mentioned in this letter.

4. He will collect his air ticket and ascertain his programme of journey from PRO, TCIL, New Delhi.

(S.C. MALIK)
SR. MANAGER (P&A)”

The relevant terms contained in Annexure-I to the aforesaid letter are as under:-

“1) To and fro air journey:

Air journey for each member of the team from Delhi to the destination abroad and back will be arranged at the company's expense.

2) Custody of air tickets and passports:

On reaching destination abroad the team leader should take custody of air tickets and passports of the team members and should keep them under his custody and should give them back to the team members only at the time of their departure for India. The passports should not be made available freely to anybody. Necessary endorsement should be obtained on the passports when required to ensure their continued validity.

4) Period of deputation:

The period of deputation will be one year which may be extended or curtailed as may be considered necessary by the company. The official will not be allowed to return to India before one year or before the completion of the project whichever is earlier and subject to exigency of work. If for any reason on his own account he performs returns to India before one year or before the completion of the project whoever is earlier, he will have to pay fare for his air journey from New Delhi to destination abroad and back. Necessary deduction in terms of office order No.8/4/83-PER dt. 12.3.83 on this subject, may be effected by the Project Director / Team Leader.

10) Repatriation:

In case the official wishes to return to India due to his personal reasons or his work/conduct has not been found satisfactory, he may be repatriated by the Company. In such event, the company shall recover from him the amount which has been incurred by it on his posting abroad.

17) Termination of assignment abroad:

Company reserves the right to terminate the assignment abroad of all or any one of these officers / officials being deputed abroad, without assigning any reason, at any time when it is so considered necessary in the interest of the company”.

Besides the aforesaid terms, Annexure-I also provides for the custody of air tickets and passport, accommodation to be provided by the petitioner during his stay abroad, messing facilities, overtime, transport to work site, medical facilities, leave abroad, insurance cover, confidentiality etc. In partial modification of the aforesaid appointment, vide letter dated 27th October, 1984 the foreign DA of the petitioner was enhanced to US \$ 13 with effect from 6th November, 1984.

3. It is the admitted position that the petitioner pursuant to the aforesaid appointment proceeded abroad and remained abroad till 2nd May, 1985 after which he returned to India. On 17th September, 1985 another identical appointment letter was issued to the petitioner asking him to proceed to Nigeria on the same terms and conditions as above. It is the case of the petitioner that on 12th November, 1985 he was directed to proceed to another unknown place in Nigeria from where he was on 27th December, 1985 directed to proceed to India and report for duty at the Delhi office of the respondent No.1 on 1st January, 1986 but no work was assigned to him; ultimately on 26th February, 1986 a memo dated 15th January, 1986 as under was issued to him:-

“Shri A.K. Prabhakar, Technician (daily wager) had been deputed to our Project in Nigeria. Since in Nigeria he was not found fit for the assignment given to him there, he was sent back to India.

Shri Prabhakar is hereby informed that his services are no longer required in TCIL as there is no work at the H. Qrs. On which his services can be utilized.

Sh. Prabhakar is also directed to deposit his passport with the undersigned immediately”.

On failure of conciliation, the reference aforesaid was made to the Labour Court.

4. The Labour Court has found that between the two appointments aforesaid of the petitioner there was a gap of three to four months; that the petitioner workman admitted that he did not work in India on any project; that the only business of the respondent No.1 in India was of laying of cables for MTNL and

other undertakings of Department of Telecommunications and there was no need for a diesel mechanic, as he is, in the said works; that the requirement of the respondent No.1 for a diesel mechanic as the petitioner is/was, for its projects abroad only. The Labour Court thus held that the petitioner was engaged for a specific project and his services came to an end after completion of the first project in Iraq; that after a few months his services were again engaged for a specific project in Nigeria from where he was sent back on his request; in the second project he did not complete 240 days; that he was thus not in continuous service with the respondent No.1 as per Section 25(B) and hence Section 25 was not applicable to him. The Labour Court also found the appointment aforesaid of the petitioner to be covered by the provisions of Section 2(oo)(bb) of the Act and held the provisions of Section 25(F) to be also inapplicable for the said reason.

5. The counsel for the petitioner has drawn attention to the photocopy of the passport issued to the petitioner and copy whereof has been filed before this Court. It is of Class 5 within the meaning of Schedule II to the Passport Act and commonly known as the 'White Passport' or official passport issued to government officials. It is urged that in the said passport, the profession of the petitioner is described as 'Government Service'. From the said passport it is also sought to be shown that the petitioner was travelling to and fro on the basis thereof and retaining custody himself of the passport. It is argued that the petitioner was permitted to have the custody of the passport even after termination of the first project in Iraq which shows that the petitioner was a government servant. The counsel for the petitioner has also argued that when he was in India between 2nd May, 1985 and 17th September, 1985 i.e. after returning from Iraq and before proceeding to Nigeria, he was in the employment of the respondent No.1. On enquiry as to whether any emoluments were paid to the petitioner during the said period, the counsel states that it is his evidence that he was paid during the said period, by repatriation of funds from London and the respondent No.1 has failed to produce any evidence in this regard. It is thus his contention that he was in the regular employment of the respondent No.1. Much emphasis is placed on the use of the expression "deputation" in the document aforesaid. It is urged that he was

regularly employed in India and only deputed abroad. Reliance is placed on ***S.M. Nilajkar Vs. Telecom. District Manager, Karnataka*** 2003 (3) SCALE 533 wherein the conditions for applicability of Section 2(o)(bb) have been laid down. It is argued that the said conditions are not fulfilled from the appointment aforesaid of the petitioner. Reference is also made to the judgment dated 18th September, 2008 of the Supreme Court in Civil Appeal No.5815/2008 titled ***District Programme Co-ordinator, Mahila Vs. Abdul Kareem***. The counsel has also argued that though the petitioner is a highly specialized technical person and has no dearth of projects and is not interested in claiming reinstatement with the respondent No.1 but the respondent No.1 cannot be permitted to throw out its employees, as the petitioner, without any reason whatsoever.

6. Per contra, the counsel for the respondent No.1 has urged that the petitioner has in his cross examination before the Labour court admitted that the documents aforesaid are the only documents of his appointment; that if the first appointment of the petitioner was to be a regular employment and not for a specific project, there was no need for the second appointment which was unequivocally accepted by the petitioner; that even though the petitioner under the first contract had completed 240 days but did not make any grievance of that appointment coming to an end and the dispute was raised only on non renewal of the contract after the second appointment and for which second appointment the petitioner had not completed 240 days. It is argued that all the conditions for applicability of Section 2(o)(bb) as laid down in ***Nilajkar*** (supra) have been satisfied. It is further urged that the plea qua the passport as urged before this Court was not the case before the Labour Court and no new plea can be taken before this Court. Reliance is placed on (i) ***Haryana State F.C.C.W. Store Ltd. Vs. Ram Niwas*** (2002) 5 SCC 654 laying down that where a contract of service exists disclosing the engagement / appointment to be for specific purpose and for a particular period and where disengagement was in terms of the said contract, Section 2(o)(bb) is attracted. (ii) ***Haryana State Agricultural Marketing Board Vs. Subhash Chand*** (2006) 2 SCC 794 where also seasonal appointment on contract basis was held to be falling under Section 2(o)(bb) of the Act. (iii) ***Karnataka Handloom Development***

Corporation Ltd. Vs. Sri Mahadeva Laxman Raval (2006) 13 SCC 15 where appointment under a scheme was held to end with the scheme irrespective of having worked for 240 or more days continuously; it was held that that the rule regarding 240 days was not applicable to Section 2(oo)(bb) of the Act & (iv) ***Punjab State Electricity Board Vs. Sudesh Kumar Puri*** (2007) 2 SCC 428 to the same effect.

7. The counsel for the petitioner has in rejoinder further urged that even though the petitioner returned to India on 27th December, 1985 his employment was terminated on 15th January, 1986 only and which shows that he was continuing in employment even after coming back to India. It is urged that the respondent No.1 cannot thus argue that the appointment of the petitioner was for contract projects only.

8. In my opinion, the aforesaid is a classic case for the applicability of Section 2(oo)(bb) of the Act. If the same were to be held not applicable to the case as the present one, then I fail to see any other situations to which it can apply. Also I find that though a plea had been taken by the respondent No.1 before the Labour Court that the provisions of the I.D. Act were not applicable to the dispute aforesaid but it appears to have been neither pressed nor agitated. In any case, there is no finding thereon in the award. Though for this reason I am also not inclined to deal with the same but I must mention that the provisions for engagement of workers for projects abroad are to be found in the Emigration Act, 1983 and in the rules framed therein. The said contracts under the Emigration Act are subject to the laws of the country in which said engagement / appointment is made and of disputes arising out of the said contracts are to be adjudicated by the Central Government.

9. Coming back to the lis as adjudicated, I am unable to accept the argument of the petitioner that owing to the petitioner having been described as a government servant in the passport or for the reason of having retained the custody of the passport in between the two contracts or for the reason of the memo

regarding termination having been issued on 15th January, 1986, the petitioner can be treated as a regular employee of the respondent No.1. The Supreme Court in *Nilajkar* has laid down that if the employment is in a project or scheme of temporary duration, is on a contract and not as a daily wager simplicitor, if the employment is to come to an end on the expiry of the scheme or project and/or if the workman has been apprised or made aware of the said terms, then Section 2(oo)(bb) is attracted. It was further laid down that mere appointment as a daily wager for no limited duration does not attract Section 2(oo)(bb) of the Act. In the present case, the terms and conditions in the letter of appointment of the petitioner are express. The appointment was for a period of not exceeding one year and terminable even prior thereto. There is no evidence whatsoever of the petitioner having been employed in India. The appointment was for a foreign project. There is nothing to indicate that the petitioner was not aware of and/or did not understand or comprehend the aforesaid terms. If the petitioner was treating himself as a regular employee of the respondent No.1, it is not understandable as to why no dispute was raised by the petitioner between May, 1985 and September, 1985 when the petitioner was in India and was neither being assigned any work nor being paid anything. The argument of the petitioner that his statement that he was being paid during the said period should be accepted as gospel truth for the reason of the respondent No.1 having not led any evidence also cannot be accepted. It was for the petitioner to prove the aforesaid contention. Though the case of the petitioner of payment by repatriation from London during the said time is unbelievable but even if that were to be so, it was for the petitioner to produce the documents in this regard. The Supreme Court in *Shankar Chakravarti Vs. Brittonia Biscuit Co. Ltd.* AIR 1979 SC 1652 has held that in a proceeding before an Industrial Tribunal or Labour Court the obligation to lead evidence or establish an allegation made by a party is on the party making the allegation. The test would be who would fail if no evidence is led. It is also not as if the respondent No.1 accepted the said statement of the petitioner. The same was challenged in cross examination. Merely because a contractual employee is issued a letter/order,

informing him that his services are not required will not convert such contractual employment into a regular appointment.

10. I am also unable to hold that merely because of the use of the word “deputation”, it has to be held that the appointment was in India and only deputation for abroad.

11. The *Oxford English Dictionary* defines “deputation” as appointment, assignment to an office or an appointment to act on behalf of another or others or delegation or even as a document conveying an appointment. One word in a document cannot be read so as to negate the meaning of the remaining document. The document aforesaid contains the terms of serving on the assignment project only and does not contain any term of appointment in India. It is inconceivable that if the appointment of the petitioner was a regular one as contended by him; the pay scale in Indian rupees would not have been mentioned.

12. Even though the respondent No.1 is a company, though of the Government of India, I may notice that Rule 51 of the Fundamental Rules provides that when a government servant is, with proper sanction, temporarily deputed for duty out of India either in connection with the post held by him in India or in connection with any special duty on which he may temporarily be placed, he may be allowed to draw during the period of deputation the same pay which he would have drawn had he remained on duty in India, besides a compensatory allowance if found necessary. There are no such provisions in the letter of appointment of the petitioner.

13. As far as the argument of retention of the passport is concerned, even though not established but even if to be true, I find nothing unusual about it. It is inconceivable that the second project for which the petitioner was sent only a few months after the return from the first project, happened suddenly. The same must have been on the horizon at the time of return of the petitioner from the first

project. In such circumstances, there is nothing unusual in the petitioner being permitted to retain the passport.

14. It is not the case of the petitioner that the appointment letters aforesaid issued to the petitioner were a camouflage for the regular appointment. The petitioner himself admits that the respondent No.1 has no need for the services of the petitioner for its business in India and requirement of such services was for projects abroad only. In the circumstances the parties are found to have well understood that the services of petitioner shall be availed as long as needed, for contracts abroad. There was no need for respondent No.1 to furnish any reasons to the petitioner.

15. No legal rights of the petitioner are found to have been trampled upon and no manifest illegality leading to injustice having been done to the petitioner is found in the award so as to invite interference, as held by Division Bench of this Court in *R.S. Sagar Vs. U.O.I* 93 (2001) DLT 194. The other test for interference laid down in *T. Prem Sagar Vs. The Standard Vacuum Oil Company, Madras*. AIR 1965 SC 111, namely of error apparent on the face of the record is also not satisfied.

16. The petition thus fails and is dismissed. However, no order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

5th April, 2010

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