

(2011) 08 CAL CK 0125

Calcutta High Court

Case No: Writ Petition No. 20403 (W) of 2010

Weather Control

APPELLANT

Vs

The State of West Bengal and
Others

RESPONDENT

Date of Decision: Aug. 18, 2011

Hon'ble Judges: Tapen Sen, J

Bench: Single Bench

Advocate: Amit Prokash Lahiri, Tapan Banerjee and Subrata Bhattacharya, for the Appellant; Jayanta Dasgupta and Balaram Patra, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Tapen Sen, J.

Reference be ade to the Order dated 05.07.2011 by which W.P. No. 17554(W) of 2010 which was being listed along with this case was separated on the prayer made by the learned Counsel appearing by the parties.

Accordingly, this Writ Petition is being dealt with independently as arguments have been closed and concluded in the said case. For the convenience of parties, Order dated 05.07.2011 is quoted below:

5.7.11 W.P. 20403(W) of 2010 With W.P. 17554(W) of 2010 Mr. Amit Prakash Lahiri, Mr. Tapan Banerjee, Mr. Subrata Bhattacharya,.... For the Petitioner.

Mr. Jayanta Dasgupta, Mr. Balaram Patra, for the Respondent No. 9 Arguments have been concluded in W.P. No. 20403(W) of 2010.

Although there was an Order dated 10.02.2011 that the other Writ Petition be listed together being W.P. No. -17554(W) of 2010, it is now stated by both the learned Counsel that the said other Writ Petition be taken up on some other day. Accordingly, let it be listed after ten days under the same heading. So far as W.P. No. 20403(W) of 2010 is concerned, since arguments have been concluded, Judgment is

reserved.

(Tapen Sen, J.)

(Quoted)

2. Mr. Jayanta Dasgupta has appeared for the Respondent No. 9 and he had stated on 04.10.2010 that he would not file any affidavit in this case. The Order dated 04.10.2010 is as follows:

4.10.2010 W.P. 20403(W) of 2010 For the Petitioner:

Mr. A.P. Lahiri, Mr. Tapan Banerjee, Mr. Subrata Bhattacharjee.

For the Respondent No. 9 Mr. Jayanta Dasgupta, Mr. Balaram Patra, 3 Mr. Saibal Mukherjee.

For the State: Mr. S. Sengupta.

Let this matter be listed along with W.P. No. 17554(W) of 2010 which has been listed at Serial No. 335 today for extension of the interim Order and in which Mr. Jayanta Dasgupta appears for the Respondent No. 9 (the Workmen represented by Weather Control Workers" Union). However, in the instant case i.e. W.P. No. 20403(W) of 2010, there is No. representation on behalf of the Respondent No. 9 but Mr. Jayanta Dasgupta states that if a copy of the said Writ Petition is served upon him then he will put in his appearance on behalf of the said Respondent No. 9 Mr. Jayanta Dasgupta further states that he is not interested in filing any Affidavit.

Under such circumstances, let both the Writ Petitions be placed together for hearing on 25th November, 2010.

Subject to an application for certified copy being made and proof in support thereof being furnished, let a plain photocopy of this Order, duly counter-singed by the Assistant Registrar (Court), be handed over to the learned Counsel for the Parties, on usual undertakings.

(Tapen Sen, J.)

(Quoted)

3. The Writ Petitioner, M/s. Weather Control has challenged the award dated 30.04.2010 passed by the learned Industrial Tribunal (5th Court) in Case No. -VIII-46/1995 whereby and whereunder it was directed that instead of reinstating the Respondent No. -9, it would be just and proper to direct the Petitioner to pay compensation for damages caused to him to the extent of Rs. 3,00,000/-(Rupees three lacks) within one month from the date of passing of the award.

4. The Petitioner has also prayed for an Order commanding upon the Respondents to explain as to why the Order of reference dated 27.02.1995 be not itself be declared to be bad and accordingly, set aside.

5. The facts of this case are that M/s. Weather Control is stated to be a proprietorship firm owned by one Bijan Bose. On account of its technical know how and expertise, it entered into contracts for maintenance, servicing and repair of air conditioners, air coolers from various Government concerns/Offices against tenders and got the job done through various small and independent concerns on job contract basis. It is the further case of the Petitioner that one such independent concern was M/s. Cold Draft and M/s. Cooling Service.

It is its further case that when the Petitioner assigned its jobs to any of the small Firms as sub-contractors, they would engage their men for executing the jobs. The Petitioner has stated that it is however not concerned with the persons deputed by these sub-contractors and have No. liabilities in respect of them and who are engaged by such sub-contractors. It is the further case of the Petitioner that one of the sub-Contractors namely M/s. Cold Draft, is a proprietorship Concern of one Supriya Ghosh. Since Supriya Ghosh could not secure sufficient business to maintain persons working under him, he therefore requested the Petitioner to assign jobs to him as and when required and it was on that basis that the Petitioner Firm assigned jobs to the said M/s. Cold Draft from time to time for execution of its own works and for which, they received money against Bills submitted by them to the Petitioner. This has been stated in Para-8 of the Writ Petition and in Para-9 the Petitioner has stated that M/s. Cold Draft used to generally send Mihir Kumar Pal (Respondent No. -9) for executing the jobs. It has further been stated that the Respondent No. 9 used to visit the sites and he became accustomed with the day-to-day affairs of the Petitioner Firm as he used to come to its Office for executing the jobs assigned to it. However, he used to get his salary from his own employer namely M/s. Cold Draft.

6. The Petitioner has further stated that taking advantage of the aforesaid situation, the Respondent No. 9 intentionally wrote letters to the Petitioner alleging that he was their employee since 01.04.1992 and that he had been forcibly terminated from his service with effect from 17.03.1983. The Petitioner has stated in Para-12 that the question of the Petitioner being taking back in service did not arise at all because he was not its employee. They have further stated that when the Petitioner did not accede to his request, the Respondent No. 9 made a false complaint before the Assistant Labour Commissioner, Government of West Bengal on 17.05.1993 requesting that steps be taken for his reinstatement in service and for compensation for enforced termination. The Petitioner has submitted, with reference to the payment vouchers brought on record vide annexure P-4 series, that they are all debit Vouchers of wages in favour of the Respondent No. 9 which go to establish that he was an employee of M/s. Cold Draft.

The Petitioner has further submitted that by a letter dated 10.02.1994, the Assistant Labour Commissioner, Government of West Bengal asked the Petitioner to file his Comments with regard to the termination of service of the Respondent No. 9 and as such, by their reply dated 10.03.1994 (Annexure P-5), the Petitioner stated that the

Respondent No. 9 was not its employee and that there was No. employer - employee relationship and that it was M/s. Cold Draft which used to pay wages to him @ 700/- per month and this could be verified by calling the said M/s. Cold Draft. They also submitted that the contentions of the Respondent No. 9 were baseless. It is stated that the dispute could not be solved as conciliation proceedings failed whereafter, an Order of reference was made on 27.02.1995 before the Industrial Tribunal (5th Court), West Bengal to decide/adjudicate the following issues:

- i) Whether the termination of service of Sri Mihir Kumar Paul is justified?
- ii) What relief, if any, is he entitled to ?

In the said Proceedings, Mihir Kumar Paul filed his Written Statement vide Annexure P-7 and the Petitioner also filed its Written Statement vide Annexure P-7.

7. Finally, by its Award dated 30.04.2000, the Industrial Tribunal (5th Court) directed the Petitioner to pay compensation to the Respondent No. 9 to the extent of Rs. 3,00,000/- (Rupees Three Lakhs) within one month from the date of passing of the Award.

Heard the Parties.

8. The learned Tribunal, while considering the facts of the case observed that "...moot question to decide in this case is whether or not Sri Mihir Kr. Paul is an employee of M/s. Weather Control. In other words, whether there exists any relationship of employer and employee between Sri Mihir Kr. Paul and M/s. Weather Control."

9. It appears to this Court that the Industrial Tribunal duly took into consideration the evidence of O.P.W.-2, namely Supriya Ghosh, the Proprietor of M/s. Cold Draft. This Court is unable to find any fault in the manner and the process in which he came to the conclusion that an there existed an employer-employee relationship between the Respondent No. 9 and the Petitioner. In Order to ascertain as to whether he was a workman of the Petitioner or not, the Respondent No. 9 had filed a Petition on 26.11.1997 with a prayer that the Service Challans, Log Book etc. be produced which would have indicated the nature of the job performed by him during different periods. The Tribunal by its Order dated 20.07.1998 had directed the Petitioner Company to produce the documents but by a Petition of the same date i.e. 20.07.1998, the Company pleaded its inability to produce those documents on the ground that the Challans had been submitted to the concerned establishment at the time of submission of Bills and that Log Books of the Company were not retained.

10. These were obviously lame excuses and the Tribunal therefore rightly held that such a plea taken by the Company did not appear to be satisfactory because the workman had raised the dispute on 24.03.1993 and the Company was therefore, aware about this fact and therefore they should have preserved those documents.

Under these circumstances, if the Tribunal came to conclusion that the Company was following "a hide and seek policy," and was not willing to come forward with clean hands, this Court does not find any irregularities with such observations of the Tribunal.

11. The Tribunal also took into consideration the fact that the Respondent No. 9, along with other co-employees had filed a Charter of Demand against the Petitioner and the same, having been referred by the Government, was pending adjudication before the same Tribunal. The Tribunal has also duly considered the submissions of the Petitioner with regard to the evidence of O.P.W.-2 Supriya Ghosh who had stated that Sri Mihir Kumar Pal used to work under him and that he used to send him to M/s. Weather Control for doing various jobs. After duly considering the submissions of the Parties, the Tribunal, at internal Page-7, proceeded to weigh the claims and counter claims and observed that "Claim and counter claim has been made by the employer and employee regarding the existence of their relation. So let me scrutinize the oral and documentary evidence carefully so that the veil can be lifted."

12. The Tribunal, having so undertaken to scrutinize the oral and documentary evidences, at the very outset, rightly observed that for reasons best known to the O.P.W.-1 (Bijan Kumar Bose) he did not produce any Registers. He did not also produce the Salary Registers, the Leave Registers, the Wage Registers, the Over time Registers, the Attendance Registers and the Pay Registers of the establishment. Under the aforementioned circumstances, the Tribunal therefore drew an adverse inference by saying "So it is abundantly clear that the company has undertaken a hide and seek policy and is not willing to come forward with a clean hand."

13. The tribunal has also duly considered the submissions of the O.P.W.-1 (Bijan Kumar Bose i.e. the Proprietor of the Petitioner) who had stated that he used to give sub-Contracts to various establishments including M/s. Cold Draft. He has duly considered the fact that there was not scrap of paper which was produced by the Proprietor of the Petitioner to support his claim that there were sub-Contractor Agreements by and between the Petitioner and M/s. Cold Draft although, before the Conciliation Officer, the Petitioner had stated "that as per sub-contract agreement by and between our company and that of M/s. Cold Draft (sub-contractor), the sub-contractor used to depute their labour at our various sites where the sub-contractors performed the sub-contractor's duty on our behalf."

14. Under the aforementioned circumstances, this Court finds No. irregularity with the observations of the Tribunal stating that "...in absence of any documentary evidence, the claim of the proprietor of M/s.

Weather Control that he entered into an agreement with M/s. Cold Draft to do his job cannot be accepted. Accordingly the evidence of O.P.W.-1 that he used to give sub-contract of his work to M/s. Cold Draft does not at all inspire confidence in the mind of this Tribunal."

15. Another important aspect is that during cross-examination of the O.P.W.-1 (Bijan Kumar Bose), he had admitted that he had not filed any documents to show that Supriya Ghosh (O.

P.W.-2) was the Proprietor of M/s. Cold Draft. The O.P.W.-1 has also admitted that he made No. correspondence with Supriya Ghosh and that Supriya Ghosh had never approached him for the job. He also stated in his cross-examination that he had not filed any document to show that Mihir Kumar Pal used to collect salary from M/s. Cold Draft. Under the aforementioned circumstances, and in the absence of any Written Statement of Cold Draft, the Tribunal rightly came to the conclusion that some Exhibits including the Debit Vouchers (Ext. H) had been filed at a belated stage and therefore, they were a "camouflage". The observations of the learned Tribunal, are therefore, reproduce below:

During cross-examination O.P.W.-1 admitted that he has not filed any document to show that Sri Supriyo Ghosh is the proprietor of M/s. Cold Draft. He also admitted that he made No. correspondence with Sri Supriyo Ghosh that Sri Ghosh ever approached him for the job or that he provided him job in accordance with an offer made by him. He also stated that he has also not filed any document to show that Sri Mihir Kr. Pal used to collect salary from M/s. Cold Draft. He has also not filed any document to show that Sri Mihir Jr. Pal was working under M/S. Cold Draft. In view of such evidence of O.P.W.-1 and in absence of any Written Statement filed by M/s. Cold Draft the documents filed by O.P.W.-2 i.e. Ext. A, Ext. C, Ext. D, Ext. E series, Ext. F series, Ext. G series and Ext. H series filed at a belated stage, speak of a camouflage transaction in absence of any paper of contract by and between O.P.W. 1 and O.P.W. 2.

16. In view of the aforementioned facts and circumstances, the Tribunal correctly held that " the so called contractor, M/s. Cold Draft is merely a name lender". Consequently the Tribunal also rightly came to the conclusion that the so called contract system as alleged by the Petitioner, was a "camouflage" a smoke screen and therefore, the Tribunal held that the Proprietor of M/s. Weather Control was the Principal employer of the Respondent No. 9 and consequently, their existed an employer - employee relationship.

17. Considering the aforementioned facts and circumstances, the Tribunal came to conclusion that the Respondent No. 9 was entitled to reinstatement in service but because of the "bad blood" between him and his employer, the Tribunal concluded that a situation had been created by which it was difficult for the workman to work without fear and harassment and even if he was reinstated, it would be difficult for him to work peacefully and under those circumstances, he directed that instead of reinstatement, the Petitioner should compensate him for the damages caused to him and therefore, he concluded that a sum of Rs. 3,00,000/- (Rupees Three Lakhs) be paid to the Respondent No. 9 as compensation within a period of one month from the date of passing of the Award.

18. Having considered the aforesaid facts and circumstances, this Court is of the view that there is No. illegality with the impugned Award. It is neither irregular nor illegal and therefore none of the points raised/ submitted on behalf of the Petitioner deserve any consideration by this Court. The same being devoid of merits, the Writ Petition is accordingly Dismissed.

However, there shall be no Order as to Costs.

Upon appropriate Application(s) being made, urgent Photostat Certified copy of this Judgment, be given/issued expeditiously subject to usual terms and conditions.

Later:

After the aforementioned Order was dictated in Court, learned Counsel for the Petitioner, Mr. Subrata Bhattacharyya, prayed for stay of this judgment so that he can file an appeal.

Having considered the fact that the private Respondent/Workman has already suffered enough, this Court refuses to grant any stay of this judgment.