

GAHC010254542013



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/4608/2013

THE EXECUTIVE ENGINEER AIZAWL CENTRAL DIVISION
CENTRAL PUBLIC WORKS DEPARTMENT, AIZAWL

VERSUS

CENTRAL GOVT. INDUSTRIAL TRIBUNAL -CUM- LABOUR COURT and ANR
R.K. MISSION ROAD, KENDRIYA SHRAM SADAN, 2ND FLOOR BIRUBARI,
GHY-16

2:BAPPA CHAKRABORTY
BEHARA BAZAR
VILL. SRINAGAR
DIST- CACHAR
ASSAM
PIN-78800

Advocate for the Petitioner : C.G.C.

Advocate for the Respondent : MR.A DASGUPTA

BEFORE

HON'BLE MR. JUSTICE KALYAN RAI SURANA

For the petitioner	: Ms. A. Gayan, CGC.
For State respondent No.2	: Mr. A. Dasgupta, Senior Advocate.
	: Ms. B. Das, Advocate.
Date of hearing	: 26.05.2022, 07.06.2022, 28.07.2022, 18.05.2023.
Date of judgment	: 22.05.2023.

JUDGMENT AND ORDER

(CAV)

Heard Ms. A. Gayan, learned CGC, appearing for the petitioner. Also heard Mr. A. Dasgupta, learned senior counsel, assisted by Ms. B. Das, learned counsel for the respondent no. 2.

2. By filing this writ petition under Article 226 of the Constitution of India, the petitioner has challenged the award dated 25.02.2013, passed by the learned Central Government Industrial Tribunal- Cum- Labour Court, Guwahati (hereinafter referred to as "CGIT-LC" for brevity) in Reference Case No. 02/2008. By the said award the learned CGIT-LC had directed reinstatement of the respondent no.2, namely, Sri Bappa Chakraborty with 25% back wages on the basis of the prevailing rate of wages on the date of his disengagement.

3. In respect of conciliation proceeding which was initially held, minutes dated 30.10.2007 was drawn up by the Conciliation Officer –cum- Assistant Labour Commissioner (Central), Silchar (hereinafter referred to as "ALC(C), Silchar" for short) under the Industrial Disputes Act, 1947. The said conciliation ended in a failure and accordingly, a failure report dated 28.11.2007 was submitted by the ALC(C), Silchar. Thereafter, a reference was made by the Government of India, Ministry of Labour, Delhi vide notification no. L-42012/85/2007[IR(DU)], dated 15.02.2008. Thus, a Reference Case was registered and tried before the CGIT-LC, being Ref. Case No. 2/2008, wherein the learned CGIT-LC had passed an award dated 25.02.2013 in favour of the respondent and against the petitioner. The said award is under challenge in this writ petition.

4. As per the minutes of conciliation proceeding held on 30.10.2007 before ALC(C), Silchar, the case of the respondent no. 2 is that since July, 1995 he was working as Typist-cum-Clerk on contractual agreement under Executive Engineer, Silchar Central Division, CPWD, Malugram, Mela Road, Silchar (hereinafter referred to as "SCD-CPWD, Silchar" for short). On the basis of assurance given by the Executive Engineer to pay monthly remuneration of Rs.5,000/- (Rupees Five thousand only), on 10.10.2006, the respondent no. 2 had joined the office of the Executive Engineer, Aizawl Central Division, Central Public Works Department, Aizawl, Mizoram ("ACD-CPWD, Aizawl" for short), as Computer Typist-cum- Clerk. Due to sudden demise of his uncle, with the prior permission from the Executive Engineer, ACD-CPWD, Aizawl, the respondent no. 2 had left Aizawl on 22.10.2006. Since the said date, the respondent no. 2 was neither reinstated in service nor had he been paid his salary. Thereafter, the herein before referred conciliation proceeding and thereafter proceeding before the CGIT-LC, Guwahati was filed.

Submissions made by the learned CGC for the petitioner:

5. As per the submissions made by the learned CGC, the impugned award has been assailed basically on three grounds, viz., (i) non-joinder of necessary parties because the establishment of SCD-CPWD, Silchar, was not impleaded in the proceeding, (ii) the respondent no. 2 was never appointed as a workman in the establishment of ACD-CPWD, Aizawl, (iii) the certificate, issued to the respondent no. 2 by the then Executive Engineer, SCD-CPWD, Silchar and the identity card issued to the respondent no. 2 by the ACD-CPWD, Aizawl would not constitute a valid appointment.

6. On the point that the SCD-CPWD, Silchar was not impleaded in the proceeding before the CGIT-LC, it was submitted that the case of the respondent no. 2 was that on contractual agreement he was appointed as Typist-cum-Clerk in SCD-CPWD, Silchar under the Executive Engineer, SCD-CPWD, Silchar. It has been submitted that the said point could not have been proved without impleading SCD-CPWD, Silchar as party to the proceeding before the CGIT-LC.

7. On the point no. (i) and (ii) that the respondent no. 2 was never appointed as a workman in the establishment of ACD-CPWD, Aizawl, and the certificates issued by some official would not make the respondent no. 2 an employee of CPWD, it was submitted that to the said effect the respondent no. 2 could not produce and prove any appointment order from the competent authority. It has been submitted that the respondent no. 2 had exhibited the following, viz., (i) a certificate dated 29.08.2000, issued by Er. P.K. Singh, the then Executive Engineer, SCD-CPWD, Silchar (Ext.1), (ii) Certificate dated 02.08.2023, issued by Er. M.K. Paul, the then Assistant Engineer, SCD-CPWD, Silchar (Ext.2), (iii) Certificate dated 08.05.1997, issued by Er. B.D. Sangal, the then Executive Engineer, SCD-CPWD, Silchar (Ext.3), (iv) Certificate dated 07.05.1997, issued by Er. J.P. Vashist, the then Assistant Engineer, SCD-CPWD, Silchar (Ext.4), (v) Certificate dated 11.02.1998, issued by Er. T.K. Banerjee, the then Assistant Engineer, SCD-CPWD, Silchar (Ext.5), which were issued in individual capacity and would not constitute a valid appointment in respect of the respondent no.2.

8. In support of her submissions, the learned CGC has placed

reliance on the case of *Ram Singh & Ors. v. Union Territory, Chandigarh & Ors.*, (2004) 1 SCC 126.

Submissions made by the learned senior counsel for the respondent no. 2:

9. Per contra, the learned senior counsel for the respondent no. 2, while replying to the points urged by the learned CGC, had urged the following points, viz., (i) there was no necessity to implead the SCD-CPWD, Silchar; (ii) the appointment of the respondent no. 2 through a labour contractor was a sham contract; (iii) the respondent no. 2 was rightly treated as the employee of the CPWD-ACD, Aizawl, for which the award was justified, (iv) the High Court, in exercise of power under Article 226 of the Constitution of India could only examine the decision making process and not the decision itself, as it was not exercising appellate jurisdiction.

10. On the point that the non-impleading of SCD-CPWD, Silchar was not fatal, it was submitted that the respondent no. 2 had raised the dispute regarding his termination of service and non-payment of dues, which was taken up in the conciliation proceeding and on failure, the reference was made by the Central Government as per the schedule appended to the notification dated 15.02.2008 by which reference of dispute was made before the CGIT-LC, Silchar. It was submitted that the Ministry of Labour, Govt. of India had deemed it appropriate only to make reference against the ACD-CPWD, Aizawl, and the terms of the said reference would also cover the SCD-CPWD, Silchar.

11. On the point that the appointment of the respondent no. 2 through a labour contractor was a sham contract and that the respondent no. 2

could not prove that he was working on contractual basis, it was submitted that the said plea was not sustainable because in this case the respondent no. 2 was engaged in the month of June, 1995 as ward and watch staff through contractor and he was deployed for doing official works and also engaged in computer typing. It was submitted that there was a ban in CPWD for giving permanent employment and therefore, by engaging the respondent no. 2 through a contractor on monthly wages of Rs.900/- per month, he had rendered service in the SCD-CPWD, Silchar. The monthly wages was increased from Rs.900/- per month to Rs.1,200/- and then to Rs.1,800/- which went upto Rs.2100/- per month. Thereafter, the office of CPWD was shifted from Silchar to Aizawl and as the then Executive Engineer assured to the petitioner wages of Rs.5,000/- per month, on such assurance, he had joined the service in the establishment of ACD-CPWD, Aizawl, under the then Executive Engineer. It was submitted that the Executive Engineer, SCD-CPWD, Silchar had issued to the respondent no. 2 an identity card no. EE/SCD/26 dated 03.07.2002 as 'typist', and that the respondent no. 2 was issued an identity card no. EE/ACD/ CPWD/05 dated 29.09.2006 as 'computerist' by the Executive Engineer, ACD-CPWD, Aizawl.

12. It was submitted that the attempt by the petitioner to project the respondent no. 2 being a contractual labour was a sham, fraudulent, smoke-screen and illusionary and if the veil was lifted, the respondent no. 2 was an employee of the CPWD. It was submitted that the work of a typist and/or computerist could not be supervised by a contractor and such work can only be done under supervision of the Executive Engineer, ACD-CPWD, Aizawl.

13. It was submitted that by taking advantage of the temporary

absence of the respondent no. 2, who had to leave Aizawl on 22.10.2006 as his uncle had died, the Executive Engineer, ACD-CPWD, Aizawl did not permit him to join back in service. It was submitted that thereafter, the respondent no.2 went to report to SCD-CPWD, Silchar, where also the respondent no. 2 was not allowed to join and thereby, the respondent no. 2 had lost 12 prime years of his life.

14. By referring to the provisions of Section 2A of the Industrial Disputes Act, 1947, it was submitted that dismissal of an individual workman would constitute an industrial dispute.

15. It was submitted that the High Court, while examining the award passed by CGIT-LC, Silchar had the power to examine whether the decision making process or the award was perverse, but would not have the power to sit in appeal over the award.

16. In support of his submissions, the learned senior counsel for the respondent no. 2 had relied on the following cases, viz., (i) *Avon Services Production Agencies Pvt. Ltd. v. Industrial Tribunal, Haryana*, AIR 1979 SC 170, (ii) *Monthly Rated Workmen at the Wadala Factory of the Indian Hume Pipe Co. Ltd. v. Indian Hume Pipe Co. Ltd.*, Bombay 1986 (Supp) SCC 79, (iii) *Gujarat Electricity Board, Thermal Power Station, Ukai, Gujarat v. Hind Mazdoor Sabha & Ors.*, (1995) 5 SCC 27, (iv) *Steel Authority of India Ltd. & Ors. v. National Union Waterfront Workers & Ors.*, (2001) 7 SCC 1, (v) *G.M., ONGC, Silchar v. ONGC Contractual Workers Union*, (2008) 12 SCC 275, (vi) *Jasmer Singh v. State of Haryana & Anr.*, (2015) 4 SCC 458, (vii) *Oil and Natural Gas Corporation*

Ltd. v. Union of India & Ors., WA 267/2004, decided on 07.01.2019 by Division Bench of this Court.

Reasons and decision:

17. Considered the submissions made on behalf of both sides. Examined the LCR, which was called vide order dated 13.12.2013. Also considered the cases cited at the Bar on behalf of both sides.

18. In order to find out as to whether or not the decision making process of the Court is perverse, the Court was of the considered opinion that the evidence on record be examined. Therefore, the records called for from the CGIT-LC, has been perused.

Terms of reference:

19. It would be relevant to extract the reference, which was made by the Government of India, Ministry of Labour, Delhi vide notification no. L-42012/85/2007[IR(DU)] dated 15.02.2008, which reads as follows:-

“Whether the contract between the management of Executive Engineer, Central Division, CPWD, Silchar/ Executive Engineer, Central Division, CPWD, Aizawl with regard to employment of Bappa Chakraborty is sham and bogus? If yes, whether the action of the said management in terminating his services from 11.10.2006 is legal and justified? If not to what relief the workman is entitled to?”

Pleadings and evidence before the learned CGIT-LC regarding engagement of the respondent no. 2 at ACD-CPWD, Aizawl:

20. The documents marked and proved by the respondent no. 2 as Ext.1 to Ext.5 are the certificates issued by the then Executive Engineer, SCD-

CPWD, Silchar. No such certificate has been proved by the respondent no. 2 regarding service, if any, rendered at ACD-CPWD, Aizawl.

21. There is no evidence on record to show that the vacancy for the post of 'Computerist' in ACD-CPWD, Aizawl was advertised and the respondent no. 2 had participated in the selection process and was selected in a transparent manner.

22. On the contrary, in para-7(c) of the additional written statement filed by the petitioner in Ref. Case No. 2/2008, it was admitted that the respondent no. 2 was deployed by Sri Manik Deb, the contractor on 11.10.2006, and as the respondent no. 2 was not found fit, his service was withdrawn by the contractor. It is the further stand of the petitioner in the pleading as well as in the examination-in-chief of Management Witness no.1 (hereinafter referred to as "MW-1" for short) is to the effect that on carrying identity card by central government employees, Inner Line Permit was not required.

23. The pleaded case of the respondent no. 2 in para-5 of the evidence-in-affidavit filed in the proceeding of Ref. Case 2/2008 is to the effect that he had joined at ACD-CPWD, Aizawl on 10.10.2006. However, the identity card (Ext.7), which the respondent no. 2 had proved, was issued on 29.09.2006. Therefore, it is the admitted case of the respondent no. 2 that the issuance of identity card had preceded the date of his purported joining in service.

24. The records reflect that the evidence-on-affidavit of the respondent no. 2, which was sworn on 24.11.2009, was filed before the CGIT-

LC, Guwahati on 10.12.2009 and he was cross examined by the management's advocate on 05.04.2010. Thereafter, on 10.08.2010, one Nanhen Khan was examined as MW-1 and he was cross examined by the advocate for respondent no. 2 on 28.10.2010.

25. In his cross-examination, the respondent no. 2 had stated as follows:-

"XXX by the Management Advocate to workman Sri Bappa Chakraborty on 05.04.2010.

O.S.A.

I do not have any grievance against the CPWD, Silchar. That is why, Silchar CPWD has not been made party. I have not made Silchar CPWD a party on the ground that everything will be disclosed which will go against me. Initially I was appointed as Typist in the Office of the Executive Engineer, CPWD, Silchar. Thereafter on verbal request of Mr. Mulchand, Executive Engineer, CPWD, Aizwal, I joined in Aizwal CPWD Office but no transfer order was issued to me. It is not a fact that I never worked as Typist in Silchar CPWD Office. When I joined at Silchar CPWD Office, I was a contract labourer under Contractor as Typist. I worked as a contractual labour in Silchar CPWD till I was taken to Aizwal Office. It is not a fact that Ext.1 to Ext.6 are prepared by me just to defend my case. I have not submitted any salary certificate. It is not a fact that while I joined at Aizwal CPWD Office, I was a contractual labour under a Contractor. After Joining at CPWD Office, Aizwal and after 15 days, my uncle expired at Silchar and I immediately contacted Executive Engineer Mr. Mulchand over phone informing the incident. He advised me to come down to Silchar and accordingly I came back to Silchar. At that time, no other officer was present at Aizwal Office at the time of departure from Aizwal. It is not a fact that while I was working at Aizwal, I was a contract labourer under Contractor Manik Deb. After completing all rituals of my uncle, I contacted Mr. Mulchand over phone and he instructed me not to join at Aizwal Office since there was no vacancy. He instructed me to join in Silchar CPWD Office. Accordingly I went to Silchar Office and wanted to join there, but I was not allowed to join in Silchar Office. It is not a fact that after working one day at Aizwal Office, I was asked by the Management CPWD that my service was not required in the office since I was not expert in Computer. It is not a fact that I was engaged as Casual worker under the Contractor while working at Aizwal of one day so question of termination does not arise."

26. One Nanhen Khan was examined as MW-1. In his examination-in-chief, the MW-1 had deposed to the effect that:

“... From the records, it is seen that he was engaged as computer operator on contractual basis. Mr. Chakraborty was appointed/ engaged through contractor as contractual worker. While Aizawl office was opened the Executive Engineer approached the contractor to supply a computer operator on contractual basis. One Manik Deb Contractor, supplied Shri Bappa Chakraborty as a computer operator on 11.10.2006 for Aizawl Office. Interview was held on 11.10.2006 for computer operator, but he was not found suitable for the post. The workman Bappa Chakraborty could not come out successful in the test and he was informed accordingly he informed the contractor Manik Deb. Since the workman was found not fit for the post, we do not require his services. Accordingly, the contractor Manik Deb released Bappa Chakraborty by paying Rs.1,500/- as cost. The then Executive Engineer, Mool Chand issued an identity card to workman for his entrance in Mizoram State where, Innerline Permit system is necessary. Mr. Chakraborty has not returned the I/card till today.”

XXX by the Advocate for the workman on 28.10.2010.

The workman namely, Bappa Chakraborty was working in Silchar Division as Computer Operator and he was never appointed at Aizwal (sic. should be Aizawl) Division. The case should have been filed against Silchar Division instead of Aizwal (sic. should be Aizawl) Division as he was working in Silchar Division. Ext.7 was issued to the workman by Aizwal (sic. should be Aizawl) Division of CPWD wherein it was stated that he was a Computerist. Since I am working at Aizwal (sic. should be Aizawl) I am possessing an identity card instead of Inner Line Permit. Central Government employees possessing identity card need not require to obtain Inner Line Permit. The workman B. Chakraborty went to Aizwal (sic. should be Aizawl) on the basis of the Identity Card issued by the CPWD, Aizwal (sic. should be Aizawl). I do not produce any document to indicate that Manik Deb was a registered Contractor under Contract Labour (Regulation & Abolition) Act. It is not a fact that the workman joined on 10.10.2006 at Aizwal (sic. should be Aizawl). I have no any record to show that the workman joined on 10.10.2006 at Aizwal (sic. Should be Aizawl) and he remained there till 22.10.2006. Following the expiry of his uncle he came to Silchar on 22.10.2006 to perform rituals. It is a fact that no Computerist can be appointed in the Central Government through contractor that has to be done in accordance with the selection process. In my chief, I have stated that B. Chakraborty was engaged as a computer operator but I cannot say where

he was posted. I do not know whether Ext.1 to Ext.6 were issued by CPWD, Silchar Office. I do not know whether the workman was working in Silchar Office from July, 1995. It is not a fact that the workman was transferred from Silchar to Aizwal (sic. should be Aizawl). It is also not a fact that he had worked at Aizwal (sic. should be Aizawl) Division. It is not a fact that while discharging duties as a computerist he availed leave to attend the funeral ceremony of his uncle at Silchar. It is not a fact that the workman was employee of CPWD as no person can be engaged in his job through contractor. I can not say whether any Notification prohibiting the engagement of contract labour in the jobs of Clerk, Typist, etc. were issued by the Government of India in the year 1994. It is not a fact that B. Chakrabarty was illegally terminated from our department at Aizwal (sic. should be Aizawl)."

Analysis of cross-examination of respondent no. 2:

27. Thus, from the cross-examination of the respondent no. 2, referred to herein before, it appears as follows:-

- a. The respondent no. 2 has admitted that he had joined at SCD-CPWD, Silchar. The documents marked as Ext.1 to Ext.5 are certificates issued by the then Executive Engineers, SCD-CPWD, Silchar. Except for the identity card (Ext.7) issued to him by the ACD-CPWD, Aizawl, the respondent no. 2 has not produced any document regarding his lawful appointment as 'Computerist' in the said establishment.
- b. As per the statement made in para-5 of the evidence-on-affidavit by the respondent no. 2, it has been stated that in the month of September, 2006 a new Division was created at Aizawl, i.e. ACD-CPWD, Aizawl. It was further stated therein that Sri Mool Chand, who was the then Executive Engineer of SCD-CPWD, Silchar, made an offer to the respondent no. 2 to appoint him as Computerist at Aizawl and he was issued an identity card (Ext.7) on 29.09.2006. Thus, if the statement of the respondent no. 2 in his evidence-in-opposition is to be believed, he

was offered appointment at Aizawl, while he was in Silchar. Therefore, no due process of appointment was followed to appoint the respondent no. 2 as Computerist at ACD-CPWD, Aizawl. It was further admitted in para-5 of the evidence-on- affidavit that after he left Aizawl, the said Executive Engineer told him not to work in the office at Aizawl and he was asked to work at SCD-CPWD, Silchar, where the respondent no. 2 was not allowed to join as he was deployed in ACD-CPWD, Aizawl.

- c. In his cross-examination, the respondent no. 2 had stated that *"I do not have any grievance against the CPWD, Silchar. That is why, Silchar CPWD has not been made party. I have not made Silchar CPWD a party on the ground that everything will be disclosed which will go against me."* It was also admitted that *"Initially I was appointed as Typist in the Office of the Executive Engineer, CPWD, Silchar. Thereafter, on verbal request of Mr. Mulchand, Executive Engineer, CPWD, Aizawl, I joined in Aizawl CPWD Office but no transfer order was issued to me."*
- d. As per the statements made in the evidence-on-affidavit of the respondent no. 2, it is not his case that he was appointed as a contract labour. The respondent no. 2 has not disclosed existence of any contract with any contractor for rendering service at SCD-CPWD, Silchar or at ACD-CPWD, Aizawl. Rather, in his cross-examination, the respondent no. 2 had categorically denied that while working at ACD-CPWD, Aizawl, he was working as a contract labour. His statement is that – *"It is not a fact that while I was working at Aizawl, I was a contract labourer under Contractor Manik Deb."*
- e. In the cross-examination of MW-1, his evidence to the effect that the

respondent no. 2 did not render any service at ACD-CPWD, Aizawl could not be demolished.

28. Thus, the respondent no. 2, in his cross-examination, has admitted that he has no grievance against SCD-CPWD, Silchar. There is also no evidence regarding the existence of any contract between the ACD-CPWD, Aizawl and the respondent no. 2. There has been no attempt by the respondent no. 2 to prove by way of any admissible evidence that he was paid any money either by SCD-CPWD, Silchar or by the ACD-CPWD, Aizawl, purportedly for another work and was made to do the work of a typist. Moreover, the respondent no. 2 also made no attempt to examine Mr. Mool Chand, the then Executive Engineer, SCD, CPWD, Silchar who had purportedly offered to give employment to the respondent no. 2 at ACD-CPWD, Aizawl.

29. Similarly, the said Mr. Mool Chand, the then Executive Engineer, who had allegedly engaged the respondent no. 2 as 'computerist' at ACD-CPWD, Aizawl was also not examined.

30. The point urged by the respondent no. 2 before the CGIT-LC was whether the respondent no. 2 was appointed as Computerist at ACD-CPWD, Aizawl. In this regard, even if the statement of the respondent no. 2 in para-5 of his evidence-on-affidavit that he had joined the ACD-CPWD, Aizawl on 10.10.2006 is assumed to be correct, he had worked there till 22.10.2006. The respondent no. 2 had admitted that his service was not transferred from SCD-CPWD, Silchar to ACD-CPWD, Aizawl. Therefore, the respondent no. 2 had rendered service in a newly created Division of CPWD, i.e. ACD-CPWD, Aizawl

for 13 days.

On clubbing the period of purported service, if any, rendered by respondent no. 2 in SCD-CPWD, Silchar with service, if any, rendered at ACD-CPWD, Aizawl:

31. It would be appropriate to reproduce the provision of Section 1 of the Contract Labour (Regulation and Abolition) Act, 1970 (hereinafter referred to as "1970 Act" for short), which is as follows:-

1. Short title, extent, commencement and application.- (1) *This Act may be called the Contract Labour (Regulation and Abolition) Act, 1970.*

(2) *It extends to the whole of India.*

(3) *It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of this Act.*

(4) *It applies to-*

(a) *To every establishment in which twenty or more workmen are employed or were employed on any day of the preceding twelve months as contract labour,*

(b) *To every contractor who employs or who employed on any day of the preceding twelve months twenty or more workmen:*

Provided that the appropriate Government may, after giving not less than two months notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any establishment or contractor employing such number of workmen less than twenty as may be specified in the notification.

(5) (a) *It shall not apply to establishments in which work only of an intermittent or casual nature is performed.*

(b) *If a question arises whether work performed in an establishment is of intermittent or casual nature, the appropriate Government shall decide that question after consultation with the Central Board or, as the case may be, a State Board and its decision shall be final.*

Explanation. For the purpose of this sub-section, work performed in an establishment shall not be deemed to be of an intermittent nature, -

(i) *If it was performed for more than one hundred and twenty days in the preceding twelve months, or*

(ii) *If it is of a seasonal character is performed for more than sixty days in a year.*

32. Thus, from the conjoint reading of (i) the evidence-on-affidavit of the respondent no. 2, (ii) cross-examination of respondent no. 2; (iii) cross-examination of MW-1, it is evident that the respondent could not prove that he had performed any duty at the ACD-CPWD, Aizawl for 120 days as required under the provisions of Section 1 of the 1970 Act. Be it also mentioned that it is not the pleaded case of the respondent no. 2 before the CGIT-LC that the work in ACD-CPWD, Aizawl was seasonal.

33. The respondent no. 2 did not make any effort to prove that the SCD-CPWD, Silchar and ACD-CPWD, Aizawl was one and inseparable unit. No effort has been made to establish that it was permissible for the CGIT-LC, Guwahati to invoke the principle of "tacking" so as to add the period of alleged service, if any, rendered in SCD-CPWD, Silchar with alleged period of service, if any, rendered at ACD-CPWD, Aizawl. The principle of "tacking" is generally invoked in computing adverse possession. The said term is lucidly explained by the Supreme Court of India in the case of *Krishnamurthy S. Setlur v. O.V. Narasimha Setty, Dead, through LRs.*, (2020) 12 SCC 244: 2019 STPL 8411 SC, where it has been observed as follows:-

58. *Adverse possession is heritable and there can be tacking of adverse possession by two or more persons as the right is transmissible one. In our opinion, it confers a perfected right which cannot be defeated on reentry except as provided in Article 65 itself. Tacking is based on the fulfillment of certain conditions, tacking maybe by possession by the purchaser, legatee or assignee, etc. so as to constitute continuity of possession, that person must be claiming through whom it is sought to be tacked, and would depend on the identity of the same property under the same right. Two distinct trespassers cannot tack their possession to constitute conferral of right by adverse possession for the prescribed period.*

On nature of service rendered by respondent no. 2:

34. The MW-1 had stated in his examination-in-chief before the CGIT-LC that the respondent no. 2 was employed as 'computer operator' in SCD-CPWD, Silchar through a labour contractor, namely Manik Deb. However, no evidence to that effect was produced by the petitioner. The respondent no. 2 has categorically denied that he was engaged at SCD-CPWD, Silchar or at ACD-CPWD, Aizawl through a contractor. Thus, the case of the respondent no. 2 is that he was directly engaged by the petitioner, and that his contract with the employer, i.e. petitioner, was a sham.

35. The respondent no. 2 did not prove that he was paid any remuneration whatsoever by the petitioner i.e. ACD-CPWD, Aizawl. Moreover, the respondent no. 2 also did not make any attempt to prove that he was directly paid any remuneration whatsoever by SCD-CPWD, Silchar. It is reiterated at the cost of repetition that although Ext.1 to Ext.5 were marked, but its contents or signatures were not proved by calling their respective authors. Thus, in the considered opinion of the Court, the respondent no. 2 failed to prove the existence of any contract, which is a *sine qua non* to claim serving in the establishment of the petitioner as a contract labour. Therefore, the impugned order passed by the learned CGIT-LC has to be held to be perverse because for a valid contract, there must exist a contract between two parties. However, as per the evidence of the respondent no. 2, he did not have any grievance against SCD-CPWD, Silchar and he could not prove that he had joined service in ACD-CPWD, Aizawl, there was no privity of contract between the ACD-CPWD, Aizawl and the respondent no. 2. Even if the respondent no. 2 had rendered any service at SCD-CPWD, Silchar, the learned CGIT-LC failed to appreciate that the respondent no. 2 could not prove that he had rendered any

service at ACD-CPWD, Aizawl for 120 days or more, as required under Explanation (i) to sub-section 5(b) of Section 1 of the 1970 Act. The respondent no. 2 had utterly failed to show that he was a contract labour and that his contract was a sham, fraudulent, smoke-screen and illusory and if the veil was lifted, the respondent no. 2 was an employee of the CPWD. It may be mentioned that in his written statement before the learned CGIT-LC, the pleaded case of respondent no.2 was that he was engaged as a watch and ward staff, but no such contract was proved.

36. Thus, in light of the discussions above, the Court is of the considered opinion that in the absence of proof of existence of any contract by ACD-CPWD, Aizawl for engaging the respondent no. 2, the finding by the learned CGIT-LC in para-14 that *"the workman was broadly under the contract of the management and not under the so called contractors. This type of engagement of the employee is nothing but a paper arrangement for some extraneous reason which may be called as illusory arrangement or sham contract actuated with some other purposes and hence, this so called contract labour would not be regarded as an employee of the contractor but an employee of the principal employer"* as well as the finding of the learned CGIT-LC at para-15 of the impugned order that the respondent no. 2 had rendered satisfactory service under the management of SCD-CPWD, Silchar and ACD-CPWD, Aizawl for more than 12 years must be held to be perverse and contrary to evidence tendered by the respondent no. 2, who was a contract labourer in so far as ACD-CPWD, Aizawl is concerned and therefore, perverse.

37. From the impugned order, it appears that the learned CGIT-LC

had accepted all the statements made by the respondent no. 2, but without considering the cross-examination of respondent no. 2, where he had expressed that he had no grievance against SCD-CPWD, Silchar. Thus, the evidence on record, as given in cross-examination of the respondent no. 2 was excluded and/or not considered, which amounts to perversity. The learned CGIT-LC also failed to take into account the positive evidence in form of Ext.1 to Ext.5, proved by the respondent no. 2, which disproves that he was working as contract labour under ACD-CPWD, Aizawl, which again amounts to perversity. The learned CGIT-LC also failed to consider the prescription of Clause (i) of Explanation appended to Clause (b) of Sub-section (5) of Section 1 of the 1970 Act, requiring 120 days of service to be rendered by the workman, which is again perverse.

On Ext.1 to Ext.5 exhibited by the respondent no.2:

38. It is observed that the respective authors of the certificates marked as Ext.1 to Ext.5 were not examined by the respondent no. 2. Be that as it may, whether Ext.1 to Ext.5 can be an acceptable evidence that the respondent no. 2 had rendered service as 'typist' in the office of the Executive Engineer, SCD-CPWD, Silchar vide Ext.1 to Ext.6 would be only an academic exercise, because, the candid statement by the respondent no. 2 in his cross-examination is to the effect that he had no grievance against SCD-CPWD, Silchar.

39. In the absence of contract and proof that the engagement of the respondent no. 2 was lawful, merely because some persons within CPWD gave certificates to the respondent no. 2 that he was rendering service, would not be

sufficient to make the respondent no. 2 a government servant, notwithstanding the length of service, if any, rendered by the respondent no. 2 because the author of such certificates were not examined as witnesses by the respondent no. 2, therefore, acceptance of certificates tendered in evidence as proof of contents is again perverse.

40. In the aforesaid context, the law regarding proof of contents of document is well settled. In the case of *Narbada Devi Gupta v. Birendra Kr. Jaiswal & Ors*, (2003) 8 SCC 745; and *Amar Nath Agarwalla v. D.T. Agency*, AIR 2007 SC 2402, the Supreme Court of India had held to the effect that mere production and marking of a document is not enough, but its execution has to be proved by admissible evidence and it was further held that where documents are admitted by the signatories thereto and marked as exhibits, there was no further burden to lead additional evidence to prove the writing and its execution. In the case of *L.I.C. of India v. Ram Pal Singh Bisen*, (2010) 4 SCC 491, it was held by the Supreme Court of India to the effect that under the law of evidence, it is necessary that contents of documents are required to be proved either by primary or by secondary evidence and it was further held that at the most, admission of documents may amount to admission of contents but not its truth. It was also held to the effect that mere admission of document in evidence does not amount to its proof and it was clarified that in other words, mere marking of exhibit on a document does not dispense with its proof, which is required to be done in accordance with law.

41. Admittedly, the respondent no. 2 has made a candid admission that he had no grievance against SCD-CPWD, Silchar and he also admits in his

cross-examination that "... *I have not made Silchar CPWD a party on the ground that everything will be disclosed which will go against me.*" Therefore, mere marking of Ext.1 to Ext.5 by the respondent no. 2 could not amount to the contents of the said document being proved. Thus, the omission by the learned CGIT-LC to appreciate the said piece of evidence i.e. Ext.1 to Ext.5, marked by the respondent no. 2 amounts to perversity.

Whether finding is based on surmises and conjectures:

42. The Court is constrained to hold that as the respondent no. 2, having expressed during his cross-examination that he had no grievance against SCD-CPWD, Silchar, any purported claim which the respondent no. 2 might have against SCD-CPWD, Silchar got extinguished. The respondent no. 2 having admitted that his service was not transferred from SCD-CPWD, Silchar to ACD-CPWD, Aizawl, could not prove the continuity of his service rendered at SCD-CPWD, Silchar with his purported engagement at ACD-CPWD, Aizawl. Such a presumption by the learned CGIT-LC also amounts to perversity.

43. Thus, the acceptance of Ext1 to Ext.5 as a proof of contractual employment amounts to perversity.

On finding regarding "contract" purportedly between the petitioner and respondent no. 2:

44. In light of the discussions above, the Court is of the considered opinion that the finding returned by the learned CGIT-LC, Guwahati in the impugned order, whereby it was held that the contract with the respondent no. 2 was a sham, is perverse and not sustainable on facts and in law.

Analysis of cases cited by both sides:

45. The case of *Avon Services Production Agencies Pvt. Ltd. (supra)*, was cited by the learned senior counsel for the respondent no. 2, to show that unless the establishments were separate, the claim by retrenched workman would be maintainable. The said case would not help the respondent no. 2 because in his cross-examination, as extracted herein before, the respondent no. 2 had provided the reason for not impleading the SCD-CPWD, Silchar. Moreover, it is the pleaded case of the respondent no. 2 that out of SCD-CPWD, Silchar, a new division, i.e. ACD-CPWD, Aizawl was created. Thus, the respondent no. 2 had disproved that SCD-CPWD, Silchar and ACD-CPWD, Aizawl were one unit and not separate units.

46. The case of *Monthly Rated Workmen at the Wadala Factory of the Indian Hume Pipe Co. Ltd. (supra)*, was cited to demonstrate that when CPWD had several units all over India, test of functional integrality should be applied and therefore, each unit would not be treated as an independent unit. In this regard, the Court is of the considered opinion that it is not the case of the respondent no. 2 that he was appointed by transparent recruitment process. He was appointed by the then Executive Engineer, SCD-CPWD, Silchar on some wages and the proof of payment of wages by SCD-CPWD, Silchar was also not proved. Therefore, if the appointment of the respondent no. 2 was illegal, by applying functional integrality test, an illegal appointee by one unit cannot be given permanent employment in another unit of the CPWD, i.e. at ACD-CPWD, Aizawl. Such an appointment would amount to give a premium to illegality.

47. The Supreme Court of India has settled the issue relating to payment of wages/ salary to illegal appointees. In this regard, we may refer to the case of *National Fertilizers Ltd. v. Somvir Singh*, (2006) 5 SCC 493.

48. Therefore, considering the admission by the respondent no.2 that he had no grievance in respect of SCD-CPWD, Silchar, in the absence of any proof that the respondent no. 2 was lawfully engaged as 'computerist' in ACD-CPWD, Aizawl, the case of *Monthly Rated Workmen at the Wadala Factory of the Indian Hume Pipe Co. Ltd. (supra)*, is not found to help the respondent no.2.

49. The case of *Gujarat Electricity Board, Thermal Power Station, Ukai, Gujarat (supra)*, was cited in support of the contention that an Industrial Dispute under Section 10 of the Industrial Disputes Act, 1947 can be raised. There is no quarrel with the said position of law. But, in this case, the respondent no. 2 could not prove payment of wages to him by the SCD-CPWD, Silchar and/or ACD-CPWD, Aizawl and moreover, the Ext.1 to Ext.5 could not be proved. Moreover, the identity card (Ext.7) was issued prior to the purported date of joining to the respondent no. 2. Thus, the engagement of the respondent no. 2 at ACD-CPWD, Aizawl could not be proved. Therefore, the cited case does not help the respondent no. 2.

50. Similarly, as master-servant relationship could not be proved by the respondent no. 2, the case of *Steel Authority of India Ltd. & Ors. (supra)*, does not help the respondent no. 2.

51. In the case of *G.M., ONGC, Silchar (supra)*, the reference was loosely worded and giving impression of dispute with regard to regularisation of services of contractual employees. However, the pleading reflected that core issue before Tribunal with regard to status of employees as employee of ONGC or of the contractor. Under such circumstances, the Supreme Court of India had observed that both the parties were aware of the real issues involved in the light of protracted litigation and the efforts made during conciliation proceedings. Therefore, the observation made by the Division Bench of High Court was approved of by the Supreme Court of India that it was open to the Tribunal to lift the veil so as to determine the nature of employment and the dispute between the parties for that purpose look into the pleadings and evidence produced before it. Accordingly, the plea that decision of Tribunal being beyond reference, was held to be hyper technical. Thus, without repeating what has already been referred several times herein above, the Court is constrained to hold that on facts, the present case is distinguishable.

52. In the case of *Jasmer Singh (supra)*, the workman had proved that he had worked for more than 240 days in a calendar year and therefore, it was held by the Tribunal that the termination order was void *ab initio*. In this case, there is no appointment order and no termination order in respect of respondent no. 2 joining the ACD-CPWD, Aizawl. The person who had allegedly appointed the respondent no. 2 at ACD-CPWD, Aizawl was also not examined by the respondent no. 2. It is reiterated at the cost of repetition that the respondent no. 2 had failed to prove payment of remuneration to him by the petitioner. Therefore, the cited case would not help the petitioner.

53. In the case of *Oil and Natural Gas Corporation Ltd. (supra)*, the management had taken a defence that the workman was employed through contractor, and therefore, it was held by the Division Bench of this Court that onus had been shifted on the management to examine such contractors. However, in this case, the respondent no. 2 had denied that he was employed by the contractor and claimed that he was engaged directly. Therefore, the burden and onus of proving such fact before the learned CGIT-LC, remained with the respondent no.2, which he failed to prove. Therefore, the cited case does not help the respondent no. 2.

54. The learned CGIT-LC also failed to appreciate that the respondent no. 2 claimed that due to ban on employment, he was shown as 'watch and ward' staff and employed in SCD-CPWD, Silchar as typist and then he was offered appointment as 'computerist' at ACD-CPWD, Aizawl. The employment made during ban period was deprecated in the case of *National Fertilizers Ltd. v. Somvir Singh, (2006) 5 SCC 493*. Therefore, the manner in which the respondent no. 2 was engaged, was illegal, which had escaped the consideration of the learned CGIT-LC.

Conclusion:

55. Therefore, in light of the discussions above, the Court is constrained to hold that the finding of the learned CGIT-LC, Guwahati is not found sustainable on facts and in law, being perverse on several counts as indicated herein before. The decision making process is found to be vitiated. The learned CGIT-LC failed to consider the evidence on record, which by admission by respondent no. 2, excluded his grievance against the SCD-CPWD,

Silchar. The learned CGIT-LC took into consideration Ext.1 to Ext.5, which are otherwise inadmissible in evidence as the authors of those certificates were not examined, for which it cannot be said that the contents thereof was proved in accordance with law. The presumption of contractual employment drawn by the learned CGIT-LC despite absence of proof of payment of wages by the SCD-CPWD, Silchar and ACD-CPWD, Aizawl, is perverse and not sustainable on facts and in law. The learned CGIT-LC also failed to consider that the respondent no. 2 could not produce any single witness who had seen him working as 'computerist' at ACD, CPWD, Aizawl and therefore, presumption of existence of relation between the respondent no. 2 as contract labour under ACD-CPWD, Aizawl is also perverse. The resultant reinstatement of the respondent no. 2 in service with 25% back wages on the prevailing rate of wages on the date of his disengagement is also perverse and not sustainable on facts and in law and would amount to giving premium to illegal appointment/ engagement without following due process of law and would operate contrary to the law laid down by the Supreme Court of India in the case of *Secretary, State of Karnataka v. Uma Devi, (2006) 4 SCC 1*, wherein it was held that illegally appointed persons had no right to claim regularisation. The said part of the order, directing payment of 25% back wages would also operate against the law laid down in the cases of *State of Orissa & Anr. v. Mamata Mohanty, (2011) 3 SCC 436*, *National Fertilizers Ltd. v. Somvir Singh, (2006) 5 SCC 493*, *Y. Token Singh (supra)*, *Rukiya Khatun v. State of Assam & Ors., (2012) 1 GLT 532*, *Md. Harunur Rashid (supra)*.

56. Therefore, the writ petition deserves to be and is accordingly, allowed. Resultantly, the impugned award dated 25.02.2013, passed by the

learned Central Government Industrial Tribunal- Cum- Labour Court, Guwahati in Reference Case No. 02/2008 is set aside and quashed and remanded back for a fresh decision by the learned CGIT-LC, Guwahati. As a consequence, the respondent no. 2 would not be entitled to the relief of reinstatement in service and payment of 25% back wages as per the impugned award.

57. Both parties, who are represented by their respective counsel, are directed to appear before the learned CGIT-LC, Guwahati on 26.06.2023 and by producing a certified copy of this order, seek further instructions from the said learned Tribunal.

58. It is made clear that while deciding the matter afresh, the learned CGIT-LC shall not be influenced by this judgment and order or views expressed in this order and the matter shall be decided in its own merit. It shall also be open to the parties to seek examination of additional witnesses or documents. However, such a prayer shall be considered by the learned CGIT-LC in its own merit and in accordance with law.

59. The parties are left to bear their own cost.

JUDGE

Comparing Assistant