

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.12 OF 2016

Gulf Oil Lubricants India Limited
having its Registered Office
at IN Centre, 49/50 MIDC
12th Road, Andheri (East)
Mumbai-400 093.

... Petitioner

Versus

1. Shri Sudhakar Parte
Represented by General Employees
Association, Tel. Rasayan Bhavan,
Tilak Road, Dadar, Mumbai-400 014
2. M/s Om Enterprises
Juhu Nagar Station Complex
Shop No.GO12 Juhi Nagar,
Navi Mumbai-400 706.
3. M/s Sagar Enterprises
Juhi Nagar Station Complex
Shop No.GO12, Juhi Nagar,
Navi Mumbai-400 706.
4. M/s Sadguru Enterprises
4, Sadguru Sadan, Anant Malvankar
Road, Mumbai-400 012

... Respondents

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Mr. J.P. Cama, Senior Counsel a/w Mr. Rohan Jajadhyaksha, Mr. Himanshu
V. Pradhan i/b Crawford Bayley & Co., for the Petitioner.
Mr. Ramesh Dinkar Bhat for Respondent No.1.

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CORAM : S.C.GUPTE, J.

DATE : 14 JUNE 2016.

P.C. :

. The Writ Petition filed under Articles 226 and 227 of the Constitution of India challenges an Award passed by the Central Government Industrial Tribunal No.2, Mumbai, in a Reference made to it under the Industrial Disputes Act, 1947.

2 The gist of the Respondent-workman's claim before the Tribunal was that he was in continuous employment with the Petitioner with effect from 20 January 1997; that he applied for being made permanent on 7 January 1998; that instead of conferring upon the Respondent the status and benefits of permanency, the Petitioner started making payment of wages to the Respondent through its contractors, M/s Sadguru Enterprises from October 2000 to December, 2001, thereafter M/s Sagar Services from January 2002 to December 2003 and M/s Om Enterprises from January 2003 to February 2007; and that from 5 March 2007, his services came to be terminated. It was the case of the Respondent-employee that the Petitioner was his employer and the wages paid through the contractors were so paid only to deprive him of the benefits of permanency. After an unsuccessful attempt of prosecuting a complaint before the Industrial Tribunal under the provisions of The Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act, 1971, the matter was carried in Reference before the Industrial Tribunal. Evidence was led by the parties before the Industrial Tribunal. After hearing the parties, the Industrial Tribunal came to the conclusion that the Respondent was an

employee of the Petitioner-Company. The Industrial Tribunal further held that the Respondent-workman having been held to be the employee of the Petitioner-employer and the labour contracts having been found to be sham, bogus and a mere camouflage, the Respondent-workman was entitled to the benefits of permanency and, accordingly, directed the Petitioner-Company to reinstate the Respondent-workman in service with 10 % back wages and continuity of service since 6 March 2007.

3 Mr. Cama, learned Senior Counsel appearing for the Petitioner-Company, makes the following submissions in support of the Petitioner's challenge to the impugned order :

- i) Firstly, it is submitted that the onus to prove the relationship of employer and employee as between the Petitioner and the Respondent, is on the Respondent-employee; and that this onus is not discharged by the Respondent-employee;
- ii) It is submitted that the Industrial Tribunal has not taken into account the various tests including the control and organization tests as also several other factors, which have a bearing on the question of relationship of employer and employee and which have been considered as decisive by courts;
- iii) It is submitted that assuming without admitting that the Respondent was employed with the Petitioner for the period between January 1997 to October 2000, with effect from October 2000, he was transferred to the contractors and employed through them. It is

submitted that this position was accepted by the Respondent and such acceptance, in the facts of the case, amounts to acquiescence and also raises an estoppel against the Respondent from contending that there was a change in his service condition without notice and in violation of Section 9A of the Industrial Disputes Act, 1947 or that the Respondent continued to be an employee of the Petitioner.

4 No doubt, as held by the Supreme Court in case of **Workmen of Nilgiri Co-op. Mkt. Society Ltd Vs. State of Tamil Nadu**¹, there are various relevant factors which the Court is required to consider whilst deciding whether or not there exists a relationship of employer and employee or master and servant between the parties before it. There are the control test and the organization test. Apart from these tests, there are various factors which can be said to be decisive of the issue. These, as observed by the Supreme Court, are : (a) who is the appointing authority; (b) who is the pay master; (c) who can dismiss; (d) how long the alternative service lasts; (e) the extent of control and supervision; (f) the nature of the job, e.g. whether it is professional or skilled work; (g) nature of the establishment; (h) the right to reject, etc. These tests determine whether the alleged employee is actually under a contract of employment or he is under a contract for employment, in the latter case to be termed merely as a contractor. Though there were documents placed before the Industrial Tribunal on these issues, without actually considering these documents in the light of the various tests and factors relevant for the purpose, the Industrial Tribunal appears to have come to the conclusion that there was a relationship of employer and employee between the

1 AIR 2004 Supreme Court 1639

Petitioner and the Respondents. To that extent, the judgment does leave much to be desired. The Court should have done better by approaching the issue differently and in the light of these tests and principles. But the fact remains that such material as has been considered by the Court to arrive at its finding is certainly relevant and germane and can sustain the conclusion. Though I have expressed my view that the Court could have addressed the issues in a proper way, I am unable to persuade myself to come to the conclusion that the impugned award is in anyway perverse or impossible, having regard to the material before the Court. My reasons for the same are as follows :

5 The first important circumstance to note is that the fact that the Respondent was originally an employee of the Petitioner and worked with it continuously during the period from January 1997 to October 2000 is not seriously disputed by the Petitioner. The Respondent-workman has come to the Industrial Tribunal with a specific case that he was in the employment of the petitioner during January 1997 to October 2000. It was his case that during this period, his salary and allowances were paid directly by the Petitioner. There is no specific denial of this case, either in the pleadings or evidence of the Petitioner. The Industrial Tribunal has rightly observed that the Petitioner has not denied the fact that the Respondent was working as Office Assistant between January 1997 and October 2000 and getting his pay and allowances directly from the Petitioner. Mr. Cama pointed out paragraph-6 of the written statement of the Petitioner as well as evidence of the Petitioner's witness (Sebin Jose, General Manager of the Petitioner) in paragraph-9, to claim that the case of the Respondent-workman of direct employment with the Petitioner

between January 1997 to October 2000 was actually contested by the Petitioner. The averments referred to by Mr. Cama can at best be described as delightfully vague. In the face of a specific case pleaded by the Respondent-workman that between January 1997 to October, 2000, he was a direct employee of the Petitioner and getting his pay and allowances from the Petitioner, what the Petitioner has pleaded in its written statement is that the Respondent was an employee of M/s Om Enterprises (Respondent No.2.); earlier to that an employee of M/s Sagar Enterprises (Respondent No.3); and prior thereto of M/s Sadguru Enterprises (Respondent No.4); and that the claim of the workman for reinstatement and permanency against the Company was not tenable in law (Paragraph-5 of the written statement). The Petitioner has simply denied that any arrangement was made for payment of wages through the contractors with a view to deny the workman the status and benefits of permanency in the post of Office Assistant, as alleged. The Petitioner has denied that the Respondent was working as Office Assistant as alleged (Paragraph-6 of the written statement). In reply to the specific case in the statement of claim that the Respondent was paid wages directly by the Petitioner during the relevant period, the Petitioner, in its written statement, has merely stated that for sometime the company, at the request of the contractor, was paying the workman directly and adjusting such payment against the amount payable to the contractor. Even in the affidavit in chief filed by the Petitioner's witness, the witness merely deposes to the appointment of the Respondent through M/s Sadguru Enterprises, relying upon an appointment letter of 30 October 2000. Once again, this accounts for the Respondent's employment after October 2000, but does not join issue with the specific case of the Respondent of his appointment with the Petitioner between

January 1997 and October 2000. This evidence, in the face of the admission of direct payment for sometime, practically puts paid to the suggestion that the Respondent was actually a contractor's employee between January 1997 and October 2000. In the cross examination of the Petitioner's witness, the witness has stated that he did not remember the period till when the Respondent was paid directly by the company. No instructions by any of the contractors for payment of any amount to the Respondent on behalf of the contractors, have been placed on record. On this state of evidence, the conclusion that the Respondent was employed with the Petitioner and received payment of salary and allowances from the Petitioner during January 1997 and October 2000, can certainly be termed as a fair and reasonable conclusion.

6 The second important circumstance which appears to have weighed with the Industrial Tribunal, is that not only was the Respondent employed with the Petitioner between the period January 1997 to October, 2000, he was continuously in service and worked as a mail-cum-delivery boy with the Petitioner from October 2000 to March 2007, though during this period, the so called contractors kept on changing. First it was M/s Sadguru Enterprises, then it was M/s Sagar Enterprises and thereafter M/s Om Enterprises. All throughout, the Respondent, on the other hand, continued to work in the establishment of the Petitioner, though his salary and allowances were paid by these three contractors. This circumstance is most certainly an important pointer towards the Respondent's actual employment with the Petitioner rather than the contractors.

7 The third important circumstance is that the change from direct

employment of the Respondent with the Petitioner to employment through these three contractors, appears to have occurred after the Respondent made an application for permanency. Mr. Cama submitted that the receipt of this application is disputed by the Petitioner. Again here, the dispute is raised on the basis of a vague plea and not an express denial. The written statement of the Petitioner does not specifically dispute the receipt of the application dated 7 January 1998 by the Respondent for benefits of permanency. Even in the evidence of the Petitioner, the Petitioner's witness has simply claimed ignorance of the receipt of the Respondent's application in the year 1998, far from asserting any categorical negation of the fact.

8 In the premises, the conclusion drawn by the Industrial Tribunal in paragraph-11 of the impugned order that the same workman continued to work with the Petitioner-company, though the contractors changed periodically, indicating the sham and bogus nature of the contracts, based on these three important facts, namely, : (i) the workman having been employed by the Petitioner in the year 1997 and having worked till October 2000 as an employee of the Petitioner-company, receiving his pay directly from it; (ii) the workman demanding benefits of permanency from the Petitioner-company; and (iii) the Petitioner-company having thereafter inducted various contractors for payment of salary and allowances of the Respondent-workman, cannot possibly be termed as perverse or impossible. This Court, sitting as a writ Court under Article 226 and Article 227 of the Constitution of India, is not expected to weigh the evidence before the Tribunal from the standpoint of its sufficiency as an appeal court would. The focus of the inquiry before this Court is whether there is evidence at all in the matter in support of the findings of the Tribunal; whether the

Tribunal has taken into account any irrelevant or non-germane material; and whether the Tribunal has disregarded any relevant and germane material. As I have shown above, that does not appear to be the case here.

9 In the face of admitted case of a direct employment with the Respondent-company between January 1997 and October 2000, the Respondent could not have been transferred to any contractor or employed through such contractor with effect from October 2000. Such change of service condition would amount to a change in conditions of service within the meaning of Section 9A of the Industrial Disputes Act, 1947, requiring a notice under that Section. Merely to say, that too on the basis of a solitary answer in his cross-examination, that the Respondent has acquiesced in the change of service condition or that he is estopped from contending otherwise, is carrying the matter a bit too far. Acquiescence is a matter of pleading. So also, estoppel. In the pleadings of the parties, one does not find any mention or basis of a plea of either acquiescence or estoppel.

10 In the premises, there is no infirmity to be found in the impugned order of the Industrial Tribunal. The Petition does not have any merit and the same deserves to be dismissed.

11 Accordingly, the Petition is dismissed. There shall be no order as to the costs.

12 Learned Counsel for the Petitioner applies for a stay of this order for a limited period to enable him to test the order. I am not inclined to grant any stay. The Industrial Tribunal has passed the order after duly hearing

the parties and I find that the same does not suffer from any infirmity. So far there has not been any stay of the impugned order of the Industrial Tribunal, though it is submitted that there was a statement made by learned Counsel for the Respondent, which was recorded in the correspondence between the parties, that the Award would not be implemented till the Petition is heard. The application of stay is, in the premises, rejected.

(S.C.GUPTE, J.)