IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.667 of 2018

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Deepak Vegpro Private Limited (Vanaspati Division) Durgawati At and P.O.- Durgawati, District- Kaimur through its Director, Mool Chand Goel.

... ... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Labour Resources Department, Bailey Road, Patna
2. Deepak Vegpro Private Limited, Karamchari Union Station Road, P.O. and P.S.- Durgawati, District- Kaimur (Bhabhua)

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Alok Kumar Sinha, Advocate Mr. Indrajeet Bhushan, Advocate
For Respondent No. 2	:	Mr. Lakshmi Kant Tiwary, Advocate Mr. Nitesh Kumar, Advocate
For the State	:	Ms. Shilpi Keshri, AC to AAG-X Mr. Naman Nayak, AC to AAG-X

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

ORAL JUDGMENT

Date : 22-11-2019

The petitioner is a Private Limited Company registered under the Companies Act, 1956. An award dated 29.04.2016, passed on 17.10.2017, by the learned Presiding Officer, Industrial Tribunal, Patna in Reference Case No. 71 of 2008 has been put to challenge in the present writ application filed under Article 226 of the Constitution. The Tribunal had the occasion to pass the award on receiving a reference made by the Government of Bihar under Section 10 of the Industrial Disputes Act, 1947.

2. It would be apt to take note of the terms of reference in the background of nature of dispute, which read as under :-

"<u>Annexure-A</u>

> *1- Whether Ex-Workmen of Ganga Vanaspati Pvt. Ltd., Durgawati are entitled to employment in the new management, Dipak Vegpro Pvt. Ltd. (Vanaspati Division) Durgawati ?*
>
> *If not what relief they are entitled to?*
>
> *2- Whether without notice retrenchment of 23 workmen from 23.01.2008 by management, Dipak Vegpro Pvt. Ltd, Durgawati Kaimur is justified?*
>
> *If not what relief they are entitled to?"*

3. Facts, necessary for adjudication of the present writ application, are not at all in dispute. Parties have been heard. Counter affidavits have been filed on behalf of the contesting parties.

4. From dispute no. 1 of the reference, as quoted above, it can be seen that the Tribunal was required to answer as to whether ex-workmen of Ganga Vanaspati Ltd., Durgawati (hereinafter referred to as 'the Old Company') were entitled to employment in the New Company, namely, Deepak Vegpro Private Limited (Vanaspati Division), Durgawati or not.

5. This is not in dispute that the Old Company was engaged in production of *Vanaspati* oil. The workmen were

working in the Old Company, according to them. Since the Old Company was not running smoothly and production had stopped, a liquidation proceeding was started with the registration of Company Petition No. 02 of 1995 before this Court. Winding up of the Old Company had commenced, tenders were invited by the Official Liquidator for sale of the factory premises of the Old Company. The New Company, which is the petitioner herein, participated in the auction sale and being the highest bidder, on quoting a sum of Rs. 2.11 crores, the said factory premises with assets were sold to the New Company.

6. It is the case of the petitioner herein that claims of the workmen under the Old Company was also calculated which had come to be around 24 lakhs. The production in the factory of Old Company had stopped in May 1991 itself, whereafter the winding up proceedings were started in 1995. The sale of the machinaries, land and buildings of the Old Company to the New Company concluded in 2006. The New Company started the same business of manufacture of Vanaspati oil. The production in the factory of the New Company started in August 2007. These are the background facts behind the first reference of the notification dated 23.06.2008 i.e. whether ex-workmen of the Old Company

would be held to be entitled to employment in new management i.e. the petitioner's Company.

7. On careful reading of the language of the reference it can be easily seen that a question as to whether the employees of the Old Company were entitled to employment had required determination by the Tribunal. The first term of reference does not contain any situation or presumption that employees of the Old Company were under the employment of the New Company. Needless to say that question of retrenchment of 23 workmen from 23.01.2008 by the new management, which was the second reference to be answered by the Tribunal, would have arisen or would arise only if the said 23 workmen were held to be in employment in new management.

8. The Tribunal by the impugned award has answered the first reference in the following terms :-

> *"All the evidence documents and law point have already discussed above and it has been found that ex-workmen of Ganga Vanaspati Pvt. Ltd. Durgawati have not every right to work under new management. It is also found that retrenchment of 23 workmen from 23.01.2008 by management Deepak Vegpro Pvt. Ltd. without notice is not justified."*

9. The second reference has been answered by the Tribunal as follows :-

> *"Second part of award is also decided that without notice retrenchment of 23 workmen from 23.01.2008 by management Deepak Vegpro Pvt. Ltd. Kaimur was not justified. Hench retrenchment is set-aside. They will get service with all consequential benefits."*

10. Mr. Alok Kumar Sinha, learned counsel appearing on behalf of the petitioner has submitted that the findings recorded by the Tribunal are perverse for the reason that there was absolutely no evidence before it to reach a conclusion that the workmen in question were in employment of the New Company i.e. the petitioner-Company. He has submitted that by no stretch of imagination, the employees, who were working in the factory of the Old Company, which had stopped production since 16.05.1991 and which was wounded up long back, could have been treated to be the employees of the New Company which was completely a new venture and had purchased only the machinaries and premises of the Old Company. He has contended that it was not the business of the Old Company which was taken over by the New Company rather, in an auction sale held in a winding up proceeding, the New Company had purchased plants, machinaries,

articles, land and building held by the Old Company. The reference made by the State of Bihar under Section 10 of the Industrial Disputes Act was challenged by the petitioner by filing a writ application before this Court giving rise to CWJC No. 11935 of 2008, which was dismissed by an order dated 20.05.2011. The challenge to reference was on the ground, *inter alia*, that it was hit by Section 445 (3) of the Companies Act, 1956. The writ application was dismissed with observation, as contained in paragraphs 13 and 14, which read thus :-

> *"13. Considering the averments made by learned counsel for the parties and the materials on record it is quite apparent that the dispute between the parties included the question as to whether the workmen of the erstwhile company M/s Ganga Vanaspati Private Limited continued to be the workmen after auction purchase by the petitioner in the year 2006 and whether their services were terminated by the petitioner-company in the year 2008. Such matter which is disputed question of fact cannot be decided by this court as for its decision evidence has to be led on behalf of the parties for coming to*

the correct finding with respect thereto.

14. So far the provision of Section 445(3) of the Companies Act, 1956 relied upon by learned counsel for the petitioner is concerned it does not support the petitioner's claim as it has to be followed fully and raising of any dispute by the said workmen giving rise to a reference under the Industrial Dispute Act is not precluded."

11. Mr. Sinha has placed reliance on supreme Court's decision in case of ***Surendranagar District Panchayat vs. Dahyabhai Amarsinh*** reported in ***2005 LAB. I.C. 4308*** and ***Ajnala Cooperative Sugar Mills Limited vs. Sukhraj Singh*** reported in ***(2009) 17 SCC 326*** to contend that in order to successfully establish a case of retrenchment the onus is on the workmen to prove that they were in employment of the management for a continuous period of 240 days in 12 months just preceding the date of their retrenchment. He has submitted that there is no finding at all in the award that the workmen had been in employment of the petitioner-Company at any point of time, let alone, for a period of 240 days in 12 months, preceding the alleged date of termination of their services. He has contended that while

answering the reference in favour of the workmen, the Tribunal has allowed all consequential benefits without taking into account any material and without any evidence as to whether the workmen were gainfully employed after their alleged retrenchment.

12. Mr. Tiwari, learned counsel appearing on behalf of the workmen, on the other hand, has submitted, referring to Supreme Court's decision in case of ***D.R. Gurushanthappa vs. Abdul Khuddus Anwar and others*** reported in ***AIR 1969 SC 744*** that the workmen had a legitimate expectation to have been appointed by the New Company after the old business was taken over by them. He has, however, fairly conceded that there is no evidence to suggest that these workmen were ever employed by the New Company. He has submitted that there was a tripartite agreement between the management of the New Company, the workmen and the Labour Superintendent in which the New Company had agreed to take the workmen in employment in the factory of the New Company. He has contended that what the New Company has done amounts to unfair labour practice. He has referred to an order of the Supreme Court dated 01.09.2011, passed in Civil Appeal No. 2585 of 2006 to contend that in this case also the petitioner-Company is resorting to a subterfuge by

making an attempt to show that the workmen, though had worked for the Company, were workmen of a contractor of the Company.

13. In my opinion, the two references made by the State Government of Bihar under Section 10 of the Industrial Disputes Act to the Tribunal contradict each other. On the one hand, the Tribunal was required to answer as to whether the ex-workmen of the Old Company were entitled to employment in the new management or not and if not what relief they were entitled to, while on the other, it was required to answer whether their retrenchment from 23.01.2008 without notice was justified or not.

14. I find substance in the submission made on behalf of the petitioner that there is absolutely no material to show that these workmen were working under the New Company after the New Company had purchased the assets of the Old Company through an auction sale in a liquidation proceeding. As a matter of fact, there is nothing to show that they ever worked in any capacity or they could work in any capacity after the Old Company went in liquidation in 1995. In my view, Section 445(3) of the Companies Act, 1956 shall have application in the facts and circumstances which stipulates that on making of a winding up order, it shall be the duty of the petitioner in the winding up proceeding and of the Company to file with the Registrar a certified copy of the order

within 30 days from the date of making of the order which shall be deemed to be notice of discharge to the officers and employees of the Company, except when the business of the Company is continued. By operation of sub-section (3) of Section 445 of the Companies Act, 1956, a notice of discharge of the employees under the Old Company shall be deemed to have been issued.

15. This is to be noted that exception of sub-section (3) of Section 445 shall have no application in the present case, as it could not be said that the business of the Old Company continued after wining up for the reason that whereas the winding up order was passed on 07.04.1995, the purchase of plants and machinaries of the Old Company by the petitioner in the auction sale was done eleven years thereafter, in 2006. It can, therefore, be said that the business of the Old Company continued because the petitioner had purchased the plants and articles of the Company and had started the business of manufacture of *Vanaspati* oil in 2007.

16. On perusal of the award of the Tribunal, I find that there is no material on the basis of which the Tribunal could have reached a conclusion that ex-workmen of the Old Company had a right to work under the new management. It is recorded at the cost of repetition that it is not even the case of the workmen that they

worked under the new management after the factory started its production in 2007, in any capacity.

17. Coming to the second question as to whether without notice retrenchment of the workmen from 23.01.2008 by the new management was justified or not, reference can be made to the oral evidence of the witnesses examined before the Tribunal for the workmen, which has been discussed by the Tribunal in various paragraphs. It emerges on reading of the impugned award that altogether eight witnesses were examined on behalf of the workmen. No workman appears to have established his case that he had worked under the new management even for a single day. No evidence was put forth to the effect that they had been in continuous service for one year under the New Company just preceding the alleged date of their retrenchment dated 23.01.2008. WW-5 in his deposition before the Tribunal though said that he had worked from 29.09.2006 to 23.01.2008, during cross-examination he admitted that he did not have any appointment letter issued by the Company nor any deductions were made against the Employees State Insurance or Provident Fund contributions. It is evident from the award that the workmen witnesses did not adduce any evidence to support their case of retrenchment in breach of Section 25-F of the Industrial Disputes

Act. It has been rightly pointed out by Mr. Sinha, learned counsel for the petitioner that even the Tribunal has not reached any conclusion that the workmen had worked for the statutory period, as stipulated under Section 25-F of the Act, before holding the so called retrenchment of 23 workmen to be unjustified. Reference has rightly been placed on Supreme Court's decision in case of ***Surendranagar District Panchayat*** (supra) wherein, referring to previous decisions of the Supreme Court it has been reiterated that burden of proof lies on the workmen to show that he had worked continuously for 240 days in the preceding one year prior to his alleged retrenchment and it is for the workman to adduce evidence apart from examining himself to prove the factum of his being in employment of the Company. Paragraphs 18 and 19 of the said decision read thus :-

> *"18. More recently, in Rajasthan State Ganganagar S. Mills Ltd. v. State of Rajasthan & another, (2004) 8 SCC 161, Municipal Corporation, Faridabad v. Siri Niwas, (2004) 8 SCC 195 and M.P. Electricity Board v. Hariram, (2004) 8 SCC 246, this Court has reiterated the principle that the burden of proof lies on the workman to show that he had worked continuously for 240 days in the preceding one year prior to his alleged retrenchment and it is for the workman to adduce an evidence apart from*

examining himself to prove the factum of his being in employment of the employer.

19. In the light of the aforesaid, it was necessary for the workman to produce the relevant material to prove that he has actually worked with the employer for not less than 240 days during the period twelve calendar months preceding the date of termination. What we find is that apart from the oral evidence the workman has not produced any evidence to prove the fact that he has worked for 240 days. No proof of receipt of salary or wages or any record or order in that regard was produced; no co-worker was examined; muster roll produced by the employer has not been contradicted. It is improbable that workman who claimed to have worked with the appellant for such a long period would not possess any documentary evidence to prove nature of his engagement and the period of work he had undertaken with his employer. Therefore, we are of the opinion that the workman has failed to discharge his burden that he was in employment for 240 days during the preceding 12 months of the date of termination of his service. The Courts below have wrongly drawn an adverse inference for non production of the record of the workman for ten years. The scope of enquiry before the Labour Court was confined to only 12 months preceding the date of termination to decide the question of continuation of service for the purpose of Section 25F of the Industrial Disputes Act. The workman has never contended that he *was regularly employed in the Panchayat for one year to claim the uninterrupted period of service as required under Section 25B(1) of the Act. In the fact and situation and in the light of the law on the subject, we find that the workman-respondent is not entitled for the protection or compliance of Section 25F of the Act before his service was terminated by the employer. As regards non-compliance of Sections 25G and 25H suffice is to say that witness Vinod Mishra examined by the appellant has stated that no seniority list was maintained by the department of daily wagers. In the absence of regular employment of the workman, the appellant was not expected to maintain seniority list of the employees engaged on daily wages and in the absence of any proof by the respondent regarding existence of the seniority list and his so called seniority no relief could be given to him for non-compliance of provisions of the Act. The Courts could have drawn adverse inference against the appellant only when seniority list was proved to be in existence and then not produced before the Court. In order to entitle the Court to draw inference unfavourable to the party, the Court must be satisfied that evidence is in existence and could have been proved."*

18. On perusal of the impugned award, I find that, as a matter of fact, no evidence has been referred to by the learned Presiding Officer of the Tribunal which could have suggested that

the workmen had worked for more than 240 days in the preceding one year prior to his alleged retrenchment.

19. Similar view has been taken by Supreme Court in case of ***Ajnala Cooperative Sugar Mills Limited*** (supra) wherein it has been held that workmen have to prove and establish that they had worked for more than 240 days. The Supreme Court's decision in case of ***D.R. Gurushanthappa*** (supra) can have no application in the facts and circumstances of the present case where the workmen have not at all been able to establish their case that they were ever employed by the subsequent management. Submission that the workmen had legitimate expectation that they would be employed once the New Company came to take over the charge of the Old Company, is not at all acceptable to this Court for the admitted fact that whereas the winding up order was passed on 07.04.1995, the assets of the Old Company were sold in 2006, whereafter the New Company started production of *Vanaspati* oil in 2007. There is no material to justify the contention made on behalf of the workmen that the business of the Old Company was taken over by the petitioner-Company. Materials on record, on the other hand, clearly suggest that plants, machinaries and other movable and immovable assets of the Old Company were purchased by the New Company on 'as is where is' basis.

20. In view of the discussions as noted above, the impugned award, in my opinion, is unsustainable and requires interference. Award dated 29.04.2016 is accordingly quashed. This writ application is allowed.

21. There shall be no order as to costs.

(Chakradhari Sharan Singh, J)

Rajesh/-

AFR/NAFR	NA
CAV DATE	NA
Uploading Date	20.12.2019
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