GAHC010009412015

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/1062/2015

THE MANAGEMENT OF M/S EMAMI LIMITED,
EPIP COMPLEX, AMINGAON, GUWAHATI, PIN 781031, REPRESENTED BY ITS MANAGING DIRECTOR

VERSUS

MD. AZAHARUDDIN AHMED and 15 ORS.

2:SRI BABUL BAISHYA

3:MANOJ KR. DAS

4:GOPI BISWAS

5:KALYANI BISWAS

6:ANANTA HALDAR

7:GULAP BISWAS

8:PRAFULLA BARUAH

9:CHATRADHAR BORDOLOI

10:PARAMESWAR SAIKIA

11:SAHADEV BARMAN

12:ANIL DAS

13:JALAL UDDIN AHMED

14:TAPAN DAS

15:ARUP BAISHYA
ADDRESS FOR COMMUNICATION OT RESPONDENT NO. 1 TO 15 C/O SRI ANANTA HALDAR
VILL. and P.O. AMINGAON
DIST. KAMRUP M
ASSAM-781031

16:THE PRESIDING OFFICER

LABOUR COURT
ASSAM
GUWAHATI 78100

Advocate for the Petitioner : MR.S CHOUDHURY

Advocate for the Respondent : MR.A D GUPTAR- 1 to 15

BEFORE

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

Advocates for the petitioner : Shri Surajit Dutta, Sr. Adv.
Shri K. Kalita, Adv.

Advocates for the respondents : Shri S. Chakraborty, Adv. R. 1 to15

Date of hearing : **18.01.2024**
Date of Judgment : **06.02.2024**

JUDGMENT & ORDER

The legality and validity of an Award dated 25.11.2014 passed by the learned Labour Court, Guwahati in Case No. 3 of 2014 is the subject matter of challenge in this petition filed under Article 226 of the Constitution of India. By the aforesaid Award, the termination of the workmen, who have been arrayed as private respondents in this case has been interfered with and it has been held that balancing the convenience and inconvenience of the parties, an amount of Rs.75,000/- (Rupees Seventy Five Thousand) be granted as compensation to each of the workman instead of reinstatement.

2. Before going to the issue which has arisen for determination, the facts of the case, as projected in the writ petition, may be narrated briefly.

3. The respondent nos. 1 to 15 had filed an application under Section 2-A of the Industrial Disputes Act, 1947 (hereinafter the ID Act) alleging that the petitioner Management had debarred them from entering the premises and in other words, they were terminated from their services. The petitioner, on receipt of notice had contested the case and raised a preliminary issue on the maintainability by contending that the workmen were contract labourers who were working under a contractor, one Shri Chandan Kakati who duly held a license under the Contract Labour (Regulation and Abolition) Act, 1970 (hereinafter Act of 1970). It was contended that there was no employer-employee relationship existing and therefore, no relief could have been claimed.

4. Upon consideration of the written statements, the following three issues were framed by the learned Labour Court:

i) Whether the workmen nos. 1-15 are contract laborers

engaged by the labour contractor?

ii) Whether the labour contractor is a necessary party to the instant proceeding? If yes, whether the present proceeding is bad for non-joinder of labour contractor as a party.

iii) What relief /reliefs the parties are entitled to?

5. The petitioner had adduced evidence by 2 nos. of witnesses, including the contractor - Shri Chandan Kakati. On the other hand, the workmen had adduced evidence through 3 nos. of witnesses. It is contended that two of the witnesses of the workmen had admitted regarding their engagement by the contractor Shri Chandan Kakati. The learned Labour Court, as has been stated above, had passed the Award on 25.11.2014 by answering the issues in favour of the workmen and had directed payment of compensation at the rate of Rs. 75,000/- to each of the workman instead of reinstatement.

6. It is the legality and correctness of the aforesaid Award dated 25.11.2014 which is the subject matter of challenge in this writ petition.

7. I have heard Shri Surajit Dutta, learned Senior Counsel, assisted by Shri K Kalita, learned counsel for the petitioner. I have also heard Shri Suman Chakraborty, learned counsel for the respondent nos. 1 to 15. The LCRs which have been transmitted to this Court have been carefully perused.

8. Shri Dutta, learned Senior Counsel for the petitioner has formulated the following grounds of challenge:

i) The petition filed by the respondent nos. 1 to 15 under Section 2-A of the ID Act was not maintainable;

ii) Even if such petition is held to be maintainable, it is an admitted fact that the respondent nos. 1 to 15 were engaged by a contractor - Shri Chandan Kakati and therefore, there was no employer-employee relationship;

iii) There was no issue framed with regard to the authenticity/genuineness of the agreement between the petitioner and the contractor - Chandan Kakati and therefore, there was no occasion on the part of the learned Labour Court to give any findings on the same;

iv) When the respondent nos. 1 to 15 could not even show a single document with regard to they being the employees of the petitioner, the question of payment of any compensation would not arise.

9. Elaborating his submissions, Shri Dutta contends that though under Section 2-A of the ID Act, right has been given to an individual workman to raise an industrial dispute directly in cases of discharge, dismissal, retrenchment or termination of service, such right is required to be espoused in the manner prescribed. It is submitted that in the instant case, fifteen persons have joined together to file one petition which itself is not prescribed in law. It is pointed out that the expression used in the section is 'workman' and not 'workmen'. He submits that even if this issue is held to be technical in nature, the records would show that the respondent nos. 5 and 13 did not even file any conciliation application and therefore, the said two respondents did not fulfill the conditions precedent for invoking Section 2-A of the ID Act. He further submits that by an amendment of 2010, sub-sections (2) and (3) have been inserted in Section 2-A of the ID Act. As per sub-section (2), the application is to be made to the

Labour Court or Tribunal after expiry of 45 days from the date he had made an application to the Conciliation Officer. It submitted that the Labour Court or Tribunal can assume jurisdictions and powers only if the aforesaid precondition is fulfilled. Shri Dutta submits that in the instant case, the said condition is not fulfilled and therefore, the proceeding itself stands vitiated because of want of jurisdiction.

10. He has also referred to an application dated 29.05.2013 submitted by one Shri Biju Banikya to the Assistant Labour Commissioner and accordingly submits that since the application was not concerning any other workmen, the application under Section 2-A of the ID was otherwise also not maintainable.

11. On the issue of the respondent nos. 1 to 15 being engaged by a contractor, it is submitted that the Workman Witness No. 1, Ghanashyam Baishya had clearly deposed that Chandan Kakati was the contractor for packaging and he had engaged the said respondents. The communication dated 15.07.2013 which was issued by the Labour Inspector and was proved as Ext.-9 had also stated that the respondent nos. 1 to 15 appear to be under the contractor. The Management Witness No. 1 - Deepak Sharma had deposed that the workmen were contract labourers engaged in packaging work under Chandan Kakati, the contractor. Shri Chandan Kakati had himself deposed as Management Witness No. 2 stating that the Management was not the employer of the workmen. It has been submitted that though there was one more witness on behalf of the workmen, namely, Sahadev Barman (WW 2), there was not even a single document which was produced to establish any employment of the workmen under the management. On the other hand, the agreement of Shri Chandan Kakati with the Management and the license of Shri Chandan Kakati were proved as Exts.- C and D and these two documents were not challenged.

12. On the submission regarding recording a finding by the learned Labour Court on the aspect of the contract labour agreement, it is submitted that in the written statement of the Management, a clear stand was taken that the respondent nos. 1 to 15 were engaged by a contractor Chandan Kakati in spite of which, no issue was framed in that regard. Shri Dutta accordingly submits that in absence of any such issue, the learned Labour Court traversed beyond the case by recording a finding that the contract was sham and a camouflage. It is submitted that the findings of the learned Labour Court assuming that there was a retrenchment under Section 25 of the ID Act was not based on any materials on record but on surmises and conjectures.

13. It is further submitted on behalf of the petitioner that the respondent nos. 1 to 15 were not the employees of the petitioner and the same is fortified by the fact that the ESI and ECPF on their behalf were paid by the contractor. Regarding the direction for payment of compensation, it is reiterated that there was no employer-employee relationship and even otherwise, the figure was arrived at without any basis.

14. In support of his contention that to invoke the provisions of the Act of 1970, he submits that the Hon'ble Supreme Court has laid down a twin test. Firstly, it is to be ascertained as to who was making the payment of monthly wages to the workmen and secondly, under whose supervision, they were working. In this regard, reliance has been placed upon a decision of ***General Manager, (OSD), Bengal Nagpur Cotton Mills, Rajnandgaon Vs. Bharat Lal and Anr.,*** reported in ***(2011) 1 SCC 635*** wherein, the following has been laid down:

> "*10. It is now well-settled that if the industrial adjudicator finds that contract between the principal employer and contractor to be sham,*

nominal or merely a camouflage to deny employment benefits to the employee and that there was in fact a direct employment, it can grant relief to the employee by holding that the workman is the direct employee of the principal employer. Two of the well-recognized tests to find out whether the contract labour are the direct employees of the principal employer are (i) whether the principal employer pays the salary instead of the contractor; and (ii) whether the principal employer controls and supervises the work of the employee. In this case, the Industrial Court answered both questions in the affirmative and as a consequence held that first respondent is a direct employee of the appellant.

12. The expression `control and supervision' in the context of contract labour was explained by this court in International Airport Authority of India v. International Air Cargo Workers Union [2009 (13) SCC 374] thus:

> *"38. … If the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by contractor, if the right to regulate employment is with the contractor, and the ultimate supervision and control lies with the contractor.*
>
> *39. The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be*

assigned/allotted to the principal employer or used otherwise. In short, worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor."

15. *Per contra*, Shri Chakraborty, learned counsel for the respondent nos. 1 to 15 has defended the Award. On the issue of non-fulfillment of the conditions precedent laid down in Section 2-A of the ID Act, he submits that there is no restriction for filing a common application jointly by more than one workman. It is pointed out that the application in this regard which was filed on 20.08.2013 contains a list of workmen and since the dispute was not resolved, the Labour Court was approached after 45 days.

16. As regards the submission made on behalf of the Management by citing the instance of one Shri Biju Banikya, he submits that it is a separate issue and not relevant. He submits that the application of the said Shri Biju Banikya dated 29.05.2013 was on the issue of his suspension and has no connection with the present dispute and further that he is not even the respondent in this proceeding and was also not a party before the learned Labour Court.

17. By referring to the communication dated 02.09.2013 of the Management to the Labour Officer, he submits that the stand of the Management was clear that the role of Shri Chandan Kakoti, the contractor was only to supply workers to the Factory on requirement basis.

18. Shri Chakraborty has referred to the written statement of the Management before the learned Labour Court and with regard to the preliminary objection raised on behalf of the Management, he submits that the inclusion of the respondent nos. 5 and 13, who were not amongst the workmen in the list will not make the entire Award bad in law. He further submits that this point was never raised before the learned Labour Court and therefore, cannot be raised now.

19. Countering the submissions made on behalf of the Management with regard to the findings of "sham contract", Shri Chakraborty submits that the issue was framed broadly and therefore, the learned Labour Court did not traverse beyond the issues.

20. Regarding the application of the Act of 1970, Shri Chakraborty has referred to Sections 7, 9 and 12 which are in connection with requirement of registration and obtaining a license by the contractor. He submits that though the contractor Chandan Kakoti appears to have a license dated 23.12.2005, the contract is not for supply of labourers. He has also referred to the deposition of WW1, Shri Ghana Shyam Baishya, as per whom, the concerned workmen were engaged in production / manufacturing works of the factory.

21. Shri Chakraborty has also referred to the depositions of WW2 (Sahadeb – respondent no. 11) and WW3 (Gulap Biswas - respondent no. 7) and has submitted that the time card contains the signature of the Manager of the Factory. Reference has also been made to the deposition of MW1 (Deepak Sarma) to support the contention that the workmen were discharging duties other than packaging also. The learned counsel accordingly submits that the finding of the learned Labour Court that the contract in question was a sham contract was based on materials on record. He accordingly submits that the

respondents are not contract labourers under Section 2(b) of the Act of 1970.

22. With regard to the quantification of the compensation, Shri Chakraborty has submitted that Rs.75,000/- as fixed was not exorbitant and in any case, the employer was a reputed and big company.

23. The rival submissions have been carefully examined and the materials including the original records of the learned Labour Court have been duly perused.

24. The first submission on behalf of the petitioner is with regard to the maintainability of the application under Section 2-A of the ID Act. It is submitted on behalf of the Management that such an application has to be by an individual workman and cannot be a common application as the terminology used is "workman" and not "workmen". By referring to the application of Shri Biju Banikya dated 29.05.2013, which has been termed to be initial application under Section 2-A, it is contended that the proceeding before the learned Labour Court itself was not maintainable and the aforesaid contentions were disputed on behalf of the workmen respondents.

25. Section 2-A was inserted in the ID Act of 1947 by an amendment of 1965 and by a further amendment in the year 2010, Section 2-A(1) and Section 2-A(2) have been inserted. The aforesaid provision being a part of the statute and the later amendment of the year 2010 laying down the procedure are, without any manner of doubt points of law and therefore, simply because of the fact that the said objection was not taken before the learned Labour Court would not preclude this Court to examine the correctness of such objection. This Court is therefore, inclined to examine the objection regarding Section 2-A of the ID Act on merits.

26. By referring to the application of one Shri Biju Banikya dated 29.05.2013, the petitioner has submitted that the dispute raised pertains to a single workman and therefore, the subsequent application before the learned Labour Court by 15 workmen under Section 2-A of the ID Act was not maintainable. This Court has however examined the said application dated 29.05.2013 by Shri Biju Banikya. The application was on the subject of re-engagement as the said Biju Banikya was suspended from service. This Court has noticed that the provision of Section 2-A of the ID Act does not cover the aspect of suspension and the right of an individual workman has been given to raise a dispute only with regard to discharge, dismissal, retrenchment or termination. For ready reference, Section 2-A is extracted hereinbelow-

> *"2A.* ***Dismissal, etc., of an individual workman to be deemed to be an industrial dispute****.—*
>
> *(1) Where any employer discharges, dismisses, retrenches, or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute.*
>
> *(2) Notwithstanding anything contained in section l0, any such workman as is specified in sub-section (1) may, make an application direct to the Labour Court or Tribunal for adjudication of the dispute referred to therein after the expiry of forty-five days from the date he has made the application to the Conciliation Officer of the appropriate Government for conciliation of the dispute, and in*

receipt of such application the Labour Court or Tribunal shall have powers and jurisdiction to adjudicate upon the dispute, as if it were a dispute referred to it by the appropriate Government in accordance with the provisions of this Act and all the provisions of this Act shall apply in relation to such adjudication as they apply in relation to an industrial dispute referred to it by the appropriate Government.

(3) The application referred to in sub-section (2) shall be made to the Labour Court or Tribunal before the expiry of three years from the date of discharge, dismissal, retrenchment or otherwise termination of service as specified in sub-section (1)".

27. That apart, the present issue is not an issue of suspension and is not connected with the said application dated 29.05.2013 by Shri Biju Banikya. Therefore, the contention that the provision of the statute was not adhered to, made on behalf of the petitioner does not hold water. Further, with regard to the use of the expression "workman" and the connected submission made on behalf of the petitioner that the said Section has to be construed to be an application by a single workman, this Court is of the opinion that the ID Act and the concerned amendment being a beneficial piece of legislation, especially for the workmen, a narrow and restricted meaning cannot be given. In any case, this Court has noticed that it is not the application dated 29.05.2013 submitted by one Shri Biju Banikya which is the initiation of the proceeding under Section 2-A but it is the application dated 20.08.2013 filed by Azaharuddin Ahmed with a list of 23 workmen which is the root of the present proceeding. It is a different matter that though the list contained 23 numbers of workmen, the application before the learned Labour Court was ultimately filed by 15 numbers of

workmen. This Court is however of the view that since respondent nos. 5 and 13 were not amongst the 23 numbers of workmen, their cases could not have been otherwise taken for consideration by the learned Labour Court as there has to be some semblance of a claim made on or behalf of the concerned workman which was not there for the respondent nos. 5 and 13.

28. This brings this Court to the issue of the correctness and validity of the findings of the learned Labour Court on merits. At this stage, it may be mentioned that unlike a Reference under Section 10 of the ID Act wherein issues for determination are framed by the appropriate Government, under Section 2-A of the Act, an application by the concerned workman is directly filed before the Labour Court / Industrial Tribunal by following the procedures laid down. It is after such an application, the written statement is filed by the Management and only thereafter, the issues are framed in a process which is akin to a civil proceeding. The issues which were framed by the learned Labour Court have already been extracted above and even at the cost of repetition, the aforesaid issues are formulated after consideration of the pleadings of the parties in the form of the initial application and written statement.

29. With regard to the first issue as to whether the workmen are contract labourers, this Court has noticed that though the workmen had adduced evidence through three numbers of witnesses (3 WWs), not even a single witness has proved any document of employment directly under the Management. In this connection, with regard to the deposition of WW1, this Court has noticed that in the cross-examination, he has admitted that he did not know what was written in the chief examination submitted by way of affidavit. He has also admitted that he is not a party to the proceedings and is rather a permanent worker directly under the Management and therefore, his status was

entirely on a different footing.

30. WW2 Sahadeb had deposed that the time card contained the signature of the Manager. The test however has laid down by the Hon'ble Supreme Court in the case of ***Bengal Nagpur Cotton Mills*** (supra) is as to whether who makes the payment and supervision. Presence of the signature of the Manager cannot be a conclusive evidence to overcome the requirement for application of the Act of 1970.

31. On the other hand, the requirements of the Act of 1970, as laid down in Sections 7 and 12 appear to have been fulfilled and both the registration as well as the license by the contractor were duly proved. The contractor Chandan Kakoti himself had adduced evidence as MW2 and had categorically stated that the Management was not the employer of the concerned workmen. In this regard, the original records have also been perused which contains the said evidence in page 101. The MW1 Deepak Sarma had also deposed that besides regular worker, there were contract labourers and the concerned workmen were contract labourers engaged in packaging works.

32. Shri Chakraborty, learned counsel has strenuously argued that the condition of the agreement of the Management with the contractor Chandan Kakoti was only for packaging and not for supply of labourers. This Court however is unable to accept the said submission. A perusal of the agreement which has been exhibited as Ext. D would show that the scope of the work was packaging of various products from bulk to retail packs. There is specific clause of appointment being clause no. 2 which reads as follows:

> "*2. Employment of labourers: the required numbers of labourers would be decided an employee by you, who would work under your supervision and*

control only. You shall be accountable for any act or conduct of such labourers deployed by you, and the Company would not responsible for any under performance by them."

33. As regards the letter dated 02.09.2013 which was referred to on behalf of the workmen, it was also stated that the supply of contract labourers solely dependent on the production plan and schedule.

34. The learned Labour Court has come to a finding that the contract was a sham and camouflage and further, certain findings have been given by stating as "real reasons". This Court has noticed that such finding is based only on the Time Card, the discussion of which has already been made above. The said finding does not appear to be based on any materials on record but on mere surmises and conjectures.

35. This Court has also noted that the validity of the authenticity of the contract was not even the subject matter of dispute and neither any issue framed on it in spite of the clear pleadings in this regard made by the petitioner Management in its written statement. As discussed above, unlike a Reference under Section 10 of the ID Act where issues are already framed by the appropriate Government, in an application under Section 2-A, issues are framed by the learned Labour Court / Industrial Tribunal on consideration of the pleadings which is akin to a civil proceeding. The observation of the learned Labour Court that the contract is a sham and a camouflage is clearly beyond the ambit of the dispute raised and therefore, cannot be sustained in law.

36. A similar procedure has been adopted by bringing in the aspect of retrenchment under Section 2 (oo) of the ID Act which was not even an issue and therefore, the findings on that aspect are not sustainable in law.

37. Since this Court has come to a finding that there were no materials before the learned Labour Court which would establish an employer – employee relationship between the parties, the question of payment of compensation in lieu of reinstatement also cannot arise. This Court makes it clear that it is not the quantum of compensation alone which is material but the very right of a party to be entitled to such compensation is required to be proved in accordance with law. In the entire set of evidence, not even a single document could be produced on behalf of the 15 numbers of workmen who were before the Labour Court and had claimed to be working in the factory for the last 10 years.

38. In view of the aforesaid discussion, this Court is of the unhesitant opinion that the impugned Award dated 25.11.2014 passed by the learned Labour Court, Guwahati in Case No. 03/2014 is unsustainable in law and accordingly the same is set aside. The interim order passed in this case is accordingly made absolute.

39. No order as to cost.

40. LCR be sent back.

JUDGE

Comparing Assistant