

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.9827 of 2001

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Bihar State Co-Operative Milk Producers' Federation Ltd. Veterinary College
Campus, P.S. Phulwari Sharif, Patna. Through its Managing Director.

.... Petitioner/s

Versus

1. Presiding officer, Labour Court, Dalmianagar, Rohtas.
2. 2. The Bihar State Co-operative Milk Producers' Federation, Mazdoor Union,
Gaya, through its Secretary.
3. Ramesh Kumar s/o Ram Lakhan Prajapati, resident of P.S. Delha, District
Gaya.
4. Gopal Yadav s/o Kail Yadav, resident of Ujapi, P.S.Chandauti, District Gaya.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Ashok Kumar Singh, Sr. Adv.
Mr. Prabhat Kumar Singh, Adv.
Mrs. Manisha Singh, Adv.

For the Respondent/s : Mr. M.K.Sinha, SC-1,
Mr. S.K.Karn, AC to SC-1.
Mr. M.K.Sinha, SC-6

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 08-05-2015

Heard counsel for the petitioner and the
respondents.

In this case, the petitioner Management is
challenging the award of the Labour Court dated 27th May 2000
passed in Reference Case no. 6 of 1994 by which the Labour
Court has granted relief of reinstatement with back wages.

Claim has been made by the workmen that they
were working under the petitioner Management at Gaya from 1989
to 1992 and were removed from service without following the
provisions of Section 25F of the Industrial Disputes Act, 1947
(hereinafter referred to as the 'Act') and without holding any

enquiry and after termination of service the dispute was raised and ultimately the matter was referred to the Labour Court with the following terms:

“Whether there is jurisdiction of the termination of the services of Shri Ramesh Kumar, and Gopal Yadav, workmen, by the Management of Gaya Unit of Bihar State Milk Producers. If not, whether those workmen be reinstated or/and what any other relief is entitled to”.

The Management filed written statement, submitted that both the private respondents were not directly employed by the Management, they were working through contractor, namely, Sardar Singh Bagga and as the contractor has informed the removal of their service, accordingly, they were not allowed to work.

The management as well as the workmen led their evidence, altogether three witnesses were examined by the workmen in support of their case, where a plea has been taken that they were directly employed by the Management, they were not engaged through any contractor whereas the Management has filed agreement dated 8th October 1991 (Annexure-2) showing that two persons were engaged through Sardar Singh Bagga and the dispute referred is not an industrial dispute as there was no direct relationship with the Management and has taken plea that under



the Contract Labour (Regulation and Abolition) Act 1970 (for short, 'Contract labour Act') unless that work is prohibited by the appropriate Government. Management is free to get the work done through the contractor. As the nature of job was for sweeping and cleaning for that the Management has entered into an agreement with the contractor.

The Labour court, Dalmianager discussed oral and documentary evidence, rejected the claim of Management that two persons named in the reference were engaged through contractor, holding that as job of establishment is intermittent or casual in nature, contract labour Act does not apply, placing reliance on the judgment reported in AIR 1999 SC 1160 (Secretary, Haryana State Electricity Board v. Suresh and other etc.) and held that as per Section 1(5) of the Contract Labour Act which provides, the Act does not apply, where the work is of intermittent in nature, recorded a finding that there is discrepancy in the name of contractor, as in the written statement name of the contractor has been mentioned as Sardar Singh whereas in the licence his name is Sardar Singh Bagga so much so Sardar Singh Bagga was not examined by the Management to substantiate the claim of management on the basis of materials available on record he has found that the two workmen namely, Ramesh Kumar and Gopal Yadav were directly engaged by the Management so much so the

Management did not follow the provisions of law and directed for reinstatement of the workmen.

Counsel for the petitioner submitted that the Labour Court has misdirected himself in holding that they were direct employees of the Management without arriving to a finding that the agreement that was produced was sham document. In absence of such finding the Labour Court should not have recorded a finding of direct engagement of the workmen. He has further submitted that in view of judgment reported in Steel Authority of India reported in (2001)7 SCC 1 (Steel Authority of India Ltd. V. National Union Waterfront Workers) where in different Paragraphs, the Hon'ble Supreme Court has held that unless it is prohibited by the State Government the engagement of a contract workman in particular industry either the work is perennial or intermittent is not prohibited. The power to make prohibition for engagement of contract workers lies with the State Government under Section 10 of the Act on following certain procedure prescribed and in absence of notification prohibiting employment in particular job it cannot be construed Management bereft with power to get the work done through contractor. The Labour Court has completely misconstrued the provisions of the Contract Labour Act and fallen in error. He has further submitted that the judgment which has been relied upon by the Labour Court is misplaced and



it has wrongly been interpreted to have applied. He has further submitted that unless there is a contract of service, in case of contract for service (contractor's employee), it will not be industrial dispute within the meaning of Section 2(k) of the I.D. Act in result, cannot be subject matter of adjudication for Labour Court or Industrial Tribunal under the Industrial Disputes Act. It has further been submitted that the agreement that has been placed by the Management itself speaks clearly that the Management was taking the work of seeping and cleaning through the contractor who used to engage contract workers and in such a situation the order of reinstatement is completely illegal. He has further submitted that in the written statement as well as in the evidence, the management has stated they were temporary employed and the onus lies upon the workmen to prove that there were not temporary employee and in absence of such pleading and proof, the Labour Court should have refused to grant a relief of reinstatement or back wages. He has further submitted, in earlier view, the Hon'ble Supreme Court, in the event of illegal termination, used to grant relief of instatement but later on the view changed, replaced by payment of suitable amount of compensation. During the course of argument, counsel for the petitioner has submitted the Management is ready to pay an amount of compensation of Rs.50,000/- to each workman.



Counsel for the workman has submitted that the workmen are not ready to accept the offer of compensation of meager amount, submitted, they were the direct employees of the Management so much so the Labour Court rightly pointed out the discrepancy in the name of contractor so much so that the Management has not produced any agreement for the period 13th May 1992 and onward, in such view of the matter, the finding recorded by the Labour Court, cannot be held to be perverse, does not require interference. He has further submitted that this Court in exercise of power of superintendence will not interfere with the finding recorded by the labour court, unless the findings are perverse in the sense, no reasonable person would arrive to such conclusion.

In Steel Authority of India (supra) in Para 71 the Hon'ble Supreme Court held that where a workman is hired in or in connection with the work of an establishment by the principal employer through a contractor, he merely acts as an agent so there will be master and servant relationship between the principal employer and the workman. But where a workman is hired in or in connection with the work of an establishment by a contractor, either because he has undertaken to produce a given result for the establishment or because he supplies workmen for any work of the establishment, a question might arise whether the contractor is a

mere camouflage as in Hussainbhai's case and in Indian Petrochemicals Corpn. Case reported in (1999)6 SCC 439, if the answer is in the affirmative the workman will be in fact an employee of the principal employer but if the answer is in the negative, the workman will be a contract labour.

So the test that has been provided in Hussainbhai v. Alath Factory AIR 1978 SC 1412 has been quoted in affirmative in that judgment in Para-115 where the Hon'ble Supreme Court has said –

“..On examining various factors and applying the effective control test, this Court held that though there was no direct relationship between the petitioner and the respondent yet on lifting the veil and looking at the conspectus of factors governing employment, the naked truth, though draped in different perfect paper arrangement, was that the real employer was the management, not the immediate contractor. The Court thereafter quoted the observation of Justice Krishna Iyer observed :
“Myriad devices, half-hidden in fold after fold of legal form depending on the degree of concealment needed, the type of industry, the local conditions and the like may be resorted to when

labour legislation casts welfare obligation on the real employer, based on Article 36, 39, 42, 43 and 43A of the Constitution. The court must be astute to avoid the mischief and achieve the purpose of the law and not be misled by the *maya* of legal appearance.”

Now looking to the test provided in Hussainbhai's case (supra) as well as in Steel Authority of India (supra) the Hon'ble Supreme Court in recent judgment in 2015(2) PLJR 43 (K.V.S. Ram v. Bangalore Metropolitan Transport Corpn.) has considered the exercise of power under Articles 226 and 227 of the Constitution while testing the award of the Tribunal where the Hon'ble Court quoted in affirmance of the judgments reported in AIR 1964 SC 477 (Syed Yakoo v. K.S.,Radha Krishnan) where the test has been provided as follows:

“ ... A writ of certiorari can be issued for correcting errors of jurisdiction, committed by inferior courts or tribunals, these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the court or tribunal

acts illegally or improperly, as for instance, it decides a question without giving an opportunity be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the court exercising it is not entitled to act as an appellate court. This limitation necessarily means that findings of fact reached by the inferior court or tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however, grave it may appear to be. In regard to a finding of fact recorded by the tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is

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based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be aggravated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.

“..We find the judgment and award of the labour court well reasoned and based on facts and evidence on record. The High Court has erred in exercise of power under Article 227 of the Constitution of India to annul the findings of the labour court in its award as it is well settled law



that the High Court cannot exercise its power under Article 227 of the Constitution as an appellate court or re-appreciate evidence and record its findings on the contentious points. Only if there is a serious error of law or the findings recorded suffer from error apparent on record, can the High Court quash the order of a lower court. The Labour Court in the present case has satisfactorily exercised its original jurisdiction and properly appreciated the facts and legal evidence on record and given a well reasoned order and answered the points of dispute in favour of the appellant. The High Court had no reason to interfere with the same as the award of the Labour Court was based on sound and cogent reasoning, which has served the ends of justice.”

In the present case, three witnesses from the side of workmen have been examined and two witnesses from the side of Management have been examined. The labour court has examined the evidence of parties and arrived to a conclusion that workmen were directly employed by the Management but counsel for the Management has submitted that there was an agreement between the Management and the contractor where Sardar Singh

Bagga has been shown contractor but that contract/agreement has not been declared sham in such a situation both persons cannot be said to be employee of the petitioner.

The labour court has found fault in the licence where it has been shown as Sardar Singh but in the agreement Sardar Singh Bagga has been mentioned and 'Bagga' is missing in licence so much so M.W.2 has said workmen were getting salary through voucher but W.W.1 in his statement has said that Sardar Singh Bagga was contractor during 1989.

If the test as provided in the case of Hussainbhai's case (supra) is applied, the agreement that has been produced by the Management itself shows that it was a paper arrangement in such a manner to deprive the right of workmen who are engaged for cleaning purpose. Of course there is no finding recorded by the labour court that the agreement that has been made is sham so much so the labour court has also committed an error holding that if the nature of work is of perennial nature the Contract Labour Abolition Act will not apply. It is not the position in law, the operation of Contract Abolition Act has been excluded to the establishment in which nature of work is intermittent or of casual nature, itself shows that contract Labour Abolition Act applies to establishment having perennial nature of work. The Management would be debarred to employ contractor workers where

appropriate Government has issued the notification of prohibition under the Contract Labour Regulation Act.

Looking to the guidelines in K.V.S. Ram (supra) and that too when the matter has come after such a long period of 21 years, it will not be proper to remand back the matter for consideration whether the agreement was sham or not.

The Management has not produced the contractor, nor any register of contractor has been brought nor the Management has produced return under the EPF or ESI Act showing the contribution was deposited under the heading of contractor. It is an undisputed that that two persons, named above, have worked with the Management from 5th May 1989 to 15th May 1992 and there is no plea of the Management that they have not worked for 240 days preceding 12 months from the date of termination and it is also a fact that before terminating the services of these workmen, they were not given one month's notice or payment in lieu thereof or compensation.

Earlier view of Hon'ble Supreme Court was if the order of termination is bad, the natural consequence is to reinstate the workman with back wages but later that view has been changed is apparently clear from Jagbir Singh v. Haryana State Agriculture Marketing Board and anr. AIR 2009 SC 3004 = (2009)15 SCC 327. In that judgment, large number of judgments



have been considered and conclusion was arrived at that reinstatement with back wages be substituted by granting compensation. In (2006)1 SCC 479 (U.P. STATE BRASSWARE CORPN. LTD. v. Uday Narayan Pandey) the Hon'ble Supreme Court has held that while granting relief, the court has to strike balance in between in the interest of workmen vis-a-vis Industry and also in the case of Senior Superintendent Telegraph (Traffic) Bhopal v. Santosh Kumar Seal and Ors. (Civil Appeal No. 3815 of 2010), AIR 2010 SC 2140 in Para-6 it has been held that reinstatement with back wages is not automatic even if termination of an employee is found to be illegal or is in contravention of the prescribed procedure, monetary compensation in lieu of reinstatement and back wages will be appropriate relief.

On conspectus facts and circumstances of the case, neither in the pleading nor in the evidence the workmen have said that they were not gainfully employed anywhere during the gestation period. In such view of the matter, unless they plead and prove that they were not gainfully employed it will be very difficult for any court to grant the relief of back wages. Workmen were performing manual unskilled work of cleaning is available in plenty.

In the present case two persons were employed on daily wages as claimed by the Management through contractor.

They had worked for little less than three years and this Court does not know at all whether still there is some vacancy for these workmen. In such circumstances, giving direction to the Management to give employment will not be appropriate in the interest of justice, as such, this Court feels that the order of reinstatement can be substituted by giving direction for compensation. What will be the amount of compensation is to be seen keeping in view of the period and the amount the workmen were getting. As the tenure is of less than three years and they were getting Rs.560/- per month which now has come to about Rs.10,000/-. It is also a fact that for subsistence of life, the workmen, must be working somewhere as manual work is available plenty but the person should be given fair amount of compensation so that they can utilize for their future development.

In such view of the matter, in the interest of justice, this Court directs the Management to make payment of Rs.90,000/- (ninety thousand) each to both the workmen.

With this observation and direction this petition is partly allowed.

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(Shivaji Pandey, J)