

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

Reserved on: 06th May, 2015
Date of Decision: 05th August, 2015

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+ W.P.(C) 901/2014
+ W.P.(C) 902/2014
+ W.P.(C) 903/2014
+ W.P.(C) 904/2014
+ W.P.(C) 905/2014
+ W.P.(C) 912/2014
+ W.P.(C) 916/2014
+ W.P.(C) 917/2014
+ W.P.(C) 919/2014
+ W.P.(C) 921/2014
+ W.P.(C) 922/2014
+ W.P.(C) 923/2014
+ W.P.(C) 991/2014

INDIRA GANDHI NATIONAL OPEN UNIVERSITY Petitioner
Through: Mr. Aly Mirza & Mr. Kulish
Tanwar, Advocates.

versus

UNION OF INDIA & ANR.Respondents
Through: Mr. V.N. Kaushik, Advocate for
R-2.

CORAM:
HON'BLE MR. JUSTICE VED PRAKASH VAISH

JUDGMENT

1. By all these petitions under Articles 226 and 227 of the Constitution of India, the petitioner has impugned the award dated 09.12.2011 passed by the Presiding Officer, Central Government

Industrial Tribunal No.1 (hereinafter referred to as the 'Tribunal'), Karkardooma Court, Delhi in ID No.04/2010, 17/2010, 03/2010, 15/2010, 08/2010, 10/2010, 16/2010, 18/2010, 07/2010, 09/2010, 05/2010, 14/2010 and 06/2010 respectively whereby the labour court allowed the claim filed by the respondent No.2 (workman in all the respective petitions) and accordingly directed reinstatement of the respondent No.2 in the service of the University with continuity and consequential benefits alongwith 20% back wages from the date of alleged retrenchment till the date of the award becoming operative under Section 17A of the Industrial Disputes Act, 1947 (hereinafter referred to as the 'ID Act').

2. Since all these petitions are between the same parties, all the petitions are against award dated 09.12.2011 passed by the Tribunal and involve identical question of law, they are being disposed of by this common judgment. For the sake of brevity the facts are being extracted from W.P.(C) No.901/2014.

3. Briefly stating the facts as emerging from the said petition are that the petitioner entered into a contract with Sybex Computer System Pvt. Ltd. vide agreement dated 01.11.2004 for outsourcing housekeeping services. This contract was subsequently extended upto 31.10.2007. Respondent No.2 was working with the said contractor to provide housekeeping services in the petitioner's campus. With effect from 01.11.2007, the contract for providing housekeeping services was given to Spick & Span Facilities Management Pvt. Ltd. The new

contractor brought his own housekeeping staff for the duration of its contract.

4. Against this new contract, the housekeeping staff including respondent No.2 resorted to illegal strike in the Petitioner University and tried to hinder the functioning of the University. In view of the obstruction so caused by the staff of the previous contractor, the University was compelled to file a suit for injunction bearing CS(OS) No.83 of 2008 before this court. On 15.01.2008, an interim injunction was passed in favour of the Petitioner University. Thereafter, on 13.03.2009, the said suit was decreed and it was held that workmen of Sybex Computer System Pvt. Ltd. cannot be stated to be appointed by the petitioner.

5. The respondent No.2 raised an industrial dispute against her termination and on the failure of the conciliation proceedings, a reference was made by the appropriate government to the Tribunal vide order No.L-42012/96/2009-IR(DU) New Delhi dated 07.01.2010 under the following terms of reference:-

“ Whether the action of the management of Indira Gandhi National Open University, in terminating the services of their workman Smt. Saroj w.e.f. 01.11.2007 is legal and justified: If not, what relief the workman is entitled to?”

6. In the said industrial dispute, the parties were heard, evidences were adduced from both sides and witnesses were cross-examined leading finally to the passing of the impugned award dated 09.12.2011.

7. Learned counsel for the petitioner contended that the impugned award is contrary to law and judicial pronouncements. The tribunal had framed certain issues for adjudication which were although decided in favour of the petitioner, however, it proceeded to consider and adjudicate on the issues which were neither pleaded nor on which any evidence was led nor any argument advanced by respondent No.2. Even though the tribunal had reached a conclusion on the basis of material on record, that respondent No.2 was the employee of the contractor, i.e., Sybex Computer Pvt. Ltd, despite this, Tribunal granted the relief in favour of the workman on the basis of the issues which were never framed nor argued much less any evidence led in that behalf.

8. It was further contended by learned counsel for the petitioner that the Tribunal reached to the conclusion that the contract between the University and the contractor was sham and granted reinstatement to the workman respondent No.2 without appreciating the fact that nowhere in the entire statement of claim it was contended that the said contract was sham and bogus. The contractor was never made a party to the proceedings. The Tribunal could not have given such finding in the absence of the contractor. Despite this, the petitioner led evidence to show that the contractor was paying EPF and ESI dues to the authority concerned. The Tribunal also acknowledged that the evidence was led in this behalf and observed that the contractor was regularly making contribution in respect of housekeepers such as respondent No.2 to the authorities concerned.

9. It was also contended on behalf of the petitioner that in case the workers engaged by the contractor are made regular employees of the principal employer, then the whole purpose of the contract labour would get frustrated. In case of violation by either party of the Contract Labour, the remedy, if any, lies with the Authorities under the Contract Labour (Regulation and Abolition) Act, 1970 (hereinafter referred to as the 'CL Act') and under such circumstances, no direction for regularisation of the contract workers could have been passed.

10. Lastly, it was contended by the learned counsel for the petitioner that the Tribunal failed to appreciate that the services of the respondent No.2 cannot be regularised with the petitioner. There is no provision for absorption/ regularisation of the said respondent in the employment of the petitioner. There was no relationship of employer-employee between the management and respondent No.2. The petitioner had no right, control and supervision over the appointment, place of work, transfer, promotion, fixation of wages and service condition of the said respondent.

11. In support of his contentions, learned counsel for the petitioner has placed reliance on, '**Manager, RBI, Bangalore v. S. Mani & Ors.**', 2005 (5) SCC 100, '**Haldia Refinery Canteen Employees Union & ors. v. M/s. Indian Oil Corpn. Ltd. & Ors.**', 2005 (5) SCC 511, '**Steel Authority of India Ltd. & Ors. v. National Union of Water Front Workers**', 2001 (7) SCC 1 and '**Gopal v. Bharat Sanchar Nigam Ltd.**', 213 (2014) DLT 325.

12. *Per contra*, learned counsel for respondent No.2 contended that the respondent No.2 had rendered continuous service with the petitioner for a period more than one year when she was illegally retrenched. At the time of her removal, neither was any notice issued to her nor was she paid retrenchment compensation and other legal dues. The petitioner did not challenge the order of reference and at this stage it is precluded from challenging the award pursuant to such a reference. Contributions towards social securities namely ESI, medical benefits and provident fund were deducted from her wages by the University. Despite the said contribution made by the workman, the University never issued any medical card, provident fund statement or account number rather passed on this responsibility on the shoulders of the contractor.

13. It was further contended by learned counsel for respondent No.2 that the facilities of earned, annual, privileged, casual, festival and medical leaves were not accorded to respondent No.2. The work was also taken on Sundays and holidays but no compensatory leave or overtime wages were given to her. The services of respondent No.2 were placed at the disposal of the contractor on 01.11.2007 however the engagement of the contractor for housekeeping work was neither communicated nor was such contractor introduced to her.

14. I have learned counsel for the parties and have perused the material on record.

15. In all these petitions two questions arise for consideration before this court. Firstly, whether the workmen (respondent No. 2 in all the

petitions) were employed by the petitioner for housekeeping services as their own employees or were the said workmen employees of the contractor, Sybex Computer System Pvt. Ltd. as contended by the management. Secondly, whether the Tribunal exceeded the scope of its reference by holding that the agreement between the petitioner and the said contractor was sham and bogus.

16. So far as the first contention of the workmen is concerned it is observed that in all these petitions the workmen have stated in their claim statement and evidence by way of affidavit that they were the employee of the petitioner establishment. At the time of taking in employment, they were asked to fill in certain prescribed form of the Petitioner University and sign the same, which they did. However, the said form and documents are in the custody of the petitioner management. They have also asserted that despite the fact that the petitioner completed all formalities at their end but they were not issued any appointment letter. The workmen have also stated that EPF and ESI numbers were also not supplied to them.

17. Dr. S.S. Bisht (MW-3) who has appeared as a witness on behalf of the management before the trial court has stated in his evidence by way of affidavit that said workmen were neither appointed by the petitioner management nor were their services terminated by the petitioner. No salary/wages or any other emoluments were ever paid by the petitioner to them. The petitioner had engaged the services of the contractor Sybex Computer System Pvt. Ltd. for outsourcing housekeeping services vide agreement dated 01.11.2004 which was

subsequently extended to 31.10.2007. In the said agreement it was categorically stipulated that all personnel/employees appointed by the contractor for the purpose of rendering housekeeping services at no time would be treated as employees of the petitioner. It was further stated therein, that the salaries/wages and/or any other emoluments including ESI contribution or EPF contribution were all given to respondent No.2 by the said contractor. No payments were ever made by the petitioner to them. For the services rendered by Sybex Computer System Pvt. Ltd., the contractor used to raise bills every month and payments were made to it from time to time and were made by cheques. Before the payments could be released by means of cheques, Sybex Computer System Pvt. Ltd. used to raise its monthly bills. Alongwith the bills the said contractor used to annex EPFO challan, ESIC challan, service tax challan, list of housekeepers who worked for the period and their attendance and proof of payment to them. After the said bills were verified, a contingent bill was raised thereafter and sanction was given for making the payment. The cheques used to be thereby drawn by the finance department after sanction was given. Some of the bills for the arrears of January-March 2007, April 2007, May 2007, June 2007, July 2007, August 2007, September 2007 and October 2007 raised by Sybex Computer System Pvt. Ltd. alongwith respective EPFO challan, ESIC challan, Service Tax challan, list of housekeepers who worked for the period and their attendance, proof of payments to them, contingent bill and sanction were proved before the trial court as Ex.MW3/11 to Ex. MW3/19.

18. It is no longer *res integra* that the burden of proving the employer-employee relationship primarily rests upon the person who asserts its existence. In a situation where a person asserts to be an employee of the management which the management denies, the duty primarily rests on the person so asserting to give positive evidence in his favour and discharge his initial burden. Once such a person has given positive evidence in his favour, only then, the burden would shift on the management to give evidence to counter such claims. This is because it is always easier to prove positive fact than a negative.

19. The Hon'ble Supreme Court in '**Workmen of Nilgiri Coop. Mkt. Society Ltd. v. State of Tamil Nadu**', AIR 2004 SC 1639 held as under:-

"47. It is a well-settled principle of law that the person who sets up a plea of existence of relationship of employer and employee, the burden would be upon him.

48. In N.C. John Vs. Secretary Thodupuzha Taluk Shop and Commercial Establishment Workers' Union and Others [1973 Lab. I.C. 398], the Kerala High Court held:

"The burden of proof being on the workmen to establish the employer- employee relationship an adverse inference cannot be drawn against the employer that if he were to produce books of accounts they would have proved employer-employee relationship."

49. In Swapan Das Gupta and Others Vs. The First Labour Court of West Bengal and Others [1975 Lab. I.C. 202] it has been held:

"Where a person asserts that he was a workman of the Company, and it is denied by the Company, it is for him to prove the fact. It is not for the Company to prove that he was not an employee of the Company but of some other person."

50. The question whether the relationship between the parties is one of the employer and employee is a pure question of fact and ordinarily the High Court while exercising its power of judicial review shall not interfere therewith unless the finding is manifestly or obviously erroneous or perverse."

20. From a perusal of the copies of the wage sheets it is seen that the payment was made to the workmen through the contractor. The documents exhibited as the copies of EPF returns filed by the contractor bear the name of workmen which indicate that the EPF contributions on their behalf was paid by the contractor and not the petitioner. Even from a perusal of the copies of the bills raised by the contractor for various months and sanction given by the petitioner for their payment vide documents Ex. MW3/11 to Ex.MW3/19, the contention of the petitioner that workmen were not its employee is fortified. The workmen have not produced any evidence to prove their employment with the petitioner. They have only claimed that at the time of their appointment they were made to sign some documents by the petitioner and despite their repeated requests, no appointment letter was issued to them. As aforementioned, the workmen have claimed that their ESI and EPF numbers were issued by the petitioner, however the workmen have failed to give any evidence in support of this contention. In fact, documents on record show that the payment on

behalf of the workmen towards the said account was made by the contractor Sybex Computer System Pvt. Ltd. and not the petitioner. Clearly, workmen have failed to discharge even their primary burden to prove their employment with the petitioner. On the other hand, the petitioner/management has, by documents aforementioned clearly shown that their services were employed through the contractor, Sybex Computer System Pvt. Ltd. Therefore, in my opinion, the Tribunal has correctly reached at a conclusion that the relationship of employer and employee is not established between the petitioner and the workmen.

21. So far as the question of the Tribunal reaching at the conclusion that the contract between the petitioner and the contractor Sybex Computer System Pvt. Ltd. being sham and bogus is concerned, it is observed that once an industrial dispute is referred to Labour Court/Tribunal by an appropriate government under a term of reference, the Labour Court/ Tribunal is bound by it and cannot travel beyond it. Labour Court/Tribunal is a creation of the reference and the Labour Court cannot go beyond the terms of reference except that the question incidental to such a dispute. It is a settled law that where the workmen claim that the contract between the principal and the contractor was a sham and camouflage, they have to raise an industrial dispute to that effect and only on a specific term of reference in this regard, the industrial adjudicator can adjudicate and decide on it.

22. The Hon'ble Supreme Court in '**Mukand Ltd. v. Mukand Staff & Officers**', (2004) 10 SCC 460 held as under:-

“36. We, therefore, hold that the reference is limited to the dispute between the Company and the Workmen employed by them and that the Tribunal, being the creature of the Reference, cannot adjudicate matters not within the purview of the dispute actually referred to it by the order of reference.”

23. This court in ‘**Ashok Kumar v. The State**’, W.P. (C) Nos.9438-42/2004 decided on 20.12.2006 held that where no reference is made to the Labour Court for determining whether the contract was sham or camouflage, the Labour Court could not have entered into this issue. This court held as under:-

“5. I consider that this argument of the counsel of the petitioner must fail. The petitioners, before Conciliation Officer as well as before the appropriate Government, did not raise any dispute about the contract being sham and camouflage. They rather claimed that they were direct employees of the management and did not claim that they were employees of the contractor. It is now settled law that where the workmen claim that the contract between principle employer and contractor was sham and camouflage, they have to raise an industrial dispute to that effect and it is industrial adjudicator who, after going through the evidence and the terms and conditions of the contract and other circumstances has to decide whether the contract between principal employer and the contractor was sham and camouflage. If the Industrial Adjudicator comes to conclusion that the contract was sham and camouflage, the industrial adjudicator can order the absorption of the workman by the principal employer. Similarly in a case where the workman considered that though they were contractor's employees but the contract labour system should be abolished, they have to approach the appropriate Government under Section 10 of the CLRA Act and it is the jurisdiction of the appropriate Government to consider the demand of

the workman and after taking into account the parameters, as laid down under Section 10 of the CLRA Act, issue a notification of abolition of the contract labour system in the industry/establishment in respect of specific jobs. The Tribunal or the High Court cannot exercise powers under Section 10 of the CLRA Act. This power vests with the Government.

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7. It is obvious that the workmen in this case did not raise correct dispute and did not approach the appropriate Government with the contentions that the contract was sham and camouflage or that the contract labour system should be abolished. They got referred a dispute that they were the employees of the management and were not being regularized. This claim was found false. The Labour Court had no alternative but to dismiss the claim. It is settled law that the Labour Courts/Tribunals cannot travel beyond the term of reference. If no reference had been made to the Labour Court for determining whether the contract was sham and camouflage, the Labour Court could not have entered into this issue and decided whether the contract was sham and camouflage.”

(emphasis supplied)

24. In the instant case, the workmen have not raised any contention in their statement of claims or even before the conciliation officer and the Tribunal that the contract entered into between the contractor and the management was sham and bogus. No evidences were adduced by the parties to this effect and even no arguments were heard on this issue. In fact the only contention that was raised by the workmen was that they were employees of the petitioner and that their services were illegally terminated by the management petitioner. Under such

circumstances, in an absence of specific reference to the Tribunal on the issue whether the contract between the petitioner and the contractor was a sham or not, the Tribunal could not have gone into this question. As already observed a Tribunal is bound by the term of reference and cannot go beyond it. While deciding such issues, although a Tribunal may decide on matters incidental to the dispute. However, a decision rendered on any issue beyond the terms of reference is not sustainable under law. Clearly, in the instant case, the question of the contract between the petitioner and the contractor being sham or not was neither a term of reference nor was it an issue incidental to the dispute. Therefore, the finding on the said issue was beyond the scope of reference and must consequently fail.

25. At this juncture it is pertinent to mention here that the Tribunal had reached this conclusion on a mere reading of the contract between the parties and in the absence of the contractor. The petitioner had moved an application for impleadment of the contractor as a party to the proceedings. However the permission for impleadment was declined by the Tribunal vide its order dated 24.04.2010. Further in the civil suit bearing CS (OS) No.83/2008 for permanent injunction preferred by the petitioner against the workmen and other persons restraining them from organizing or leading mob in picketing, gathering, demonstrating, putting tent or shamiana etc. in front of the petitioner premise, this court has already reached a conclusion that the workers employed by the contractor Sybex Computer System Pvt. Ltd. (defendant No.2 therein) were not the employees of the petitioner. It was also observed therein that on conclusion of the agreement between

the petitioner and the said contractor, the persons so employed by them ceased to have any connection with the petitioner.

26. Another submission of learned counsel for the workman in respective petitions is that Central Government issued notification S.O. No.779(E) dated 09.12.1976 whereby the Central Government after consultation with the Central Advisory Contract Labour Board, in exercise of the power conferred by Sub-section (1) of Section 10 of the Contract Labour (Regularisation and Abolition) Act, 1970 (37 of 1970) prohibited the employment of contract labour on and from the 1st March, 1977, for sweeping, cleaning, dusting and watching of buildings owned or occupied by the establishments in respect of which the appropriate Government under the said Act is the Central Government. The said notification reads as under:-

“S.O. No. 779(E)8/9-12-76 in exercise of the power conferred by Sub-section (1) of Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 (37 of 1970) the Central Government after consultation with the Central Advisory Contract Labour Board hereby prohibits employment of contract labour on and from the 1st March, 1977, for sweeping, cleaning, dusting and watching of buildings owned or occupied by the establishments in respect of which the appropriate Government under the said Act is the Central Government:

Provided that this notification shall not only apply to the outside cleaning and other maintenance operations of multi-storeyed buildings where such cleaning or maintenance operations cannot be carried out except with specialised experience.”

27. However, it is observed in this regard that the said notification came up for consideration before the Apex Court in ‘**Steel Authority of India Ltd. and Ors. vs. National Union Waterfront Workers and Ors.**’, (supra), wherein the Hon’ble Supreme Court while setting aside the said notification observed as under: -

“53. xxxx xxxx xxxx

A glance through the said notification, makes it manifest that with effect from March 1, 1977, it prohibits employment of contract labour for sweeping, cleaning, dusting and watching of buildings owned or occupied by establishment in respect of which the appropriate Government under the said Act is the Central Government. This clearly indicates that the Central Government had not adverted to any of the essentials, referred to above, except the requirement of consultation with the Central Advisory Board. Consideration of the factors mentioned above has to be in respect of each establishment, whether individually or collectively, in respect of which notification under Sub-section (1) of Section 10 is proposed to be issued. The impugned notification apart from being an omnibus notification does not reveal compliance of Sub-section (2) of Section 10 of the Act. Besides it also exhibits non-application of mind by the Central Government . We are, therefore, unable to sustain the said impugned notification dated December 9, 1976 issued by the Central Government.”

(emphasis supplied)

28. It is also worth mentioning here that in the case of similarly placed workman in ID No.117/2011 titled as ‘Rakesh vs. The Vice Chancellor, IGNOU, ID No.118/2011 titled as ‘Deepak vs The Vice

Chancellor, IGNOU’, ID No.119/2011 titled as ‘Sonu Kumar vs. The Vice Chancellor, IGNOU’, ID No.120/2011 titled as ‘Raj Pal vs. The Vice Chancellor, IGNOU’ and ID No.121/2011 titled as ‘Mukesh vs. The Vice Chancellor, IGNOU’, the Tribunal has refused to decide on the question of whether the contract between the management and the contractor is sham or bogus holding that the said issue was never referred by the appropriate government for adjudication of the Tribunal under its terms of reference. While reaching such conclusion, it was also observed therein that the Tribunal is bound by the terms of reference and cannot enlarge its scope.

29. In the light of the above discussion, the petitions are allowed to the extent that the impugned award dated 09.12.2011 passed by the Presiding Officer, Central Government Industrial Tribunal No.1, Karkardooma Court, Delhi is set aside to the extent which directs reinstatement of respondent No.2/workmen in the service of the petitioner with continuity and consequential benefits alongwith 20% back wages from the date of his alleged retrenchment.

30. Trial Court record(s) be sent back forthwith.

C.M. Appl. Nos.1206/2015 & 2173/2015 in W.P.(C) No.901/2014
C.M. Appl. Nos.1212/2015 & 2176/2015 in W.P.(C) No.902/2014
C.M. Appl. Nos.1210/2015 & 2180/2015 in W.P.(C) No.903/2014
C.M. Appl. Nos.8208/2015 & 1813/2014 in W.P.(C) No.904/2014
C.M. Appl. Nos.1217/2015 & 2179/2015 in W.P.(C) No.905/2014
C.M. Appl. Nos.1213/2015 & 2174/2015 in W.P.(C) No.912/2014
C.M. Appl. Nos.1215/2015, 2178/2015 & 1845/2014 in W.P.(C) No.916/2014
C.M. Appl. Nos.1214/2015, 2181/2015 & 1849/2014 in W.P.(C) No.917/2014

C.M. Appl. Nos.1205/2015 & 2170/2015 in W.P.(C) No.919/2014
C.M. Appl. Nos.1207/2015 & 2177/2015 in W.P.(C) No.921/2014
C.M. Appl. Nos.1211/2015 & 2171/2015 in W.P.(C) No.922/2014
C.M. Appl. Nos.1216/2015 & 2175/2015 in W.P.(C) No.923/2014
C.M. Appl. Nos.1204/2015 & 2172/2015 in W.P.(C) No.991/2014

In view of my aforesaid findings, the applications are dismissed as infructuous.

The Registry is directed to release the amount deposited in terms of order dated 15.04.2014 to the petitioner.

(VED PRAKASH VAISH)
JUDGE

AUGUST 05, 2015
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