(2002) 10 CAL CK 0029

Calcutta High Court

Case No: C.O. No. 18985 (W) of 1996

Nageswar Mondal and Others		APPELLANT
	Vs	
State of West Bengal and Others		RESPONDENT

Date of Decision: Oct. 7, 2002

Acts Referred:

- Constitution of India, 1950 - Article 226
- Industrial Disputes Act, 1947 - Section 10, 12, 12(4), 12(5), 2

Citation: (2003) 3 CALLT 160 : (2004) 2 CHN 59

Hon'ble Judges: Pratap Kumar Ray, J

Bench: Single Bench

Advocate: Amaresh Chakraborty and K.K. Boral, for the Appellant;Alok Banerjee, Raja Basu Chowdhury and N. Roy, for the Respondent

Judgement

P.K. Ray, J.
Heard the learned advocates appearing for the respective parties.

2. Challenging the Memo No. B/2351/228/94/DLC dated 30th September, 1996 issued by the Deputy Labour Commissioner, Barrackpore whereby and whereunder a decision of the Labour Commissioner, West Bengal directing the Union to take the matter of workers of the concerned mills who filed the application before the Labour Commissioner for adjudication and reference of a dispute thereto, with the State Advisory Contract Labour Board for necessary action was communicated, this writ application has been filed. In this writ application the petitioners have prayed the following reliefs:

(a) A writ in the nature of Mandamus commanding the respondents Nos. 1, 2 and 3 to rescind, recall and/or set aside the purported order as mentioned in the Memo No. B/2351/228/94/DLC dated 30.9.96, being annexure "F" to this petition, and

further commanding them to refer the dispute before the Tribunal u/s 10 of the Industrial Disputes Act, 1947 forthwith;

(b) A writ in the nature of certiorari directing the respondents Nos. 1, 2 and 3 to produce the records relating to the conciliation and the purported report passed by the respondent No. 2 as mentioned in the said Memo dated 30.9.96, being annexure ''G'' to this petition and after perusal of the same conscionable justice may be administered by quashing the said purported order passed by the Labour Commissioner, being the respondent No. 2, as mentioned in the said Memo dated 30.9.96 and to direct the respondents Nos. 1 and 2 to refer the dispute to the Industrial Tribunal for adjudication forthwith;

(c) A writ in the nature of prohibition prohibiting the respondents Nos. 1, 2 and 3 and each of them from giving any effect or further effect to the said purported order passed by the respondent No. 2 as mentioned in the said Memo dated 30.9.96, being annexure ''G'' to this petition;

(d) Rule Nisi in terms of prayers (a), (b) and (c) above;

(e) A mandatory order be passed directing the respondents Nos. 1 and 2 to refer the dispute as raised by the petitioners u/s 10 of the Industrial Disputes Act, 1947, before the Industrial Tribunal for adjudication forthwith;

3. The facts leading to the writ application are to this effect:

The petitioners, who are working in the mill by engaging themselves on various jobs namely unloading of wheat, cutting and putting wheat into the machine for final crushing of the wheat and/or delivering of the wheat products i.e. Flour, Atta, Suji and Besan for more than 12 years as on 6th November, 1994, filed an application before the Deputy Labour Commissioner, Government of West Bengal, Barackpore, North 24-Parganas requesting him to deal with the matter for inclusion of their names in the Master Roll for permanent workers of the mill, alleging, inter alia, that they were not contract labourers under so called contractor and due to service as rendered there was no embargo of such decision for inclusion of their name in the Master Roll of the mill as permanent workers. The Deputy Labour Commissioner, Barrackpore, served a notice to the concerned employer Sri Durga Food Products (P) Ltd. who is respondents No. 4 herein, inviting him for a joint conference with the representative of the concerned workmen. The Company''s letter dated 12th April, 1995 as addressed to the Deputy Labour Commissioner in response to the said communication was served upon the petitioners who in turn submitted reply on 12th May, 1995, contending, inter alia, that they were not working under the contractors in the true sense as contract labourers, as the name of the contractor as mentioned thereto, was a man of the company itself who was living permanently in the company''s quarter and the said system on alleged agreement of labour contractor was nothing but a paper transaction to deprive the petitioners from their lawful right to have a declaration as permanent workers of the said mill. It was

further contended that the petitioners were working under direct supervision of the company within the factory premises and they got the identical Registration No. under ESI Act and under Provident Fund Act similar to the permanent employees of the mill. It was categorically contended that the stand of the mill was not justified on issue of the lack of jurisdiction of the Labour Commissioner for necessary of the issue. General Secretary of the West Bengal Flour Mills Mazdoor Congress affiliated to INTUC by their communication dated 3rd July, 1995 informed the Deputy Labour Commissioner concerned that the dispute as raised by the workmen was genuine, just and fair, upon contending, inter alia, that the so called contractor Shyamlal was a contractor by name and he was a man of the company and there was no real relationship of the workmen with the said contractor to attract the provision of Contract Labour (Regulation and Abolition) Act, 1970 and thereby to refuse the scope of conciliation on the ground of lack of jurisdiction. It was contended that the stand of the company on issue of contractor labourers was not the real state of affairs but same was a paper transaction to deprive the workmen. By a further letter dated 27th July, 1995, the workmen concerned categorically replied to the company''s letter dated 13th June, 1995 as submitted to the Labour Commissioner contending that there was no relationship as contractor labourers with Shyamlal and the same was only a paper transaction made by the company to deprive the petitioners. It was further contended that the Labour Commissioner would open the veil to find out the real position and thereby would take necessary steps.

4. In the opposition it is contended that the respondent No. 4 entrusted the job of loading and unloading wheat to a contractor, Sri Shyamlal Dinodia, a registered labour contractor, under the Contract Labour (Regulation and Abolition) Act, 1970, hereinafter referred to as CLRA Act for brevity. It was further contended that the said contractor entered into long term tripartite settlements in course of conciliation proceedings through the office of the Assistant Labour Commissioner, Barrackpore wherein the writ petitioners also were the parties and the terms and conditions of service accordingly were settled and concluded in terms of the Industrial Disputes Act, hereinafter for brevity referred to as ID Act. A copy of such settlement also was annexed. It was contended further that no industrial dispute could be raised by the workmen of the contractor, the present writ petitioners against the respondent No. 4 either before or after the contract labour system was abolished by the appropriate Government u/s 10 of the CLRA Act, 1970. It has been further contended that there was employer qua employee relationship between the writ petitioners and the respondent No. 4. An affidavit-in-reply has been filed denying all the allegations as made in the affidavit-in-opposition.

5. It is submitted by the learned advocate of the petitioner that the impugned decision communicated by Labour Commissioner is not at all a speaking order on issue as to why the case of the petitioners would not be considered for a report u/s 12(4) of Industrial Disputes Act. It is further contended that the document relating to the tripartite settlement was a sham paper transaction and there was no real and

actual relationship of the petitioners with Shyamlal as contractor labourers under him. It has been further contended that the Labour Commissioner had no jurisdiction to adjudicate any matter as to whether the petitioners workmen were labour contractors or not. Relying upon the judgment of the Apex Court passed in the case Gujarat Electricity Board, Thermal Power Station, Ukai Vs. Hind Mazdoor Sabha and Others, , it is submitted that the conciliation officer was required to submit the report in terms of Section 12(4) of ID Act, 1947. It is contended that u/s 12(5) of the said Act, it is the appropriate Government who is the authority to consider the entire issue and thereby to decide the matter for reference to a Board or Labour Court or Tribunal as the case may be. It is submitted that the Labour Commissioner since had no jurisdiction to hold that the petitioners are labour contractors and thereby their cases to be placed to the State Advisory Contract Labour Board for a decision on abolition of the contractor labourers, the impugned decision is bad in law.

6. Learned advocate for the respondent No. 4 on the other hand has contended that the judgment passed in the case Gujarat Electricity Board (supra) was distinguished by a Bench consisting of five Judges in the case Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc. etc., . Reliance has been placed to paragraph 103 of the said report.

7. Having regard to the contentions as made by the parties, the only point for decision is as to whether in terms of Section 12 of the ID Act, the Conciliation Officer was justified to pass the impugned decision advising the Union to place the matter to the State Advisory Contract Labour Board? Before deciding the issue, legal question as raised may be looked into on the reflection of the judgment passed by the Apex Court in the case Gujarat Electricity Board (supra), a judgment of two Judges Bench. In paragraph 11 of said report it is held to this effect:

"The decisions in unambiguous terms lay down that after the coming into operation of the Act, the authority to abolish the contract labour is vested exclusively in the appropriate Government which has to take its decision in the matter in accordance with the provisions of Section 10 of the Act. This conclusion has been arrived at in these decisions on the interpretation of Section 10 of the Act. However, it has to be remembered that the authority to abolish the contract labour u/s 10 of the Act comes into play only where there exists a genuine contract. In other words, if there is no genuine contract and the so called contract is sham or a camouflage to hide the reality, the said provisions are inapplicable. When, in such circumstances, the concerned workman raise an industrial dispute for relief that they should be deemed to be the employees of the principal employer, the Court or the industrial adjudicator will have jurisdiction to entertain the dispute and grant the necessary relief. In this connection, we may refer to the following decisions of this Court which were also relied upon by the counsel for the workmen.

.....

If the contract had been mala fide and a cloak for suppressing the fact that the workmen were really the workmen of the company, the Tribunal would have been justified in ordering the company to take over the entire body of workmen and treat it as its own workmen."

8. In paragraph 13, it is held:

"However, as stated earlier, the exclusive jurisdiction of the appropriate Government u/s 10 of the Act arises only where the labour contract is genuine and the question whether the contract is genuine, or not can be examined and adjudicated upon by the Court or the industrial adjudicator, as the case may be. Hence, in such cases, the workmen can make a grievance that there is no genuine contract and that they are in fact the employees of the principal employer."

9. In paragraph 16, it is held as follows:

"As has been pointed out earlier, if the contract is not genuine, the workmen of the contractor themselves can raise such dispute, since in raising such dispute the workmen concerned would be proceeding on the basis that they are in fact the workmen of the principal employer and not of the contractor. Hence the dispute would squarely fall within the definition of industrial dispute u/s 2(k) of the ID Act being a dispute between the employer and the employees. In that case, the dispute would not be for abolition of the contract labour, but for securing the appropriate service conditions from the principal employer on the footing that the workmen concerned were always the employees of the principal employer and they were denied their dues. In such a dispute, the workmen are required to establish that the so called labour contract was sham and was only a camouflage to deny them their legitimate dues."

10. In paragraph 17, the Court held:

"If the workmen of the so called contractor allege that in fact the contract is sham and they are in fact the workmen of the principal employer, they may raise the dispute themselves not for abolition of the contract labour system, but for making available to them the appropriate service conditions. When such dispute is raised, it is not for abolition of the contract labour, but for a declaration that the workmen concerned are in fact the employees of the principal employer, and for consequential reliefs on such declaration."

11. In paragraph 18 accordingly the Court summarised the legal questions as decided, the relevant portion of the report as is necessary for adjudication of this case is quoted hereinabove:

"18. Our conclusions and answers to the questions raised are, therefore, as follows:

(i) .....

(ii) if the contract is sham or not genuine, the workmen of the so called contractor can raise an industrial dispute for declaring that they were always the employees of the principal employer and for claiming the appropriate service conditions. When such dispute is raised, it is not a dispute for abolition of the labour contract and hence the provisions of Section 10 of the Act will not bar either the raising or the adjudication of the dispute. When such dispute Is raised, the industrial adjudicator has to decide whether the contract is sham or genuine. It is only if the adjudicator comes to the conclusion that the contract is sham, that he will have jurisdiction to adjudicate the dispute. If, however, he comes to the conclusion that the contract is genuine, he may refer the workmen to the appropriate Government for abolition of the contract labour u/s 10 of the Act and keep the dispute pending. However, he can do so if the dispute is espoused by the direct workmen of the principal employer. If the workmen of the principal employer have not espoused the dispute, the adjudication, after coming to the conclusion that the contract is genuine, has to reject the reference, the dispute being not an industrial dispute within the meaning of Section 2(k) of the ID Act. He will not be competent to give any relief to the workmen of the erstwhile contractor even if the labour contract is abolished by the appropriate Government u/s 10 of the Act.

(iii) If the labour contract is genuine a composite industrial dispute can still be raised for abolition of the contract labour and their absorption. However, the dispute, will have to be raised invariably by the indirect employees of the principal employer. The industrial adjudicator, after receipt of the reference of such dispute will have first to direct the workmen to approach the appropriate Government for abolition of the contract labour u/s 10 of the Act and keep the reference pending. If pursuant to such reference, the contract labour is abolished the appropriate Government, the industrial adjudicator will have to give opportunity to the parties to place the necessary material before him to decide whether the workmen of the erstwhile contractor should be directed to be absorbed by the principal employer, how many of them and on what terms. If, however, the contract labour is not abolished, the industrial adjudicator has to reject the reference."

12. In the five Judges Bench in the case Steel Authority Limited (supra) as relied upon by respondent No. 4, the aforesaid findings have not been changed/modified by the Apex Court. In that case the Apex Court was considering the scope of passing direct order and/or decision on absorption of contract labourers as was directed in the Air India Statutory Corporation case, reported in (1997) 9 SCC 1344. It was held that said view was not a right decision on that point, accordingly the Court overruled the judgment. Here in this case, the stage as was considered in the said judgment Steel Authority of India Limited (supra) at all has not reached. Here the question is limited on issue of the jurisdiction of the Labour Commissioner in terms of Section 12 of the ID Act and his responsibility and liability to discharge the statutory duties. Section 12 of the ID Act reads thus:

"Section 12. Duties of conciliation officers.--(1) Where any industrial dispute exists or is apprehended, the conciliation officer may, or where the dispute relates to a public utility service and a notice u/s 22 had been given, shall, hold conciliation proceedings in the prescribed manner.

(2) The conciliation officer shall, for the purpose of bringing about a settlement of the dispute, without delay, investigate the dispute and all matters affecting the merits and the right settlement thereof and may do all such things as he thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute.

(3) If a settlement of the dispute or of any of the matters in dispute is arrived at in the course of the conciliation proceedings the conciliation officer shall send a report thereof to the appropriate Government [or an officer authorised in this behalf by the appropriate Government] together with a memorandum of the settlement signed by the parties to the dispute.

(4) If no such settlement is arrived at, the conciliation officer shall, as soon as practicable after the close of the investigation, send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof, together with a full statement of such facts and circumstances, and the reasons on account of which, in his opinion, a settlement could not be arrived at.

(5) If, on a consideration of the report referred to in Sub-section (4), the appropriate Government is satisfied that there is a case for reference to a Board, [Labour Court, Tribunal or National Tribunal], it may made such reference. Where the appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefore.

(6) A report under this section shall be submitted within fourteen days of the commencement of the conciliation proceedings or within such shorter period as may be fixed by the appropriate Government:

[Provided that (subject to the approval of the conciliation officer,) the time for the submission of the report may be extended by such period as may be agreed upon in writing by all the parties to the dispute.]"

13. On a clear reading of Section 12, it appears that under Sub-section 4 of Section 12, the conciliation officer was bound by the mandatory word "shall" to send a report to the appropriate Government, a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing a settlement thereof and also a full statement of such facts and circumstances and reasons thereof on account of which in his opinion, settlement could not be arrived at. Under Sub-section (5) of Section 12, it is the appropriate Government who is to decide the issue on consideration of such report for taking

necessary decision as to whether the same would be referred to the Board and/or to the Labour Court or Tribunal for appropriate action. Hence, from statutory provision, it is abundantly clear without any ambiguity that the conciliation officer when has entertained an application raising the industrial dispute as filed by the present petitioners praying their inclusion in the Master Roll of the mill as permanent workmen and reply of such application as made by the respondent No. 4 was considered by him, it was mandatory upon him to submit a full report in terms of Sub-section (4) of Section 12 of the said Act to the appropriate Government for their necessary decision. The conciliation officer under the statute never has been given any power to adjudicate the matter in the manner as has been done in the instant case by advising the Union for reference of the matter to the State Advisory Contract Labour Board. Hence, the impugned decision passed by the concerned Labour Commissioner is de hors of the statutory provision under Sub-section (4) of Section 12 of the said Act. Furthermore, from the impugned decision, it appears that there was no reason assigned for which the Union was advised to take up the matter with the State Advisory Contract Labour Board. Accordingly, the impugned decision is also hit by "doctrine of speaking order", which provides that in every field, whether it is the administrative and/or otherwise, decision must be with reason. In the instant case, the workmen and the Union both contended that the tripartite settlement as has been relied upon by the mill as a document to destroy the case of the workmen upon colouring themselves as contractor labourer was a sham paper transaction and accordingly requested the conciliation officer to unfold the hidden traps and to find out the real issue in question and thereby to refer the matter by a report for necessary adjudication under Sub-section (5) of Section 12 of ID Act.

14. The concerned Labour Commissioner under the law was required to do such as already held in the Gujarat Electricity Board (supra), holding that in the event of any dispute as raised alleging that the documents relating to the status of contractor labourers was a sham paper transaction, it was a fit case for raising an industrial dispute for a decision. In that view of the matter, the impugned decision of the conciliation officer being de hors of the statutory provision more particularly Sub-section (4) of Section 12 of the said Act, the decision is not legally sustainable and furthermore the decision never has been passed by ascertaining the proper reasons for coming to such conclusion. In that view of the matter, I am to hold that the impugned decision is not legally sustainable and accordingly same is set aside and quashed. The concerned conciliation officer accordingly is directed to act in terms of Sub-section (4) of Section 12 of the ID Act and to submit a full report to the appropriate Government for necessary adjudication of the issue in terms of Sub-section (5) of Section 12 of the ID Act. The writ application is accordingly allowed.

7.10.2002

15. Let urgent xerox certified copy of this order, if applied, be given to the learned advocates appearing for the parties expeditiously.