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W.P.Nos.15803, 15804, 16309 & 16343 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.08.2023

PRONOUNCED ON : 17.08.2023

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

W.P.Nos.15803, 15804, 16309 & 16343 of 2015
and W.M.P.Nos.15170 & 15177 of 2019

W.P.No.15803 of 2015 :-

The Executive Engineer (E)
BSNL Electrical Division II,
Ground Floor, BSNL Admin Building,
Greams Road, Chennai – 6

...Petitioner

-Vs-

1. The Presiding Officer,
Central Government Industrial
Tribunal cum Labour Court,
Chennai.
2. M/s.Air Kool Engineers (Contractor)
24, Deivanayagam Street,
Nungambakkam,
Chennai – 34.
3. The District Secretary,
Tamil Manila Telecom Contract
Labour Union,
C/o. Bharath Sanchar Nigam Ltd.,
Cuddalore.

... Respondents



W.P.Nos.15803, 15804, 16309 & 16343 of 2015

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records pertaining to I.D.No.30 of 2013 on the file of the first respondent and quash the award dated 17.12.2014 passed therein by the first respondent.

For Petitioner : Mr.K.V.Shanmuganathan

For Respondents

R1 : Tribunal
For R2 : Not ready in notice
For R3 : Mr.M.Devaraj

W.P.No.15804 of 2015 :-

The Executive Engineer (E)
BSNL Electrical Division II,
8th Floor, BSNL Admin Building,
Greens Road, Chennai – 6

...Petitioner

-Vs-

1. The Presiding Officer,
Central Government Industrial
Tribunal cum Labour Court,
Chennai.

2. M/s.Air Kool Engineers (Contractor)
24, Deivanayagam Street,
Nungambakkam,
Chennai – 34.

3. G.D.Sathishkumar

... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records pertaining to



W.P.Nos.15803, 15804, 16309 & 16343 of 2015

I.D.No.10 of 2013 on the file of the first respondent and quash the award dated 17.12.2014 passed therein by the first respondent.

For Petitioner : Mr.K.V.Shanmuganathan

For Respondents

R1 : Tribunal
For R2 : No appearance
For R3 : Mr.M.Devaraj

W.P.No.16309 of 2015 :-

C.Ramanathan

...Petitioner

-Vs-

The Executive Engineer, Electrical,
BSNL Electrical Division II,
Block-3, 3D, GST Road,
Meenambakkam,
Now at
No.16-A, Greaves Road,
BSNL Administrative Building,
Chennai – 6

... Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus, directing the respondent to comply with the directions issued by the Central Government Industrial Tribunal cum Labour Court in I.D.No.30 of 2013 dated 17.12.2014, within the time stipulated.

For Petitioner : Mr.M.Devaraj

For Respondent : Mr.K.V.Shanmuganathan



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W.P.No.16343 of 2015 :-

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G.D.Sathish Kumar

...Petitioner

-Vs-

The Executive Engineer, Electrical,
BSNL Electrical Division II,
Block-3, 3D, GST Road,
Meenambakkam.

Now at

No.16-A, Greams Road,
BSNL Administrative Building,
Chennai – 6

... Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus, directing the respondent to comply with the directions issued by the Central Government Industrial Tribunal cum Labour Court in I.D.No.10 of 2013 dated 17.12.2014, within the time stipulated.

For Petitioner : Mr.M.Devaraj

For Respondent : Mr.K.V.Shanmuganathan

COMMON ORDER

The writ petitions in W.P.Nos.15803 & 15804 of 2015 have been filed by the management/employer and the writ petitions in W.P.Nos. 16309 & 16343 of 2015 have been filed by the workmen, challenging the



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award dated 17.12.2014, passed by the first respondent in I.D.Nos.30 & 10 of 2013, thereby ordered to reinstate the workmen without back wages.

2. The petitioner in W.P.Nos.15803 & 15804 of 2015 is called employer and the petitioners in W.P.Nos. 16309 & 16343 of 2015 are called as workmen. The workmen had joined in the employer organization as lineman helper/operator in the year 2003. Thereafter, in the year 2006, they were appointed as contract worker in the Air Condition (AC) plant. The nature of work is skilled and maintenance of the AC plant round the clock as such it is a substantive post. From the year 2006, the workmen were permanently engaged by the employer through various contractors.

3. In order to avoid payment of the benefits and other perks payable to the permanent employee, the employment was through contractors however, controlled by the employer. They were paid only consolidate salary of Rs.2,000/-. The salary was not even minimum wages payable as prescribed by the Central Government as per the



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notification dated 24.09.2012. Therefore, all the workmen made complaint before the Labour Enforcement Officer Central at Pudhucherry and filed claim petition before the Regional Labour Commissioner Central.

3. Therefore, the employer had directed the contractors to terminate the workmen employment. Hence, the workmen were not permitted to attend duty after 03.09.2012. However, conciliation failed and referred the matter before the first respondent in I.D.Nos.30 & 10 of 2013. After considering the documentary and oral evidence, the first respondent directed the employer to reinstate the workmen without back wages. Therefore, both the employer and the workmen filed the present writ petitions.

4. The learned counsel appearing for the employer would submit that the employer is having AC package units at seven centers viz., Kallakurichi, Chidambram, Virudhachalam, Neyveli, Cuddalore, Tindivanam and Villupuram. The maintenance of those AC package units were given to contractors from time to time. Therefore, the



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workmen were working under the various contractors. During the year 2012, the workmen were working under the second respondent contractor viz., M/s. Air Kool Engineers, Chennai.

4.1. He further submitted that on 06.06.2012, they raised industrial dispute on the ground that they were illegally terminated from service without any notice. In fact, the workmen categorically admitted that they were working under the various contractors and at the time of disengagement of their service, they were working under the second respondent at Virudhachalam & Cuddalore respectively. The control and supervision of the workmen is resided with the employer merely because the security staff, Junior Engineer and Assistant Engineer checked the attendance of the workmen. No single test – be it control test, be it organization or any other test is determinative factor for determining the jural relationship of employer and employee.

4.2. He also relied upon the judgment of the Hon'ble Supreme Court of India reported in *AIR 2004 SC 1639* in the case of *Workmen of Nilgiri Coop. Mkt. Society Ltd., Vs. State of Tamil Nadu and ors*, which



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held that determination of the vexed questions as to whether a contract is a contract of service or contract for service and whether the concerned employees are employees of the contractors has never been an easy task. No decision of this Court has laid down any hard and fast rule not it is possible to do so. The question in each case has to be answered having regard to the fact involved therein. No single test-be it control test, be it organization or any other test – has been held to be the determinative factor for determining the jural relationship of employer and employee.

4.3. Therefore, it may not be possible to inter that a relationship or employer and employee has come into being only because some persons had been more or less continuously working in a particular premises in as much as even in relation thereto the actual nature of work done by them coupled with other circumstances would have a role to play. Even according to the workmen, the contract was sham and nominal and the contractors were not having any licence under the Contract Labour (Regulation and Abolition) Act.



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4.4. He further submitted that the tests that applied to find out whether a person is an employee or an independent contractor may not automatically apply in finding out whether the contract labour agreement is a sham, nominal and is a mere camouflage. The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to the employer. But it is the contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise.

4.5. In short, the worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor. Therefore, the award passed by the first respondent to reinstate the workmen is liable to be set aside.



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5. The learned counsel appearing for the workmen submitted that the workmen were working under the contractors and the employer periodically used to change the contractors. Though the workmen were working under the contractors and they were supervised by the employer. Therefore, the first respondent rightly ordered to reinstate the workmen and the same was not complied with by the employer. Hence, the workmen filed the present writ petition to direct the employer to comply the order passed by the first respondent.

5.1. He further submitted that though the first respondent rightly directed the employer to reinstate the workmen, failed to order any back wages. Therefore, the workmen filed amendment petitions in W.M.P.Nos.15177 & 15170 of 2019, to amend the prayer challenging the award passed by the first respondent insofar as the denial of the back wages.

6. Heard Mr.K.V.Shanmuganatha, learned counsel appearing for the employer and Mr.M.Devaraj, learned counsel appearing for the workmen.



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7. Though the workmen filed the present writ petitions to direct the employer to comply the award passed by the first respondent viz., Labour Court, Chennai, while pending the writ petitions, the workmen filed amendment petition in W.M.P.Nos.15177 & 15170 of 2019, to amend the prayer viz., challenging the award passed by the first respondent insofar as non awarding any back wages.

8. The workmen after completion of their IIT Course in Electrician and AC Mechanic respectively, were engaged by the employer in the AC package unit from the year 2006. The employer had changed the contractors continuously. Though the contractors were changed, the workmen continued to be employed by the employer. They were paid only Rs.2,000/- and as such, the employer failed to pay the minimum wages as per the notification issued by the Central government dated 24.09.2012. They were not paid PF and ESI for the workmen.

9. The employer is operating the telephone exchange, where in the AC plant is to run continuously for constant functioning of the telephone exchange. The work of the workmen was supervised by the



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staff of the employer. The nature of work is skilled and maintenance of AC plant round the clock. Therefore except for taking the contract, the contractors had no control over the workmen.

10. Admittedly, the workmen were working with the employer from the year 2006, under the various contractors. Though the contractors were changed, they were working under the employer. The employer would take care of the ESI and provident fund of the workmen. In fact, the work of the workmen was supervised and checked by the Security, Junior Engineer and Assistant Engineer and other supervisor. The employer categorically admitted the said fact, in the cross-examination as such, the first respondent rightly concluded that the workmen were working under the control of the employer.

11. The agreement between the employer and the contractor was marked as Ex.M2. It is clear that the work is to be done round the clock and the decision of the Executive Engineer is final. It shows that employer had the control over its staff viz., workmen. The workmen were terminated at the insistence of the employer. Therefore, rightly



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concluded by the first respondent that the employer had the actual control of the day to day affairs of the workmen.

12. In the judgment relied upon by the workmen reported in **2004 (3) SCC 514** in the case of **Nilgiri Co-operative Society Vs. State of Tamil Nadu**, the Hon'ble Supreme Court of India held as follows:-

“37. The control test and the organization test, therefore, are not the only factor which can be said to be decisive. With a view to elicit the answer, the Court is required to consider several factors which would have a bearing on the result (a) who is appointing authority; (b) who is the pay master; (c) who can dismiss; (d) how long alternative service lasts; (e) the extent of control and supervision; (f) the nature of job e.g., whether it is professional or skilled work; (g) nature of establishment; (h) the right to reject.”

13. That apart, the first respondent directed to order reinstatement on the basis of the evidence and material and also admission made by the employer. Therefore, this Court finds no infirmity or illegality in the order passed by the first respondent thereby ordered to reinstate the workmen.



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14. Further, the first respondent rightly denied back wages, since the workmen were not produced any documents to prove that during their tenure, they were not employed any where. That apart, the workmen failed to challenge the award insofar as non awarding any back wages. After the period of several years the workmen filed amendment petition in W.M.P.Nos.15177 & 15170 of 2019, to amend the prayer challenging the award insofar as the denial of back wages. Therefore, this Court is not inclined to entertain the petition filed for amendment and it is liable to be dismissed. However, the workmen are entitled to get salary as contemplated under Section 17 (B) of the Industrial Dispute Act, from the date of order passed by the first respondent to reinstate the workmen viz., from 17.12.2014.

15. Accordingly, the petitioner/employer is directed to comply the award dated 17.12.2014, passed by the first respondent in I.D.Nos.30 & 10 of 2013, within a period of four weeks from the date of receipt of a copy of this Order. The petitioner/employer is also directed to pay salary to the workmen as contemplated under Section 17 (B) of the Industrial



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Dispute Act, from the date of order passed by the first respondent to
reinstate the workmen viz., from 17.12.2014.

16. With the above directions, both the writ petitions filed by the employer in W.P.Nos.15803 & 15804 of 2015 are dismissed and the writ petitions filed by the workmen in W.P.Nos.16309 & 16343 of 2015 are allowed. However, the writ miscellaneous petitions filed for amendment in W.M.P.Nos.15177 & 15170 of 2019 are dismissed. There shall be no order as to cost.

17.08.2023

Internet: Yes
Index : Yes/No
Speaking/Non Speaking order

rts

To

1. The Presiding Officer,
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Tribunal cum Labour Court,
Chennai.
2. The District Secretary,
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G.K.ILANTHIRAIYAN. J.

rts

3. The Executive Engineer, Electrical,
BSNL Electrical Division II,
No.16-A, Greams Road,
BSNL Administrative Building,
Chennai – 6

ORDER IN
W.P.Nos.15803, 15804, 16309 & 16343 of 2015
and W.M.P.Nos.15170 & 15177 of 2019

17.08.2023