

IN THE HIGH COURT OF ORISSA AT CUTTACK**WP(C) No.11054 of 2013**

(Through Hybrid mode)

Orissa State Beverages Corporation Petitioners
Ltd. and another

-Versus-

Rajendra Barik and another Opposite Parties

For Petitioners : Mr. Ramesh Sahoo, Advocate

For Opposite Parties : Mr. A. N. Dash, Advocate
(for opposite party no.1)

None
(for opposite party no.2)

CORAM:

JUSTICE ARINDAM SINHA
JUSTICE SANJAY KUMAR MISHRA

JUDGMENT

06.12.2022

ARINDAM SINHA, J.

1. Mr. Sahoo, learned advocate appears on behalf of petitioner-management. He submits, impugned is award dated 7th June, 2012, made ex-parte against his client. On query from Court he submits, there is no averment in the petition regarding notice had of impugned award and thereupon his client moving this Court by the writ petition.

2. He submits, the workman (opposite party no.1) was not an employee of his client. His services were obtained on contract

basis through contractor (opposite party no.2). Said opposite party no.2 also did not appear before the labour Court.

3. He relies on judgment of the Supreme Court in **Dena Nath v. National Fertilisers Ltd.**, reported in (1992) 1 SCC 695, paragraph 22. A passage from the paragraph is extracted and reproduced below.

*“22. It is not for the High Court to inquire into the question and decide whether the employment of contract labour in any process, operation or in any other work in any establishment should be abolished or not. It is a matter for the decision of the government after considering the matter, as required to be considered under Section 10 of the Act. The only consequences provided in the Act where either the principal employer or the labour contractor violates the provision of Sections 9 (sic 7) and 12 respectively is the penal provision, as envisaged under the Act for which reference may be made to Sections 23 and 25 of the Act. **We are thus of the firm view that in proceedings under Article 226 of the Constitution merely because contractor or the employer had violated any provision of the Act or the rules, the Court could not issue any mandamus for deeming the contract labour as having become the employees of the principal employer.** xx xx xx”*

(emphasis supplied)

With reference to above relied upon paragraph he submits, the labour Court too could not direct reinstatement and payment of back wages as such direction implies finding that the workman had become employee of the principal employer, his client.

4. Mr. Dash, learned advocate appears on behalf of the workman, while none appears on behalf of the contractor

(opposite party no.2). There appears to have been proper dispatch of the notice but neither acknowledgement due card nor the postal article was returned. Good service is presumed.

5. Mr. Dash submits, his client was actually employee of petitioner. He draws attention to annexures in his client's counter. In particular he refers to intimation dated 19th September, 2001 issued by Oriental Security Service to him. Text of the intimation is reproduced below.

“Your name has been recommended by the Hon'ble Minister, Finance, Orissa for engagement in O.S.B.C. on contract basis. You are hereby requested to attend the interview on 25.9.2001 by 11.00 A.M. at 315-A, Saheed Nagar, Bhubaneswar positively. Failing which your application for engagement will not entertain further. No T.A/D.A will be given to attend the interview.”

He submits, pursuant to his client being successful in the interview, he was deputed as Depot Attendant in warehouse of petitioner at Rayagada. He also refers to manpower position maintained by petitioner as on 1st January, 2004, wherein his client's name appears. He then draws attention to letter dated 28th November, 2007 from Minister of State for Excise and Tourism, Odisha to petitioner. Text of it is reproduced below.

“Enclosed, please find the representation of Sri Rajendra Kumar Barik which is self explanatory. As stated therein Sri Barik has been working as Class-IV employee at Nirgundi Depot under Orissa State Beverage Corporation on adhoc basis since 2003 with utmost satisfaction of higher authority. He belongs to a poor family. He has prayed before me in my grievance cell for his continuance in the said post considering his past

experiences. The genuine case of Sri Barik for his continuance may be considered favourably.”

He submits, his client is an employee of petitioner, wrongfully shown to be a contract labour. Hence, the reference and it has been answered in his favour by the labour Court. There is no allegation in the writ petition that notice of the reference was not had by petitioner. In the circumstances, there should be no interference with impugned order.

6. In reply Mr. Sahoo draws attention to his client's rejoinder. In it is disclosed proceeding under section 33C(2) in Industrial Disputes Act, 1947. He relies on deposition in cross-examination of the workman in said proceeding. The deposition of cross-examination recorded on 16th February, 2015, is reproduced below.

“Cross-examination

Panthar Security had engaged me under the O.P.-The Supervisor of the Panthar Security was making me payment. It is not a fact that the present proceeding against the O.P is not maintainable in absence of my original employer Panthar Security. It is not a fact that I have no legal claim against the O.P. without taking any step against my original employer Panthar Security.”

On query from Court Mr. Sahoo submits, above section 33C(2) proceeding was initiated by the workman during pendency of the writ petition.

7. We find, allegation of the workman by complaint made on 28th January, 2008 was that he was prevented from joining work on and from 28th December, 2007. The writ petition was presented on 8th May, 2013. On 9th January, 2014 there was

direction by the then Bench, inter alia, staying impugned award subject to compliance of provisions in section 17B. However, by subsequent order dated 22nd July, 2015 the condition was waived. The writ petition has been pending since then. It was listed before us on 16th November, 2022 and today has been called on for hearing and disposal.

8. We find from impugned award, the schedule of reference was, as quoted below.

“Whether the termination of services of Sri Rajendra Barik, Depot Attendant by the management of Odisha State Beverages Corporation Ltd. and M/s. Panther Security Service with effect from 28.12.2007 by way of refusal of employment is legal and/or justified? If so, what relief the workman is entitled to?”

The schedule mentions two employers of the workman. The issue that arises from the schedule is on refusal of employment with effect from 28th December, 2007, whether legal or justified and if so, what relief the workman is entitled to.

9. Above mentioned managements did not appear before the labour Court in the reference. We extract and reproduce paragraph 3 from impugned award.

“3. In spite of valid notices, both the management neither filed any written statement nor contested the present proceeding. Hence both the management were set ex-parte vide order dated 2.12.2011.”

We find, since the reference proceeded ex-parte before the labour Court, impugned award does not contain illumination by evidence relied upon, for the Court below to have felt that the

workman had a genuine case. We reproduce below paragraphs 4 and 5 in impugned order.

“4. In the ex-parte hearing, in order to substantiate his claim, the workman has examined himself as W.W.1 and proved the documents under the cover of Exts.1 to 11.

5. In view of the unchallenged testimony of the workman and considering the documents filed by him, it is felt that he has genuine case and he is entitled to the reliefs claim.”

10. On perusal of the counter we find also that the workman has disclosed employees provident fund slip, wherein are mentioned the two successive contractors, Orient Security Service and Panthar Security Service, as his employers. Contention of challenge urged before us by petitioner is that in answering the reference, regarding reinstatement and back wages, that the workman was never an employee of it was not considered by the labour Court. No document could have been produced by the workman to establish the same.

11. We have answer to the reference that refusal of employment to the workman was neither legal nor justified and he is entitled to be reinstated with full back wages. However, none of the documents produced by the workman and tendered in evidence were referred to in the context, by the labour Court. We are satisfied that impugned award does not disclose reasons.

12. The writ petition has been pending since 8th May, 2013. The workman suffered waiver of the condition on 22nd July, 2015 and appears to have accepted the same. The order of reference was neither challenged by petitioner nor by opposite

party no.2. In such circumstances, we set aside impugned order and restore the reference to the labour Court, for expeditious disposal.

13. We direct that petitioner will pay cost assessed at Rs.25,000/- (rupees twenty-five thousand) to the workman (opposite party no.1). This direction is condition precedent and must be complied with on payment by way of demand draft for the amount, drawn in favour of the workman and produced along with this order before the labour Court on or before 16th December, 2022. Said Court will thereupon proceed with hearing on the reference by giving an opportunity to file written statement to the appearing management and without granting unnecessary adjournments. It is made clear, in event the condition precedent is not complied with by petitioner, within the time stipulated, impugned award will be restored as not interfered with herein. It is expected that the reference will be concluded on passing of award, by 31st March, 2023.

14. The writ petition is disposed of.

(Arindam Sinha)
Judge

(S. K. Mishra)
Judge

R.K.Sethi