

2023:PHHC:166383

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**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

CWP-14402-2016
Date of Decision: 15.11.2023

Surender Singh

..... Petitioner

Versus

Presiding Officer, Industrial Tribunal-cum-Labour Court-II, Gurgaon,
Haryana and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE HARSH BUNGER

Present: Mr. Sumeet Jain, Advocate
for the petitioner.

Ms. Seema Pasricha, Advocate
for respondent No.2.

HARSH BUNGER J. (ORAL)

1. Petitioner (Surender Singh) has filed the instant writ petition under Article 226 of the Constitution of India seeking a writ in the nature of Certiorari for setting aside of impugned award dated 05.05.2015 (Annexure P-3) passed by the Presiding Officer, Industrial Tribunal-cum-Labour Court-II, Gurgaon (for short 'the Tribunal'), whereby the reference of industrial dispute raised by petitioner, regarding termination of his services, has been answered against him.

A further prayer has been made to direct respondents No.2 and 3 to reinstate the petitioner in service along with all other consequential benefits.

2. Briefly, petitioner-workman raised an industrial dispute, regarding termination of his services, which was referred by the appropriate Government, while exercising its powers under Section 10(1)(c) of the Industrial Disputes Act, 1947 (for short 'the 1947 Act'), to the Tribunal below, for adjudication, by making the following reference:-

“(1) Whether the appellant/employee is the employee of Manager M/s Metso Mineral India (P) Ltd., District Rewari, or of the contractor.

(2) In case it is held that he is the employee of Manager M/s Metso Mineral India (P) Ltd., District Rewari, whether the termination of his services was illegal? If the answer is in affirmative then to what consequential reliefs the employee is entitled to?”

3. As per the claim of petitioner, he was appointed as Welder with the Management on 05.01.2010 and his services were illegally terminated on 31.03.2012. Petitioner claimed that at the time of termination of his services, his salary was Rs.11,000/- per month and his services were orally terminated without issuance of any notice pay or retrenchment compensation despite the fact that he had worked continuously for more than 240 days with the Management. Accordingly, he prayed for reinstatement in service with continuity thereof and all the other consequential benefits.

4. It appears that respondents No.2 and 3 herein initially appeared before the Tribunal below, however subsequently, they absented and were accordingly proceeded against *ex-parte* on 09.01.2015.

5. In *ex-parte* evidence, petitioner-workman appeared as PW-1 and tendered his affidavit Ex. P-1 and further tendered the following

documents:-

- Ex. P-2 : Copy of salary slip issued by respondent No.2 to workman.*
- Ex. P-3 : Copy of experience certificate issued to workman by respondent No.2.*
- Ex. P-4 : Copy of E.S.I. identity card of the workman.*
- Ex. P-5 : Copy of salary account of the workman with AXIS Bank.*
- Ex. P-6 &: Copies of qualification certificates of the workman.*
- Ex. P-7*
- Ex. P-8 : Copy of pay order issued by respondent No.2.*

6. Thereafter the Tribunal below, on the first point of reference, returned the finding that the petitioner has not been able to show that he was an employee of respondent No.2 – M/s Metso Mineral India (P) Ltd. rather material on record shows that he was in employment of respondent No.3 – M/s Choudhary Service. Accordingly, it was held that petitioner was an employee of the contractor, i.e. respondent No.3 herein.

As regards the second point of reference, Tribunal below held that once the workman has not been able to show that he was an employee of M/s Metso Mineral India (P) Ltd., accordingly, no question arises regarding termination of his services by the said Management; and consequently, it was concluded by the Tribunal below that the petitioner-workman had failed to prove the relationship of master and servant between him and respondent No.2 – M/s Metso Mineral India (P) Ltd. and he was not held entitled to any relief.

7. Being aggrieved against award dated 05.05.2015 (Annexure P-3), petitioner has filed the instant writ petition before this Court.

8. Learned counsel for the petitioner submits that the Tribunal below has erred in law and fact in rejecting the claim of the petitioner. It is submitted that the Tribunal below has failed to appreciate the evidence

available on record, which duly revealed that petitioner was an employee of respondent No.2 herein, i.e. M/s Metso Mineral India (P) Ltd. It is further submitted that respondents No.2 and 3 had failed to appear before the Tribunal below, accordingly, they were proceeded against *ex-parte* and evidence laid by the petitioner had gone un rebutted; therefore, the Tribunal should have granted the necessary relief to petitioner. Learned counsel for the petitioner contends that although in the records, petitioner has been shown as a contract labourer, however for all intents and purposes, he was a worker of M/s Metso Mineral India (P) Ltd. (respondent No.2 herein). It is further contended that the employment of petitioner with respondent No.2 herein through the contractor (respondent No.3 herein) was merely a paper arrangement and a camouflage; and the same was contrary to the provisions of the Contract Labour (Regulation and Abolition) Act, 1970 (for short 'the 1970 Act).

With the aforesaid submissions, learned counsel for the petitioner has prayed for setting aside the impugned award dated 05.05.2015 (Annexure P-3) and granting the necessary relief to the petitioner.

9. Per contra, learned counsel for respondent No.2 has opposed the prayer made on behalf of the petitioner by submitting that the Tribunal below has passed a well reasoned and justified order, which does not call for any interference by this Court, while exercising its writ jurisdiction. It is submitted that there is sufficient evidence/material available on record, which clearly indicates that petitioner was in fact an employee of contractor, i.e. respondent No.3 herein (M/s Choudhary Service), and not that of respondent No.2 (M/s Metso Mineral India (P) Ltd.), therefore, the reference has been rightly decided by holding that petitioner is not entitled to any relief. Accordingly, prayer has been made for dismissal of the instant writ

petition.

10. I have heard learned counsel for the parties and perused the paper book with their able assistance.

11. Before considering the case in hand, it would be apposite to refer to the demand notice served by the petitioner upon respondents No.2 and 3 herein, which reads as under:-

“ *Registered*

To

1. *The Manager,*

M/s Metso Mineral India (P) Ltd.

Plot No. 172 H.S.I.D.C. Bawal Rewari

2. *M/s Choudhary Service Bawal Road Rewari*

Shop No.21 Op. Brass Market

Subject:- Demand Notice under Section 2 of the Industrial Disputes Act.

Dear Sir,

1. *That it is requested that worker Surender Singh was working on the post of Welder since 5/1/2010 with his utmost hard work and sincerity.*
2. *That on 31-3-2012 management has terminated the services of the workmen in a wrong and illegal manner. At that time, the petitioner was drawing monthly salary of Rs.11000/-.*
3. *That in above organization, the petitioner was served more than 240 days. While terminating the services of the workman, workman has not paid his earned wages and payment of Notice against Section 25 (F) of the Industrial Disputes Act. Workman has terminated by verbal order. Such type of termination is open violation of law and workman is entitled for all benefits.*
4. *That Management has terminated the services of the workman against provisions of Industrial Disputes Act which are wrong and illegal. Workman has not given any notice in written, Charge-sheet and not done any type of domestic inquiry.*

Workman has terminated by verbal order. The action of the management is illegal, against workmen and against natural justice and workman is entitled for all benefits.

5. *That the workman is unemployed till date from the date of his termination and is nothing employed anywhere.*

So, you are hereby requested workman may be taken back with full back wages from the date of termination otherwise workman will constraint to approach Labour Court of which all expenses will be in your account.

*Sd/-
Applicant*

*Dated: Surender Singh S/o Rajender Singh
Village – Kathuwas
Post – Sangwari
District – Rewari”*

A perusal of the above extracted demand notice would show that petitioner had made very general and vague assertions therein, without indicating as to whether his services were engaged by respondent No.2 or respondent No.3 herein. It is also not forthcoming from the said demand notice as to whether services of the petitioner were terminated by respondent No.2 or respondent No.3 herein.

12. It is borne out from the impugned award that the aforesaid demand notice itself was treated as claim statement on behalf of the petitioner. Therefore, Tribunal below was justified in holding that the demand notice raised by the petitioner was general in nature.

13. Furthermore, in order to substantiate his claim, petitioner has only examined himself as PW-1 and while submitting his affidavit in support of his claim, following averment has been made in paragraph No.2 thereof:-

“2. *That the deponent is an I.T.I. pass Industrial Labourer*

to whom respondent No.1 – Management has inducted as Welder on 05.01.2010. But management has not given any appointment letter at the time of appointment and he has been put on roll of defendant no.2 from the date of appointment.”

The aforesaid stand of petitioner on affidavit clearly indicates that respondent No.2 herein (M/s Metso Mineral India (P) Ltd.) had not given any appointment letter to him rather it is a conceded case on the part of petitioner that he was put on the Roll of M/s Choudhary Service from the date of his appointment.

14. It is evident from the impugned award that Ex. P-2 is a copy of salary slip issued by M/s Choudhary Service, Ex. P-3 is a copy of Experience Certificate issued to petitioner by M/s Choudhary Service and Ex. P-8 is a copy of Pay Order issued by M/s Choudhary Service.

15. Further, while considering the evidence available on record, Tribunal below returned the following findings:-

“6. After hearing learned Authorised Representative for the workman, I am of the view that the first point of reference whether the appellant is employee of M/s Metso Mineral India (P) Ltd. i.e. respondent No.1 or of contractor, I am of the view that from the own record produced by the workman, he has not been able to show himself to be employee of respondent No.1, rather material on the record shows that the workman was in the employment of respondent No.2. This fact is amply proved from the salary slip Ex.P-2, certificate issued by respondent No.2 in favour of workman Ex.P-3 and Ex.P-8 pay orders. All these have been issued by respondent No.2 showing the workman to be their employee. There is nothing on the file to show that the workman remained under the direct supervision of the management and was being paid salary directly by the management, so to qualify for the direct employment under the principal employer. The workman herein has failed to pass the

twin test for that. He has not satisfied the twin test approved in citation General Manager (OSD), Bengal Nagpur Cotton Mills, Rajnandgaon versus Bharat Lal etc., 2011 LLR 113 that he was being directly paid by the company and he was working under the direct command of the company. Whatever secondary control management company was exercising over the workman, in view of citation International Airport Authority of India versus International Air Cargo Workers' Union and another, 2009 (3) LLN 489, the same is insufficient to clothe the relationship of employer and employee between the workman and respondent No.1 company. Under these circumstance, I have no hesitation in holding that the workman was the employee of contractor, i.e. respondent No.2.”

A perusal of the above extract would leave no manner of doubt that the petitioner is an employee of M/s Choudhary Service, as has been rightly held by the Tribunal below, and learned counsel for the petitioner has failed to dislodge the said finding.

16. I have considered the plea of petitioner that the contract between respondent No.2 (M/s Metso Mineral India (P) Ltd.) and respondent No.3-contractor herein was only a paper arrangement and a camouflage, whereas for all intents and purposes, petitioner was an employee of respondent No.2 herein; however, I do not find any merit in the same.

17. In “*Workmen of Nilgiri Coop. Mktg. Soc. Ltd. v. State of Tamil Nadu*”, 2004(2) S.C.T. 789, Hon'ble Apex Court observed as under:-

“DETERMINATION OF RELATIONSHIP :

32. 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 nor 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 organisation or any other test - has been held to be the determinative factor for determining the jural relationship of employer and employee.

33. There are cases arising on the borderline between what is clearly an employer-employee relation and what is clearly the independent entrepreneurial dealing.

TESTS :

*34. This Court beginning from **Shivanandan Sharma v. Punjab National Bank Limited [1955]1 L.L.J. 688 : AIR 1955 Supreme Court 404** and **Dharangadhara Chemical Works Limited v. State of Saurashtra and others [1957]1 L.L.J. 477 : AIR 1957 Supreme Court 264** observed that supervision and control test is the prima facie test for determining the relationship of employment. The nature or extent of control required to establish such relationship would vary from business to business and, thus, cannot be given a precise definition. The nature of business for the said purpose is also a relevant factor. Instances are galore there where having regard to conflict in decisions in relation to the similar set of facts, the Parliament has to intervene as, for example, in the case of workers rolling bidis.*

35. In a given case it may not be possible to infer that a relationship of employer and employee has come into being only because some persons had been more or less continuously working in a particular premises inasmuch as even in relation thereto the actual nature of work done by them coupled with other circumstances would have a role to play.

*36. In **V.P. Gopala Rao v. Public Prosecutor, Andhra Pradesh [1970]2 L.L.J. 59 : AIR 1970 Supreme Court 66**, this Court said that it is a question of fact in each case whether the relationship of master and servant exists between the management and the workmen and there is no abstract a priori test of the work control required for establishing the control of service. A brief resume of the development of law in this point was necessary only for the purpose of showing that it would not*

be prudent to search for a formula in the nature of a single test for determining the vexed question.

RELEVANT FACTORS :

37. The control test and the organisation test, therefore, are not the only factors which can be said to be decisive. With a view of eliciting the answer, the Court is required to consider several factors which would have a bearing on the result : (a) who is the 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 the job, e.g. whether, it is professional or skilled work; (g) nature of establishment; (h) the right to reject.

38. With a view to find out a reasonable solution in a problematic case of this nature, what is needed is an integrated approach meaning thereby integration of the relevant tests wherefor it may be necessary to examine as to whether the workman concerned was fully integrated into the employer's concern meaning thereby independent of the concern although attached therewith to some extent.

XXX XXX XXX

CAMOUFLAGE :

68. Whether a contract is a sham or camouflage is not a question of law which can be arrived at having regard to the provisions of Contract Labour (Regulation and Abolition) Act, 1970. It is for the industrial adjudicator to decide the said question keeping in view the evidences brought on records.

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92. On the aforementioned backdrop of legal principles, we may now consider the Constitution Bench judgment of this Court in Steel Authority of India Limited (supra). The principal question which arose for consideration therein was as to whether having regard to the provisions contained in Section 10 of the Contract Labour (Regulation and Abolition) Act, the workmen employed by the contractors in the event of abolition of contract labour were entitled to be automatically absorbed in

*the services of the principal employer. While answering the question in the negative the court reversed the earlier decision of this Court in **Air India Statutory Corporation and Others v. United Labour Union and Others, (1997)9 SCC 377**. This Court referring to a large numbers of decisions and tracing the history of the Contract Labour (Regulation and Abolition) Act, noticed that the Industrial Tribunal although prior to coming into force could issue directions for such regularisation but such directions could not be issued after coming into force of the Act. In view of the Constitution Bench decision in **M/s Gammon India Limited and Others etc. v. Union of India and Others, (1974)1 SCC 596**, the Court held that although the principle that a beneficial legislation needs to be construed liberally in favour of the class for whose favour it is intended, the same would not extend to reading in the provisions of the Act what the legislature has not provided whether expressly or by necessary implication, or substituting remedy or benefits for that provided by the legislature. Upon analyzing the case law, the categories of cases were sub-divided into three stating:*

"An analysis of the cases, discussed above, shows that they fall in three classes : (i) where contract labour is engaged in or in connection with the work of an establishment and employment of contract labour is prohibited either because the industrial adjudicator/court ordered abolition of contract labour or because appropriate Government issued notification under Section 10(1) of the CLRA Act, no automatic absorption of the contract labour working in the establishment was ordered; (ii) where the contract was found to be a sham and nominal, rather a camouflage, in which case the contract labour working in the establishment of the principal employer were held, in fact and in reality, the employees of the principal employer himself. Indeed, such cases do not relate to abolition of contract labour but present instances where in the Court pierced the veil

and declared the correct position as a fact at the stage after employment of contract labour stood prohibited; (iii) wherein discharge of a statutory obligation of maintaining a canteen in an establishment the principal employer availed the services of a contractor the courts have held that the contract labour would indeed be the employees of the principal employer."

From a perusal of the judgment rendered in the case of *Workmen of Nilgiri (supra)*, it would be evident that whether a contract is a sham or camouflage, is not a question of law which can be arrived at having regard to the provisions of Contract Labour (Regulation and Abolition) Act, 1970. It is for the industrial adjudicator to decide the said question keeping in view the evidences brought on record.

18. Apparently, in the instant case, no plea was raised by the petitioner before the Industrial Adjudicator that the contract between respondent no. 2 (M/s Metso Mineral India (P) Ltd) and respondent No. 3 – Contractor was only a paper transaction and a camouflage. Since no such plea was raised before the Tribunal below, there is also no evidence on record to that effect and in the absence of the same, the said plea cannot be considered.

The Tribunal below has considered the material/evidence available on record and has returned a finding of fact that the petitioner was an employee of the contractor and not that of respondent No. 2 (M/s Metso Mineral India (P) Ltd).

19. Moreover, the parameters for exercise of jurisdiction by the High Court under Article [226](#) of the Constitution of India, in cases involving challenge to the award passed by the Labour Court/Industrial Tribunal and orders passed by other judicial and *quasi-judicial* bodies, are well defined. A

writ of *certiorari* can be issued for correcting errors of jurisdiction committed by inferior Courts or Tribunals. A writ can also be issued where in exercise of jurisdiction conferred on it, the Court or the Tribunal acts illegally or improperly, i.e. it decides a question without giving an opportunity to be heard to the party affected by the order or where the procedure adopted by it is opposed to the principles of natural justice. However, it must be remembered that the jurisdiction of the High Court to issue a writ of *certiorari* is a supervisory jurisdiction and not appellate one. This necessarily means that the finding of fact reached by the inferior Court or Tribunal, as a result of the appreciation of evidence, cannot be reopened or questioned in writ proceedings except when the judgment, order or award suffers from an error of law apparent on the face of the record. This is the abstract statement of law, but the vexed question is as to what is an error of law apparent on the face of the record and in what circumstances a finding of fact recorded by an inferior Court or Tribunal or a *quasi-judicial* authority can be corrected. Broadly speaking, an error of law is one which can be discovered on a bare reading of the judgment, order or award under challenge along with the documents which have been relied upon by the inferior Court, Tribunal or *quasi-judicial* authority. An error, the discovery of which is possible only after a detailed scrutiny of the evidence produced by the parties and lengthy debate at the bar cannot be regarded as an error of law for the purpose of a writ of *certiorari*. A finding of fact recorded by an inferior Court or Tribunal can be corrected only if it is shown that in recording the said finding, the Court or the Tribunal had erroneously refused to admit admissible and material evidence or had erroneously admitted inadmissible evidence and the same has influenced the impugned finding.

Similarly, a finding of fact based on no evidence would be regarded as an

error of law which can be corrected by a writ of *certiorari*. However, sufficiency or adequacy of the evidence relied upon by the inferior Court or Tribunal or the *quasi-judicial* authority cannot be gone into by the High Court while considering the prayer for issue of a writ of *certiorari*. Likewise, the mere, possibility of forming a different opinion on re-appreciation of evidence by the parties is not sufficient for issue of a writ of *certiorari* “*Syed Yakoob v. K.S. Radhakrishnan and others, AIR 1964 Supreme Court 477*”; “*Shaikh Mahammad Umarsaheb v. Kadalaskar Hasham Karimsab and others, AIR 1970 Supreme Court 61*”; “*Jitendra Singh Rathor v. Sh. Baidyanath Ayurved Bhawan Ltd. and another, AIR 1984 Supreme Court 976*”; “*R.S. Saini v. State of Punjab and others, 1999(4) RCR (Civil) 253 (SC) : J.T. 1999(6) S.C. 507*” and “*Mohd. Shahnawaz Akhtar and another v. Ist A.D.J. Varanasi and others, J.T. 2002(8) S.C. 69*”.

20. Considering the totality of circumstances in the light of legal principles indicated above, there is no scope for any interference in the findings/Award rendered by the Tribunal below. Resultantly, the instant writ petition fails and the same is dismissed.

21. All pending application(s), if any, shall also stand closed.

15.11.2023

Apurva

(HARSH BUNGER)
JUDGE

1. Whether speaking/reasoned : Yes/No

2. Whether reportable : Yes/No