

HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

W.P.No.25851 of 2015

ORDER:

In this Writ Petition, the petitioner questions award dt.28-10-2007 in I.D.No.28 of 2007 of 2nd respondent published on 20-11-2014 by the Government of India.

THE BRIEF FACTS

2. The 1st respondent was appointed by the petitioner on 15-07-1995 on contract basis to work as Lab Attender mentioning that this *appointment would be under a project* titled “Biotechnology Project on Breeding Tobacco Varieties for Biotic Stresses” in the office of the petitioner at Rajahmundry. The said appointment order mentioned that the contract of the petitioner is purely temporary and tenable up to three months and that his services could be terminated at any time before the date or extendable for some more time.

3. On the expiry of the above three month period, a fresh office order dt.01-11-1995 was issued extending the contract awarded to the petitioner for a further period of three months from 18-10-1995. This was followed up by an office order dt.24-01-1996 extending the contract for a further period of three months and a further office orders dt.01-05-1996 and dt.17-07-1996 extending his contract by three months up to 17-10-1996.

4. The petitioner was then given work of cleaning the laboratory equipment/apparatus in the Works section – Administration III. On 16-01-1997, a proceeding was issued to the petitioner stating that work on contract basis under the DBT Project on Biotech stresses is awarded to the petitioner for three months. This was extended periodically three months at a time by orders dt.01-04-1997, 02-07-1997, 31-10-1997, 11-02-1998, 14-05-1998, 09-06-1998, 04-08-1998, 30-10-1998, 01-01-1999, 19-03-1999, 13-05-1999 and 01-09-1999.

O.A No.392/2005

5. The 1st respondent filed O.A No.392/2005 in the Central Administrative Tribunal (CAT), Hyderabad seeking regularization of his services in the petitioner organization. He contended therein that the Trade Union of the petitioner organization was unwilling to take up the issue with the management for regularization of services for casual and contract workers and that during the vacation period of the CAT, Hyderabad, the petitioner singled out the 1st respondent by disengaging his services.

6. The CAT dismissed the said O.A 392 of 2005 on 26.10.2005 holding that he is not entitled to seek regularization of his services in the petitioner organization.

THE INDUSTRIAL DISPUTE NO.28/2007

7. The first respondent contends that he was performing full time duties of permanent nature on par with the duties attached to permanent Group-D nature of post in the petitioner-organization from 18-07-1995 till 01-09-1999; thereafter, the petitioner changed the system and paid salary through sanction register in petitioner's name in the Division of Crop Improvement from 01-10-2000 to 31-07-2002; that later a new system was introduced with effect from 11-08-2002 by taking hand quotations from a group of nine persons and appointing one of them as contractor and rotating every three months similar nature of work attached to regular Group-D persons @ 1900/- per month; but the name of the 1st respondent has been removed from the Muster Roll without serving any notice under Section 25F of the Industrial Disputes Act, 1947 (for short 'the Act') because 1st respondent requested to regularize his services.

8. The 1st respondent contended that he completed more than 240 days of continuous service and in view of the decisions of the Supreme Court and this Court, the conduct of the petitioner amounts 'Unfair Labour Practice' as defined in Section 2 (ra) as enumerated at item Nos.6, 7 and 10 of the Fifth Schedule read with Sections 25 (T) and 25 (U) of the Act.

9. The Government of India, Ministry of Labour made a reference under Sec.10 of the Act vide Proceeding No.

L-40012/52/2006-IR (DU) dt.16-04-2007 to 2nd respondent to decide the following question:

“Whether the action of the Management of CTR-I Rajahmundry in terminating the services of their workman Shri Bikkina Koteswara Rao with effect from 11-02-2006 is legal and justified? If not, to what relief the workman is entitled?”

10. This was numbered as I.D.No.28 of 2007 before the 2nd respondent.

THE CLAIM STATEMENT

11. Claim statement was filed before 2nd respondent by 1st respondent raising contentions mentioned above and seeking reinstatement of his service with continuity of service and back wages.

THE COUNTER

12. Counter affidavit was filed by the petitioner to the said claim statement contending that O.A.No.392 of 2005 filed by 1st respondent had been rejected on 26-10-2005 and the Industrial dispute raised by the 1st respondent is not maintainable. While admitting the fact that the 1st respondent was employed as Lab Attender, it is however contended that the appointment was on contract basis under the DTB Project title “Biotechnology Project on Breeding Tobacco Varieties for Biotic Stresses”. It is admitted that every three months, the services of 1st respondent were extended commencing from

15-07-1995. It is stated that 1st respondent agreed to the terms and conditions of his appointment order and he was continued in the project and when the Principal Investigator of the project informed the 1st respondent to discontinue the contract work awarded to 1st respondent, by proceeding dt.29-10-1996, the services of the 1st respondent were dispensed with on 29-10-1996. It is contended that thereafter, tender was invited for the work of cleaning of lab equipment, that the 1st respondent quoted lowest rate and he was awarded the contract work. It is also contended that the remuneration paid to 1st respondent cannot be called 'wage' and that it was only a 'rate' for a particular type of a work quoted by a contractor, that the lowest rate quoted for the work on contract is selected and work orders issued accordingly. It is also contended that 1st respondent is not a worker or an employee of the petitioner and he was working under a contractor on contract basis and there was no jural relationship of employer and workman between 1st respondent and the petitioner.

13. Before the 2nd respondent, 1st respondent examined himself as W.W.1 and marked Exs.W-1 to W-20. The petitioner examined one witness as M.W.1 and marked Exs.M-1 to M-7.

THE AWARD DT.28.10.2014

14. Thereafter, 2nd respondent passed the impugned award dt.28-10-2014 holding that the petitioner's action in terminating the services of the 1st respondent with effect from 11.02.2006 was not

legal or justified and it is set aside. It directed the 1st respondent to be reinstated into service by the petitioner with back wages and all other attendant benefits.

15. In the said award, he firstly held that Industrial dispute raised by the petitioner is maintainable and the order dt.26-10-2005 in O.A.No.392 of 2005 passed by the CAT, Hyderabad would not come in the way of the petitioner raising the industrial dispute.

16. It held that the 1st respondent had been appointed as Lab Attender by the petitioner after inviting him to attend an interview by sending Ex.W19 Call Letter; he was interviewed by a Selection Committee of the petitioner and was given appointment after being satisfied about his suitability and subject to conditions stipulated in Ex.W.1 Appointment Order; Ex.W1 indicated that his appointment was on contract basis under the Administrative Control of the Director of the petitioner-Institute and the 1st respondent was to devote his whole time to the contract; and this indicates that he was working full time under the direct control of the petitioner only.

17. It held that the term of the 1st respondent's contract was being extended from time to time every three months from 15.07.1995 to 17.10.1996 as evidenced by Exs.W.6 to W.12 and this was because his work was to the satisfaction of the Principal Investigator of the Project. It noted that though under Ex.M.5 dt.29.06.1996 casual nature of work was extracted from the 1st respondent by obtaining

sanction from the sanction register, the 1st respondent was never informed that his appointment as contract worker had been dispensed with for any given reason on any specified date and that the petitioner internally built up the record in its office by keeping him totally dark about it and this was done only to wriggle out of the obligations on its part without regularizing his services and to continue to engage him for years together.

18. It also noticed that subsequently even extracting casual nature of work from the 1st respondent was dispensed with in the record of the petitioner some time later by calling quotations for the work of cleaning of lab equipment, etc. and since the 1st respondent quoted the lowest rate, he was awarded the work on contract basis periodically.

19. It took note of the fact that the 1st respondent claimed that for eleven continuous years he worked for the petitioner honestly and that it was not even suggested to him that he did not work under the direct control of the petitioner. It rejected the evidence of MW.1 that the contract entered into by the petitioner with the 1st respondent was to supply man power according to quotations but Exs.W.16 to W.18 belie this and that they show that he was entrusted work to the satisfaction of the Principal Investigator and as per his instructions and he was executing the work under his direct control.

20. It held that terminating the 1st respondent's contract in 1996 without any formal order and continuing to extract work from him subsequently as if it was on the quotations submitted by him was a make-believe version only to deny him service benefits which have rightfully accrued to him. It concluded that after selecting him through a regular process of selection, petitioner built up the record as if he was a piece-meal contractor and not a person working under the direct control of the petitioner and reading between the lines it can be concluded that he worked for the petitioner continuously for eleven years under the direct control of the petitioner. It therefore held that the contract was only a mere camouflage and the 1st respondent was in fact an employee of the petitioner and was never under any contractor.

21. Assailing the same, this Writ Petition is filed.

CONTENTIONS OF COUNSEL FOR PETITIONER

22. The learned Standing Counsel for the petitioner contended that the award passed by 2nd respondent is erroneous and contrary to law and the evidence on record. She contended that 1st respondent had approached the CAT for the same relief and it had held that 1st respondent was not entitled to relief of regularization of service. She questioned findings of 2nd respondent and raised a plea that 1st respondent is not a 'workman' within the definition of said term in Section 2(s) of the Act. The learned Standing Counsel also relied upon the judgment of the Supreme Court in **Haryana State F.C.C.W. Store Limited and Another Vs. Ram Niwas and**

Another¹ and contended that the provisions of Section 2 (oo) (bb) of the Act, 1947 are attracted and that the services of 1st respondent were disengaged on the completion of the project in which he was provided employment.

CONTENTIONS OF COUNSEL FOR 1ST RESPONDENT

23. The learned counsel for 1st respondent refuted the above contentions and supported the order passed by 2nd respondent. According to him, the petitioner never raised the plea before 2nd respondent that the petitioner services were disengaged on completion of the project in which he was employed, that there is also no plea raised by the petitioner about the applicability of Section 2 (oo) (bb) and therefore it is not open to the petitioner to now raise the said contention. According to him, the continuation of services of the 1st respondent from 15-07-1995 by extending his contract every three months amounts to Unfair Labour Practice; since it cannot be disputed that 1st respondent has worked for a continuous period of more than 240 days, and since the material on record clearly establishes that he was employed till 01-01-2000, and since there is no evidence of compliance of Section 25F by the petitioner before terminating the services of the 1st respondent, 1st respondent was rightly granted reinstatement with back-wages and all attendant benefits.

¹ (2002) 5 S.C.C. 654

THE POINT FOR CONSIDERATION

24. In view of the rival contentions, the point for consideration is “*whether the award of the 2nd respondent is valid and sustainable in law?*”

THE CONSIDERATION BY THE COURT

25. It is no doubt true that in the reference made to 2nd respondent by the Government of India, it is not mentioned that the services of the 1st respondent were terminated with effect from 11-02-2006. However, the material on record shows that the services of the 1st respondent were engaged by the petitioner initially on 15-07-1995 for three months (W1) and this continued up to 31-12-1999. This is a period extending more than four years. I am of the opinion that even if 1st respondent had not been able to show that his services were terminated by the petitioner with effect from 01-12-2006, he has led evidence to show that he was engaged on contract basis by the petitioner from 15-07-1995 to 31-12-1999 and that his services were being extended regularly in installments of three months by issuing separate orders.

26. Thus the 1st respondent was engaged as a Lab Attendant initially and later to do work of cleaning of the lab on contract basis.

27. Section 2 (s) of the Act defines a ‘workman’ as follows:-

“Section 2 (s) "workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person--

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding ⁶⁰[ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.]

28. It is not the contention of the petitioner that the 1st respondent was engaged in a managerial or administrative capacity or in a Supervisor capacity. The orders issued by the petitioner to the 1st respondent indicate that he was employed to do manual skilled/technical work for reward. Therefore, I am of the opinion that 1st respondent would fall within the definition of term ‘workman’ under Section 2 (s) of the Act, 1947.

29. Merely because in the several orders issued to 1st respondent, the petitioner did not mention the term ‘wage’ and used the word ‘consolidated amount’ ‘total cost’ ‘total sum’ etc., it would make no difference since they would definitely fall within the definition of term ‘wages’ under Section 2 (rr) of the Act as *remuneration* paid to 1st respondent for the work executed by him.

30. I will next consider the plea of the petitioner that the provisions of Section 2 (oo) (bb) of the Act are attracted. The said provision reads:

“Section 2 [(oo) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action but does not include--

(a)

(b)

⁴⁸*[(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or]*

(c).....”

31. In **Haryana State F.C.C.W. Store Limited** (1 supra), cited by the petitioner’s counsel, the Supreme Court considered the provisions of Section 2 (oo) of the Act, 1947. In that case, the appellant before the Supreme Court had been entrusted with the responsibility of procuring wheat and to supply the same to the Haryana Warehousing Corporation. On account of non-availability of

godowns, heavy stock of grains had to be stored in open area at Hasanpur Mandi. For watching and keeping care of the stock lying in the open area, necessity of watchman/chowkidar was felt by the District Manager of the Appellant Society. The Managing Director, having sanctioned the engagement of watchman, the respondents were appointed on contract basis on payment of daily wages till the stocks were disposed of for a period of three months. Thereafter the respondents' services were terminated after the stock lying in the open was secured. Provisions of Section 25F of the Act, 1947 were not complied with before such disengagement or termination of the respondents. They raised an industrial dispute. The Labour Court held that the respondents were engaged by the management for specific purpose and for specific period and therefore the respondents were not entitled to any relief. The High Court however reversed the same and set aside the award of the Labour Court and directed reinstatement with all consequential benefits with full wages. Before the Supreme Court, appellants relied on Section 2 (oo) (bb) and contended that the case of the respondents comes within that provision. The Supreme Court observed that the Labour Court relied on oral and documentary evidence and the order of the Managing Director of the appellants sanctioning engagement of the respondents and had held that their engagement or appointment was for a specific purpose or for a particular period and *since purpose of their appointment was over and the period of appointment had expired*, their services were disengaged, and this would not be retrenchment

within the meaning of Section 2 (oo) of the Act. It held that High Court has not recorded the finding that there is no contract of work between the management and workman concerned and since there exists a contract of service with the terms and conditions stipulating that the engagement was only for a period of three months or till the clearance of the stock lying in the open area, the conclusion is inescapable that their disengagement was not retrenchment.

32. This decision, in my opinion, has no application to the present case because firstly, it was never pleaded by the petitioner that on the conclusion of the project where the 1st respondent was employed, it had disengaged him. Admittedly the engagement of the petitioner from 15-07-1995 to 31-12-1999 is well documented and was not contested by the petitioner. In the absence of a plea by the petitioner that the engagement of the 1st respondent was only for the period during which the project in question was being done and that the 1st respondent was itself engaged on the completion of the project, the petitioner cannot rely upon the above decision and contend that the disengagement of the 1st respondent was retrenchment within the meaning of Section 2 (oo) of the Act and the clause (bb) thereof is attracted.

33. In **Durgapur Casual Workers Union and others Vs. Food Corporation of India and others**², the Supreme Court held that if a particular plea on the basis of which management could oppose

² (2015) 5 C.C.C. 786

the grant of relief to the workman was not taken before the Labour Court or Industrial Tribunal, in the High Court such a plea could not be entertained and the workman cannot be denied the benefit on that basis.

34. In that case, workmen had approached the Industrial Tribunal seeking regularization of their services in the respondent-organization. The respondent did not take a plea before the Industrial Tribunal that the initial appointment of workmen is illegal or that they were appointed through back door means. The Labour Court granted relief to the appellant-workmen but the High Court reversed the same holding that the initial appointments of the workmen were in violation of Articles 14 and 16 of the Constitution of India even though the Tribunal had given a specific finding on Unfair Trade Practice on the part of the respondent Corporation. The Supreme Court set aside the decision of the High Court.

35. In **Bhuvnesh Kumar Dwivedi Vs. Hindalco Industries Limited**³, the services of the appellant which were engaged by the respondent as a Labour Supervisor had been terminated several times and he was subsequently employed again till his service was finally terminated on 27-07-1998. The appellant's brief period of contracts with the respondents were from 28-12-1992 to 28-12-1993 for the first time, from 03-04-1994 to 29-12-1994 for the second time, from 10-01-1995 to 05-01-1996 for the third time, from 16-01-1996 to

³ (2014) 11 S.C.C. 85

11-01-1997 for the fourth time, from 20-01-1997 to 21-01-1998 for the fifth time and from 27-01-1998 to 27-07-1998 for a final time, at the end of which, his service was terminated. The Supreme Court held that the period of services extended close to six years save the artificial breaks made by the respondent with an oblique motive so as to retain the appellant as a temporary worker and deprive the appellant of his statutory right of permanent worker status. It held that the conduct of the respondent perpetuates “Unfair Labour Practice” under Section 25 (ra) of the Act and it is not permissible in view of Sections 25-T and 25-U of the Act read with Entry at Serial 10 in the Fifth Schedule to the Act regarding Unfair Labour Practice. It also rejected the argument of the respondent that the appellant had been engaged solely on the contract basis in the following term.

“28. The Respondent, in order to mitigate its conduct towards the Appellant has claimed that the Appellant was appointed solely on contract basis, and his service has been terminated in the manner permissible Under Section 2(oo)(bb) of the I.D. Act. However, we shall not accept this contention of the Respondent for the following reasons:

28.1. Firstly, the Respondent has not produced any material evidence on record before the Labour Court to prove that it meets all the required criteria under the Contract Labour (Regulation and Abolition) Act, 1970, to be eligible to employ employees on contractual basis which includes license number etc.

28.2. Secondly, the Respondent could not produce any material evidence on record before the Labour Court to show that the Appellant was employed for any particular project(s)

on the completion of which his service has been terminated through non-renewal of his contract of employment.

29. Therefore, we deem it fit to construe that the Appellant has rendered continuous service for six continuous years (save the artificially imposed break) as provided Under Section 25B of the I.D. Act and can therefore be subjected to retrenchment only through the procedure mentioned in the I.D. Act or the state Act in pari materia.”

36. In the light of these decisions, I am of the opinion that material on record in the present case also shows that the 1st respondent had been engaged from 15-07-1995 to 13-12-1999 for almost 4 ½ years and there was no break also in between the periods since at the end of every three months a fresh order of appointment on contract basis for a further three months was being issued. This conduct clearly shows that the petitioner had an oblique motive to retain the 1st respondent as a temporary worker and to deprive the 1st respondent of his statutory right of permanent worker status.

37. I hold that this conduct of the petitioner amounts to “unfair labour practice” as defined under Section 2 (ra) of the Act which is prohibited by Section 25-F and 25-T read with Entry of Serial 10 in the Fifth Schedule of the Act.

38. In any event, the petitioner had not produced any material before the Court below to prove that it meets all the required procedural aspects under the Contract Labour (Regulation and Abolition) Act, 1970 to be eligible to the employ persons on contractual basis.

39. Therefore, I am of the opinion that the 2nd respondent had rightly held that the provisions of Section 25-F of the Act have been violated since 1st respondent had rendering continuous service for almost 4 ½ years as provided under Section 25-B of the Act. So his services can be disengaged only through the procedure mentioned in Section 25-F of the Act and not otherwise.

40. Since the petitioner had not also established that 1st respondent was gainfully employed after his termination of his services, I hold that the 2nd respondent rightly held that the 1st respondent is entitled to reinstatement with full back-wages and consequential and attendant benefits.

41. I therefore do not find any merit in the Writ Petition. It is accordingly dismissed. No costs.

42. As a sequel, the miscellaneous petitions pending, if any, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 09-11-2016
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