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W.P.Nos. 23719 & 23720 of 2004

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.12.2024

CORAM:

THE HONOURABLE MR. JUSTICE **D.BHARATHA CHAKRAVARTHY**

W.P.Nos. 23719 & 23720 of 2004

and

W.M.P.Nos.28741 & 28743 of 2004

W.P.No. 23719 of 2004

V.G.P.Golden Beach Resorts Limited,
Injambakkam,
Chennai - 600 041.
Rep. by Director.

... Petitioner

Vs

1. The Presiding Officer,
Industrial Tribunal, Tamilnadu, Chennai.
2. The General Secretary,
Bharathiya Employees Mazdoor Sangam,
Injambakkam,
Chennai - 41.

... Respondents

Prayer: Writ Petition filed under Article 226 of Constitution of India for the issuance of Writ of Certiorari, call for the records of the first respondent in I.D.No. 175 of 1999 and quash its award dated 11.01.2002.



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W.P.No. 23720 of 2004

V.G.P. Golden Beach Resorts Limited,
Injambakkam,
Chennai - 600 041.
Rep. by Director.

... Petitioner

Vs

1. The Presiding Officer,
Industrial Tribunal, Tamilnadu, Chennai.
2. The President,
V.G.P. Golden Beach Resorts Limited,
Employees Union,
7, Mclean St,
Chennai - 1.

... Respondents

Prayer: Writ Petition filed under Article 226 of Constitution of India for the issuance of Writ of Certiorari, call for the records of the first respondent in I.D.No. 109 of 2000 and quash its award dated 11.01.2002.

In both W.Ps.

For Petitioner : Mr.P. Raghunathan
for Mr.T.S.Goplan & Co

For R1 : Labour Court

For R2 : Mr.K.M.Ramesh, Senior Counsel
Assisted by Mr. V.Subramani

ORDER



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These two writ petitions arise out of the common award dated 11.01.2002 passed in I.D.Nos. 175 of 1999 and 109 of 2000 and are taken up for disposal by way of this common order.

2. By G.O.(D). No. 677, dated 09.08.1999, the following question was referred for adjudication by the Tribunal:-

“சென்னை/41, வி.ஜி.பி.கோல்டன் பீச் ரிசார்ட்ஸ் லிமிடெட் நிறுவனத்தில் பணிபுரிந்த கீழ்க்காணும் 43 தொழிலாளர்களை நிர்வாகம் வேலை நீக்கம் செய்தது சரிதானா- இல்லையெனில் அதற்கான நிவாரணம் என்ன என்பதை குறிப்பிடுக”

The said reference was taken on file as I.D.No. 175 of 1999. While so, the Government again referred the following question vide G.O.(D).No. 733, dated 28.08.2000.

“வி.ஜி.பி. கோல்டன் பீச் ரிசார்ட்ஸ் லிமிடெட் என்ற நிறுவனம் கீழ்க்கண்ட 5 தொழிற்சங்க நிர்வாகிகளை சென்னையிலிருந்து, கிளை நிறுவனத்திற்கு பணியிடமாற்றம் செய்தது மற்றும் கீழே குறிப்பிட்டுள்ள 43 தொழிலாளர்களை வேலை நீக்கம் செய்தது ஆகிய செயல்கள் நிர்வாகத்தினரின் தொழிலாளர் விரோதப் போக்கினை காட்டுகிறது என்ற தொழிற்சங்கத்தின் கோரிக்கை நியாயம் தானா- ஆமெனில் தகுந்த உத்தரவுகள் பிறப்பிக்க”

The names of the 5 transferred workmen and 43 non-employed workmen is given in the annexure. The said reference was taken on file as I.D.No.109 of 2000. Both were taken up together by the Industrial Tribunal and by a common award, the Industrial Tribunal answered the reference. The



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operative portion of the Award of the Industrial Tribunal is extracted

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“15. Hence the termination of the 43 workmen is found not justified. So far as the question of transfer is concerned, we have already passed an award dated 12.10.2001 in I.D.No. 137/98. Award passed accordingly. No costs.”

3. The brief factual background is that these 43 workmen claimed that they were working under the management. The management is running a resort at Injambakkam near Chennai, wherein 65 cottages are built and it is situated on an area of 55 acres. These workmen were undertaking all the jobs at the said resort. While so, they claim that 14 of them were non-employed with effect from 15.06.1998 and the rest of them were non-employed with effect from 01.08.1998. Therefore, claiming back wages and reinstatement, they made demands through their union namely B.E.M.S. (Bharathiya Employees Mazdoor Sangam). They had also subsequently formed a separate union, namely V.G.P. Golden Beach Resorts Limited Employees Union. When the claim was made through the first Union namely B.E.M.S., the same was referred for adjudication as above. There is no justification whatsoever for non-employing the workmen. Therefore, they prayed that all 43 workmen



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to be reinstated with full back wages, continuity of service and all attendant benefits.

4. The claim was resisted by the management through a counter affidavit. It is the specific case of the management that these 43 workers were contract labourers and were not direct employees under the management. They cannot claim reinstatement and back wages from the management. There were also earlier proceedings between the parties. The allegation of victimization is incorrect. The claim petition was framed as if 43 workers were first represented by B.E.M.S. Union and thereafter by the second union, which is incorrect in law and as such should be dismissed in limine as not maintainable. In view of the second reference, a claim statement with the same allegations was made, which was also resisted by the filing of a counter statement. The management never victimised any of the employees and there was no unfair labour practice. Based on the said pleadings, the Industrial Tribunal took up the enquiry.

5. During the enquiry, on behalf of the workmen, three witnesses were examined. One S.R.Somasundaram, the trade union representative was examined as W.W.1, one P. Vedammal and one G.Suseela, two workers were



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examined as W.W.2 and W.W.3. On behalf of the workmen in I.D.No. 175 of 1999, Ex.W1 to Ex.W19 were marked and with reference to I.D.No. 109 of 2000, Ex.W1 to Ex.W4 were marked. On behalf of the management, no oral evidence was let in. However, in I.D.No.175 of 1999, Ex.M1 to Ex.M31 were marked and in I.D.No. 109 of 2000, Ex.M1 to M60 were marked. Thereafter, the Tribunal considered the issue.

6. No specific finding was given concerning the second reference, (i.e.) regarding unfair labour practice. The Tribunal found that the workmen had marked Ex.W.12, in which the Provident Fund Authorities had decided the issue in favour of the workmen. It relied upon the said evidence to reject the claim of the management and upheld the claim of the workmen that they were not contract labourers but they were direct employees under the management. Therefore, in the absence of any domestic enquiry or procedure being followed to retrench them, their non-employment was not justified. The Tribunal stopped with that. The operative portion was extracted supra. Aggrieved by the same, the management has filed these two writ petitions.

7. Heard *Mr.P. Raghunathan*, the learned counsel appearing on behalf



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of the management and *Mr.K.M. Ramesh*, the learned Senior counsel appearing on behalf of the workmen.

8. *Mr.P.Raghunathan*, the learned Counsel appearing on behalf of the management submits that when the reference contained two questions as to whether the non-employment is justified or not and what relief should be granted to the workmen, no relief was granted to the workmen at all. Therefore, the remedy that was open to the workmen was to approach the Government, which could seek further clarification under Section 36A of the Industrial Disputes Act. In the absence of the said exercise, no meaning can be attributed to the award. The operative portion of the award would amount to the refusal of grant of any relief to the workmen. The principles of constructive res-judicata, contained in the Civil Procedure Code, though not directly applicable, should be extrapolated and applied to the situation. Similarly, the principle contained in Section 34 of the Specific Relief Act should also be applied and a mere declaration alone ought not to have been granted, as it is of no use to the workmen. According to the learned counsel, when the Industrial Tribunal abdicated its jurisdiction in deciding the issue, then that should be held only as against the claimant workmen. Therefore, he



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submits that this Court should hold that the award is unenforceable and without any meaning at all. He would secondly submit that the Industrial Tribunal did not even finally term the non-employment as illegal, it only held that it is not justified. Both are different terms and therefore, no relief can be granted to the workmen in the impugned award.

9. *Mr. Raghunathan* would further submit that the claim statement reads as if the 43 workmen is first represented by one union and second represented by another Union. Such a frame of dispute itself is incorrect in law and the workmen cannot be represented by two unions. In the referral order, only the B.E.M.S., the first union alone is mentioned. Therefore, the claim as made is liable to be rejected. The learned counsel, turning the attention to the merits of the claim of the workmen would submit that it is the categorical claim of the management that these workmen are only contract labourers. Firstly, the workmen should have discharged their burden to prove that they are the direct workers under the management. According to the learned counsel, in the workmen's document in Ex.W3 and W4, they expressly admit Francis Xavier as their contractor. Therefore, on the admission of the workmen themselves, it would be clear that they were working only under the contractor.



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10. Once the workmen admit that they were under the contractor, then the further defects of not having the licence or not maintaining the records are all only matters for prosecution under the Contract Labour (Regulation and Abolition) Act, 1970 and will not create an employer-employee relationship. Therefore, when the workmen have not proved that they are direct employees under the management, the Tribunal ought to have rejected their claim. The Tribunal had only rejected the case of the management based on Ex.W12. Ex.W12 is an order passed under the Employees Provident Fund and Miscellaneous Provisions Act, 1952. As per Section 2(e) of the said act, the definition of employer includes the principal employer as well. Similarly, the definition under Section 2(f) of the term employee includes contract labour as well. The Act specifically empowers the authorities to realise the dues from the principal employer. Therefore, the Provident Fund Authorities would hold the management liable even in a case where the employees are contract labour and therefore, Ex.W.12 cannot be pressed into service to claim an employer-employee relationship with the petitioner management.

11. The learned Senior Counsel appearing for the management would



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rely upon the judgement of the Bombay High Court in ***Bhartiya Kamgar***

Sena vs. Udhe India limited and another¹ more specifically relying upon paragraph No. 20, to contend that merely because the employees were doing housekeeping and other work, that would not change the relationship between the company and the workmen. From the documents, it is clear that the workmen were only working under the contractor. Because orders are passed under the Provident Fund Scheme, and under the ESI Act, the same will not alter the relationship. The learned counsel would also draw the attention of this Court to the evidence that is let in by the management in the form of various invoices through which they have made payments to the contractor. The learned counsel would further rely upon the judgement of the Supreme Court of India in ***Dena Nath and others Vs. National Fertilisers Limited and others***², more specifically placing reliance upon paragraph No. 22, to contend about the nature of the enquiry that can be made regarding the employer-employee relationship. Even if the contractor violates the provisions of Section 9 (sic 7) and 12, the same being only a penal provision, only punishment can be imposed on the contractor and no employer-employee relationship can be presumed. In this case, he would further submit that the

¹ 2007 (6) Mh.L.J185

² (1992) 1 SCC 695



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workmen had not made the contractor a party, despite their express allegation

in Ex.W3 and W4.

12. Adverting to the second industrial dispute, the learned counsel would submit that firstly, the same ought not to have been referred at all because, except for the non-employment, which is dealt with in the present industrial dispute and the transfer, which is also dealt with in an independent industrial dispute, no other unfair labour practice that is enumerated in the fifth Schedule of the Industrial Disputes Act is even pleaded. Therefore, the very referral itself was incorrect. On reading the question, it can be seen that it is nothing but superfluous. Thirdly, the Labour Court had not given any findings concerning unfair labour practice under the said reference. The learned counsel would rely upon the judgement of the Supreme Court of India in *Hindustan Lever Limited Vs. Ashok Vishnu Kate and others*³ more specifically relying upon paragraph No.37 of the judgement, to contend that there must be an express decision concerning the unfair labour practice by properly enumerating the kind of unfair labour practice. The same cannot result in a direct complaint or prosecution. The learned counsel finally would

3 (1995) 6 SCC 326



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submit that even though the present award was passed in favour of the workmen, the workmen never reported for duty, seeking reinstatement. In this regard, the learned counsel would rely upon the judgement of this Court in ***Peer Mohamed & Co., Madras vs. Mohamed Hussain and another***⁴ reported in, more specifically placing reliance upon paragraphs No.6, to contend that when they have not even reported for work, no further relief could be granted to them, even by this Court.

13. Per Contra, *Mr K.M.Ramesh*, the learned senior counsel appearing on behalf of the workmen would submit that when the workmen have claimed that they are in direct employment with the management, it is specifically alleged by them that the wages are paid only by the petitioner management. No evidence whatsoever was produced by the management with reference to the payment of wages by the contractor. The Ex.W12 & W13 etc., clinches the issue. All along, when these workmen were treated as direct employees by various other authorities, then that would prove the case for the workmen. Per contra, nothing prevented the management from coming up with a specific case as to the respective period. There is no pleading as to who was the

⁴ 1967 SCC Online Mad 283



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contractor, what was the contract, and what are the records maintained by the contractor. Except to make a general statement that these workmen were with the contractor, nothing is done by the management.

14. He would submit that the claim concerning the cause title is also hypertechnical and untenable. Both the unions were shown in the cause title. The witness S.R. Somasundaram who was examined as W.W.1, was the first person to write the letter making their demand and was also a representative of the B.E.M.S. union. Therefore, the technical objection is unjustified. Regarding the operative portion of the award, it should be deemed that the Labour Court has granted the benefit of reinstatement with back wages and continuity of service, as labour jurisdiction is a beneficial jurisdiction to grant relief to the workmen.

15. The learned Senior counsel would rely upon the judgement of the Hon'ble Supreme Court of India in ***Hussainbhai, Calicut Vs. The Alath Factory Thezhilali, Union, Kozhikode and others***⁵ that whenever a claim of contract labour is made by the management, this Court should lift the veil and

⁵ 1978 (37) FLR 136



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find out whether the claim of the management is actually justified or whether it is sham and nominal only to avoid an award in favour of the workmen.

Therefore, he would submit that the writ petition should be dismissed and the entire benefits to be granted to the workmen.

16. I have considered the rival submissions made on either side and perused the material records of the case.

17. The first question to be decided is that whether or not the workmen are directly under the employment of the petitioner management. The workmen have pleaded that they are directly under the management. They have examined W.W.1 to W.W.3 claiming that they were directly under the management and that the wages were paid by them. They have also produced Ex.W12 etc., in their favour. When it is the specific case of the management that they are only contract labourers, the person making an assertion has the initial burden to prove the same. Except for producing the invoices, no other evidence is there on record. The invoices neither contain the names of the workmen nor contain the name of the said Francis Xavier who is said to be the contractor. Therefore, the same doesn't lead anywhere. No specific contract



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etc., is pleaded or produced. Even in the counter affidavit, the name of the contractor etc., is not categorically pleaded. Further, it can be seen that in Ex.W.12, it is not the case that the Provident Fund Authorities that the management is liable as a principal employer. When Provident Fund Authorities claimed dues in respect of the very workmen who are before this Court and also other workmen, in all totalling 96 persons, the defence of the management was that they were all contract labourers and were not directly under their employment. The authorities under the Employees Provident Fund Act went into the said question and it was specifically found that the case of the management that these employees were contract labourers and that there was a separate code allotted in their name are factually incorrect.

18. The authorities found that in 1997 one code had been registered in favour of one contractor. Therefore they held that the workmen were directly employed. Therefore, I find that the reliance placed by the Industrial Tribunal in Ex.W12 etc., to hold that the workmen were directly employed by the management is in order. I reject the submissions made to the contrary and hold that the workmen have proved that they were directly employed by the



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management. Further, though in Ex.W3 and W4, the said Francis Xavier is also mentioned as a contractor, as rightly pointed out by the learned Senior counsel, it has been mentioned in the context as if he is the alleged contractor. Therefore, the Industrial Tribunal, in the exercise of its labour jurisdiction, has to take into account the entire evidence on record and come to a conclusion as to whether the employees are contract labourers or not.

19. On the oral and documentary evidence that are produced before the Court, especially in the absence of a specific pleading about the name of the contractor, the production of the contract and other records relating to contract employment etc., I am of the view that the finding of the Industrial Tribunal cannot be termed as perverse or incorrect. I hold that the workmen are directly employed under the management.

20. Once the workmen are held to be the direct employees under the management then their non-employment, without any domestic enquiry or without following the provisions of Section 25F, is incorrect and illegal. Therefore, the non-employment is not justified and accordingly, the finding of the Industrial Tribunal that their non-employment is not justified is in order.



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21. Next *Mr.Raghunathan* contends that no meaning can be ascribed to the Industrial Tribunal's decision since the consequential relief was not given. Per Contra, *Mr.Ramesh* contends that everything should be deemed to be granted. Both the contentions cannot be accepted. Once the reference is made regarding the question of non-employment and the relief to be granted to the workmen, the same has to be considered in the context of labour jurisdiction. In the context of labour jurisdiction, even if the non-employment is held to be unjustified, the reinstatement with back wages and continuity of service is not automatic. The relief has to be expressly granted for reinstatement with or without back wages, with or without continuity of service. The Tribunal also can grant the relief of compensation in lieu of reinstatement. In this case, it is only by oversight the Tribunal did not advert to the further relief to be granted. That is an error. This Court, under Judicial Review, is not powerless to rectify the said error. The relief can be granted by this Court. But there cannot be any presumption as to constructive res-judicata as this is not a second or subsequent proceeding but a judicial review of the award itself. Similarly, the award of the labour court should only be given meaning by correcting the error and shall not be rendered unenforceable or meaningless by following the



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principles of Section 34 of the Specific Relief Act. The argument is opposed to the context and illogical.

22. Thus, to decide what relief to be granted to the workmen, the following factors are taken into consideration:

- a. Despite the award partly in their favour, the workmen have not subsequently filed even 17B wages before this Court.
- b. The management has obtained the stay of the award and this writ petition has been pending since 2004, for the past 20 years.
- c. Several of the workmen have also crossed the age of superannuation.
- d. The very nature of the employment under the management had undergone significant changes.

Therefore, for all the above foregoing factors, I am of the view that this is a fit case to order compensation in lieu of reinstatement with back wages rather than reinstatement with back wages.

23. Coming to the question of compensation, it is as per the judgement of the Hon'ble Supreme Court of India in the O.P Bhandari case that roughly



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an amount equivalent to the wages of 39 months can be granted with adding some more amount towards the loss of future employment. The learned counsel for the management contends that the wages were Rs.50/- per day at the relevant point of time, whereas the contention of the learned counsel appearing on behalf of the workmen by relying upon the averments made in C.P.No. 321 of 2007 is that the wages were Rs.80/- per day. When this Court went through the computation petitions, some of the workmen have claimed Rs.35/- per day and some of them have claimed Rs.80/- per day. Therefore, I am of the view that it can be taken as Rs.50/- as contended by the learned counsel for the Management. Therefore, the compensation roughly works out to Rs.58,500/-. Adding a little more sum towards the loss of employment and all other claims, such as gratuity etc., so that the workmen need not be further dragged into various other fora, I am of the view that each of the workmen will be entitled to a sum of Rs. 85,000/- as full quit for all claims.

24. Further, as regards two references, as rightly contended by the learned counsel for the management, when the transfer of 5 workmen has been dealt with in a separate I.D., and the non-employment of the 43 workmen has also been in the first referral. the second I.D. itself is superfluous and the



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Industrial Tribunal has also not granted any relief based on the second reference. Therefore, there is force in the contention of the learned counsel for the management. However, absolutely no outcome is there. Even in the claim petition, the very same reinstatement is only pleaded in the second claim petition.

25. In view thereof, these writ petitions are disposed of on the following terms:-

(i). The award of the Industrial Tribunal dated 11.01.2002 passed in I.D.No. 175 of 1999, is upheld in as much as it holds that the workmen are the direct employees under the management and that their non-employment is not justified;

(ii). The award is held to be illegal in as much as it did not grant the further consequential relief and the further consequential relief of compensation in lieu of reinstatement with back wages is granted by this Court;

(iii) Each of the workmen shall be paid by the petitioner Management for a sum of Rs.85,000/- which sum shall be in full quit towards all and any further claim



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whatsoever, within twelve weeks from the date of receipt/production of the website-uploaded copy of this order, not waiting for the certified copy of the order;

(iv) If the amount is not paid within the said period, thereafter, it shall carry further interest at the rate of 6% per annum;

(v) If any of the cases, the workmen have since passed away, their legal heirs will be entitled to make a claim to the management by producing the death certificate and legal heirship certificate and upon verification, the compensation amount shall be paid to the legal heirs;

(vi) The very reference and consequently the award with the limited reference to I.D.No. 109 of 2000 is held to be superfluous;

(vii) Consequently, connected miscellaneous petitions are closed. No costs.

10.12.2024

Neutral Citation: Yes
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To
The Presiding Officer,

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Industrial Tribunal, Tamilnadu, Chennai.

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D.BHARATHA CHAKRAVARTHY, J.

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