IN THE HIGH COURT OF JUDICATURE AT MADRAS

Delivered On: 27.09.2023

Reserved On: 21.09.2023

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

W.P.Nos.3930 and 3931 of 2018
And
W.M.P.Nos.3339 of 2022 and 20659 of 2018

The Managing Director
Larsen and Toubro Limited
Puducherry. ... Petitioner in both the W.Ps.

Vs.

1.The Presiding Officer,
Industrial Tribunal cum Labour Court,
Puducherry. ... Respondent in both the W.Ps.

2.V.K.Jesudoss ... Respondent in W.P.3930/2018
2.K.Durairaj ... Respondent in W.P.3931/2018

3.V.Sampath ... Respondent in W.P.3930/2018
3.D.Kumar ... Respondent in W.P.3931/2018

Common Prayer:

Petitions filed under Article 226 of the Constitution of India to issue a Writ of Certiorari calling for records pertaining to the award dated 30.10.2017 passed in I.D.Nos.19 and 23 of 2013 respectively, on the file of the first respondent herein and quash the same.

For Petitioner : Mrs.Rita Chandrasekar
for M/s Aiyar and Dolia

For Respondents : Mr.P.R.Thiruneelakandan for R2
Mr.A.Hameshanth for R3

COMMON ORDER

Assailing the award dated 30.10.2017 passed by the Industrial Tribunal cum Labour Court, Puducherry, in I.D.Nos.19 and 23 of 2013 respectively, wherein, the Tribunal has directed the petitioner to reinstate the respective second respondent in service with 30% backwages from the date of termination till the date of reinstatement with continuity of service and other attendant benefits, these writ petitions have been filed.

2.Since the issue involved in these writ petitions are one and the same, they are heard together and disposed of by way of a common order.

3.The learned counsel appearing for the petitioner submitted that the respective second respondent initially raised dispute against the respective third respondent before the Conciliation Officer and the petitioner was not arrayed as a party and subsequently, due to after thought and to negotiate with the legal shortfall, the petitioner was impleaded in the industrial dispute. The said action goes to prove that there was no privity of contract inbetween the petitioner and the second respondent.

4.The learned counsel appearing for the petitioner further submitted that there is no master and servant relationship inbetween the petitioner and the respective second respondent and they were engaged by the respective third respondent. Hence, the respective second respondent ought to have raised industrial dispute only as against the respective third respondent and not against the petitioner.

5.The learned counsel appearing for the petitioner further submitted that it is the duty cast upon the respective second respondent to establish before the Tribunal that there was master and servant relationship inbetween the petitioner and the respective second respondent by adducing evidence and mere production of ESI contribution is not conclusive proof to establish that the respective second respondent were employed with the petitioner.

6.The learned counsel appearing for the petitioner further submitted that the respective second respondent did not establish before the Tribunal that they worked for 240 days continuously in a calender year under the petitioner. In the absence of any substantial evidence, the Tribunal, based on the ESI contribution made by the petitioner in the name of the respective second respondent arrived at a conclusion that there was master and servant relationship inbetween the petitioner and the respective second respondent and passed award in favour of the respective second respondent, which warrants interference.

7.The learned counsel appearing for the petitioner further referred to the various provisions of the EPF Act as well as the ESI Act and submitted that mere payment of contribution in the name of the respective second respondent will not amount to establish the master and servant relationship. The petitioner paid the contribution on behalf of the contractor and as per Section 40 of the ESI Act and as per Section 8 of the EPF Act, the petitioner is entitled to recover the contribution made from the contractor. When the provisions itself makes it clear that the petitioner is entitled to recover the contribution paid in the name of the respective second respondent from the respective third respondent or contractor, the award passed by the Tribunal is perverse and is liable to be interfered with.

8.Per contra, the learned counsel appearing for the respective second respondent submitted that the respective second respondent were working as fitter and electrician in the Doka Form Metal shop section of the petitioner from 15.03.2000 and 01.07.2007 respectively and they were in service under the direct control of the petitioner. The learned counsel further submitted that the second respondent in W.P.No.3931 of 2018 met with an accident during the course of employment on 15.07.2009 and sustained injuries on his left hand finger for which, he had undergone plastic surgery and the petitioner submitted report to the ESI Corporation mentioning that Larsen and Toubro is his employer and that he was receiving Rs.185/- as daily wages.

9.The learned counsel appearing for the respective second respondent further submitted that before the Tribunal, the second respondent in W.P.No.3930 of 2018 marked the copy of ESIC card;

copy of ESI account statement and Information furnished under RTI Act as Ex.W.4 to Ex.W.6 and the second respondent in W.P.No.3931 of 2018 marked the copy of ESIC card; copy of accident report submitted by the petitioner to the Management of ESI Corporation, medical leave receipts regarding treatment undergone by him and Information furnished under RTI Act as Ex.W.5 to Ex.W.8. The said exhibits makes it clear that the respective second respondent were in direct employment under the petitioner. The Tribunal after properly appreciating the entire facts, passed the award in favour of the respective second respondent, which warrants no interference.

10.The learned counsel appearing for the respective second respondent further submitted that the respective second respondent conducted agitation and made representation to increase their wages, however, the petitioner Management all of a sudden orally terminated the respective second respondent without any notice and without any enquiry, which is non est in law and the same is in violation of principles of natural justice.

11.The learned counsel appearing for the respective second respondent further submitted that the initial burden lies upon the respective second respondent to establish the master and servant relationship inbetween the petitioner and the respective second respondent. Inorder to prove the same, they marked Ex.W.4 to Ex.W.6 and Ex.W.5 to Ex.W.8 respectively before the Tribunal and it is for the petitioner Management to rebut the said evidence, however, in the present case, the petitioner Management miserably failed to establish that there is no master and servant relationship inbetween the petitioner and the respective second respondent.

12.The learned counsel appearing for the respective third respondent submitted that the termination referred in the claim statements is only retrenchment as contemplated under Section 2(oo) of the Industrial Disputes Act, which is under the jurisdiction of the Labour Court and the Industrial Tribunal has no jurisdiction to adjudicate the issue. Without any jurisdiction, the Tribunal passed award in favour of the respective second respondent, which is not sustainable one.

13.Heard the arguments advanced on either side and perused the materials available on record.

14.The primary contention of the petitioner is that mere payment of contribution in the name of the respective second respondent is not conclusive proof to establish the master and servant relationship inbetween the petitioner and the respective second respondent. The petitioner paid the contribution on behalf of the contractor and as per Section 40 of the ESI Act and as per Section 8 of the EPF Act, the petitioner is entitled to recover the contribution made from the contractor.

15.For better appreciation, Sections 40, 41 of the ESI Act and Section 8 of the EPF Act are extracted hereunder:

Employees' State Insurance Act, 1948:

> ***"40.Principal employer to pay contributions in the first instance***
>
> *(1) The principal employer shall pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution.*
>
> *(2) Notwithstanding anything contained in any other enactment but subject to the provisions of this Act and the regulations, if any, made thereunder, the principal employer*

shall, in the case of an employee directly employed by him (not being an exempted employee), be entitled to recover from the employee the employee's contribution by deduction from his wages and not otherwise:

PROVIDED that no such deduction shall be made from any wages other than such as relate to the period or part of the period in respect of which the contribution is payable, or in excess of the sum representing the employee's contribution for the period.

(3) Notwithstanding any contract to the contrary, neither the principal employer nor the immediate employer shall be entitled to deduct the employer's contribution from any wages payable to an employee or otherwise to recover it from him.

(4) Any sum deducted by the principal employer from wages under this Act shall be deemed to have been entrusted to him by the employee for the purpose of paying the contribution in respect of which it was deducted.

(5)The principal employer shall bear the expenses of remitting the contributions to the Corporation.

41.Recovery of contributions from immediate employer

(1) A principal employer, who has paid contribution in respect of an employee employed by or through an immediate employer, shall be entitled to recover the amount of the contribution so paid (that is to say the employer's contribution as well as the employee's contribution, if any) from the immediate employer, either by deduction from any amount payable to him by the principal employer under any contract, or as a debt payable by the immediate employer.

[70][(1A) The immediate employer shall maintain register of employees employed by or through him as provided in the regulations and submit the same to the principal employer before the settlement of any amount payable under sub-section (1).]

(2) In the case referred to in sub-section (1), the immediate employer shall be entitled to recover the employee's contribution from the employee employed by or through him by deduction from wages and not otherwise, subject to the conditions specified in the proviso to sub-section (2) of section 40."

The Employees' Provident Funds And Miscellaneous Provisions Act, 1952:

> ***"8. Mode of recovery of moneys due from employers– any amount due -***
> *(a) from the employer in relation to an establishment to which any Scheme or the Insurance Scheme applies in respect of any contribution payable to the Fund or, as the case may be, the Insurance Fund, damages recoverable under section 14B, accumulations required to be transferred under sub-section 2 of section 15 or under sub-section 5 of section 17 or any charges payable by him under any other provision of this Act or of any provision of the Scheme or the Insurance Scheme; or*
> *(b) from the employer in relation to an exempted establishment in respect of any damages recoverable under section 14B or any charges payable by him the appropriate Government under any provision of this Act or under any of the conditions specified under section 17 or in respect of the contribution payable by him towards the Pension Scheme under the said section 17, may, if the amount is in arrear, be recovered in the manner specified in section 8B to 8G.*

8A. Recovery of moneys by employers and contractors*.*

(1) The amount of contribution that is to say, the employer's contribution as well as the employee's contribution in pursuance of any Scheme and the employer's contribution in pursuance of the Insurance Scheme and any charges for meeting the cost of administering the Fund paid or payable by an employer in respect of an employee employed by or through a contractor may be recovered by such employer from the contractor, either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor.

(2) A contractor from whom the amounts mentioned in sub-section 1 may be recovered in respect of any employee employed by or through him, may recover from such employee the employee's contribution under any Scheme by deduction from the basic wages, dearness allowance and retaining allowance if any payable to such employee.

(3) Notwithstanding any contract to the contrary, no contractor shall be entitled to deduct the employer's contribution or the charges referred to in sub-section 1 from the

basic wages, dearness allowance, and retaining allowance if any payable to an employee employed by or through him or otherwise to recover such contribution or charges from such employee."

16.Perusal of the above said provisions makes it clear that the principal employer can pay the contribution in the name of the contract labour on behalf of the contractor and after payment they are entitled to recover the amount from the respective contractor. Such liberty was granted in the provisions itself and hence there is considerable force in the argument of the learned counsel appearing for the petitioner that mere payment of ESI contribution by the principal employer would not confer the employer and employee relationship.

17.In the present case, it is the duty of the respective second respondent to establish that they worked for 240 days continuously in a calender year under the petitioner by producing appointment order and other relevant materials. However, the respective second respondent only marked the copy of ESIC card and the Information furnished under RTI Act to establish their employment with the petitioner and no other documents like the appointment order has been marked by the respective second respondent. However, in view of the above provisions, mere payment of contribution in the name of the respective second respondent will not amount to establish the master and servant relationship inbetween the petitioner and the respective second respondent.

18.It is also worth to mention here that initially the respective second respondent raised dispute against the respective third respondent before the Conciliation Officer and the petitioner was not arrayed as a party and subsequently, due to after thought and to negotiate with the legal shortfall, the petitioner was impleaded in the industrial dispute.

19.This Court perused the Government Orders through which the disputes were referred to the Industrial Tribunal, which reveals that the disputes were referred to the Tribunal to decide '(a)Whether the dispute raised by Thiru.V.K.Jesudoss against one Thiru.V.Sambath, Labour Contractor for M/s.Larsen & Toubro Farm Work Metal Shop, Puducherry – over non-employment is justified or not? If justified what relief he is entitled? (b) If justified, what relief the workman is entitled to? and (c)To compute the relief, if any, awarded in terms of money, if it can be so computed?' and '(a)Whether the dispute raised by Thiru.K.Durairaj against Thiru.D.Kumar, a Contractor (for M/s.Larsen & Toubro Limited, Puducherry) over non-employment is justified or not? (b) If justified, what relief the workman is entitled to? and (c)To compute the relief, if any, awarded in terms of money, if it can be so computed?' respectively. Perusal of the above reveals that the respective second respondent had raised dispute only as against the respective third respondent who are contractors for the petitioner.

20.Further, this Court also perused the petition made by the respective second respondent before the Conciliation Officer marked as Ex.W.3 and Ex.W.4 respectively and it reveals that the respective second respondent has raised the dispute only as against the respective third respondent and the petitioner was not initially arrayed as a party. Subsequently, the petitioner has been impleaded as the party. At the relevant point of time, they have specifically mentioned that they are employed with the contractors. The above facts reveal that the respective second respondent are employed with the respective third respondent.

21.When such being the position, if at all the respective second respondent have any grievance, they have to work out their remedy only under the Contract Labour (Regulation and Abolition) Act and raising dispute before the Industrial Tribunal is not sustainable one. Further, the respective second respondent failed to establish the master and servant relationship.

22.In view of all the above, the award dated 30.10.2017 in I.D.Nos.19 and 23 of 2013 respectively, passed by the Industrial Tribunal cum Labour Court, Puducherry, are set aside. The writ petitions are allowed. No costs. Consequently, the connected miscellaneous petitions are closed.

27.09.2023

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

To

1.The Presiding Officer,
Industrial Tribunal cum Labour Court,
Puducherry.

M.DHANDAPANI,J.
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**Pre-delivery Order in
W.P.Nos.3930 and
3931 of 2018
And
W.M.P.Nos.3339 of 2022
and 20659 of 2018**

27.09.2023