

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

THURSDAY, THE 12TH DAY OF FEBRUARY 2015/23RD MAGHA, 1936

W.P.(C).No.12160 of 2013 (T)

[AGAINST THE AWARD IN I.D.NO.10/2007 DATED 15.03.2013
OF THE INDUSTRIAL TRIBUNAL, KOLLAM].

PETITIONER(S):-

THE KERALA STATE VIDESHA MADHYA VYAVASAYA THOZHILALI UNION,
P.KRISHNA PILLAI BHAVAN, NORTH RAILWAY STATION ROAD,
KOCHI-682 018, REPRESENTED BY ITS GENERAL SECRETARY.

BY ADV. SRI.KOSHY GEORGE.

RESPONDENT(S):-

1. THE KERALA STATE BEVERAGES (M&M) CORPORATION,
SASHAMANGALAM, THIRUVANANTHAPURAM, PIN - 695 0001,
REPRESENTED BY ITS MANAGING DIRECTOR.
2. THE GENERAL SECRETARY,
KERALA STATE BEVERAGES CORPORATION EMPLOYEES ASSOCIATION,
SUGATHAN MEMORIAL, VAZHUTHACAUD,
THIRUVANANTHAPURAM-695 014.
3. THE GENERALA SECRETARY,
VIDESHA MADHYA VYAVASAYA THOZHILALI FEDERATION,
SANTHINAGAR, PRESS ROAD, THIRUVANANTHAPURAM, PIN - 695 002.
4. THE PRESIDENT,
KOTTAYAM DISTRICT TODDY AND ABKARI WORKERS CONGRESS (INTUC),
KOTTAYAM, PIN - 686 001.
5. THE SECRETARY,
KERALA TODDY AND ABKARI WORKERS CONGRESS (INTUC),
CHALAKKUDI, PIN - 680 722.

6. THIRUVALLA TALUK KERALA STATE BEVERAGES CORPORATION,
FL NO.9, LABELLING WORKERS CONGRESS (INTUC),
THIRUVALLA, PIN - 686 612.

7. THE GENERAL SECRETARY,
PATHANAMTHITTA KERALA STATE BEVERAGES CORPORATION
FL NO.IX, LABEL WORKER'S CONGRESS, PIN - 689 645.

8. THE INDUSTRIAL TRIBUNAL, KOLLAM, KERALA STATE, PIN - 673 307

R1 BY STANDING COUNSEL SRI.C.S.AJITH PRAKASH.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 12-02-2015,
ALONG WITH W.P.(C).NO.13797 OF 2013-Y & CONNECTED CASES, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C).No.12160 of 2013 (T)

APPENDIX

PETITIONER(S)' EXHIBITS:-

EXHIBIT P1: COPY OF THE AWARD DATED 15.3.2013 OF THE COURT OF THE
INDUSTRIAL TRIBUNAL, KOLLAM.

RESPONDENT(S)' EXHIBITS:-

NIL.

Vku/-

[true copy]

“C.R.”

K. Vinod Chandran, J.

W.P(C) Nos.12160 of 2013, 13797 of 2013, 18995 of 2013,
4570 of 2015 and O.P.(LC).1663 of 2013

Dated this the 12th day of February, 2015

JUDGMENT

The above Writ Petitions and Original Petition were heard along with W.P.(C).No.14724 of 2011, since the writ petitions were stated to be raising identical question, of regularisation of 'Labelling Workers' employed by the Kerala State Beverages Corporation [for brevity “the Corporation”]. The Industrial Tribunal, Kozhikode had, in I.D.No.6 of 2005, impugned in W.P.(C). No.14724 of 2014, directed regularisation of the 23 employees whose cause the Union espoused therein. In the present Writ Petitions and Original Petition, the award challenged is of the Industrial Tribunal, Kollam, which found the issue referred, to be against the Unions and rejected the claim of regularisation. It was held that the Unions would have to approach the appropriate Government under the Contract Labour (Regulation and Abolition) Act, 1970 [for brevity “Contract Labour Abolition Act”].

2. After hearing the writ petitions and going through the evidence, this Court is of the opinion that, but for the issue being regularisation, the facts and the evidence adduced differ considerably. Hence, separate judgments are delivered. The fact that the regularisation granted by the Industrial Tribunal, Kozhikode has been upheld in W.P.(C).No.14724 of 2011, does not at all help the petitioners herein who challenge the rejection of their claim of regularisation. The nature of employment is not identical, which would be evident from the discussion herein below.

3. Three Unions of employees, one at Kochi and two at Thiruvananthapuram, raised a dispute under the Industrial Disputes Act, 1947 [for brevity "ID Act"], before the State Government regarding regularisation of employees engaged in the work of labelling the bottles of the Indian Made Foreign Liquor [for brevity "IMFL"] dealt with by the Corporation as provided under the Foreign Liquor Rules. The Foreign Liquor Rules, under the Abkari Act [1 of 1077], by Rule 26 prescribes the affixture on the foreign liquor bottles, security labels containing the State Emblem and the facsimile of the signature of the Excise Commissioner. Hence, there is a statutory obligation enjoined upon the Corporation to

affix such security labels on the foreign liquor bottles before sale of IMFL to ensure that no spurious liquor is sold in the market. The Corporation has a monopoly on the trade of IMFL, in the State.

4. The issue referred by the Government for adjudication was:

“Whether the demands for regularization of sticker fixing workers in KSBC is justifiable”.

Before the dispute was adjudicated, four Unions, shown as additional Unions 4 to 7, impleaded themselves in the reference and filed separate claim statements. The Industrial Tribunal, on an examination of the claims as also the evidence adduced and the defence set up by the Corporation, found that the claim of regularisation cannot be accepted. If at all; the Unions could only urge abolition of contract labour before the appropriate Government, was the finding.

5. The contention of all the Unions were noticed separately. The common contentions raised in support of the claim for regularisation was the manner of recruitment, payment of wages, the aspect of supervision and the recovery of damages, which, according to the Unions, indicated an employer-employee

relationship between the Corporation and the Labelling workers. The workers were said to have been recruited on different dates, directly by the Corporation, and were stated to be working as casual employees on piece-rate basis in the different warehouses. The wages are stated to be distributed weekly and the security labels were said to be supplied directly by the management to the employees and any breakage of bottles, while carrying on the labelling work, was stated to be the liability of the individual worker. This was the broad statement made by the 1st Union to establish the employer-employee relationship. The 1st Union also relied on the decision in ***Hussainbhai v. Alath Factory Thezhilali Union*** **[(1978) 4 SCC 257]** to contend that the work is of a perennial nature and is inextricably connected with the business of the Corporation.

6. The 2nd and 3rd Unions had raised the demand of regularisation as ancillary to many demands with respect to betterment of working conditions. The 2nd and 3rd Unions specifically contended that the employment of the workers were through contractors and the same was a clear violation of the Contract Labour Abolition Act.

7. The Unions 4 to 7, impleaded as Additional Unions, reiterated the general contentions raised by the Unions which had initiated the reference. The 4th Union were members of Bharat Sevak Samaj Women Self Help Group, which Group had been assigned the job of labelling. There was a specific contract signed between the management and the District Co-ordinator of the Group, which was stated to be a “name-sake” document. The 5th Union comprised of the members of one Chalakkudy Vanitha Welfare Society; the society having been awarded the contract of labelling. The Welfare Society was stated to be a “paper-society”. The 6th Union agitated the cause of workers who were members of Kripa Kudumbasree, which unit had obtained the contract after a litigation. The 7th Union too were members of Kripa Kudumbasree, who asserted the contract between the Kudumbasree unit and the Corporation to be a “sham” document.

8. The Corporation resisted the contention on the specific ground that tenders were called for and contract was awarded to those who quoted the lowest rates and after obtaining security deposit from the contractors. The employees engaged in such work was exclusively those of the contractors and the

Corporation had no choice as to the engagement of a particular employee. The remuneration is paid to the contractor on the basis of the work done when the bills are raised at the agreed rates. Payment too is said to be made to the contractor after deducting tax at source.

9. The Tribunal raised three issues, being the employer-employee relationship, the existence of a contract and the claim for regularisation. The Tribunal first looked at the charter of demands submitted by the 1st Union and found that the said Union does not have a specific, consistent case and contrary assertions have been made regarding the nature of engagement of labelling workers. The vernacular portion in the charter of demands, extracted in the award of the Tribunal, indicates that the Union specifically pleaded that they were employed under a contract; in a work which was of a perennial nature. The specific demand also was that they should be paid wages directly and they should not be made to extend their hand before a third-party. Hence, the employer-employee relationship claimed on the basis of the recruitment by the Corporation and wages paid directly by the Corporation to the employees stood dispelled.

10. The 2nd and 3rd Unions were also not clear about their claim of regularisation. Nor was it clear as to how the members of the Union were employed in the labelling work. The members of the additional Unions were engaged as members of a Self Help Group, a society, and a Kudumbasree unit, who had obtained contract from the Corporation for carrying on the work. But for merely asserting that the contract was a sham, there was nothing to indicate that the award of contract was merely a device under which the workers of the various Unions were employed. This in fact distinguishes the case from that decided by the Industrial Tribunal, Kozhikode.

11. The witness examined for the 1st Union [WW4] is stated to have unequivocally stated in chief examination as well as in the cross examination that there was a contract between the Corporation and the Society. The payment made as charges for the work was also made directly to the Society, which disbursed the amounts to the individual workers. One of the witnesses examined on behalf of the 1st Union [WW7] also stated that she was engaged under a Mahila Association, which entered into an agreement with the Corporation. WW1, being the witness of the 2nd

and 3rd Unions, too admitted the engagement under the Mahila Association and on the basis of the agreement executed between the management and the Association. It was also categorically admitted that the tenders were called for and award was granted to the lowest tenderer. The fact of payment made to the contractors and deduction of tax made at source too was admitted.

12. Exhibit W19 was the agreement between the Vanitha unit and the Corporation, based on which the witness of the 4th Union deposed. WW6, the witness of the 5th Union also deposed that the employees of the Union were the members of the Chalakkudy Vanitha Welfare Society. Though payment of wages was stated to be made directly to the employees and a disciplinary action too was stated to be taken by the Corporation, there was absolutely no evidence on those two counts. The witness of the 6th and 7th Additional Unions also deposed in the same manner. The various documents produced by the Unions itself showed that the Corporation was addressing the contractors, viz., the Society/Association/Self Help Group, with respect to the conduct of the labelling work. This Court does not find any reason to interfere with the factual findings of the Industrial Tribunal with respect to

the employer-employee relationship.

13. To state briefly, the evidence and the finding, before the Industrial Tribunal, Kozhikode; was to the effect that 23 ascertained workers were employed directly by the Corporation and were continued over the years with the Convenor liaising with the Corporation and transacting the payment of wages, bonus, etc. for and on behalf of the workmen. The Corporation too could not prove the contract, asserted by them. Such compelling evidence is absent herein, to find the admitted contract to be a sham.

14. The agreement between the various contractors were produced before the Industrial Tribunal. None of the Unions claimed any employment *de hors* the contract. Hence, while in the reference, which arose from the Kannur Depot, the contract was specifically found to be a sham and a device of camouflage; herein there is absolutely no evidence to so find the contract and lift the veil to find a direct employer-employee relationship.

15. The learned counsel for the Unions/petitioners stress the direct control of the workmen by the Corporation. The evidence with respect to the administrative control exercised on the workmen of the contractors, is only one of the factors which

could decide the employer-employee relationship. In any event, the fact that the work was carried on within the premises of the Corporation under the direct supervision of the Corporation cannot at all, in the present circumstances, be held to be a compelling factor. The goods dealt with is IMFL, a controlled commodity, in which the Corporation has been assigned the privilege of vending liquor, which otherwise would be within the exclusive domain of the State. The prescription in the Foreign Liquor Rules for sticking the security labels containing the State Emblem and the facsimile of the signature of the Excise Commissioner, is a measure to ensure that no spurious liquor is sold in the market. Effective control of the Corporation would be a definite mandate under the Abkari Act and the Rules framed thereunder. One cannot on that basis alone find an employer-employee relationship which entails regularisation. One other significant factor noticed by the Industrial Tribunal also is the absence of the contractors in the party array.

16. The learned counsel for the petitioners, however, would place reliance on a decision of the Hon'ble Supreme Court, reported in ***National Thermal Power Corporation Ltd. v. Karri Pothuraju*** [(2003) 7 SCC 384]. The said case arose from a

dispute raised by the employees in a canteen maintained by the National Thermal Power Corporation [NTPC], which was a statutory duty as enjoined under Section 46 of the Factories Act, 1948. The claim for regularisation was upheld by a two-Judge Bench of the Hon'ble Supreme Court, noticing the Constitution Bench decision in ***Steel Authority of India Ltd. v. National Union Waterfront Workers* [(2001) 7 SCC 1]**.

17. The specific reliance was to paragraphs 106 and 107, which is extracted hereunder:

“We have gone through the decisions of this Court in *VST Industries case* [(2001) 1 SCC 298], *G.B.Pant University case* [(2000) 7 SCC 109] and *M.Aslam case* [(2001) 1 SCC 720]. All of them relate to statutory liability to maintain the canteen by the principal employer in the factory/establishment. That is why in those cases, as in *Saraspur Mills case* [(1974) 3 SCC 66] the contractor labour working in the canteen were treated as workers of the principal employer. These cases stand on a differing footing and it is not possible to deduce from them the broad principle of law that on the contract labour system being abolished under sub-section (1) of Section 10 of the CLRA Act the contract labour working in the establishment of the principal employer have to be absorbed as regular employees of the establishment.

107. An analysis of the cases, discussed above, shows that they fall in three classes: (i) where contract labour is engaged in or in connection with the work of an establishment and employment of contract labour is prohibited either because the industrial adjudicator/court ordered abolition of contract labour or because the appropriate Government issued notification under Section 10(1) of the CLRA Act, no automatic absorption of the contract labour working in the establishment was ordered; (ii) where the contract was found to be a sham and nominal, rather a camouflage, in which case the contract labour working in the establishment of the principal employer were held, in fact and in reality, the employees of the principal employer himself. Indeed, such cases do not relate to abolition of contract labour but present instances wherein the Court pierced the veil and declared the correct position as a fact at the stage after employment of contract labour stood prohibited; (iii) where in discharge of a statutory obligation of maintaining a canteen in an establishment the principal employer availed the services of a contractor the courts have held that the contract labour would indeed be the employees of the principal employer”.

The two-Judge Bench in ***National Thermal Power Corporation*** (*supra*) found, under clause (iii) of the declaration in ***Steel Authority of India Ltd.*** (*supra*), that, it was too late in the day to

decline regularisation, since the canteen was run as a direct obligation under the Factories Act. The learned counsel for the petitioners specifically point to clause (iii) to contend that the present case would also fall under the said clause.

18. This Court would have followed the said binding precedent but for the fact that a subsequent three-Judge Bench considered the very same issue in ***Balwant Rai Saluja v. Air India Ltd.* [(2014) 9 SCC 407]**. Therein also, the above extracted paragraphs of ***Steel Authority of India Ltd.* (supra)** were quoted and as in the present case, reliance placed on clause (iii) was noticed and it was so held:-

“19. By placing his fingers on Clause (iii) of para 107 in SAIL case, the learned counsel would contend that the said observation is the ratio of the Court's decision and, therefore, it is binding on all other courts. We do not agree. The Constitution Bench in SAIL case was primarily concerned with the meaning of the expression “appropriate Government” in Section 2(1)(a) of the Contract Labour (Regulation and Abolition) Act, 1970 and in Section 2(a) of the Industrial Disputes Act, 1947 and the other issue was automatic absorption of the contract labour in the establishment of the principal employer as a consequence of an abolition notification issued under Section 10(1) of

the Contract Labour (Regulation and Abolition) Act. The Court while overruling the judgment in Air India Statutory Corpn. v. United Labour Union [(1997) 9 SCC 377] prospectively, held that neither Section 10 of the Contract Labour (Regulation and Abolition) Act nor any other provisions in the Act, whether expressly or by necessary implication, provides for automatic absorption of contract labour on issue of notification under the said section, prohibiting contract labour and consequently the principal employer is not required to absorb the contract labour working in the establishment concerned.

20. Firstly, in the aforesaid decision in SAIL case, (i) the issue whether contract labourers working in statutory canteen(s) would fall within the meaning of expression "workmen" under the 1948 Act and therefore they are employees of the principal employer, and (ii) whether the principal employer to fulfil its obligation under Section 46 of the 1948 Act engages a contractor, the employees of the contractor can claim regularisation and extension of the service conditions extended to the employees of the principal employer did not remotely arise for consideration of the Court.

21. Secondly, in our considered view, the observations made by the Constitution Bench in para 107 of the judgment in SAIL case by nbo stretch of imagination can be considered "the law declared" by the Court. We say so for the reason, the Court after noticing several decisions

which were brought to its notice, has summarised the view expressed in those decisions in three categories. The categorisation so made cannot be said to be the declaration of law made by the Court which would be binding on all the courts within the territory of India as envisaged under Article 141 of the Constitution of India”.

19. In **Balwant Rai Saluja** (*supra*) also the question of regularisation of employees of a canteen was raised. Air India, which has the statutory obligation to maintain canteen, had contracted the work to a subsidiary Company, being the Hotel Corporation of India Ltd. After discussing the various decisions on the subject, **Indian Petrochemicals Corpn. Ltd. v. Shramik Sena [(1999) 6 SCC 439]** was quoted with approval and it was stated so:

“This Court is in agreement with the principle laid down in Indian Petrochemicals case wherein it was held that: (SCC p.449, para 22)

“22. ... the workmen of a statutory canteen would be the workmen of the establishment for the purpose of the 1948 Act only and not for all other purposes.”

We add that the statutory obligation created under Section 456 of the 1948 Act, although establishes certain liability of the principal employer towards the

workers employed in the given canteen facility, this must be restricted only to the 1948 Act and it does not govern the rights of employees with reference to appointment, seniority, promotion, dismissal, disciplinary actions, retirement benefits, etc., which are the subject-matter of various other legislations, policies, etc. Therefore, we cannot accept the submission of Shri Jayant Bhushan, learned counsel that the employees of the statutory canteen ipso facto become the employees of the principal employer”.

Hussainbhai (*supra*) was also distinguished in paragraph 46 finding that there the question of statutory obligation never arose.

Hussainbhai (*supra*) was found to have rested on the basic premise of employer-employee relationship, giving weightage and consideration to the concept of “economic control”. Various factors to be taken into consideration to establish an employer-employee relationship was held to include:

- “(i) who appoints the workers;
- (ii) who pays the salary/remuneration;
- (iii) who has the authority to dismiss;
- (iv) who can take disciplinary action;
- (v) whether there is continuity of service; and
- (vi) extent of control and supervision i.e., whether there exists complete control and supervision”.

20. The expression “control and supervision” was gone into in some detail and ***Bengal Nagpur Cotton Mills v. Bharat Lal [(2011) 1 SCC 635]*** was quoted to distinguish the control and directions issued by the principal employer, after the labour is assigned/allotted/sent to him. The contractor, being the person entitled to choose the workers; assigning or allotting an individual as a contract worker to a particular employer evidenced the primacy of the contractor, who retains the ultimate supervision and control with him. The worker is controlled by the contractor and the work alone is supervised by the awarder.

21. The control and supervision of the work itself, especially with respect to a controlled commodity as in this case, would have to be with the principal employer. That alone cannot be a decisive factor in finding an employer-employee relationship. This Court, hence, finds a clear distinction insofar as the case which arose from the Kannur Depot and does not find any reason to interfere with the award of the Industrial Tribunal, Kollam. The writ petitions and the Original Petition by the respective Unions are found to be devoid of merit and are dismissed.

22. However, it is to be noticed that the Industrial Tribunal also found that work is perennial in nature and that the workers are engaged for long as contract labourers and, hence, the remedy would be to invoke the provisions of the Contract Labour Abolition Act. Definitely such finding would not at all limit the powers of the appropriate Government acting under the provisions of the Contract Labour Abolition Act. The issue would have to be considered independently of the findings of the Industrial Tribunal. This Court cannot ignore the fact that, the issue agitated in two different Industrial Tribunals, indicate that in many depots of the Corporation the labelling workers have been granted regularisation. The Corporation definitely cannot take a stand that, in certain depots the work is of a perennial nature and in others it is not. In making such observation, it is also to be emphasised that, in the dispute arising from the Kannur Depot, there was clear ascertainment of the workers employed, 23 of them, their engagement commencing from a specific date and continued thereafter under the Corporation itself. Such a compelling circumstance is not available in the present dispute. This Court, hence, would not invoke its extra-ordinary powers under Article 226

of the Constitution, to direct regularisation; nor would it be possible as held by the Hon'ble Supreme Court in ***Secretary, State of Karnataka v. Uma Devi [(2006) 4 SCC 1]***. But, the Corporation and the employees could take up the matter with the Government and there could be either abolition of contract labour, in which case there would be no question of absorption of the employees. Hence, as an alternative measure there could be a decision arrived at taking the Unions into confidence on how the grievance of the contract employees; ascertainable and continued for long, could be mitigated; by a scheme of regularisation.

Writ petitions and Original Petition dismissed with the above observations. No costs.

Sd/-
K. Vinod Chandran,
Judge

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