Amrut

# IN THE HIGH COURT OF BOMBAY AT GOA

## CIVIL APPLICATION (REVIEW) NO.20 OF 2019
## IN
## WRIT PETITION NO.632 OF 2010

MAHADEV K. NAIK. … Petitioner

*Versus*

CIDADE DE GOA AND 2 ORS. … Respondents

Mr Shivraj Gaonkar and Mr. Ramnath Sawant, Advocates for the Petitioner.
Ms Smrati Bangera, Advocate for the Respondents.

**CORAM: M. S. SONAK, J.**

**DATED : 9th FEBRUARY 2023**

**ORAL ORDER:**

**1.** Heard Mr S. Gaonkar, learned counsel for the review Petitioner and Ms S. Bangera, learned counsel for the Respondents.

**2.** This is a petition seeking a review of the judgment and order dated 11.04.2018 passed by (Nutan D. Sardessai, J ) dismissing the Writ Petition No.632 of 2010 instituted by the review Petitioner.

**3.** Writ Petition No.632 of 2010 had taken exception to the award dated 24.05.2010 made by the Labour Court dismissing the Petitioner's claim for reinstatement and back wages consequent upon the termination of his services by Fomento Engineering Company Limited.

**4.** At the outset, it is quite inexplicable why Fomento Engineering Company Limited, which had terminated the services of the Petitioner, was not even a party before the Labour Court. Mr Gaonkar explains that it was the case of the Petitioner that Fomento Engineering Company Limited had transferred the Petitioner's services to Respondent Nos. 1 and 2. Therefore, the termination of services by Fomento Engineering Company Limited was invalid. At least *prima facie*, such an issue could not have been gone into in the absence of Fomento Engineering Company Limited.

**5.** Be that as it may, the Petitioner's contention based on ***Manager, M/s Pyarchand Kesarimal Porwal Bidi Factory Vs Omkar Laxman Thenge and others***[1] has been examined in great detail in the judgment and order of which the review is applied. Mr Gaonkar points out that the coordinate Bench has focused on paragraph 8 of the decision of the Hon'ble Supreme Court but not considered the law in paragraph 9.

**6.** To appreciate Mr Gaonkar's contention, paragraphs 8 and 9 of *Manager, M/s Pyarchand Kesarimal Porwal Bidi Factory* (supra) are transcribed below.

> "*8. A contract of service being thus incapable of transfer unilaterally, such a transfer of service from*

**1** AIR 1970 SC 823

*one employer to another can only be affected by a tripartite agreement between the employer, the employee and the third party, the effect of which would be to terminate the original contract of service by mutual consent and to make a new contract between the employee and the third party. Therefore, so long as the contract of service is not terminated, a new contract is not made as aforesaid and the employee continues to be in the employment of the employer. Therefore, when an employer orders him to do a certain work for another person, the employee still continues to be in his employment. The only thing that happens in such a case is that he carries out the orders of his master. The employee has the right to claim his wages from the employer and not from the third party to whom his services are lent or hired. It may be that such third party may pay his wages during the time that he has hired his services, but that is because of his agreement with the employer. That does not preclude the employee from claiming his wages from the employer. The hirer may also exercise control and direction in the doing of the thing for which he is hired or even the manner in which it is to be done. But if the employee fails to carry out his directions he cannot dismiss him and can only complain to the employer. The right of dismissal vests in the employer.*

*9. Such being the position in law, it is of the utmost importance in the present case that the appellants at no time took the plea that the contract of employment with the factory was ever terminated or that the respondent gave his consent, express or implied, to his contract of service being transferred to the head office, or that there was a fresh contract of employment so brought about between him and the head office. Unless, therefore, it is held from the circumstances relied upon by Mr Phadke that there* *was a transfer of the consent of service or that Respondent 1 gave his consent, express or implied, to such a transfer, Respondent 1 would continue to be the servant of the factory. Since the case has been remanded to the Assistant Commissioner, we refrain from making any observations as regards the effect of the admissions said to have been made by Respondent 1 and relied on by the Assistant Commissioner."*

**7.** Though the judgment and order of which the review is applied do not quote paragraph 9, from reading the entire judgment and order, it is apparent that cognizance has been taken of the observations in paragraph 9 mentioned above. It is only after following the law in paragraphs 8 and 9 that judgment and order were made.

**8.** Mr Gaonkar contends that there could be a transfer of employment even based upon the implied consent of all parties. Assuming this, the learned coordinate Bench has considered the evidence on record and concluded that there was neither express nor implied transfer or consent for transfer. The Court has pointed out that there was no tripartite agreement, and even the other circumstances on record were insufficient to make out a case of any implied consent on the part of Fomento Engineering Company Limited or the other companies. These are findings of fact concurrently recorded by the Labour Court and the coordinate Bench.

**9.** Considering the limited scope of review jurisdiction, no case of error apparent on the face of the record is made out. Besides, Ms

Bangera pointed out that the Petitioner had preferred a Special Leave Petition against the judgment of which review is not applied, and the Hon'ble Supreme Court dismissed the same on 26.10.2018 by making the following order.

> "Heard.
> Delay condoned.
> We do not find any reason to interfere in the matter. The special leave petition is accordingly dismissed. Pending applications, if any, shall stand disposed of."

**10.** Mr Gaonkar, however, relied upon ***Khoday Distilleries Ltd. ( Now known as Khoday India Limited ) and others vs Sri Mahadeshwara Sahakara Sakkare Karkhane Limited, Kollegal***[2] to point out that dismissal of the Special Leave Petition would not constitute a merger. Therefore, the review petition was heard on merits instead of going into this issue. But, since no case of error apparent on the face of the record is made out, the review is liable to be dismissed and is hereby dismissed.

**11.** Accordingly, the review petition is dismissed without any order for costs.

**M. S. SONAK, J.**

**2** 2019 (4) SCC 376