(2007) 01 GAU CK 0034

Gauhati High Court

Case No: None

Management of Food Corpn. of india		APPELLANT
	Vs	
Central Govt. Industrial Tribunal and Another		RESPONDENT

Date of Decision: Jan. 9, 2007

Acts Referred:

- Constitution of India, 1950 - Article 38, 39, 43, 43A
- Industrial Disputes Act, 1947 - Section 10, 2, 25, 25B, 25F

Citation: (2007) 115 FLR 102 : (2007) 2 GLT 789

Hon'ble Judges: Amitava Roy, J

Bench: Single Bench

Judgement

Amitava Roy, J.

The award dated 19.08.1996 passed by the Central Government Industrial Tribunal, Calcutta, (hereinafter referred to as the Tribunal) rendered in Reference No. 42/1981 directing reinstatement of the persons involved in the industrial dispute with back wages as indicated herein constitutes the subject matter of the instant proceeding. Being aggrieved thereby, the Food Corporation of India, Guwahati, (hereafter referred to as the Corporation) is before this Court seeking redress.

2. I have heard Mr. P.K. Roy, learned Standing Counsel for the Corporation assisted by Mr. S.K. Chakraborty, Advocate. By application No. Misc. Case 57/2000, seven such persons had prayed for their impleadment as party respondent. On a consideration of the statements made, the prayer is hereby allowed. The applicants would stand impleaded as respondents 3 to 9. I have heard Mr. I. Hussain, Advocate for the newly impleaded respondents.

3. The facts in brief leading to the filing of the instant petition are that on an industrial dispute being raised contending that 12 persons engaged by the Sr.

Regional Manager of the Corporation through its handling contractor M/s NBN Enterprise had been illegally and unjustifiably terminated from service on 01.03.1980, the Government of India by Order No. L42011/12/81FCIDIV (A) dated 26.10.1981 in exercise of its powers u/s 10(1)(d) of the Industrial Disputes Act, 1947, (hereafter referred to as the Act) referred the same to the learned Tribunal for adjudication. The term of reference was as hereunder--

Whether the termination of service of Sarbashree Md. Hanif, Md. Halim, Mr. Mustaifa, Ram Nath Mahatu, Lakshman Shah, Ram Kishan Yadav, Md. Sarif, Md. Nuralam, Bindu Rai, Dwarika Gupta, Seikh Khaguddin and Sagir Ahmed engaged by the Sr. Regional Manager, Food Corporation of India, Guwahati (Assam) through the handling contractor M/s NBM Enterprise, FCI, contractors, Gochaigaon Depot is justified?

4. The proceeding was registered as Reference No. 42/1981 and being notified the parties entered appearance therein.

5. In its written statement, the Corporation assailed the reference to be bad in law in view of the bar under the Contract Labour (Regulation and Abolition) Act, 1970. Its categorical plea inter alia was that the persons involved have not been employed by it but were engaged through its contractors. It pleaded that its depot at Gochaigaon had no labour employed by it and the administrative staff in its rolls was only posted there. It maintained that all the handling and other allied works at the depot were being executed by the contractor(s) appointed and that the persons involved had been engaged by the said contractor at the depot. Contending that it had no control over the said labourers, it asserted that they were engaged by M/s NBN Enterprise and were under the supervision of the said contractor, payments also being made by it.

6. Per contra, the persons disengaged (hereafter for convenience referred to as workmen as well) in their written statement stated that the Corporation at its Gochaigaon Depot employed 62 handling labourers who worked in groups of fourteen composed of one Sardar, one Mandal and twelve Loaders. According to them, they had been working as industrial Mazdoor along with 15 others since 1968 at the said depot and their services were supervised by the officers at the Corporation. They were under its direct control and were also paid by it. They alleged that M/s NBN Enterprise, a contractor of the Corporation terminated their services orally w.e.f. 01.03.1980 without assigning any reason. Asserting that the industrial labourers at Gochaigaon depot were the permanent and regular staff of the Corporation, they contended that their termination was in violation of Section 25F and 25G of the Act.

7. The parties exchanged further pleadings, a reference thereof being considered unnecessary to avoid repetition of the facts. In the reference both the parties adduced evidence, both oral and documentary. Where as the Corporation examined

two witnesses, the workmen also examined witnesses of equal number. The learned Tribunal on a consideration of the pleadings of the parties ''and the evidence on record, by the impugned award directed that the 12 persons involved in the dispute were entitled to the back wages calculated @ 15 days for every month for the period for which they were out of service.

8. Before adverting to the rival submissions, it would be appropriate to record the conclusions of the learned Tribunal. On the aspect of the status of the persons involved, it held that they were engaged by the Sr. Regional Manager, FCI, and that the role of M/s NBN Enterprise was limited to mustering them therefor. It acted on the evidence of Shri Motilal Saha, WW1, that the Contractor had been asked only to supply labour and that the Corporation employed them when they were produced before it for the said purpose. His testimony that the job of handling labour was to lower the food grains from trains and trucks and to reload it in the trucks and trains for the Corporation under the supervision of its staff was taken note of. The evidence of the said witness that the Corporation maintained their attendance register was also recorded. The learned Tribunal also noticed the testimony that the system was prevalent from before 1970 and that the Contractor was not the employer of the handling mazdoors and did not at all supervise their work.

9. The evidence of Md. Hanif Sardar, WW2, to the effect that he had been continuously working since 1968 and that the 12 workmen involved belong to the batch of 62 such workers was taken note of. The learned Tribunal, on a consideration thereof concluded that the 12 persons had been engaged in the service of the Corporation since 1968 with the change of Contractors thereof in between and thus were its employees. It drew an adverse presumption against the Corporation for non-production of relevant records including the agreement with the Contractors in authentication of its stand that the workmen involved were not in its rolls.

10. The learned Tribunal, however, negated the challenge of their termination being violative of Section 25F of the Act, holding that the workmen had failed to establish that they had been in continuous service as defined in Section 25B thereof. While appreciating the evidence adduced on behalf of the workmen, the learned Tribunal noticing the testimony of WW2 to the effect that they had worked for about 20 days in a month during the period of their service, held that the workmen had failed to prove that they had actually worked for 240 days within a period of 12 calendar months preceding their termination. It, therefore, concluded that they were not entitled to be reinstated in service for retrenchment in violation of Section 25 of the Act.

11. While dwelling on the grievance of contravention of Section 25G of the Act, the learned Tribunal started on the premise that the assertions made in the paragraph 80 of the written statement of the workmen had remained unrebutted, the Corporation having failed to controvert the same in its written statement. Referring

to the evidence of WW2 to the effect that out of 62 handling labours engaged, 12 of them had been retrenched while others were allowed to continue, the learned Tribunal was of the opinion that the pleadings in para 8(j) of the workmen stood substantiated and that the mandatory requirement of Section 25G of the Act had been violated. In coming to the said conclusion, the learned Tribunal observed that the Corporation had neither denied the said allegation nor had adduced any evidence countering the same. Following the said determination, the order of reinstatement with backwages as above was passed.

12. Assailing the findings of the learned Tribunal bearing on the status of the persons involved and contravention of Section 25G of the Act, Mr. Roy has assiduously urged that those are patently illegal and unsustainable in law. According to the learned Counsel, the finding qua the status of the persons as workmen is nonest in law, the same having been arrived at by leaving out of consideration, the evidence adduced by the Corporation as available on records. Drawing the attention of this Court to the award, Mr. Roy has argued that the learned Tribunal not having referred to the evidence of the Corporation on this issue, its conclusion that the persons involved were its (Corporation) workmen is on the face of the records, perverse. Without prejudice to the above, the learned Counsel has urged that even otherwise the evidence adduced by the workmen does not establish any continuity in service with the Corporation so as to claim the status of workmen u/s 2(s) of the Act. According to him, the learned Tribunal, therefore, had rightly held that their disengagement did not contravene Section 25F. As the evidence adduced by the workmen indicates their deployment by the Corporation''s Contractor M/s NBM Enterprise, having regard to the casualness in their employment, they could not be construed to be its workmen.

13. Mr. Roy further urged that the learned Tribunal having rejected the plea of infringement of Section 25F, it erred in directing reinstatement on the ground of violation of Section 25G. The persons involved not being workmen within the meaning of the Act, the Corporation was not under any obligation in law to maintain their records more particularly to display their seniority in service with it and, therefore, the learned Tribunal fell in error in sustaining the plea of impingement of Section 25G. The workmen having failed to adduce any evidence to discharge their burden to substantiate their claim of being so with the Corporation and that the principle of last come first go had not been adhered to, the contention of the workmen based on Section 25G ought to have been summarily rejected, he urged. In support of his submissions, Mr. Roy has placed reliance on the decision of the Apex Court in Manager, R.B.I., Bangalore Vs. S. Mani and Others, , Surendranagar District Panchayat and Another Vs. Jethabhai Pitamberbhai, , R.M. Yellatti Vs. The Assistant Executive Engineer, , The Haryana State Agricultural Marketing Board Vs. Subhash Chand and Another, and Manager (Now Regional Director) R.B.I. Vs. Gopinath Sharma and Another, .

14. Mr. Hussain in reply has insisted that the learned Tribunal having held the persons involved in the dispute to be workmen on an appropriate consideration of the evidence on record, no interference therewith by this Court in exercise of its writ jurisdiction is warranted. Contending that the evidence of the Corporation on the issue of workmen being of no significance what so ever, the learned Counsel urged that mere omission on the part of the Tribunal to refer to it per se does not invalidate its conclusion pertaining thereto. According to him, the learned Tribunal rightly declared the persons disengaged to be the workmen of the Corporation.

15. Mr. Hussain referring to Section 25G of the Act and Rule 77 of the Industrial Disputes (Central) Rule, 1977 (hereafter referred to as the Rules) has maintained that a plain reading thereof discloses a legal obligation of the employer to retrench the last person employed in absence of any agreement to the contrary. As the Corporation in the instant case failed to discharge its onus of establishing that the mandate of the above legal provisions had been complied with, the learned Tribunal was perfectly justified in invalidating the retrenchment of the workmen being violative of Section 25G of the Act. To buttress his contentions, the learned Counsel has placed reliance on the decision of the Apex Court in Hussainbhai, Calicut Vs. The Alath Factory Thezhilali Union, Kozhikode and Others, and Calcutta Port Shramik Union Vs. Calcutta River Transport Association and Others,

16. I have extended my thoughtful consideration to the rival submissions. Noticeably the finding of the learned Tribunal rejecting the impugnment based on Section 25F of the Act has remained unassailed. Consequently the conclusion of the learned Tribunal that the workmen had failed to establish to have served for 240 days in the 12 calendar months immediately preceding their termination has attained a finality.

17. The above notwithstanding, the declaration of the learned Tribunal vis-a-vis the status of all the persons involved needs scrutiny in view of the competing assertions. The evidence of the workmen as recorded by the learned Tribunal has been noticed hereinabove. A reading of the award makes it evident that the learned Tribunal in adjudicating this issue had not referred to the evidence of the management at all. Though Mr. Roy on this count was emphatic in urging that having regard to the constricted scope of the power of judicial review, the matter deserves to be remanded for a fresh appreciation of the evidence on record as a whole, bearing in mind the period that has elapsed in between, I am not inclined to adopt that course. The controversy claims an early quietus. It is, therefore, felt expedient in the above circumstances to consider the evidence of the management''s witnesses to assess the bearing thereof on the issue of the status of the workmen involved.

18. MW1, SP Sabale, Chief Labour Inspector, was categorical in stating that in the Corporation, there were departmental workers, direct payment system workers and contract labours and that the workmen involved in the reference were labours of the Corporation''s Contractor M/s NBM Enterprise. The said witness inter alia proved

exhibit M1, the list of registered contractors of the Corporation, which, according to him, included M/s NBM Enterprise.

19. MW2, Shri D.N. Sarkar, Inspector Grade I of the Corporation deposed that between 1978 to 1981, 30-40 handling Mazdoors were engaged at the Gochaigaon Depot. According to the witness, they were not employed by the Corporation but by its Contractor M/s NBM Enterprise. The witness further disclosed that the Contractor used to supervise the work of the handling Mazdoors and also paid their wages. It was further testified that the Corporation had no control over the handling Mazdoors engaged by the Contractor and that, therefore, it did not grant any leave to them or maintain any attendance register enlisting them. The witness was categorical in stating that the Corporation maintained only one attendance register incorporating its office staff. The said register was proved as exhibit M-10.

20. The evidence of the Management''s witness noticed herein above even if accepted on its face value demonstrate that the workmen involved were engaged as handling Mazdoors at the Gochaigaon Depot being employed by its Contractor, M/s NBM Enterprise and that they were neither registered in its rolls as its workmen nor did it use to supervise their works. Their wages were paid by the Contractors and that except the services rendered by the said handling Mazdoors for the Corporation, there was no other nexus or bond so as to render them workmen under it.

21. A common and prominent feature of the evidence of both sides is that the workmen concerned at the relevant time were working as handling contractors at Gochaigaon Depot rendering their services. Whereas the workmen assert that they were the permanent and regular employees of the Corporation and were thus entitled to the corresponding recognition and privilege under the Act, the latter disowned the claim contending that they had been merely detailed by its Contractor for the handling works.

22. The test to determine the relationship of employer and employee or a workmen and employer in the context of industrial jurisprudence was dilated upon by the Apex Court in Hussainbhai, (supra). The petitioner therein was a factory owner manufacturing ropes and a number of workmen were engaged therefore within the factory. They, according to the petitioner, were hired by the Contractors who had executed agreement with him to get such work done. The petitioner, therefore, contended that the persons engaged were not his workmen but those of the Contractor.

23. In the industrial dispute that emerged, the Industrial Court held the persons engaged in making ropes to be the petitioners'' workmen. The challenge eventually was taken to the Apex Court. It was noticed that the work done by the persons concerned was an integral part of the industry of the petitioner and that the raw materials for the production was supplied by the Management. Not only the

equipments used belonged to it, the finished products were taken by it for its own trade. On a cumulative consideration of the above factors, the Apex Court refused to interfere with the determination of the industrial Court. While differentiating the subtle distinction between the classical law of contract and the industrial law, the Apex Court observed as hereunder:

The true test may, with brevity, be indicated once again. Where a worker or group of workers labours to produce goods or services and these goods or services are for the business of another, that other is, in fact, the employer. He has economic control over the workers'' subsistence, skill and continued employment. If he, for any reason, chokes off, the worker is, virtually, laid off. The presence of intermediate contractors with whom alone the workers have immediate or direct relationship ex contractu is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, we discern the naked truth, though draped in different perfect paper arrangement, that the real employer is the Management, not the immediate contractor. Myriad devices, half-hidden in fold after fold of legal form depending on the degree of concealment needed, the type of industry, the local conditions and the like may be resorted to when labour legislation casts welfare obligations on the real employer, based on Articles 38, 39, 42, 43 and 43A of the Constitution. The Court must be astute to avoid the mischief and achieve the purpose of the law and not be misled by the maya of legal appearances.

24. The Apex Court thus propounded that if the livelihood of the workmen substantially depends on labour rendered to produce goods and services for the benefit and satisfaction of the enterprise, the absence of direct relationship or the presence of dubious intermediaries or the make-believe trappings of detachment from the Management cannot snap the real life-bond.

25. The facts as obtained in the case in hand do not admit of the application of the profound legal proposition adumbrated in Hussainbhais, (supra). The contextual facts therein demonstrated pronounced and inseparable nexus between the petitioner and the workmen involved establishing their employment under him. The Apex Court, on the assessment of the attendant facts, concluded that they were under the control of the petitioner. The workmen in the present case have failed even to prove their continuous engagement under the Corporation to be entitled to the protection of Section 25F of the Act. This assumes significance in face of the consistent and categorical stand of the Corporation disowning them to be in its rolls as its employees. The required association of the persons involved with the Corporation as conceived of in Hussainbhai, (supra), is not decipherable. The learned Tribunal''s findings recognizing the status of the persons involved as workmen of the Corporation having regard to the totality of the facts thus cannot be sustained.

26. Before elaborating on the aspect of Section 25G it would be apt to notice some of the authorities relatable to Section 25F. The Apex Court in Manager, Reserve Bank

of India, Bangalore, (supra), Surendranagar District Panchayat (supra), and R.M. Yellatti (supra), has consistently held that the burden of proving that a workman had been in continuous service within the meaning of Section 25B of the Act, is on him in order to succeed in his challenge to his retrenchment alleged to be in violation of Section 25F. In view of the determination of the learned Tribunal in this regard which remains unquestioned in the instant proceeding, any further discussion on the said pronouncements is inessential.

27. Section 25G enjoins upon the employer to adhere to the norm of last come first go in the matter of retrenchment. In other words, the employer in such an eventuality is obliged to retrench the workman who was the last person to be employed unless, formidable and persuasive reason to the contrary exists to justify retrenchment of any other workman. Rule 77 of the Rules predicates that an employer would prepare a list of all workmen in a particular category from which retrenchment is contemplated arranged according to the seniority of their service in that category and cause a copy thereof to be pasted on a notice board in a conspicuous place in the premises of the industrial establishment at least seven days before the actual date of retrenchment. The above provision of the Rules, therefore, stipulates an obligation of the employer to prepare a list of workmen contemplated to be retrenched according to their seniority in service.

28. The mandate noticeably pre-supposes that the workmen involved would not only have to be in the rolls of the industrial establishment but also in its permanent service. To put it differently, such a requirement is inconceivable vis-a-vis persons engaged in casual, intermittent and part time works with no continuity in employment. The insistence for preparation of a list of workmen in order of seniority when they are not in regular service of an industrial establishment but engaged from time to time or day to day or work need basis, is not the enjoinment of the said provision. Such a requirement in my opinion, having regard to the underlying objective thereof, would be illogical and unrealistic. This assumes importance in view of the stand taken by the Corporation.

29. The materials on record do not establish that the workmen were in the permanent rolls of the Corporation. As a matter of fact, WW2, Md. Hanif in his evidence stated that the persons concerned used to work for about 20 days in a month till they were disengaged. This, to say the minimum, suggests lack of continuity. It is incomprehensible that a person in the rolls of an industrial establishment can afford to render his services only for 20 days in a month unless in a given fact situation a contract to the contrary exists. The records are conspicuously silent on this aspect. True it is that the Corporation did not produce any material to establish that a list of the handling contractors engaged to render services to it had been prepared as contemplated in Rule 77. The recorded facts also do not evince that any prayer was made on behalf of the workmen before the learned Tribunal for production thereof. Be that as it may, bearing in mind the stand of the Corporation,

disowning the workmen to be in its rolls, one has to proceed on the basis that no such document exists. The above notwithstanding, having regard to the Corporation''s pleaded case, its omission to prepare a list of the workmen in order of seniority cannot in the peculiar fact situation be said to be in contravention of Section 25G or Rule 77 of the Rules. Non-preparation of a list of the Corporation''s handling contractors in order of seniority considering its stand and the incoherent nature of their employment and service thus would not ipso facto demonstrate contravention of Section 25G and Rule 77 of the Rules. In view of the above, I am constrained to hold that the finding of the learned Tribunal on this aspect of the lis, in the facts and circumstances of the case, cannot be sustained and is thus liable to be interfered with. Ordered accordingly.

29. The award, therefore, in so far as it relates to the determination vis-a-vis the status of the workmen, Section 25G and the direction of reinstatement in backwages is set aside. The petition is partly allowed. No costs.