

IN THE HIGH COURT OF ORISSA, CUTTACK

WP(C) No.8856 of 2010

(Through hybrid mode)

M/s Orissa Industrial Infrastructure Petitioner
Development Corporation, IDCO Tower,
Bhubaneswar.

-Versus-

The Presiding Officer, Industrial Tribunal Opposite Parties
and another

Advocates appeared in the case:

For petitioner - Mr. S.P. Mishra,
Senior Advocate

For opposite parties - Mr. B. Satpathy,
Advocate

CORAM:

JUSTICE ARINDAM SINHA
JUSTICE SANJAY KUMAR MISHRA

JUDGMENT

14.12.2022

ARINDAM SINHA, J.

1. The writ petition is of the management. It was moved before this Bench on 9th November, 2022, when Mr. Mishra, learned senior advocate appearing on their behalf had submitted, there had been orders made by coordinate Benches, requiring affidavits being filed.

The requirement was because though there was direction for regularization of 43 workmen, no particulars could be provided by the union, at whose instance the reference was caused. His client has also filed affidavit. We reproduce below paragraphs 3 and 4 from our said order dated 9th November, 2022.

“3. We find, impugned is award dated 30th March, 2010. We have perused order of reference being whether 80 casual workers are entitled for regularization along with payment for equal pay on equal work. The tribunal found on facts, inter alia, 43 persons out of 80 workmen were seeking regularization. Particulars of the persons have been given in page-11 of the award. It goes on to record a further finding of fact that the management had regularized good number of Nominal Muster Roll (NMR) employees with approval of the Board of Directors. Those regularized stood in same footing as the 43. Hence, opinion of the tribunal that claim for regularization made by them merits consideration owing to them having rendered unblemished service under the corporation for more than 18 years. This too is a finding of fact.

4. The management will be heard on adjourned date regarding perversity on any one or more of above recorded findings of fact.”

(emphasis supplied)

2. Today Mr. Mishra submits, perusal of impugned award dated 30th March, 2010 will reveal there was no evidence before the labour Court to say that 43 workmen had been appointed/engaged by his client. During pendency of the writ petition, several of the 43 have

crossed the age of superannuation. One of them raised separate industrial dispute, regarding which the reference is still pending. He adds by reference to since set aside judgment dated 21st April, 2017 of the learned Single Judge, earlier disposing of the writ petition that three workers of the 43, against serial nos.34, 35 and 43, had no document to support they ever having worked for his client.

3. Mr. Mishra refers to failure report dated 23rd September, 2008 of conciliation made under section 12(4) in Industrial Disputes Act, 1947. He submits, there was clear admission by the workmen that they had been engaged through the contractors. This was the position on compliance of specific direction made by the Managing Director on circular dated 6th May, 1986. Text of the circular is reproduced below.

“Please recall that from time to time we have taken decisions not to engage N.M.Rs. without specific sanction from Managing Director and also disengage them on completion of the project for which N.M.Rs. were engaged. I hope, all are taking steps to review the position work-wise under your division and disengaging the N.M.Rs. when not required to reduce the burden of our Corporation, i.e. cannot survive unless all responsible office bearers are conscious that they have a moral duty to see that the Corporation finances are not overburdened due to our negligence. If we do not follow certain discipline, this organization will not be able to take the burden and as a consequence even the existing 1000 or so employees will face serious difficulty in retaining their jobs.”

I would, therefore, once again request you that no new hands should be taken as N.M.Rs. without specific approval from the Managing Director to ensure control on the number of staff. Copies of circular No.11994 dated 20.05.83, 3850 dated 23.02.1985 and No.2539 dated 3.2.1986 issued in this respect are enclosed for your ready reference. A list of person kept on DLR since 1.1.86 may please be intimated for my information.”

4. He then refers to impugned award and submits, the workmen could not tender a single document to show they had been appointed /engaged by his client. His client had several ongoing projects at that time and therefore, had obtained workers through contractors, specifically for the projects. The work was not perennial in nature. There had been no engagement. There is no question of whether such engagement was made through contractors against posts, for application of the exception declared by the Supreme Court in **Secretary, State of Karnataka v. Umadevi**, reported in (2006) 4 SCC 1. He also relies on another judgment of said Court in **Official Liquidator v. Dayanand**, reported in (2008) 10 SCC 1, paragraphs 59, 101, 115 and 116. Mr. Mishra submits, none of the 43 workmen are at present working for his client in any of his client’s projects. Affidavit saying so has been filed. He submits, there be interference on the award as containing findings based on no evidence.

5. Mr. Satpathy, learned advocate appearing for the Union (opposite party no.2) relies on impugned award. He submits, it was a trial on evidence resulting in finding on facts. Opportunity was given to the management and they adduced evidence. This being the writ Court, as different from an appellate Court, on such an award there should be no interference.

6. The writ petition was presented on 11th May, 2010 impugning award dated 30th March, 2010. It was heard on several occasions and as aforesaid, dealt with by the learned Single Judge on judgment dated 21st April, 2017. Said judgment was set aside in writ appeal by order dated 4th April, 2019, on ground no.9 taken therein saying that the judgment was passed after period of six years since date of argument and therefore, vitiated due to inordinate delay. The Division Bench, following judgments of the Supreme Court in **Bhagwandas Fatechand Daswani v. HPA International**, reported in (2000) 2 SCC 13 and **Kanhaiyalal v. Anupkumar**, reported in (2003) 1 SCC 430, set aside the judgment. There was a Special Leave Petition filed but dismissed by the Supreme Court on order dated 19th August, 2019. Hence, the writ petition is before us on remand.

7. Perused impugned award. We find that particulars of the 43 workmen were given therein, as aforesaid. They have claimed to have been employed in various divisions in years 1985 and 1992, to work as casual workers in different posts such as Work Sarkar, Clerk, Fire Guard, Electrical Helper, Supervisor, Pump Operator, Peon, Watchman etc. On query from Court, it could not be shown from impugned award that the workmen had made out a case in the labour Court, of having been employed through contractors. On the contrary there is record in impugned award that case of the workmen was, from inception their employment was with the corporation and they had rendered services to it. Only with a view to frustrate their claim, the management has taken plea of their engagement through contractors.

8. On the side of the workmen two witnesses were examined. They exhibited several documents, which were appreciated by the labour Court to indicate their engagement by the management. The Court below, however, recorded that the two witnesses were asked in cross-examination and had admitted that managing director of the corporation is the appointing authority in respect of Class-III and Class-IV employees. It is clear from impugned award, the workmen

could not produce any document of appointment issued by the appointing authority.

9. The management also adduced evidence. They produced documents of a contractor. The labour Court found that though the management witness had produced contractor's document but surprisingly, he himself did not know the contractor. Further finding of the labour Court is that such documents were of year 1996 onwards and not prior thereto, the workers claim of engagement in years 1985 and 1992, as aforesaid. We notice, the contractor himself/themselves did not take the box as party witnesses of the management.

10. We extract and reproduce below the passage from failure report dated 23rd September, 2008, relied upon on behalf of the management.

"Though the payment was made through the contractors but they are working in the same place under direct control and supervision of the management since last five to six years. Further none of the contractor have work orders continuously for five to six years under the management as principal employer. So the management is paying wages to the workers through different contractors and supervision and control of their work is being done by the management. Neither the principal employer has obtained registration for engagement of contractor to do the work of these workers through contractors nor the contractor have obtained licence for execution of

work and engagement of these labourer from the appropriate Authority as per the provisions of Contract Labour (R&A) Act. Further none of the contractor have issued wage slips or service certificate to these workers in support of their engagement. Hence these daily rated workers can not be treated as contract labour in accordance with the Contract Labour (R &A) Act. It is only an after thought concept of the management to treat these workers as contract labour without any documentary in accordance with law. ”

(emphasis supplied)

The Conciliation Officer filed the report. Said officer was not a witness in the labour Court. Above passage in the report being appreciation of said officer regarding case of the parties or specifically the workmen, same could not be relied upon as evidence in the labour Court, unless the officer had been examined therein. Nevertheless, the report can be said to be in favour of the workman. The appreciation of the situation by the officer found confirmation by the findings on facts in impugned award.

11. We made query to Mr. Satpathy regarding any document relied upon by the labour Court in respect of the workmen against serial nos.34, 35 and 43, respectively being Parsuram Pattanaik, Dayananda Dehury and Prasnta Kumar Senapati. Nothing could be shown.

12. Impugned award contains findings of facts. Exhibit 1 relied upon by the workmen is office order dated 8th May, 2008. We extract subject passage from said order and reproduce it below.

“Pursuant to the decision taken by the Board of Directors in its 72nd meeting held on 28.1.2008 & 2.2.2008 vide Agenda No.19, the following NMR/DLR/NMR on Contract basis employees are hereby regularized in the posts and scale of pay as mentioned against their names each subject to the following terms conditions.”

We are clear in our mind the tribunal relied on the documents produced by the workmen. They had engagement from the management, was inference drawn on trial upon having evidence laid before the Court. In such a situation we have before us the contentions of the management, on reliance upon above referred circular, of embargo in engagement of workmen. Yet, the management by the office order had regularized on 8th May, 2008, contract basis employees in the posts and scales of pay as mentioned therein. This regularization made indicates, the circular dated 6th May, 1986 was not adhered to or complied with. Mr. Mishra submits, those workmen, regularized by said office order, had been engaged prior to year 1986. The position that emerges is, even contractual workers had been regularized by the management and here, evidence before the labour

Court was that some of the workmen had been engaged in year 1985, prior to year 1986. The management produced documents of a contractor to show engagement from year 1996 but the contractor did not take the box to prove those documents.

13. Dayanand (supra) is of no aid to petitioner, having placed reliance on paragraphs 59, 101, 115 and 116 of the judgment. The Supreme Court in paragraph 59 said that creation and abolition of posts, formation and structuring/re-structuring of cadres, prescribing the source and mode of recruitment and qualification and criteria on selection, etc. are matters, which fall within the exclusive domain of the employer. There is no controversy regarding that in the case before us. Here, petitioner has petitioned for judicial review over impugned award directing regularization. Paragraphs 101, 115 and 116 are on legitimate expectation. Our appreciation of impugned award is that regularization was directed thereby on findings of fact, of engagement of the workmen by the corporation in various divisions and posts. In those circumstances, case of the management that the workers had been engaged through contractors was not accepted, to direct regularization. Said direction was not made on finding that the workers had a legitimate expectation to be regularized and, therefore, there

should be direction accordingly. The workers had not claimed such on basis of any assurance held out by the management. It was nobody's case that the management had given assurance of absorbing the workmen.

14. In view of above discussion we do not find reason to interfere with impugned award. We are reminded of the declaration of law made by the Supreme Court regarding interference with award on industrial disputes made by the Supreme Court in **Syed Yakoob v. Radhakrishnan**, reported in AIR 1964 SC 477.

15. The writ petition is dismissed.

