

(1999) 12 CAL CK 0027

Calcutta High Court

Case No: M.A.T. No. 4045 of 1998

Calcutta Metropolitan
Development Authority

APPELLANT

Vs

Ajit Kumar Majumdar and Others

RESPONDENT

Date of Decision: Dec. 17, 1999

Acts Referred:

- Contract Labour (Regulation and Abolition) Act, 1970 - Section 10(1), 10(2)

Citation: (2000) 86 FLR 7 : (2000) 2 LLJ 505

Hon'ble Judges: Samaresh Banerjee, J; S.N. Bhattacharjee, J

Bench: Division Bench

Advocate: Pradip Kr. Ghosh, Partha Sarathi Bose and Aniruddha Bagchi, for the
Appellant; Abhijit Choudhury, for the Respondent

Final Decision: Allowed

Judgement

S.N. Bhattacharjee, J.

The writ petitioners are contract labourers who have been working under the respondent, Calcutta Metropolitan Development Authority (CMDA for short) as Security personnel in the Howrah sub-way under direction and control of Assistant Engineer and Executive Engineer since 1975. During this period he filed a writ petition claiming absorption in the employment of CMDA in the respective posts along with fitment in proper scales as CMDA is their real owner as the Duty Roster, Medical Leave and Leave Register, Bills are prepared by the Executive Engineer. Their work was supervised by CMDA and disbursed wages through the petitioner. The contractor is only a little man. The CMDA on the other hand have asserted that the writ petitioners are the employees of Secret Information and Detective Services at 72/4, S.N. Banerjee Road, Calcutta (SIDS for short) who are acting as contractors. The petitioners worked under the direct control and supervision of the SIDS appointed by the CMDA. The CMDA only oversees the work of the petitioners as per stipulation of contract entered into between the CMDA and the contractor of SIDS,

CMDA from time to time appointed contractor on the basis of its selection procedure based on invitation of tenders/quotations and the privity of contract is between CMDA and the contractor. Moreover the particular project in connection with which the contractor was engaged has really come to an end. In view of the pendency of the interim order by this High Court, CMDA was not able to terminate the contract even though the services of the said contractor are no longer required.

2. The learned trial Judge held that regularisation or absorption can be done even if the nature of the job is perennial and there is no contrary provision with the recruitment rules for engagement/appointment. According to him, the relationship of master and servant can only be said to have been existing when the master is paying the salary to the employee, the master is having each and every moment supervisory and administrative control in the performance of the duty of the employee. On such findings a writ of mandamus was issued directing "The CMDA Authority to regularise and/or absorb the petitioners in its regular cadre removing the so-called existence of the contractor who is in no way having any dominant role to stand in between the CMDA, principal employer and the writ petitioners."

3. The present appeal against the order of the learned writ Court is under challenge. The only question that has been raised before us is whether the learned writ Judge in the facts and circumstances of this case has jurisdiction to direct the respondent to regularise and absorb the writ petitioners in its regular cadre instead of relegating the writ petitioners to the appropriate Government for issuing notification u/s 10(1) of the Contract Labour (Regulation and Abolition) Act, 1970.

4. The learned Counsel for the appellant has taken us through various decisions of the Apex Court from the pre-enactment period till this date and submitted that the writ Court generally exercises writ jurisdiction of judicial review and factual adjudication will be done by either the State Government or the Industrial Forum depending on the facts of the case. The High Court may straightaway issue a writ in the nature of mandamus for permanent absorption of the workmen on a very rare occasion when the preponderance of facts and circumstances would unmistakably establish by incontrovertible materials, which can be translated into admissible and relevant evidence, that factual existence of employer-employee relationship between the workers and the principal employer is clearly beyond dispute. According to him, the learned trial Judge has failed to appreciate that when the contractor enters into a contract for mere supply of labour, such as supply of security guards, quite obviously, the decision as to how to use them for the purpose of needs of the establishment of the principal employer will have to be taken by the principal employer. So also the allotment of duty, supervision of work, issue of instruction etc. will have to be done by the principal employer. To that extent some element of man-management would be necessary on the part of the principal employer. That by itself will not make the contract labourers the employees of the principal employer. It would be wrong to conclude from these facts that an

employer-employee relationship has been created thereby. He has further submitted that when the factual allegations made by the petitioners in their writ application are disputed by the respondent and when there is no unimpeachable material showing that that contract was sham or that the petitioners were in reality the employees of CMDA, the learned writ Judge was not justified to issue a writ straightaway in the nature of mandamus.

5. The learned Counsel for the respondent has strongly supported the judgment passed by the learned single Judge by submitting that the writ petitioners working for CMDA, receive salaries from CMDA, are within the disciplinary control of CMDA, work as per job requirement of CMDA and as such they are very much employees under CMDA. He has relied upon a decision in Indian Iron and Steel Company Limited v. United Contract Workers Union and Ors., reported in 1996 (I) CHN 217. The Division Bench held that the writ Court has not denuded of its power to direct regularisation or absorption in any case inasmuch as there is no question of factual investigation, the employment of the petitioners is admitted and that the petitioners are still continuing in service since 1975 is also admitted. In Senior Regional Manager, Food Corporation of India, Calcutta v. Tulsi Das Bauri and Ors., the liability has been prescribed under Sub-section (2) thereof every principal employer shall nominate a representative duly authorised by him to be present at the time of disbursement of wages by the contractors.

6. The learned trial Judge observed in his judgment, "Relying on the aforesaid decision which I am obliged to do so, I am to examine whether in this case lifting of corporate veil is necessary or not, I could not do so had there been no material in this case, nay there are." On lifting corporate veil the trial Judge has found the Executive Engineer of the respondent has increased the wages of the petitioners, extended period of contract, issued administrative directions, prepared duty rosters, supervised work of the labourers. The contractor was initially responsible for bringing the writ petitioners in the employment under the respondent No. 2A. The contractor used to prepare the Bills and collect wages from respondent on behalf of the writ petitioners and made demands for higher rate of wages. The learned Judge has also found that the job is of perennial in nature and it is continuing since 1975 till today. The learned trial Judge however, did not come to a finding whether it is a case of genuine contract labour or such contract is sham and the corporate veil is too transparent to visualise the real existence of direct relationship between the employer and the employee. Such a decision is important in view of the fact that if it is a case of genuine contract labour, matter has to be referred to the appropriate authority for issuing Notification u/s 10(1) of the Contract Labour (Regulation and Abolition) Act, 1970 (hereinafter referred to as the said Act) after careful consideration of the factors mentioned in Section 10(2). In a recent decision in Sheikh Jahangir Ali and Others Vs. Calcutta Port Trust and Others, a single Judge of this Court held at p. 386:

"27. Considering the provisions of Section 10 of the above Act and the various decisions cited on behalf of the parties, the ratio which emerges is that consequent upon abolition of contract labour in a particular establishment by publication of a notification u/s 10(1) of the said Act, the workman concerned acquires a right to be absorbed in the regular establishment, and such right could be enforced in the writ jurisdiction on the Hon"ble Supreme Court and the High Courts."

"In the present case, no such notification has been published as far as "vulcanizes" employed as contract labour under the Calcutta Port Trust are concerned and until such a notification is published, the petitioners, in my view, cannot straightaway claim absorption in the regular establishment."

7. We cannot record our approval to the judgment of the learned single Judge quoted above for the reasons discussed hereinafter. In the particular case before us the writ petitioners were engaged through the contractor for guarding Howrah sub-way in 1975. By virtue of interim order dated September 9, 1988 the writ petitioners are continuing with their services. The respondent has asserted that the project was of temporary nature and has been completed but the services of the writ petitioners have to be retained due to the interim order of the Court. It has been stated at page 20 of the written argument filed on behalf of the writ petitioners as follows:

"Though a stand has been taken by the CMDA that the petitioners were appointed in respect of a project and the project has been completed as far back as in 1978, there is no question of understanding the services of the writ petitioners, but this statement is not factually correct inasmuch as, the interim order was passed by this Hon"ble Court in 1988 and the petitioners have been provided with employment at different places to do different works for the CMDA and by the CMPA. So, need was and still is permanent."

8. For this reason the legislature in its wisdom has passed its statutory obligation upon the appropriate authority to consider the factors mentioned in Section 10(2) of the said Act and such enquiry is in nature of quasi-judicial enquiry has been held by the Apex Court. It is not possible for the writ Court to enquire into those factors nor it is permissible for the writ Court to act as a substitute for the statutory authority. The writ Court can direct the statutory authority to act in accordance with the rule and procedure prescribed thereunder but cannot act as a substitute for the prescribed authority. Therefore, if the statutory authority cannot issue any notification u/s 10(1) of the said Act without enquiring into the factors which are constituents behind the decision making process writ Court cannot overstep that enquiry and directly issue a direction for absorption. Such direction can only be given when the writ Court is satisfied in view of unimpeachable materials on record unerringly pointing that the contract was sham or that the petitioners were in fact and law, the employees of the appellant. Only because wages are paid by the appellant and distributed through the contractor or that the officials of the

appellant exercised supervision and control over the management over the services and duties of the writ petitioners, it is not possible to come to a finding that the contract was sham.

9. We, therefore, are of the opinion that this is a fit case when the matter should be referred to the appropriate authority for consideration whether a notification should be issued u/s 10(1) of the said Act in accordance with law.

10. Petitioners are, therefore, directed to make a comprehensive (sic) application to the appropriate Government within a month (sic) from this date u/s 10(1) of the said Act for abolition of contract labour under the appellant and if such application is made, the appropriate Government shall dispose of the same within six months from the date of the receipt of the application. The appellant shall further take steps in the matter on the basis of the decision of the appropriate Government. The services of the respondent/petitioners shall continue as on date till the decision of the appropriate Government. It is made clear that the appropriate Government will be at liberty to call for any records, documents or materials at any stage of the decision making process.

11. The appeal is accordingly allowed and the impugned judgment of the trial Court is hereby set aside. There will be no order as to cost.

12. If an urgent xerox certified copy of this judgment is applied for, the same is to be supplied expeditiously, subject to compliance with all the required formalities.

Samaresh Banerjee, J.

I fully agree with the reasons of my learned brother for allowing the appeal and setting aside the order of the Trial Court.

2. I only add, that not only it appears to us that this is not a case whether there are unimpeachable evidence before the Court on the basis of which the writ Court itself may direct absorption, the finding of the learned Judge that the nature of work is also perennial cannot be supported. It appears to us that such finding is really not based on sufficient materials. It appears that the learned Judge, *inter alia*, has over emphasised on the fact that the writ petitioners are still working overlooking that they are still working *inter alia* because of interim order granted by this Court

3. The fact that the CMDA might not have applied for vacating the interim order cannot, in our view, be a material in support of the contention that the nature of the work is perennial.

4. In our view there are not sufficient materials before the Court at all to come to a decision that the nature of work is a perennial one and not the work of a project which really came to an end.

5. While the petitioners will be at liberty to file representation to the appropriate Government for the purpose(sic) pointed out by my learned brother, the company is

also at liberty to file an objection to the same giving all particulars therein. For the aforesaid purpose therefore a copy of the application and/or representation which is now to be filed by the petitioners before the appropriate Government, shall be served upon the respondent, CMDA.

6. Urgent xerox certified copy of the judgment, if applied for, be supplied expeditiously.