

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1509 OF 2016

General Industries Kamgar Union (AITUC)

...Petitioner

Versus

M/s. Pan India Paryatan Ltd., and Ors.

...Respondents

Ms. Gayatri Singh, Senior Advocate a/w Ms. Bhavna Mhatre i/by Kranti LC for petitioner.

Mr. V.P. Vaidya i/by Mahendra M Agavekar for Respondent No. 1.

CORAM : PRASANNA B. VARALE, J

DATE : SEPTEMBER 06, 2017

ORDER:

1. Being aggrieved by the award declared by the Presiding Officer, Industrial Tribunal, Mumbai dated 20/06/2015, whereby reference submitted to the learned Presiding Officer was adjudicated with a negative finding. It was further declared that the second party union is not entitled for the reinstatement of 24 workmen in the employment of the first party no. 1 w.e.f. 21/04/2005 nor is entitled for continuity in service with consequential benefits as like permanent workman.

2. Learned Counsel appearing for the petitioner vehemently submitted that the petitioner union represents the cause of 24 workman who were working with the first party respondent and their services were terminated illegally on 21/04/2005. It was also submitted by learned Counsel for the petitioner that under the garb of an agreement between Respondent No. 2 and petitioner workman it was submitted before the learned Court below that the petitioner workman are the contractual labours and they were engaged for a temporary period. It was then submitted by the learned Counsel for the petitioner that when the petitioners were terminated and were directed not to enter in the premises, immediately report to the police station was lodged. It was also submitted that though initially the complaint was filed and the same was withdrawn behind the back of the petitioners without disclosing any reasons. It is also submitted that after submitting a complaint (ULP) No. 172 of 2004 was filed before the competent forum and ad-interim order was also operating against the petitioners and on an misrepresentation complaint sought to be withdrawn. The petitioner was left with no other choice but to approach again for redreesal of their grievance.

3. Learned Counsel appearing for the petitioner in support of her submissions placed reliance on the judgment of the Hon'ble the Apex Court in the matter of General Manager, Oil and Natural Gas Commission, Silchar Vs. Oil and Natural Gas Commission Contractual Workers Union¹.

4. Per contra, the petition is vehemently opposed by the Counsel appearing for the respondents and it was submitted that no error is committed by the learned Presiding Officer and on just and proper appreciation of material as well as on by clear and cogent findings, issues were framed by the learned Presiding Officer and the award is declared. It was vehemently submitted by the learned Counsel for the respondents that the petitioners have miserably failed to establish the basic requirement so as to entertain the reference i.e. the relationship between the petitioner and respondents i.e. of employer-employee. It was also submitted by the learned Counsel for the respondents that the petitioners were unable to place on record any material to show that the petitioners have challenged the agreement between the parties. Petitioners neither challenged the agreement nor sought for the declaration against the

1 (2008) 12 Supreme Court Cases 275

agreement and learned Presiding Officer on perusal of the material, recorded the findings.

5. To consider the submissions advanced by the learned Counsel appearing for the respective parties, it would be necessary to refer to certain facts in brief giving rise to the present petition:

6. On a grievance that the respondent no. 1 terminated all the 24 workman illegally on 21/04/2005, the petitioner herein by way of communication dated 30th April, 2005 made a demand for reinstatement of 24 workman as permanent employee of M/s. Pan India Paryatan Ltd. with all consequential benefits with continuity of services and back wages from 21/04/2005. As there was no response from the management the petitioner union filed a letter before Conciliation Officer on 03/05/2005 with a request for conciliation in respect of demand raised by the union. The parties were called upon to settle the matter in conciliation proceeding but the matter could not be settled as such, it was sent for adjudication. The petitioner union then filed statement on claim and it was pleaded that the Respondent No. 1 herein (first party respondent company and referred to as “the Employer” in the judgment and award) is in the business of entertainment and water sports, such as joy ride,

giant wheels etc. It was pleaded that for running these activities nearly 250 workman including 24 petitioner workman were working their. All these workman have completed 240 days in each calendar year and have worked for more than 7 to 10 years till their date of termination. It was further pleaded that they were working as hosts in the ride operation department and their jobs was of continuous and perennial in nature. It was submitted that the respondent no. 2 M/s. Radix Consultants was nothing to do with the employment of all the petitioner workman and the Respondent No. 2 was merely acting as an agent of Respondent No. 1 and only to create an impression that the Respondent No. 2 had engaged the petitioner workman on contract basis and they were the employees of Respondent No. 2, a paper agreement/contract was shown to be made. It was submitted that the entire work of the petitioners was controlled and supervised by the officers of the Respondent No. 1 Employer. It was also submitted that only to deprive the petitioners from the benefits of permanency, letters were issued about the breaking their services and this was artificial break in the service of petitioner. It was then submitted that even the practice of issuing letters of continuity in service was stopped in the year 2003 and though no such letters were

issued to the petitioners, the work was actually extracted from the petitioners. The petitioners became the members of one union i.e. Bhartiya Kamgar Karmachari Mahasangh (for short “ **BKKM**”). The said BKKM filed a complaint (ULP) No. 172 of 2004 and obtained interim order restraining the first party employer from terminating the services of the employees. That order was in force till 20th April 2005. During the pendency of the order the first party started pressuring the workmen to sign a settlement. A meeting was held on 04/03/2005 in which certain issues were discussed. It was decided that a draft settlement would be prepared for further discussions. Thereafter, second meeting was placed between the first party and BKKM officer bearers. The workmen were not present in the said meeting and they were not aware about what transpired in that meeting.

It was also submitted that in the draft settlement of 13/04/2005 the Respondent No. 1 was not shown as a employer, instead of that one Mr Surendra R. Shevade, Proprietor, M/s SRV Human Resources Private Ltd. was shown as the employer. It was alleged that Mr. Shevade was personal manager of Respondent No. 1 and when the workman made an attempt to protest against the unilateral change, the

management threatened that their services would be terminated with immediate effect. It was then submitted that office bearers of BKKM started pressuring the workmen to sign the settlement. As the petitioners were not in agreement with the pressuring practices of BKKM therefore, they decided to implead themselves as party in the complaint (ULP) No. 172 of 2004, but before they could submit an application for impleading them as party, BKKM approached the Court on 20/04/2005 and withdrew the complaint. The withdrawal of the complaint at the behest of the BKKM was a fact unknown to the petitioners. When the petitioners attended the Court on 21/04/2005 they came to know about the withdrawal of the complaint. Though request was made to restore the complaint but the learned Court turned down the request and advised the petitioners to take up appropriate legal remedies.

7. It was submitted that from 21/04/2005 the workmen were stopped from entering in the premises of the Respondent No. 1 herein and they were informed that their services are terminated with immediate effect. Immediately a written complaint was lodged in the police station on 21/05/2005. The termination letters dated 25/04/2005 were issued by Respondent No. 2 herein. It is also alleged in the

complaint that only to show that Respondent No. 2 herein was the employer certain records in respect of deduction of the provident fund contribution and ESI was created. Then a letter dated 30th April, 2005 was addressed to Respondent No. 2 as there was no response from Respondent No. 1, ultimately Union submitted the letter to Deputy Commissioner Labour, Mumbai for conciliation. The Respondent No. 1 filed written statement opposing the claim and it was submitted that as there was no relationship of employer and employee between the parties there was no cause of action and there was no industrial dispute. It was then submitted by Respondent No. 1 that though workmen are employed by the Respondent No. 2 and Respondent No. 2 is responsible for entire process such as, recruitment, selection and appointment of the 24 persons and it was managing, controlling and supervising their work. A reference was also given to the withdrawal of earlier complaint filed through the union i.e. BKKM. It was then submitted in the written statement that out of those 24 workmen some workmen had worked with the Respondent No. 1 on probation under a training scheme or under education subsidy scheme. It was then submitted that the cessation of their employment is purely as per the terms of contract and these 24

persons have accepted their employment through Respondent No. 2 and have not raised any grievance / challenge to the agreement between them. It was submitted that cessation of those 24 workman was just and proper. It was also submitted that the services of these workmen were sought for by the Respondent No. 2 to meet the necessity for additional man power arising due to vacations, holidays or such other events and festivals. The nature of work of these workman was purely on temporary basis. It was submitted that for running the ride activities and managing of those activities sufficient workers are available with Respondent No. 1 in normal course and those 24 persons were engaged only to provide their services in case of urgency. The Respondent No. 2 also filed written statement and according to Respondent No. 2 that the contractor Radix Consultants is a proprietary firm. It was carrying on with its activities of supplying man power and also taking work of the various companies on contract basis as per the terms and conditions agreed into between both the parties. The first party no. 2 contractor approached the first party no. 1 company to carry out their activities. Accordingly, an agreement dated 1st July 2006 was entered into between the company and the contractor. As per the terms and conditions mentioned in the

said agreement, the contractor started providing its 40-45 skilled employees to the company and those employees were appointed by the contractor by issuing letter of appointment dated 24th February 2004. Their services were up to 1st March 2004 and the contractor reserved its right to extend to those services further at the discretion of the contractor as and when required. It has agreed in the said letter of appointment that the service of those employees shall be terminated after giving them one month notice or notice salary in lieu thereto without giving any reason. All the employees have signed the letter of appointment. The employees started working with the contractor from February 2004. Their services have been extended from time to time.

It would be important to note that the Respondent No. 2 specifically submitted in the written statement that those employees were provided with provident Fund, Employees State Insurance benefits and letter of appointment etc. It was also submitted that the contractor used to pay salary to these employees by crediting in their individual bank account. Those employees were called as "Deputies". It was also submitted that respondent no. 1 company requested the contractor to reduce 24 employees and as per the terms of the contract and the terms

of the letter of appointment, services of the 24 employees came to be terminated by letter dated 21st April 2005. At the time of termination those employees have given one month's notice salary and all other legal dues and same were sent to them by post to their last known address of the employees. All employees have accepted the letter of termination and the Cheques toward their legal dues. It is also stated that those employees who were available at their postal address the letters were signed to their known postal address and all the employees have accepted the letter of termination and cheques towards their legal dues. The learned Presiding Officer on the rival claims of the parties framed the issues and recorded negatives findings which as follows:

1. *Does the Second Party union proves that the first party viz M/s Pan India Paryatan Ltd. is the real employer of the concerned employees?*
2. *Does the 2nd party prove that the services of the concerned employees were terminated by the above said the first party?*
3. *Does the 2nd party prove that the termination was illegal?*
4. *Whether the 2nd party is entitled for the reliefs as prayed for?*

8. Learned Counsel appearing for the second party Respondent

before the Presiding Officer (petitioner herein) placed reliance on certain judgments so as to submit that the Respondent no. 1 though had engaged the petitioner and extracted works for more than 7 years only to create record. Insistence is placed on the agreement between the Respondent No. 1 and 2.

Learned Presiding Officer considering all the relevant material pleased to observed thus:

20.

In our case neither the declaration about the permanency as against the first party no. 1 nor the declaration of contract being sham, bogus and camouflage between the first party no. 1 and the first party no. 2 have been sought. There was no any industrial dispute in respect of those 2 aspects. Reference was not sent for adjudication of those 2 aspects. Reference is only in respect of reinstatement of 24 workman w.e.f. 21/04/2005 and continuity of service with the first party no. 1.

21. *Neither in the demand before the Management nor before Conciliation Officer such type of demands are sought. Even after impleading the first party no. 2 and there was specific case of both of the first parties about employment of 24 workmen by the contractor.*

No amendment was carried out in earlier demand. Having opportunity to amend the Statement of Claim and seeking corrigendum to the reference no efforts were taken in that respect.

9. The fact of earlier complaint is reiterated and it is observed by the learned Presiding Officer as under:

22. It is worthwhile to mention here that in earlier Complaint (ULP) No. 172 of 2004, the first party no. 2 was not the party and no declaration was sought in respect of bogus, sham and camouflage contract.

.....

10. It was further observed that:

23. So in earlier complaint also there was stand of the first party no. 1 that the employees were appointed through contractor in view of that also there was no amendment in that complaint and no relief has been sought about the camouflage of contract. It is correct that as per the roznama of that complaint matter was kept on 21/04/2015 and one day before on 20/04/2005 that complaint was withdrawn.

Though, it was vehemently submitted that on 21/04/2005 the employees attended the Court and insisted for restoring the matter

bu the Court informed them to seek other legal remedies but nothing was placed on record to show that on 21/04/2005 any application was filed before the Court at the instance of these 24 employees for restoration of the complaint.

11. The Presiding Officer was justified in observing as under:

24.

There was proper remedy for the workmen to file restoration application before Industrial Tribunal and also to challenge the order of withdrawal. No such steps were taken by the second party. The second party having the knowledge that there was an objection to the earlier complaint about no, "employer- employee" relationship. There was no any demand before the management or before the Conciliation Officer in respect of declaration of camouflage, bogus and sham contract and seeking permanency with the first party no. 1. So, without industrial dispute in that respect, when the reference is only made for adjudication of reinstatement of 24 workmen with the first party no. 1. Applying principle of Apex Court and our Parent High Court in cited case Supra, I am of considered view that this Tribunal has no any jurisdiction to consider and decide

whether the contract between the first party no. 1 and the first party no. 2 is sham, bogus and camouflage contract. It is also out of consideration to decide the aspect of permanency.

12. Learned Presiding Officer further observed that:

25. In this case after framing of issues, even thereafter also, there is no application for amendment in the issue or additional issue in respect of declaration of sham, bogus and camouflage contract and declaration of permanency, without any corrigendum to the industrial dispute sent for adjudication. There is no ground to consider those aspects.

13. It would be important to note the observations of learned Presiding Officer in respect of testimony of the witnesses examined before the learned Presiding Officer on behalf of the petitioners:

26.

All the three witnesses of the second party union Mr. Ankush A. Shinde, Mr. Sukumar V. Damle and Mr. Anant G. Indurkar deposed in respect of that. From the various appointment letters on record, it is seen that those employees were appointed for some specific period. After the completion of that specific period those

workmen were given brake and another appointment letters were issued, this practice was followed till January-February 2003. During that period no concerned employees or union has challenged the activities of the first party no. 1 about giving artificial brakes for avoiding permanency and termination of their services, after the specific period. So legality of terminations during the period from 23/10/1998 till January 2003 cannot be considered at this stage.

27. The termination of dtd 21/04/2004 is under consideration, assuming for the sake of argument that, as per the case of second party union and evidence of Mr. Ankush A. Shinde , Mr. Sukumar V Damle and Mr. Anant G. Indurkar from January 2003, the first party no. 1 had stopped to issue appointment letters. Then natural conduct of the concerned employees and the union was to file the case for unfair labour practice seeking direction for giving appointment letter. It is unbelievable that the first party company, which had given appointment letters for the specific period and it was continued up to the January 2003, that company, without any appointment letter not appointed those workmen and continued them till the termination without any three months artificial brake. Looking to the past conduct of the first party no. 1 of giving artificial brake, this aspect is unacceptable and

unbelievable. If workmen had been appointed after January February 2003 without any appointment letters, obviously the wages should have been deposited in their bank account of ICICI. There is no evidence on record showing that the wages for the month of September, October and December- 2003 and January and February 2004, were paid to the concerned employees. Absence of wages for that period is fated to the case of second party union.

28. Contrary evidence is on record Shri Sitaram Vishram Bagwe at Exh- CW-1 and Mr. Arvind Anand Parab at Exh- CAW-1 the Proprietor of M/s Radix Consultants. It has come in their evidence that the first party no 2 introduced to Pan India Paryatan Ltd. and there was talk about the contract, letter dtd. 12 November 2003 at Exh C-15 was signed by him. Employees Provident Fund Organization allotted code number, letter is at Exh C-15, letter dtd. 25 July 2003 was given by witness CAW-1 to the first party no. 1. Maharashtra State Tax on profession, trades, calling and employment issued him a licence which is filed to pg. no.8 of Exh C-15, certificate of registration dtd. 2nd September 2003 issued under the above Maharashtra State Tax is at Exh C-15, certificate of registration under Finance Act dtd. 17th September 2003, is at Exh C-15,

letter issued by Employees State Insurance Corporation dtd. 19th October 2003 is at Exh C-15. The first party no. 2 was issued code number by ESI Corporation on having firm registered with the Corporation. After obtaining contract from Pan India Paryatan Ltd, the first party no. 2 got licence under the Contract Labour(Regulation and Abolition) Act, 1970 pg no. 29 of Exh C-15, that licence was issued on 02/04/2004 and it was valid till 31 December 2004. It has come in the evidences of both the witness of the first party no 1 and the first party no. 2 that, there was a contract between the first party no. 1 and the first party no. 2 Exh C- 19 dtd. 16/02/2004. That contract was started from 1 March 2004 as per that contract the first party no. 2 agreed to provide services on deputation (Concerned workmen).

14. Then the witnesses have stated before the Presiding Officer that legal dues were already paid by the Respondent No. 2 to those 24 workmen. It was also deposed by the witnesses that necessary deduction in profession tax, provident fund, employees state insurance were deducted by the respondent no. 2 herein.

15. In so far as the appointment letters issued to the workmen is concerned, the learned Presiding Officer observed thus:

29. The appointment Letter dtd. 28th February 2004 named and styled as "Offer for employment" bears the signature of the concerned workmen. Those appointment letters are computerized typed. In view of signature of concerned employees on those appointment letters it is to be assumed that, after going through contentions of appointment letters, those appointment letter might have been signed by them. The evidence of the first party no. 2 is also seems to be supported by documents of second party itself. Exh U-21 is letter of concerned employees in which there was allegation that, the wages of those employees up to February 2004 were paid in the name of Pan India Paryatan Ltd. ie. the first party no. 1, but abruptly wages of March 2004 was paid in the name of M/s Radix Consultants. It was accepted by workers under protest. I have already held that there was no any evidence from September 2003 to February 2004 for payment of wages were paid by the first party no. 1. No doubt prior to the above letter there was a complaint dtd. 27/03/2004 to the Borivali Police Station about obtaining signatures of the workmen on the 2 documents of M/s Radix Consultants, it means at that time of signing those documents those were written down, which supports my view that, all the workmen after going through the contents must have signed the

documents, otherwise there was no reason for them to sing those document dtd. 28 February 2004. Another letter from M/s Radix Consultants to Pan India Parytan Ltd. for outsourcing man power dtd. 12/11/2013 was criticizingly by Id. Adv. Shri Arvind Tapole. As per that letter the first party no. 1 agreed that ;

"We will take over the existing employees on our payroll. The employees will be required to apply on our application bank and subsequently, resign their services in you company. Next step will be that the employees will be made offer on contract basis as per their present CTC or as approved by you as our employee after necessary verification and reference checks."

16. Learned Presiding Officer was also justified in observing thus:

30.

Looking to the complaint dtd. 25/03/2004 and 27/03/2004 and letter dtd. 11/04/2004 there is no doubt that concerned workmen were very vigilant for protection of their legal rights. Therefore, it is highly unnatural that from 1' March 2004 till 21-04-2005 ie. Till their termination, the concerned workmen and union had not taken any objection in the earlier complaint, as well as, by filing separate complaint against

both of the first parties. So that fact creates doubts about the case of the second party union and 3 witnesses of the second party union. Admittedly the contribution of Employees State Insurance for the period from April 2004 till 21/4/2005 and mandatory deductions of Provident Funds were made by the first party no. 2, salaries were paid by M/s Radix Consultants. The challans on record along with CA-6 corroborated the evidence of Proprietor of Radix consultants. Admittedly, the termination letters are in the name of M/s Radix Consultants, the first party no. 2. The legal dues were paid by that contractor, which were accepted under protest. Looking to all these aspects and in the light of the facts that, there is no appointment letter by the first party no. 1, no payments were made by the first party no. 1, no deductions were made by the first party no 1, no termination letters were issued by the first party no. 1 and no legal dues were paid by that company. So, absolutely, there is no evidence to hold that the concerned 24 workmen were appointed and were in the employment of the first party no. 1.

17. The Learned Presiding officer then recorded the findings in so far as the grievance in respect of permanency claimed by the petitioner is concerned, it was observed thus:

31. So far as, permanency is concerned neither it was sought nor there was any industrial dispute referred by the State Government. Therefore, there is no question to appreciate and consider whether the nature of work of the concerned employees of permanent and perennial in nature. There is no question to decide, whether the permanent employees of the first party no. 1 were not sufficient and therefore permanency needs to be granted. As already discussed the declaration about bogus, sham and camouflage contract has not been sought. Legality termination at the hands of M/s Radix Consultants has not been challenged. The concerned employees are in the employment from 1st March 2004 till 21-4-2005. After the termination as per appointment letters, the legal dues were paid. Those dues were not challenged as illegal and wrongly calculated. Therefore, the discussion of various citations in respect of Section 2(00) (bb), is unwarranted, it would cause unnecessary burden on the judgment. Once the reinstatement has been sought in the employment of the first party no. 1. The Tribunal by exceeding the jurisdiction cannot consider legality of termination at the hands of the first party no. 2, cannot consider any relief in that respect. True it is that some facts about withdrawal of the complaint on 20/04/2004. The termination of the concerned employees on 21/04/2004

*and draft settlement dtd. 01/04/2005 in which name of the another contractor Mr. Surendra R. Shewde was shown, indicates that earlier BKKM was not representing the grievances of the concerned employees properly. There is also reason to believe that, that union might be hand in gloves with the first party no. 1, but that cannot be the ground to hold that the concerned 24 employee are the workmen of the first party no. 1 and they were illegally terminated by the first party no. 1. Therefore, my findings to the issue no. 1 and 2 are in “**Negative**”.*

18. I have gone through the evidence placed on record as well as cross-examination of those witnesses and copies of depositions placed on record.

19. On going through the material, I am of the opinion that no error is committed by the learned Presiding Officer in arriving at the conclusion that the petitioners herein failed to show before the Court that there is relationship between the petitioners and the respondents as employer-employee. At the cost of repetition it can also be stated that the petitioners have accepted the appointments offered to them by Respondent No. 2 by way of appointment letters on the backdrop of

contract. It is also not in dispute that the earlier complaint filed before the Learned Presiding Officer was withdrawn and the petitioners have made no attempt to restore the said complaint and have lodged the complaint to the police station but to take any steps for restoration of the complaint before the competent forum.

20. Considering all these facts and material placed on record, I am of the opinion that the petition is devoid of merit and deserves to be dismissed. Hence, Writ Petition is dismissed.

(PRASANNA B. VARALE, J.)

patilsr