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IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.8797 of 2017

Kallamudin Khan .... ***Petitioner***

-versus-

Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court, Bhubaneswar and others .... ***Opposite Parties***

Learned advocates appeared in the case:

For petitioner : Mr. Darpanarayan Pattnayak, Advocate

For opposite parties : Mr. Debaraj Mohanty, Advocate

CORAM:

JUSTICE ARINDAM SINHA

JUSTICE SIBO SANKAR MISHRA

Dates of hearing : 01.11.2023 and 08.11.2023

Date of judgment : 08.11.2023

ARINDAM SINHA, J.

1. Petitioner is a workman, who had raised a dispute regarding refusal of employment. The Central Government, by order dated 17th April, 2006 referred the dispute as per schedule therein. Text of the schedule is reproduced below.

> *"**Whether the action of the management of M/s IOCL**, Jatni Depot, Khurda **in refusing employment to Sri Kallamuddin Khan w.e.f. 17/6/2003 through their Contractor M/s. Shakti Marketeers** instead of regularizing his service in M/s IOCL, **even after rendering more than 8 years of continuous service to the organization in regular & perennial nature of job, is legal and justified**? If not, what relief the workman is entitled to?"*

(emphasis supplied)

2. Mr. Pattnayak, learned advocate appears on behalf of the workman and Mr. Mohanty, learned advocate, for the principal employer. Opposite party no.4 is the contractor. Said opposite party has chosen to go unrepresented inspite of good service.

3. We have ascertained from appearing learned advocates that the principal employer had unsuccessfully challenged the order of reference by writ petition to this Court. Co-ordinate Bench by **judgment dated 20th April, 2011** in **WP(C) no.8567 of 2006 (Indian Oil Corporation Limited v. Union of India and others)** dismissed the challenge on imposing cost of ₹ 5,000/-, pursuant to view taken that the management had unnecessarily questioned validity of the order of reference. It will be sufficient for us to extract and reproduce two sentences from paragraph 8 of the judgment.

> "8. xxx xx xxx *Therefore, the points of dispute formulated in the Schedule is perfectly legal and valid and the appropriate Government is competent to make the reference.* ***Whether it is an industrial dispute or not is a fact to be ascertained by the Tribunal/Labour Court in the enquiry required to be conducted under the I.D. Act****."*
>
> (emphasis supplied)

We have also been told that the management thereafter was unsuccessful in obtaining leave to prefer appeal in the Supreme Court. The special leave petition was dismissed by order dated 8th July, 2011. The reference was thereafter adjudicated by the Central Government Industrial Tribunal (CGIT) and impugned award dated 24th June, 2016 made.

4. On behalf of the workman first submission is, the point of reference was not answered. As such, impugned award is liable to and should be set aside and quashed. Without prejudice the alternative submission that finding in the award is perverse. Management witness (MW-1) had clearly admitted to have competence to depose only on and from year, 1997. He, therefore, could not have deposed on petitioner's engagement prior thereto, from year, 1994. Petitioner had worked as office boy in the earlier period and, thereafter, wrongfully

shown to have been transferred to the contractor and engaged through him as 'handler'. Everything regarding the workman was initially done by the principal employer and subsequently through its contractor. In the circumstances and where the point of reference clearly stated the workman had rendered more than 8 years continuous service to the organization in regular and perennial nature of job, the question to be answered was whether refusal of the employment was justified. Instead, the tribunal said the workman was never engaged, neither by the principal employer nor by the contractor.

5. Mr. Pattnayak relies on **judgment dated 5th February, 2004** of the Supreme Court in **Appeal (civil) 1351-53 of 2002 (Workmen of Nilgiri Coop. Mkt. Society Ltd. v. State of Tamil Nadu and others)**. Relied upon passage is reproduced below.

> *"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 the 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 wherein the Court pierced the veil and declared the correct position as a fact at the stage after employment of contract labour stood prohibited; (iii) where in 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."*
>
> (emphasis supplied)

6. Mr. Pattnayak relies on another judgment of the Supreme Court in **Silver Jubilee Tailoring House v. Chief Inspector of Shops and Establishments** reported in **(1974) 3 SCC 498**, paragraph-11, reproduced below.

> "*11. The question for decision was whether the agarias were workmen as defined by Section 2(s) of the Industrial Disputes Act of 1947 or whether they were independent contractors. The Court said that the* ***prima facie test to determine whether there was***

> ***relationship between employer and employee is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the employee is to do but also the manner in which he had to do the work****. In other words, the proper test according to this Court is, whether or not the master has the right to control the manner of execution of the work. The Court further said that the nature of (sic) extent of the control might vary from business to business and is by its nature incapable of precise definition, that it is not necessary for holding that a person is an employee that the employer should be proved to have exercised control over his work, that even the test of control over the manner of work is not one of universal application and that* ***there are many contracts in which the master could not control the manner in which the work was done****."*
>
> (emphasis supplied)

He submits, applying the judgment will result in finding that impugned award is perverse inasmuch as control by the principal employer either on directing what work his client was to do or the manner in which he has to do the work cannot be said to be of universal application and the Supreme Court declared that there are

many contracts, where the master could not control the manner in which the work was done.

7. On behalf of the principal employer submission is that the tribunal found on facts that there was no office in the period commencing year, 1994 to year, 1997. In the circumstances, consequent finding of fact was that there was no engagement of the workman by the principal employer in that period. The workman had forged a certificate as from MW-1. Further finding of fact was, there was no engagement through the contractor. The tribunal had answered issue no.1 in favour of both, the principal employer and the contractor. We reproduce below the issues framed from impugned award.

HIGH COURT ORISSA सत्यमेव जयते

"Issues.

1. ***Whether the disputant Shri Kallammuddin Khan has even been a workman under the 1st Party-Management No.1 and 3****.*

2. Whether the action of the Management of M/s. IOCL, Jatni Depot, Khurda in refusing employment to Shri Kallammuddin Khan w.e.f. 17.6.2003 through their Contractor M/s. Shakti Marketers, instead of regularizing his service in M/s. IOCL, even after rendering more than 8 years of continuous service to the organization in regular & perennial nature of job, is legal and justified?

3. If not, what relief the workman is entitled to?"

(emphasis supplied)

Mr. Mohanty disputes application of **Silver Jubilee Tailoring House** (supra) to facts in this case.

8. It is necessary for us to quote below sub-section (4) in section 10 of Industrial Disputes Act, 1947.

> *"10(4) Where in an order referring an industrial dispute to a Labour Court, Tribunal or National Tribunal under this section or in a subsequent order,* ***the appropriate Government has specified the points of dispute for adjudication****, the Labour Court or* ***the Tribunal*** *or the National Tribunal, as the case may be,* ***shall confine its adjudication to those points and matters incidental thereto****."*
>
> (emphasis supplied)

Applying the provision to the schedule of reference it is clear that the tribunal was to answer, either in the affirmative on holding that the refusal of employment was legal and justified or in the negative, to say that it was illegal and unjustified. To enquire into by trial and come to finding that petitioner was never employed was not what was required to be answered, even as being incidental to the order of reference. However, co-ordinate Bench by **judgment dated 20th April, 2011** (supra) had left open to the tribunal to decide whether the

dispute is an industrial dispute on facts to be ascertained. The tribunal finding that petitioner was never engaged either by the principal employer nor by the contractor to work for the principal employer but was engaged by the contractor to handle loading and unloading of oil tanker works appears to suggest that the tribunal found there was no industrial dispute. We reproduce below passages from paragraphs 9, 10 and paragraph 12 from impugned award.

> *"9. xxx xxx xxx On the other hand it is emerging from the evidence of the M.W.1 and documents relied upon by the Management that* ***handling contract i.e. loading and unloading of oil tanker in the Jatni Depot was entrusted to the contractor M/s. Shakti Marketers and thus, the evidence adduced before the Tribunal leads to a conclusion that he was working as a labourer of the contractor M/s. Shakti Markerters, who handle the loading and unloading of oil tanker works****.*
>
> *10. xx xx xx Hence doubt can be entertained regarding existence of any "employer and employee" relationship between the 1st party-Management and the workman Kallammuddin Khan and as such it cannot be accepted that the workman was ever employed under the 1st Party-Management as a contract labourer.*

> *"12. In view of my above findings that* ***Kallammuddin Khan was not ever appointed or he worked in any capacity being employed by the 1st Party-Management or worked as a contract labourer through M/s. Shakti Marketers it cannot be held that he was refused employment*** *by the 1st Party-Management either directly or through M/s. Shakti Marketers and as such he is not entitled to any regularization"*
>
> (emphasis supplied)

Hence, issue no.1 and answer in favour of the management parties.

9. Above finding by the tribunal is urged to be in teeth of the principal employer's unsuccessful challenge to the order of reference. We have already quoted above the order of reference and a paragraph from the judgment of co-ordinate Bench, dismissing the challenge mounted by the principal employer. The schedule clearly formulated the point for answer to be whether refusal of employment with effect from 17th June, 2003 instead of regularizing the workman even after rendering more than 8 years of continuous service to the organization in regular and perennial nature of job, was legal and justified. Embodied in the point of reference were refusal of employment with effect from 17th June, 2003 and the workman having had rendered more than 8 years of continuous service to the organization in regular

and perennial nature of job. We clearly understand why the principal employer challenged the order of reference but it was unsuccessful, both before this Court and the Supreme Court, where the special leave petition was dismissed.

10. Nevertheless, we must notice that the Tribunal did enquire and find, as has been submitted on behalf of the principal employer that admitted fact was non-existence of office in period between year 1994 and year 1997. Petitioner's contention before the tribunal was, he was engaged as office boy in the period. Further finding on fact by the tribunal was that petitioner had forged a certificate saying so. Still further finding of fact was, the contractor had engaged petitioner as 'handler' for loading and unloading oil tanker works in executing his handling contract. There has been no attempt by petitioner to assail the findings on perversity.

11. Regarding **Silver Jubilee Tailoring House** (supra) it is necessary to also reproduce below paragraphs 28 and 30 from the judgment.

> *"28. It is exceedingly doubtful today whether the search for a formula in the nature of a single test to tell a contract of service from a contract for service will serve any useful purpose. The most that profitably*

can be done is to examine all the factors that have been referred to in the cases on the topic. Clearly, not all of these factors would be relevant in all these cases or have the same weight in all cases. It is equally clear that no magic formula can be propounded which factors should in any case be treated as determining ones. ***The plain fact is that in a large number of cases, the court can only perform a balancing operation weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction*** *(12).*

xxx xxx xxx xxx xxx xxx

30. The fact that generally the workers attend the shop which belongs to the employer and work there, on the machines, also belonging to him, is a relevant factor. When the services are performed generally in the employer's premises, this is some indication that the contract is a contract of service. It is possible that this is another facet of the incidental feature of employment. This is the sort of situation in which a court may well feel inclined to apply the "Organisation" test suggested by Denning, L.J. in Stevenson Jordan and Harrison v. Mac. donal and Evans.(14).''

(emphasis supplied)

12. We have given our careful consideration to the paragraphs from the judgment reproduced in the last preceding and paragraph 6 above. The Supreme Court said that it is exceedingly doubtful today whether the search for a formula in the nature of a single test to tell a contract of service from a contract for service, will serve any useful purpose. Nevertheless, it also said that the most that profitably can be done is to examine all the factors that have been referred to in the cases on the topic and then taking relevant factor of where the workman was working, may also apply the 'organization' test. It transpires that petitioner, relying on the judgment, is therefore contending that finding on issue no.1 suggesting there was no industrial dispute on absence of employer workman relationship, as not existing neither between petitioner and principal employer nor between petitioner and the contractor, is perverse. We have already reproduced above findings in impugned award on issue no.1 framed in the reference. The tribunal clearly found that petitioner was neither engaged by the principal employer nor by the contractor, qua principal employer. The tribunal was clear in finding that there was handling contract awarded to M/s. Shakti Marketers, to execute which the contractor had engaged petitioner. By the award the tribunal also had recorded its finding that the handling contract was

not fictitious, or as said, a camouflage. Hence, so far as the reference is concerned, no relief for petitioner was directed in impugned award.

13. **In Nilgiri Coop. Mkt. Society Ltd.** (supra), relied upon passage is regarding where the principal employer had acted through the contractor in creating camouflage. Facts found by the tribunal do not attract application of the decision.

14. In view of aforesaid the tribunal appears to have adjudicated on the dispute referred keeping in mind said **judgment dated 20th April, 2011** (supra). As such interference in judicial review is not warranted.

15. The writ petition is dismissed.

(Arindam Sinha)
Judge

(S. S. Mishra)
Judge

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