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IN THE HIGH COURT OF DELHI AT NEW DELHI

R-34

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W.P. (C) 8907/2007

KAPIL RAJPAL

..... Petitioner

Through Mr. Rajiv Tyagi with
Ms. Chanchal Biswal, Advocate.

versus

GOVT. OF N.C.T. OF DELHI & ORS.

..... Respondents

Through None.

CORAM: JUSTICE S. MURALIDHAR**ORDER****27.09.2010**

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1. Aggrieved by an order dated 3rd May 2005 passed by the Authority under the Delhi Shops and Establishments Act, 1954 ('DSEA') directing the Petitioner to deposit a sum of ₹ 1,35,000/- on account of the earned wages of Respondents 3 to 8 herein for the period 6th July 2003 to 25th November 2003 along with compensation of Rs.100/- per applicant within 30 days and further aggrieved by the consequent order dated 27th June 2007 of the Authority under the DSEA declining to entertain the application filed by the Petitioner to set aside the aforementioned *ex parte* order dated 3rd May 2005, the Petitioner has filed this writ petition.

2. The Petitioner states that he is a building contractor engaged in the business of constructing residential houses and apartments on turnkey contractual basis. One such project undertaken by him was the construction of residential houses at Z-30, Hauz Khas, New Delhi. The Petitioner

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invited quotations for whitewashing and painting job to be done on

contract basis. It is stated that in April/May 2003 Respondent No. 3, an independent whitewashing and painting contractor, submitted his quotation. The Respondents 4 to 8 were, according to the Petitioner, working at that relevant time with Respondent No. 3. According to the Petitioner, the work was agreed to be performed by Respondent No. 3 for a consideration of ₹ 70,000/- with the further understanding that the work will be completed by October 2003. It is stated that from time to time the running bills aggregating to ₹ 65,000/- were in fact paid to Respondent No. 3 although the Petitioner is unable to produce any receipts for this purpose.

3. It is alleged that after receiving the complete payment, Respondent No. 3 demanded an extra sum of ₹ 50,000/- which the Petitioner refused. It is stated that on 16th January 2004 through the Jagriti Labour Union, the Respondents 3 to 8 caused a notice dated 16th January 2004 to be served upon the Petitioner claiming the payment of earned wages for the period 6th July 2003 to 25th November 2003. That was followed by Respondents 3 to 8 filing a claim petition before the competent authority under the DSEA claiming wages for the aforementioned period. A copy of the said petition filed under Section 21 (3) of the DSEA shows that Respondents 3 to 8 categorically stated that each of them was working as a workman under the Petitioner on a monthly salary of ₹ 4,500/-; that despite demands no amount has been paid to them. Consequently, the prayer was that the Authority under the DSEA should direct the Petitioner to pay Respondent No. 3 a sum of ₹ 22,650/- and each of the other Respondents 4 to 8 a sum of ₹ 22,500/-. Although notice was issued to the Petitioner in the said claim petition, the Petitioner did not appear. It is the case of the Petitioner

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that he never received any such notice. Be that as it may, as far as Respondents 3 to 8 are concerned, each of them filed evidence by way of affidavits reiterating what has been stated in the claim petition. By an order dated 3rd May 2005, the Authority under the DSEA allowed the claim petition filed by Respondents 3 to 8. It is noticed in para 2 of the impugned order that notice of the claim petition was forwarded to the Petitioner by a notice dated 24th December 2003 sent by Registered Post. Notices were again served on 26th August 2004 for the hearing on 21st September 2004. It is noted in the order that "the management refused to received (*sic* 'receive') letter and neither the management appeared nor any written statement was filed in this Court on the proceedings held in time to time and the management was absent continuously." The Authority under the DSEA discussed the evidence filed by the Respondents 3 to 8 and directed the Petitioner to deposit sums as noticed hereinbefore.

4. On coming to know of the above order and the impending steps for the recovery of the said amount, the Petitioner is stated to have filed an application for recall of the *ex parte* order before the Authority under the DSEA. This application was rejected by the second impugned order dated 27th June 2007 passed by the Authority under the DSEA, after noting that the question of recovery of the monies due to the claimants was being dealt with by the Special Metropolitan Magistrate for over an year and was kept in abeyance.

5. When the case was listed before this Court on 30th November 2007, notice was issued subject to the Petitioner depositing ₹ 60,000/- within
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four weeks. The said amount was, however, deposited only some time in August 2008. Be that as it may, the said amount of ₹ 60,000/- continues to remain deposited as no further directions have been issued permitting Respondents 3 to 8 to withdraw the said sum.

6. Today none appears for the Respondents 3 to 8.

7. The submissions of Mr. Rajiv Tyagi, learned counsel for the Petitioner have been heard.

8. It is first submitted that the learned Authority under the DSEA was not justified in rejecting the application filed by the Petitioner under Order IX Rule 13 CPC for recalling the *ex parte* order dated 3rd May 2005 only because recovery proceedings were already pending before the learned Special MM.

9. It is next submitted that the valuable right of the Petitioner to be heard in the claim petition could not be taken away by the Authority under the DSEA. The Petitioner ought to have been given one last opportunity of leading evidence and cross-examining the claimants/Respondents 3 to 8. While maintaining that Respondents 3 to 8 were not employed with the Petitioner, Mr. Tyagi forcefully argued that it was incumbent on the Respondents 3 to 8 to first show before the Authority under the DSEA that they had an employer-employee relationship with the Petitioner herein. The burden was on Respondents 3 to 8 who are the claimants to show that they were in fact employed with the Petitioner. Reliance is placed on the

decisions of the Supreme Court in *Workmen of Nilgiri Coop. Marketing Society Ltd. v. State of Tamil Nadu* (2004) 3 SCC 514; *GM, Tanda Thermal Power Project v. Jai Prakash Srivastava* (2007) 14 SCC 98 and of a learned Single Judge of this Court in *Ajay Kumar Sharma v. Presiding Officer 2007 (I) LLJ Delhi 262*. Further, it was submitted that the mere filing of affidavits by Respondents 3 to 8 in the claim petition was not sufficient as they should first prima facie show through some documentation that they were directly employed by the Petitioner. Reliance is placed on the judgment of the Supreme Court in *Range Forest Officer v. S.T. Hadimani AIR 2002 SC 1147*.

10. Finally, it is urged that the Petitioner should be given one opportunity to go back to the Authority under the DSEA to lead evidence and to show that Respondents 3 to 8 were never employed with him.

11. The above submissions have been considered by this Court.

12. In the first place, it requires to be noticed that the Petitioner has not satisfactorily explained why despite service of notice, it did not chose to appear before the Authority under the DSEA. Although the Petitioner claims not to have received such notice, considering the fact that the notices were sent by registered post at his last known address, this Court is not prepared to reject the findings on facts in the impugned order of the Authority under the DSEA that despite service the Petitioner did not appear before the Authority. There is no document produced by the Petitioner to back his claim that the Respondents 3 to 8 were employed

with the Respondent No. 3 an independent contractor and that none of them was employed with the Petitioner. Even the Petitioner's claim that ₹ 70,000/- was paid as agreed to Respondent No. 3, is not supported by any evidence.

13. It was suggested by Mr. Tyagi that the Petitioner was not obliged to disclose as to what his line of defence before the Authority under the DSEA might be. According to him, once the case is remanded to the Authority under the DSEA, the Petitioner will then lead evidence through his witnesses.

14. This Court finds the above submission to be unacceptable. In order to demonstrate the prejudice caused to the Petitioner on account of the *ex parte* order dated 3rd May 2005, it is incumbent on the Petitioner to show to this Court the kind of evidence available with the Petitioner and which would have been produced by him before the Authority under DSEA had he an opportunity of being heard. In other words, the Petitioner would have to show that if the evidence available with the Petitioner was produced before the Authority under the DSEA, a different result might have ensued.

15. This Court finds that the Petitioner has not laid any factual foundation in support of his contention that he has been deprived of a valuable opportunity of leading evidence before the Authority under the DSEA. With the Petitioner not being able to show to this Court the evidence which he was deprived of leading before the Authority under the DSEA, a remand of the matter to the Authority under the DSEA will not serve any

purpose. It will in fact delay the resolution of the dispute even further. While the decisions cited by the Petitioner do cast a burden on the claimant to show that they had an employer-employee relationship with the Petitioner, as far as the present case is concerned, each of the Respondents 3 to 8 have filed an affidavit reiterating what has been stated in the claim petition before the Authority under the DSEA. In the absence of the Petitioner being able to produce any shred of document to substantiate any of his claims, to cast the entire burden only on Respondents 3 to 8 to prove their claim is not fair or reasonable.

16. The judgments cited hereinbefore have to be understood in the context in which they came to be passed. As far as the present case is concerned, by filing their affidavits, Respondents 3 to 8 have discharged their initial burden to show that they were employed with the Petitioner. It is now for the Petitioner to show that whether and in what capacity he paid ₹ 70,000/- to Respondent No. 3 alone. There is nothing produced by him to substantiate this.

17. In the circumstances, this Court is not inclined to accept the prayer of the Petitioner to hold that the impugned order dated 3rd May 2005 and the consequent order dated 27th June 2007 of the Authority under the DSEA to be bad in law and remand the matter to the Authority under the DSEA for a fresh determination on merits.

18. The amount of ₹ 60,000/- lying deposited by the Petitioner in this Court will now be transferred forthwith by the Registry, together with
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interest, if any, accrued thereon to the Authority under the DSEA. Thereafter the Authority under the DSEA will follow the due process of law and disburse the amounts *pro-rata* to Respondents 3 to 8. In the initial phase, the Authority under the DSEA will retain the said amount in a short-term fixed deposit in a nationalised bank for three months and keep it renewed till such time Respondents 3 to 8 appear and receive their respective *pro-rata* sums together with interest, if any, accrued thereon.

19. With the above directions, the writ petition is dismissed with no orders as to costs. Interim orders stand vacated.



S. MURALIDHAR, J.

SEPTEMBER 27, 2010

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