



GAHC010046482019

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

Case No. : WP(C)/2057/2019

GODA DHAR DAS
S/O LT. CHANMAL DAS, R/O RED CROSS ROAD, 1ST BY LANE, P.S.-
CHANDMARI, DSIT.-KAMRUP(M), GUWAHATI-03, ASSAM

VERSUS

NUMALIGARH REFINERY LTD. AND 2 ORS.
REP. BY THE MANAGING DIRECTOR NRL, 122 A, G.S. ROAD,
CHRISTANBASTI, GUWAHATI, ASSAM, PIN-781005

2:THE EXECUTIVE DIRECTOR
NUMLIGARH REFINERY LIMITED
122 A
G.S. ROAD
CHRISTANBASTI
GUWAHATI
ASSAM
PIN-781005

3:UNION OF INDIA
REP. BY THE SECRETARY MINISTRY OF LABOUR AND EMPLOYMENT
GOV. OF INDIA
NEW DELH

Advocate for the Petitioner : MR A DASGUPTA

Advocate for the Respondent : ASSTT.S.G.I.

**BEFORE
HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI**

Date of hearing : **17.05.2022**
Date of Judgment : **26.05.2022**

JUDGMENT & ORDER

The writ jurisdiction of this Court has been sought to be invoked by the petitioner by questioning the legality and validity of an Award dated 31.01.2018 passed by the Central Government Industrial Tribunal-cum-Labour Court of Assam (hereinafter referred to as the Tribunal) in Reference Case No. 11 of 2014. By the impugned Award, it was held that the Workman (present petitioner) is not entitled to any relief and the reference was answered in favour of the Management.

2. Before going to the issue which has arisen for determination in this Case, it would be convenient to state the facts of the case in brief.

3. The appropriate authority namely, the Central Government had made a reference under Section 10 of the Industrial Disputes Act, 1947 (hereinafter refer to ID Act) to the learned Tribunal in the following terms-

“Whether the action of the Management of M/s NRL in not regularizing the services of Sri Goda Dhar Das in the post of Peon-cum-Messenger under the Management though he is discharging his functions effectively since 1995 on the plea on non-fulfilling the criteria of qualification contained in the Recruitment Rules even though his juniors were considered, is just, proper and justified. If not, what relief the workman Sri Goda Dhar Das is entitled for?”

4. Upon receipt of notices, both the parties had filed their respective written statements.

5. The case of the workman was that he was initially appointed as Peon-cum-

Messenger in M/s. IBP Co. Ltd. in the year 1989. However, upon commissioning of the Numaligarh Refinery, M/s. IBP Co. Ltd. which was a part thereof, the petitioner was engaged as Office Peon in the NRL since 1995. The petitioner claims that he used to sign Attendance Register along with other employees. He also claims that wages were increased and later, was paid overtime allowances by the NRL from 1993 to 2006. The petitioner also claims of having issued Identity Card. However, the grievance is that his services have not been regularized by the Management.

6. On the other hand, in the written statement filed by the Management, it has been stated that the workman is a contract labour engaged through one contractor Shri RN Taye and was not a regular employee of the Management.

7. I have heard Shri A. Dasgupta, learned Senior Counsel for the petitioner. I have also heard Shri D. Sahu, learned counsel for the respondents-Refinery, who has also raised a preliminary objection.

8. Before considering the submission made by the learned counsel, let us first deal with the preliminary objection raised by Shri Sahu, learned counsel for the Refinery. By relying upon a Judgment of the Hon'ble Supreme Court in the case of **Radhe Shyam and another Vs. Chhabi Nath and Others** reported in **(2015) 5 SCC 423**, the learned counsel submits that the Hon'ble Supreme Court in the said decision has laid down that judicial orders of Civil Court are not amenable to the writ jurisdiction under Article 226 of the Constitution of India and such challenge can be made only by taking recourse to Article 227.

9. On the other hand, Shri Dasgupta, the learned Senior Counsel for the petitioner submits that the aforesaid preliminary objection is a misconceived one inasmuch as judicial review is a basic structure of the Constitution of India which cannot be taken away. He further submits that there is a difference between 'Court' and 'Tribunal' and therefore, the decision of the Hon'ble Supreme Court in the case of **Radhe Shyam (supra)** is not applicable.

10. Before going into the inter se merits, let us first deal with the preliminary objection raised on behalf of the Management. The objection regarding maintainability appears to be structured on the case of **Radhe Shyam** (*supra*). However, a bare reading of the said case would reveal that the restrictions were imposed upon in challenging a judicial order of a Civil Court. The Hon'ble Supreme Court has also laid down that such restriction was necessary in view of the remedies prescribed in the Code of Civil Procedure, 1908 itself.

11. This Court is also unable to accept the submission made on behalf of the Management that Court *per se* means a Tribunal. While a Court is strictly guided by the CPC, there is no such application in a Tribunal which has its own Rules. This Court is also in the opinion that since certain powers of the Civil Court have been vested upon a Tribunal by Section 11(3) of the Act, the Tribunal can be assumed to be Civil Court. Further, in the Industrial Disputes Act, the definition of Court is given in Section 2(f) which reads as follows:

"2. Definition- in this Act, unless there is anything in the subject or context-

a.....

b...

.....

f. "Court" means a Court of enquiry constituted under this Act."

12. Therefore, it becomes apparent that the expression 'Court' used in the Industrial Disputes Act cannot be said to mean a Civil Court.

13. Raising another preliminary issue, Shri Sahu, the learned counsel further submits that under Section 17(2) of the Act, all awards are final and therefore, the same cannot be put to challenge by way of a writ petition.

14. As regards the submission made on behalf of the Management that use of the

expression 'final' in Section 17(2) of the Act would indicate that no challenge by way of judicial review would be maintainable, the Hon'ble Supreme Court in a number of judgments has laid down that judicial review is a basic structure of the Constitution of India and the same cannot be tinkered with by any legislative Act. At this juncture, it would be beneficial to refer the landmark case of **L. Chandra Kumar vs. Union of India** reported in **(1997) 3 SCC 261** the relevant paragraph of which is extracted hereinbelow-

“99. In view of the reasoning adopted by us, we hold that clause 2(d) of Article 323-A and clause 3(d) of Article 323-B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the “exclusion of jurisdiction” clauses in all other legislations enacted under the aegis of Articles 323-A and 323-B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323-A and Article 323-B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the Tribunal concerned falls. The Tribunals will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned. Section 5(6) of the Act is valid and

constitutional and is to be interpreted in the manner we have indicated.”

15. The Hon’ble Supreme Court in the aforesaid case of **L. Chandra Kumar** (*supra*) while declaring the “exclusion of jurisdiction” clause appearing in clause 2(d) of Article 323-A and clause 3(d) of Article 323-B to the extent to exclude the jurisdictions of the High Court and the Supreme Court under Article 226 / 227 and 32 of the Constitution of India as unconstitutional has laid down that such decision can be the subject matter of scrutiny in the High Court within whose jurisdiction the Tribunal concerned falls.

16. The aforesaid case of L. Chandra Kumar (*Supra*) has been followed consistently by the Courts. In a recent judgment, the Hon’ble Supreme Court in the case of **Balkrishna Ram v. Union of India**, reported in **(2020) 2 SCC 442** has made the following observations-

“10. While holding so, we place reliance upon a judgment of a Constitution Bench of this Court in L. Chandra Kumar v. Union of India. This Court clearly held that judicial review is a part of the basic structure of the Constitution and the power of judicial review vested in the High Courts and the Supreme Court cannot be taken away.

17. The Hon’ble Supreme Court in another recent case of **Ashwani Kumar v. Union of India**, reported in **(2020) 13 SCC 585** has laid down as follows-

“13. The most significant impact of the doctrine of separation of powers is seen and felt in terms of the institutional independence of the judiciary from other organs of the State. Judiciary, in terms of personnel, the Judges, is independent. Judges unlike members of the legislature represent no one, strictly speaking not even the citizens. Judges are not accountable and answerable as the political executive is to the legislature and the elected representatives are to the electorate. This independence ensures that the Judges perform the constitutional function of safeguarding the supremacy of

the Constitution while exercising the power of judicial review in a fair and even-handed manner without pressure and favours. As an interpreter, guardian and protector of the Constitution, the judiciary checks and curbs violation of the Constitution by the Government when they overstep their constitutional limits, violate the basic structure of the Constitution, infringe fundamental rights or act contrary to law. Power of judicial review has expanded taking within its ambit the concept of social and economic justice. Yet, while exercising this power of judicial review, the courts do not encroach upon the field marked by the Constitution for the legislature and the executive, as the courts examine legality and validity of the legislation or the governmental action, and not the wisdom behind the legislative measure or relative merits or demerits of the governmental action. Neither does the Constitution permit the courts to direct, advise or sermonise others in the spheres reserved for them by the Constitution, provided the legislature or the executive do not transgress their constitutional limits or statutory conditions. Referring to the phrase "all power is of an encroaching nature", which the judiciary checks while exercising the power of judicial review, it has been observed that the judiciary must be on guard against encroaching beyond its bounds since the only restraint upon it is the self-imposed discipline of self-restraint. Independence and adherence to constitutional accountability and limits while exercising the power of judicial review gives constitutional legitimacy to the court decisions. This is essence of the power and function of judicial review that strengthens and promotes the rule of law.

18. In view of the above, this Court has no hesitation to reject the preliminary objections regarding the maintainability of the writ petition. It is a settled position of law that doctrine of judicial review is an essential part and forms the basic structure of the Constitution of India which cannot be amended by the Legislature or be restricted by any Act.

19. In view of the fact that the writ petition has been held to be maintainable, this Court would now be required to answer the issue arising in this writ petition on merits.

20. Shri Dasgupta, the learned Senior Counsel for the petitioner has submitted that since the denial of regularization of the services of the petitioner as Peon-cum-Messenger was on account of non-fulfilling the educational qualification as per the Recruitment Rules, it was incumbent upon the Management to produce the Recruitment Rules which allegedly stipulate such qualification requiring an incumbent to be Matriculate. However, the Management had failed to discharge the said burden and therefore, the reference ought to have been answered in favour of the workman.

21. On the other hand, Shri Sahu, the learned counsel for the Refinery submits that though it is a fact that the Recruitment Rules could not be produced as the same was not readily available, the records would show that the petitioner was only an employee of the contractor of the Refinery and there was no employee-employer relationship. In absence of such jural relationship, the question of regularizing the services would not arise. In support of his submissions, Shri Sahu has relied upon a judgment of the Hon'ble Supreme Court in the case of **Union of India v. Arulmozhi Iniarasu** reported in **(2011) 7 SCC 397**, the relevant extract of which is quoted hereinbelow-

“16. We may now advert to the second limb of the question in para 13. The issue need not detain us for long as in our view the factual position as obtaining in the present case does not fit in with the fact situation in Nagendra Chandra. In the instant case, indubitably, the respondents were engaged as part-time contingent casual labourers in the office of the Commissioner of Central Excise for doing all types of work as may be assigned to them by the office. Their part-time engagement was need based for which they were to be paid on hourly basis. Though their stand is that many a times they were required to work day and night but it is nowhere stated that they were recruited or ever discharged the duties of a "Sepoy" for which recruitment process was initiated vide public

notice dated 14-1-2008 and the Tribunal as also the High Court has directed the appellants to grant relaxation in age-limit over and above what is stipulated in the recruitment rules/advertisement. In view of the stated factual scenario, in our opinion, the engagement of the respondents as casual labourers even for a considerably long duration did not confer any legal right on them for seeking a mandamus for relaxation of age-limit."

22. As quoted above, the reference appears to be an issue to justify the action of the Management in not regularizing the services of the petitioner in the post of Peon-cum-Messenger under the Management though he is discharging his functions effectively since 1995 on the plea of non-fulfillment of the educational qualification contained in the Recruitment Rules, even though, his juniors were considered.

23. A bare reading of the reference makes it clear that there is already an assumption that the petitioner was discharging his function since 1995 under the NRL as Peon-cum-Messenger and that his services were not regularized for not meeting the qualification even though his juniors were considered.

24. Though an assumption on fact appears to be there regarding the employment of the petitioner under the Management-NRL, that will not dispense with the requirement in law to prove the fact of such employment. This is in view of the settled law that a party at whose instance a litigation has been instituted has the initial burden to stand on his own legs.

25. As would reveal from the records, the pleaded case of the Management is that the petitioner-workman was engaged by one Shri RN Taye, who was the contractor. There is no employer-employee relationship at all between the petitioner and the Management. In this regard, the Management adduced evidence through three numbers of witnesses and the Management witness no. 1 in clear terms had stated that the petitioner was on contractual service under the contractor, Shri RN Taye and to facilitate discharge of duties, some official papers were given to all contractual

employees like gate pass etc. for easy access to the project area.

26. What is intriguing in this case is that no appointment letter, as such, could be exhibited or even produced by the workman before the learned Tribunal. Though certain documents have been proved, none of the said documents would show that the Management had recognized the petitioner as one of its employee. On the other hand, the materials on record, more particularly the deposition would bring the Court to a conclusion that the petitioner was a contract labour from the year 1999 under the contractor, Shri RN Taye. Though it also appears that few of the casual labourers were absorbed as regular employees in course of time as they have possessed the qualification of Matriculate, the petitioner cannot make out a case of any discrimination inasmuch as, admittedly he was not at par with those candidates on the ground of education. Though it is a fact that the Management could not produce the Recruitment Rules in the learned Tribunal to substantiate the plea regarding requirement of Matriculation for regularization of services, since the petitioner had failed to discharge his initial burden, there is no requirement for this Court to venture to answer the second point. In any case, the Management had filed an affidavit dated 17.06.2021 wherein it has been categorically stated that the required qualification for the post of Peon-cum-Messenger was Matriculation.

27. In that view of the matter, this Court is of the opinion that no case for exercise of the extra ordinary jurisdiction under Article 226 of the Constitution of India is made out requiring interference with the Award dated 31.01.2018 of the learned Industrial Tribunal. Accordingly the same stands dismissed.

28. No order as to cost.

JUDGE

Comparing Assistant