

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 20.05.2015

Decided on : 17.07.2015

+ **W.P.(C) 926/2001**

BHARAT HEAVY ELELCTRICALS LTD. Petitioner

Through: Mr.J.C. Seth and Mr.Udit Seth,
Advocates

versus

P.O. LABOUR COURT- VIII & ORS. Respondents

Through: Ms.Asha Jain Madan, Advocate for
R-2.

**CORAM:
HON'BLE MS. JUSTICE DEEPA SHARMA**

JUDGMENT

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1. The petitioner by way of this writ petition has challenged the impugned award dated 09.06.2000.

2. The following reference was made to the learned Labour Court vide reference No.F24 (2710)/98-Lab./41403-8 dated 23.12.1992 by the appropriate Government for adjudication, which was registered as ID No. 19/1993:-

“Whether the suspension of Shri Jagdish Prasad

w.e.f. 11.06.90 is mala fide and/or unjustified and if so, to what relief is he entitled and what directions are necessary in this respect?”

3. The petitioner—Bharat Heavy Electricals Limited (hereinafter referred to as ‘BHEL’), was arrayed as respondent No.1 before the learned Labour Court. Respondent No. 1 is a proforma respondent being the Presiding Officer of Labour Court. The respondent No.2 before this Court was the workman and the claimant before the Labour Court (hereinafter called the claimant). The respondent No.3, the Ideal Caretakers (hereinafter referred to as ‘the contractor’), was respondent No.2 before the Labour Court. The claim of the workman before the Labour Court was that though his wages were paid to him by the contractor, but the same were fixed by BHEL and actually were paid by BHEL through the contractor. He was working as an attendant with BHEL and worked till 11.06.1990. The suspension letter dated 11.06.1990 was issued and served upon him by the contractor which enclosed the letter dated 08.06.1990 of Deputy Manager of BHEL. The claimant had contended that he was not paid the suspension allowance, despite service of the demand notice dated 03.06.1991, wherein he had also sought reinstatement.

4. BHEL denied the relationship of employer and employee between

him and the claimant and had alleged that the claimant was the employee of the contractor to whom the contract dated 19.10.1988 was given and a formal agreement dated 04.04.1989 for cleanliness and maintenance was entered into. There is no denial that the workman had been working for BHEL, but the control and supervision upon him was that of the contractor. The plea of the contractor before the learned Labour Court was that the claimant had been working with BHEL as an attendant much before he was awarded the contract by BHEL and he was working under the direct supervision and control of BHEL. The contractor had not denied that dispersion of wages to contract employees was done by him after collecting money from BHEL. He had however taken the plea that it was BHEL who had suspended/terminated the services of the claimant and he had only conveyed the said order to the claimant and that relationship of employer and employee existed between BHEL and the claimant, so liability to pay the subsistence allowance was that of the contractor.

5. On the basis of the pleadings of the parties, the learned Labour Court had framed the following issues:-

- “i. Whether the claimant is employee of management No.1 or management No.2?*
- ii. As per terms of reference?”*

6. On the basis of the evidences led by the parties, the learned Labour Court had decided issue No. 1 and reached to the conclusion that *“in another words, I come to the conclusion that it stands proved on record that there was no direct relationship between BHEL and the claimant but the claimant was employed by M/s Ideal Care Takers and his services were placed at the disposal of BHEL.”*

7. Thereafter, the learned Labour Court had framed another question of the following nature:-

“The only question which remains to be decided is whether such a contract of services violates the provisions of Contract Labour (Abolition and Regulations) Act?”

8. This issue had been answered by the learned Labour Court as under:-

“22. Now coming to the alleged contract of service between BHEL and M/s Ideal Care Takers is concerned, the work of sweeping and cleaning is such in which, employment of contract labour has been prohibited by the notification already referred to above. Secondly, the work of cleaning and sweeping available with the management is of perennial nature. Thirdly, to my mind, the contract entered into between BHEL and M/s. Ideal Care

Takers to make available the services of workers for the purpose of sweeping and cleaning its office, it was entered with intention to get rid off the inconvenience which may be occasioned by dealing with labour force. In another words, it is nothing but, a device or a subterfuge to camouflage the real relationship between principal employer and the contract labour with intention to defeat their rights to seek regular employment with it. To my mind, such an arrangement is nothing, but, an unfair labour practice and is a device intended and used to defeat the right of the worker and therefore, cannot be legally recognised. Ld. A.R. for the workman has relied upon the authority, Secretary Haryana State Electricity Board vs. Suresh and others, J.T. 1999(2) SC 435, Air India Statutory Corporation and Others vs. United Labour Union and Others (1997) 9 SC Cases 377. In these authorities, it has been held that Contractor is an intermediary between the workman and the principal employer and the movement contract labour system stands prohibited u/s 10(1) of Contract Labour (Regulations & Prohibition) Act, the embargo to continue as contract labour is put to an end and direct relationship has been provided between the

workman and the principal employer. In another words, it was held that a principal employer thereby directly becomes responsible for taking services of the workman hitherto regulated through contractor. If veil is pierced, the actual relationship which emerges to exist between BHEL and the contract labour is that of the employer and employee, since the device of intermediary sham contractor cannot be recognized in view of prohibition of employment of contract labour in trades like cleaning, sweeping etc.

23. In view of the reasons given above, I am of the view that relationship of employer and employee existed between BHEL and the claimant and respondent No.2 is nothing but, a sham entity which cannot be said to be the employer of the claimant. Accordingly, I come to the conclusion that relationship of employer and employee existed between BHEL and the claimant. This issue is decided accordingly.”

9. Thereafter, the learned Labour Court proceeded to decide the terms of reference and dealt with the issue whether suspension of the claimant was *mala fide* or unjustified and if so, to what relief he was entitled to. The learned Labour Court had answered this issue against the claimant and had

reached to the conclusion that the suspension of the claimant was not illegal *mala fide* or unjustified. The learned Labour Court had observed as under:-

“In his reply, the claimant has not denied that no incident of beating the General Manager, Personnel took place or that he did not take part therein. He has not stated that any official of BHEL is inimically disposed towards him. He has also not stated that there is any mala fide on the part of BHEL in imputing misconduct to him. Even in his testimony, he has not stated that he has been falsely implicated in any false charge so as to get rid off him. Even in his affidavit, he has not stated that no incident as alleged in the charge sheet ever took place. There is hardly any material on record which shows mala fide on the part of the management in issuing charge sheet to him. To my mind, therefore, when the claimant is alleged to have committed a grave misconduct of assaulting General Manager (Administration) and he has been placed under suspension, it cannot be said that suspension of the claimant is in any manner illegal, mala fide or unjustified.”

10. The award of the Labour Court further shows that the Management had raised the plea that the dispute relating to ‘suspension’ does not fall

within the purview of 'industrial dispute', therefore, the Court had no jurisdiction. Relying on the findings of this Court in the case of **Delhi Transport Corporation vs. D.D. Gupta and Another**, 1977 Lab.I.C. 1757 and distinguishing it, the learned Labour Court had observed as under:-

“In this authority, the case of the worker was that he had been suspended by an officer who was incompetent to suspend him, therefore, the suspension was invalid and is entitled to full wages. In that context, it was held by their Lordship that question whether an order of suspension is valid or not is not apparently an industrial dispute in as much as the claimant can be given the relief regarding computation of back wages under Section 33-C(2) of the Act. But, in the present case, no such relief can be given to the claimant under Section 33-C(2) of the I.D. Act. In the present case, the management of respondent No.1 has denied that relationship of employer and employee exists between the parties. Similarly, respondent No.2 has also denied that the claimant is its employee. In these circumstances, when the status of the claimant has been in dispute, application under Section 33-C(2) is not maintainable. In Tara and Others vs. Director,

Social Welfare and Others 1999 LAB I.C. 228 (SC), it has been held that where the status and nature of employment of the workman is itself disputed, unless, there is a prior adjudication on merits of the status, which is the foundation for making the claim for wages at specified rates, the question of moving an application under Section 33-C(2) of the Act would not arise nor his application would be maintainable. Secondly, there is a dispute regarding existence of contract labour and unless, the same is held to be illegal, the application of the claimant would not have been maintainable. Therefore, the facts of the present case are distinguishable from the facts of Delhi Transport Corporation case (supra). When the status of the claimant has been disputed and which requires adjudication, such an issue could have been adjudicated only upon a reference of the dispute under Section 10 of the Act. Therefore, the question of suspension in relation to the dispute of status and dispute of existence of contract labour certainly constitutes an industrial dispute.

(Emphasis supplied)

11. Thereafter, the learned Labour Court had given the conclusion in the

following manner:-

“Accordingly, I come to the conclusion that the claimant shall be deemed to have been suspended by BHEL.”

12. The plea that has been vehemently urged before me by BHEL is that the ‘suspension’ is not an industrial dispute and as such could not be referred under Section 10(1)(c) of the I.D. Act by the Appropriate Government. It is argued that since reference is bad in law, the award is liable to be set aside on this ground alone. It is further argued that under Article 226 of the Constitution of India, this court is empowered to see whether such reference could be made or not.

13. On behalf of the claimant (respondent No.2), it has been argued by Ms Asha Jain that once a reference has been made by the appropriate authority under Section 10(1)(c) of the Industrial Disputes Act, a presumption has to be raised that the reference is legal and valid and that the industrial dispute exist between the parties and that an award should be sustained instead of picking holes therein on trivial points. Reliance has been placed on the findings in the case of Calcutta Port Shramik Union vs. CRT Association 1988 (Supp) SCC 768 and Reckitt and Colman of India, Ltd. vs. Fifth Industrial Tribunal (1980) 1 LLN 129.

14. I have given due considerations to the rival contentions of the parties. As regards the jurisdiction of this Court, the same is considered in the case of Nedungadi Bank Ltd. vs. K.P. Madhavankutty, 2000-1-LLJ-561, the Apex Court, after relying on its earlier order in National Engineering Industries Ltd. vs. State of Rajasthan AIR 2000 SC 469 has held as under:-

“8. It will be thus seen that High Court has jurisdiction to entertain a writ petition when there is allegation that there is no industrial dispute and none apprehended which could be subject matter of reference for adjudication to the Industrial Tribunal under Section 10 of the Act. Here it is a question of jurisdiction of the industrial tribunal, which could be examined by the High Court in its writ jurisdiction. It is the existence of the industrial dispute which would clothe the appropriate Government with power to make the reference and the Industrial Tribunal to adjudicate it, if there is no industrial dispute in existence or apprehended appropriate government lacks power to make any reference.”

15. This Court thus is within its jurisdiction to determine if the reference made by the appropriate Authority was a valid reference. The answer to this question squarely affects the jurisdiction of the Labour Court. It is also a

settled proposition of law that the Industrial Tribunal/Labour Court has to examine such issues which affect its jurisdiction and are pure questions of law as a preliminary issue. (Reliance has been placed on **J. K. Synthetics v. Rajasthan Trade Union Kendra** AIR 2001 SC 531)

16. Further, in **Mukand Ltd. v. Mukand Staff and Officers Association** 2004 SCC (LS) 798, the Apex Court relying on its earlier judgment of **Parry & Co. Ltd. v. P. C. Pal and Ors.** AIR 1970 SC 1334 has held as under:-

“11. The grounds on which interference by the High Court is available in such writ petitions have by now been well established. In Basappa vs. Nagappa AIR 1954 SC 440, it was observed that a writ of certiorari is generally granted when a Court has acted without or in excess of its jurisdiction. It is available in those cases where a Tribunal, though competent to enter upon an enquiry, acts in flagrant disregard of the rules of procedure or violates the principles of natural justice where no particular procedure is prescribed. But a mere wrong decision cannot be corrected by a writ of certiorari as that would be using it as the cloak of an appeal in disguise but a manifest error apparent on the face of the

proceedings based on a clear ignorance or disregard of the provisions of law or excess of jurisdiction, when shown can be corrected....”.

17. Having said so, the question is whether order of ‘suspension’ is an ‘industrial dispute’ and be referred under Section 10(1)(c) of I.D. Act for adjudication to Labour Court.

18. The Supreme Court in **Balvantray Ratilal Patel vs The State of Maharashtra**: (1968) 2 SCR 577 : AIR 1968 SC 800 has elaborated the general principles relating to suspension of an employee pending enquiry. The relevant paragraph is reproduced as under:-

“3.....Ordinarily, therefore, the absence of such power either as an express term in the contract or in the rules framed under some statute would mean that the master would have no power to suspend a workman and even if he does so in the sense that he forbids the employee to work, he will have to pay wages during the period of suspension. Where, however, there is power to suspend either in the contract of employment or in the statute or the rules framed thereunder, the order of suspension has the effect of temporarily suspending the relationship of master and servant with the consequence that the servant is not bound

to render service and the master is not bound to pay.....

.....It is equally well settled that an order of interim suspension can be passed against the employee while an inquiry is pending into his conduct even though there is no such term in the contract of appointment or in the rules, but in such a case the employee would be entitled to his remuneration for the period of suspension if there is no statute or rule under which it could be withheld. In this connection it is important to notice the distinction between suspending the contract of service of an officer and suspending an officer from performing the duties of his office on the basis that the contract is subsisting. The suspension in the latter sense is always an implied term in every contract of service. When an officer is suspended in this sense it means that the Government merely issues a direction to the officer that so long as the contract is subsisting and till the time the officer is legally dismissed he must not do anything in the discharge of the duties of his office. In other words, the employer is regarded as issuing an order to the employee which, because

the contract is subsisting, the employee must obey.”

19. The Supreme Court in **State of Orissa vs. Bimal Kumar Mohanty** **AIR 1994 SC 2296** had relied on the findings of the Constitutional Bench in **V.P. Gindroniya v. State of Madhya Pradesh and Another** (1970) 1 SCC 362: (1970) 3 SCR 448. In its judgment, the Supreme Court has quoted the findings of the Constitutional Bench in **V.P. Gindroniya** (*supra*) in para 9 as under:-

"9. The general principle is that if the master has a power to suspend his servant pending an inquiry into his misconduct, either in the contract of service or in the statute or the rules framed thereunder governing the service, an order of suspension passed by the master has the effect of temporarily suspending the relationship of master and servant with the consequence that the servant is not bound to render service and the master is not bound to pay any wages during the period of suspension. Such a power to suspend the contract of service cannot be implied and therefore, if in the absence of such a power in the contract, statute or rules, an order of suspension is passed by the master it only forbids the servant to work without

affecting the relationship of master and servant, and the master will have to pay the servant's wages."

20. Further, the Apex Court in **Bimal Kumar Mohanty** (supra) has held as under:-

"12.....Suspension is not a punishment but is only one of forbidding or disabling an employee to discharge the duties of office or post held by him. In other words it is to refrain him to avail further opportunity to perpetrate the alleged misconduct or to remove the impression among the members of service that dereliction of duty would pay fruits and the offending employee could get away even pending inquiry without any impediment or to prevent an opportunity to the delinquent officer to scuttle the inquiry or investigation or to win over the witnesses or the delinquent having had the opportunity in office to impede the progress of the investigation or inquiry etc"

21. The Court has further observed as under:

"13. On the facts in this case, we are of the considered view that since serious allegations of misconduct have been alleged against the respondent, the Tribunal was quite unjustified in interfering with the orders of suspension of the

respondent pending inquiry. The Tribunal appears to have proceeded in haste in passing the impugned orders even before the ink is dried on the orders passed by the appointing authority. The contention of the respondent, therefore, that the discretion exercised by the Tribunal should not be interfered with and this Court would be loath to interfere with the exercise of such discretionary power cannot be given acceptance.”

In that case, the appellant found out that the respondent Mr Bimal Kumar Mohanty had committed serious financial irregularities, fabrication of records and vouchers and misappropriation of money and after considering the record, the Appointing Authority found it necessary to take disciplinary action against the respondent. On 17.03.1993, an order directing the enquiry into the irregularities was passed and it was also decided to keep him under suspension pending further action. Anticipating this action, the respondent attempted to pre-empt it and filed OA No. 396/1993 in the State Administrative Tribunal, Bhubneswar and prayed for quashing of the Government memorandums dated 14.01.1993 and 11.02.1993 and also filed an application for *ad interim* injunction. On the same date, i.e., 17.03.1993, the Tribunal issued a direction that the respondent be not suspended and also

issued a direction to the Standing Counsel to obtain instruction of the need to suspend the respondent. It was in the background of these facts that the above findings have been given by the Apex Court.

22. In **Ester India Employees Union and Presiding Officer and Another**, W.P. No. 904/2003 (MS), decided on 03rd August, 2004, the issue came up before the Court was as to whether the Industrial Tribunal had the power to look into the validity of reference. In that case, the question which was referred for adjudication to the Industrial Tribunal was with regard to the validity of the suspension of 28 workers and the Tribunal had observed that suspension being not a punishment, the same was not covered under the definition of 'industrial dispute' and as such the Tribunal had no jurisdiction to adjudicate the dispute and the High Court of Uttaranchal had upheld the findings of the Tribunal.

23. Before the learned Labour Court in the matter in hand BHEL had relied on the findings of this Court in the case of **D.D. Gupta (supra)**, wherein this Court had held as under:-

“8. In the present case, the claim of the workman to receive full wages was based on an invalid suspension. The suspension order in this case was passed on three occasions by persons, who have

been found by the Labour Court to have no power to order suspension; that there has been no attempt before me to show that the suspension order was valid in any of these cases. Therefore, the only question which arises under this part of the petitioner's case is whether it is within the capacity of the Labour Court to determine the invalidity of the suspension or whether this matter has necessarily to be referred to an Industrial Tribunal as an Industrial Dispute. The definition of "industrial dispute" in the Act shows that it is a dispute or difference between employers and employers, or between employers and workman, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person. The question whether an order of suspension is valid or not is not apparently an industrial dispute and, therefore, does not appear to be a question which could have been referred to an Industrial Tribunal as an Industrial Dispute."

(Emphasis supplied)

24. The findings of this Court in D.D. Gupta (*supra*), however, had not been applied by the learned Labour Court on the ground that it is

distinguishable on facts. In **D.D. Gupta** (*supra*), the petitioners had filed a claim under Section 33C(2), claiming certain some of money after they were placed under suspension. The plea of the DTC was that the workmen were rightly paid subsistence allowance during the period of suspension under the service regulations. It was on these facts, this Court had observed as above and held that “*if the claim of the workmen involves adjudication of disputes which falls within the definition of an industrial dispute as given in the Act, then that dispute cannot be resolved under Section 33C(2)*”; conversely any dispute which do not fall within the definition of ‘industrial dispute’ can be resolved by the Court under Section 33C(2) in order to determine the entitlements permissible under Section 33C(2) of the I.D. Act. The learned Labour Court has, therefore, wrongly held that the proposition of law laid down by this Court were not applicable on the facts of this case. The Labour Court has also erred in its finding that the status of the claimant was in dispute and, therefore, it was essential for the Court to venture upon the status of the claimant in order to decide the terms of reference which relates to the suspension. In this case, as is clear from the terms of reference, the matter referred to the Labour Court was to find out whether the suspension was unjustified or mala fide. The use of the expression ‘*mala fide*’ and

‘unjustified’ in the terms of reference itself presupposes that the person who had acted, had the authority to act, but his action was mired with *mala fide* and that he had not acted justifiably. It is to be borne in mind that the reference does not relate to the question if ‘suspension was legal or illegal’. The expression ‘legality and illegality’ challenges the authority of the person who had acted.

The Labour Court has also erred in usurping the jurisdiction under Section 33C(2) of the I.D. Act by holding that since both, BHEL and the Contractor had denied the relationship of employer and employee with the claimant, it would not have been possible to claim wages for suspension period under Section 33C(2) of the Act for claimant.

As discussed above, as held by the Apex Court in **Balvantray Ratilal Patel** (*supra*), on suspension the employee could only be entitled for the remuneration for the period of suspension and, it clearly gives jurisdiction to the Labour Court to compute the suspension allowance/wages of the suspension period.

25. In the present case, it is not in dispute that there was a contract between BHEL and the contractor. The Memorandum of Understanding dated 28.09.1988 was also proved by the claimant in his evidence before the

Trial Court as Ex.WW1/E. Clause 3 of the said contract reads as under:-

“3. Party No.1 will pay the said enhanced money and arrears to Party No.2 on the understanding by him that the same will be paid to his employees working in HT House for Party No.1 without any deduction within 30 days hereof.”

26. This clearly shows that the liability to pay to all the employees working in HT House was that of contractor which he could reclaim from BHEL. It was thus the admitted position that it was contractor, who under the terms of contract, used to pay wages to the claimant. Similarly, after suspension also, liability to pay wages/suspension allowance does not change. Even otherwise, if the claimant had any dispute regarding his status, nothing had precluded him from raising the industrial dispute for determination of his status. This Court **D.D. Gupta** (*supra*) has clearly held that ‘suspension’ is not an ‘industrial dispute’ and the learned Labour Court has failed to take note of the findings of this Court on the grounds which were not tenable and not open.

27. From the above discussion, it is apparent that the suspension could not be the subject matter of an industrial dispute under the Act. Reference dated 18.12.1998 which relates to the suspension of the claimant, was an invalid

reference. The findings of the Labour Court on invalid reference is thus without jurisdiction and, therefore, *non est*. Since the entire award of the Labour Court was without jurisdiction, no findings have been given on the merit of the case. The award dated 09.06.2000 is hereby set aside and the writ petition is allowed.

JULY 17, 2015
BG



DEEPA SHARMA
(JUDGE)