(2014) 11 GAU CK 0022

Gauhati High Court

Case No: Writ Petition (Civil) No. 3654 of 2010

Deba Kanta Das		APPELLANT
	Vs	
Oil and Natural Gas Corporation Limited		RESPONDENT

Date of Decision: Nov. 27, 2014

Acts Referred:

- Contract Labour (Regulation and Abolition) Act, 1970 - Section 10, 12

Citation: (2015) 146 FLR 764 : (2015) 2 GLD 432 : (2015) LabIC 1166 : (2015) 2 LLJ 427

Hon'ble Judges: Hrishikesh Roy, J

Bench: Single Bench

Advocate: A. Dasgupta, Sr. Advocate and A. Mukherjee, Advocate for the Appellant; G.N. Sahewalla, Sr. Adv., B.K. Das, Asstt. S.G.I., P.K. Roy, S.K. Chakraborty, A. Chakraborty and M. Dutta, Advocate for the Respondent

Judgement

Hrishikesh Roy, J.
Heard Mr. A. Dasgupta, learned Sr. counsel representing the petitioners. Also heard Mr. G.N. Sahewalla, learned Sr. counsel representing the ONGC and their Executive Director. The Union of India is represented by Mr. J. Deka, learned Central Govt. counsel.

2. The petitioners challenge the award dated 15.05.2009 (Annexure-G) in the Reference Case No. 3(C)/1996, whereby the learned Industrial Tribunal, Guwahati held that the 11 workmen are not entitled to regularization/equal wages, at par with the permanent security guards under the ONGC, but they are entitled to continue as contract labourer under the labour contractors engaged by the Management. This 2nd award was given on remand of the matter by this Court, through its judgment dated 21.05.2004 (Annexure-D) in the WP(C) No. 8368/2001, wherein the High Court held that there is inadequate evidence on record for the Industrial Tribunal to answer the reference on demand for regularization/equal pay, claimed by 11 workmen. In the 1st round, through the award dated 30.11.2000 (Annexure-C) the

Industrial Tribunal declared that the works of security guards of ONGC is perennial in nature and consequently the Management was directed to regularize the services of the workmen and to pay equal remuneration at par with regular employees of their status, till they are regularized in service.

3. Before the Tribunal the following issue was referred for adjudication:

"Whether the demand for regularization by management of Oil & Natural Gas Corporation, Nazira and equal wages at per with their direct counterparts by Shri Jatin Kr. Nath, Md. Safiratdin Ahmed, Deba Kanta Das, S.K. Nurmahammad Ali, Sri Sreeprasad Das, Md. Basiratdin Ahmed, Anil Ch. Das, Dijen Kakaty, Pranab Borah, Parag Phukan, Prafulla Das, Bhadra Kanta Das, Rupam Kr. Das, Bipul Borah, Sunil Dey, Atul Ch. Das, Md. Rafiqul Hussain and Bijit Nath is legal and justified? If so, to what relief are those workmen entitled?"

4. On receipt of the reference, notices were issued to both parties, where the workmen pleaded that their family lands was acquired by the ONGC for oil exploration in the year 1986 and there was an assurance that one member of each affected family will be provided employment by the ONGC. Consequent to discussions between the Management, the affected families and the District Authorities, the concerned workmen were engaged in 1986-87 as temporary security guards but when the Management failed to regularize their temporary services, a demand was raised by the workmen and eventually the said demand after failure of conciliation, was referred for adjudication under Section 10 of the Industrial Disputes Act, 1972.

5. On the other hand, the Management claimed that the workmen were employees of the contractors engaged by the ONGC to guard their equipment/drill sites and that there is no employer-employee relationship between the temporary security guards and the ONGC. The Management also pleaded that prohibitory notification under Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 (hereinafter referred to as the "Abolition Act") was not issued against the ONGC and therefore their engagement of security guards through contractors was contended to be legally permissible.

6. After consideration of the rival plea and also the evidence on record, the learned Industrial Tribunal found inherent contradiction in the ONGC''s case in as much as on one hand the Management claimed that the workmen concerned were of the contractors whereas on the other hand, the case projected was that the concerned workmen were the contract employees. But since the ONGC had neither examined any contractors to prove the engagement of the workmen concerned and nor the Management had exhibited any licence for the contractors to employ contract labourers, it was concluded that the concerned workmen were direct employees of the ONGC and therefore they are entitled to regularization of service/equal pay, with permanent employees of same status.

7. But on challenge by the Management to the 1st award dated 30.11.2000 through the WP(C) No. 8368/2001, this Court held that the finding reached by the learned Tribunal were based on insufficient evidence since the Management had not adduced any evidence to satisfy that the workmen concerned were employees of the contractors engaged by the ONGC. Simultaneously from the workmen''s side also, inadequate material was noticed by the High Court to conclude that the workmen were direct employees of the ONGC. Therefore, since evidence was found to be insufficient to correctly answer the referred question, (except for the 6 employees whose cases are outside this proceeding), the High Court remanded the matter back to the Industrial Tribunal for a de novo adjudication for the 11 workmen. It may be noted that the 6 who are excluded from the purview of the remanded exercise were found to be contractors engaged by the ONGC and accordingly the remanded exercise was ordered to be confined to only the balance 11 workmen.

8. Following the remand, the Management instead of adducing any fresh evidence, re-examined the MW-1 Ashok Kr. Hazarika, who stated that the workmen were engaged as security guards through the labour contractors and the ONGC had no direct relationship with these workmen. On the other hand from the workmen''s side, evidence of WW-3 Pranab Borah was introduced. In his testimony made on behalf of his all co-workers, the witness deposed that their family land was acquired by the ONGC for exploration purpose and as per the assurance of the ONGC for employment, interviews were conducted of the candidates sponsored by the local Employment Exchange. This witness proved Exbts.-19 to 27, which were the call letters issued by the ONGC to candidates of the land losers'' family. The witness also proved the multiple meeting(s) with the ONGC, the affected families and public leaders in the chamber of the Sivasagar Deputy Commissioner on 16.07.1986, 01.08.1986 and 10.09.1986 (Exbts.-15, 16 and 17) and projected that because of these meetings, the ONGC was compelled to temporarily engage the concerned workmen for securing the ONGC sites and equipment and because of this, without issuance of any formal appointment order, the workmen were engaged as security guards w.e.f. 1986/87. Similar evidence by another workman Basiruddin Ahmed as WW-4 was also given in the remanded exercise and this witness further stated that some of the engaged workmen were shown as contractors, but this was a paper arrangement made only to derecognize them as direct employees of the ONGC.

9. The Industrial Tribunal heard the matter on several dates, but proceeded on the understanding that the remanded reference is required to be decided only on the additional evidence to be adduced by the parties. In the 2nd round since hardly any additional evidence was tendered, the industrial adjudicator found insufficient evidence to conclude that the workmen were direct employees under the ONGC or that the contractual agreement with the labour contractors are sham and/or camouflage. Consequently, it was declared that the workmen were not entitled to regularization/equal pay as permanent security guards, under the ONGC. But it was

also held that as employees under the labour contractors, they are entitled to continue and draw wages from the labour contractors at the appropriate rate for daily wagers.

10.1 Assailing the legality of the impugned award, Mr. A. Dasgupta, learned Sr. counsel submits that the workmen are erroneously considered to be the employees under the labour contractors as it was a sham plea of the Management to deprive the rights of the workmen engaged as security guards at the drill sites, gas gathering sites and the rig wells of the ONGC.

10.2 The counsel submits that since the Management''s plea was that the workmen were the employees of the contractors, it was the ONGC''s burden to prove that the contractors were licenced under Section 12 of the Abolition Act and accordingly it is argued that the Management''s plea, in the absence of any evidence under Rule 75 of the Contract Labour (Regulation and Abolition) Central Rules, 1971 of the workmen being deployed by the contractors, should not have been accepted by the industrial adjudicator.

10.3 The Sr. counsel submits that the concerned workmen were deployed since 1986/87 as security guards and it was a clear case of contract for service and since the Management failed to adduce any evidence to prove that the security guards were engaged under a contract of service, the workmen should have been considered as direct employees under the ONGC, as the concerned contractors were not produced by the Management although they pleaded that the workmen were engaged through contractors.

11.1 Representing the respondent ONGC, Mr. G.N. Sahewalla, learned Sr. counsel submits that the claim for regularization for service by the temporary workmen cannot be entertained since the Recruitment and Promotion Regulation, 1980 (as amended in 1987) (hereinafter referred to as the "Recruitment Rules") governs the mode of recruitment to ONGC and therefore since the workmen were not engaged through due process as envisaged by the Recruitment Rules, they cannot be considered for regularization.

11.2 According to the Sr. counsel, the 6 labour contractors engaged by the ONGC to provide security service may have also worked as security guards, but this by itself will doesn''t establish that security guards were not deployed through contractors. This submission is made on account of the evidence adduced by the workmen that the so called labour contractors, was a sham arrangement and in fact the so called labour contractors worked as colleagues of the workmen, in their security duties.

11.3 The Management lawyer refers to the agreement dated 01.07.1988 between one Safirat Uddin and the ONGC to project that the labour contractors were engaged to provide security for materials at drill sites and accordingly it is argued that instances of security guards being deployed through contractors is evident from prior to 1995.

12. In cases where a sham contract between the principal employer and the contractor is pleaded to deny direct employment benefits, it is necessary for the industrial adjudicator to consider whether an employer-employee relationship exist between the Management and the concerned workmen. In Balwant Rai Saluja Vs. Air India Ltd., , the Supreme Court after examining the earlier decision on the point concluded that the relevant factors to be taken into consideration for establishment of an employer-employee relationship would include, inter alia, (i) who appoints the workers; (ii) who pays the salary/remuneration; (iii) who has the authority to dismiss; (iv) who can take disciplinary action; (v) whether there is continuity to service; and (vi) extent of control and supervision i.e. whether there exists complete control and supervision.

13. In this case, the workmen''s witness Basirat Uddin (WW-4) had categorically stated that the agreement with the labour contractors was a sham/camouflage to hide the employer-employee relationship between the workmen engaged as security guards in the ONGC establishment with the ONGC. While the Management pleaded that the security guards were deployed through labour contractors, they conspicuously failed to adduce the required licence for the labour contractors, under Section 12 of the Abolition Act.

14. It is well known that to answer the issue on whether the workmen were deployed in a contract of service or in a contract for service, multiple tests are to be applied and the decision cannot be given solely on the basis of the test of control of the manner of work, ownership of tools, chance of profit, risk or loss as these tests are not always conclusive on the issue.

15. In the case in hand, the aspiring family members of the land losers'' families were asked to appear with all their testimonials by the ONGC and Exbts.-19 to 27 are the call letters, which were proved by the workmen''s witnesses. The minute(s) of the meetings in the chamber of the Sivasagar Deputy Commission held on 16.07.1986, 01.08.1986 and 10.09.1986 (Exbts.-15 to 17) also established that demand was made to employ one person from each family and a senior official of the ONGC had agreed to make such appointment. Of course, the workmen could not produce any appointment letters, but their engagement as security guards in the different ONGC establishments since 1986/1987 is clearly established. But the only issue is whether they were engaged under a contract of service through the labour contractors or they were engaged in a contract for service, where there will be employer-employee relationship.

16. Unfortunately, even on remand, the Management failed to adduce any evidence in support of their plea that the workmen were engaged through contractors. This could have been easily proved by the ONGC by proving the register of workmen employed by contractors which is required to be maintained in Form-XIII of the 1971 Rules or by producing the licence issued to the Labour Contractors, under Section 12 of the Abolition Act.

17. In the 1st proceeding before the Industrial Tribunal, it was observed that the Management has failed to establish that the security guards were engaged through contractors. But on the other hand, it was found that the workmen were deployed as security guards since 1986/87 and they were paid monthly salary on the basis of bills prepared by the Management''s Officer and their work was also supervised by the Security Officer of the ONGC. Since the security guards were deployed for last nearly 3 decades at various drill sites, gas gathering sites as well as rig wells of the ONGC, it can be reasonably concluded that the work executed by the security guards is perennial in nature and deployment of such security guards is incidental to the core exploration activities of the ONGC.

18. But unfortunately after the case was remanded by the High Court on 21.05.2004, the Industrial Tribunal proceeded on the basis that fresh finding is required to be given only on the basis of new evidence to be adduced by the parties in the remanded proceeding. But this was certainly not the intention of the judgment in the WP(C) No. 8368/2001 as this Court merely observed that evidence is inadequate to answer the reference made to the Tribunal. But the evidence adduced in the 1st round was certainly relevant and should have been taken into account by the Industrial Tribunal together with the additional evidence (however inadequate), adduced by the parties. In my view, only after considering the entire evidence, the reference should have been answered by the learned Tribunal. But it erroneously considered that the fresh decision is required to be given only on the basis of the additional evidence adduced by the parties and consequently the Tribunal addressed the issued on incorrect premises.

19. In this case, the writ petitioners'' plea that the Management entered into pseudo contract to escape from their liabilities should have been addressed by the learned Tribunal as the concerned workmen were deployed since 1986/87, whereas the labour contractors were engaged by the ONGC only after 1995.

20. Following the above reasoning, but also being conscious of the limited role of the writ court and the primary role of the industrial adjudicator to answer the reference as was held in Dena Nath and others Vs. National Fertilisers Ltd. and others, , I remand the matter back to the Industrial Tribunal, Guwahati (now renamed as Central Government Industrial Tribunal) for a fresh decision by considering the entire evidence adduced by the parties in both rounds. Consequently, the impugned award dated 15.05.2009 (Annexure-G) is held to be unsustainable and the same is quashed.

21. With the above decision, the case is disposed of without any order on cost.