M/S. BHARAT HEAVY ELECTRICAL LTD. A

v.

STATE OF U.P. AND ORS.

JULY 21, 2003

[SHIVARAJ V. PATIL AND D.M. DHARMADHIKARI, JJ.] B

Labour Laws:

Uttar Pradesh Industrial Disputes Act, 1947—Termination of services—Industrial dispute—Company pleading that workmen not employed by them—Labour Court holding Company to be principal employer and directing re-employment of workmen—High Court upholding the same—Justification of—Held: Applying test of control, evidence on record and facts and circumstances of the case, workmen under direct employment, supervision and control of the Company—Thus, concurrent finding of courts below justified. C D

Gardeners were engaged to look after the lawns and parks inside the factory premises and the campus of the residential colony of the appellants through an agency. Their services were terminated and they raised an industrial dispute. Appellant pleaded that since they did not employ the gardeners, they were not liable to re-instate them or pay compensation. Labour court held that the appellant was the principal employer and passed the award directing re-employment and payment of compensation for non-compliance of Section 6-N of Uttar Pradesh Industrial Disputes Act, 1947. High Court upheld the order. Hence the present appeals. E F

Appellant contended that the findings recorded by the Labour Court as upheld by the High Court are perverse being contrary to the evidence placed on record; that the High Court committed a serious error in applying test of control in relation to the work of the respondent-workmen having regard to the definition of 'employer' in Section 2(i)(iv) of the Act as the work of the respondent-workmen was not part of the industry; and that the respondents-workmen had not worked for 240 days to complain violation of Section 6-N of the Act. G

Dismissing the appeals, the Court H

A HELD: 1.1. The definition of 'employer' given in Section 2(i)(iv) of the Uttar Pradesh Industrial Disputes Act, 1947 is an inclusive definition. The true test of control is that where workmen-labour is engaged to produce goods or services for the business of another, the other is employer. In the instant case, the work of the respondents-workmen is not totally disassociated in fact between them and the appellant to say that they were not employees of the B appellant. The respondents-workmen were employed with the appellant to work in their premises and which fact is found established after removing the mask or facade of make-believe employment under the contractor, the appellant cannot escape its liability. Furthermore, the other evidence and facts and circumstances of the case supports such a finding. Also the appellant did not C produce the records alleging that they were not available which led to drawing adverse inference against them. [631-D, B; 632-D]

1.2. Considering the evidence, the facts and circumstances of the case and findings of fact recorded by the Labour Court, the High Court held that the workmen were under the direct employment, supervision and D control of the appellant. It did not find any illegality and irregularity in the award passed by the Labour Court so as to interfere with it exercising the writ jurisdiction. Hence it cannot be said that concurrent findings recorded by the Labour Court and the High Court that the workmen were to be treated as the employees of the appellant are either perverse or based E on no evidence or untenable at all. [629-D-E; 630-A; 632-E]

Hussainbhai Calicut v. *The Alath Factory Thozhilali Union, Kozhikode and Ors.*, [1978] 4 SCC 257 and *Steel Authority of India Ltd. and Ors.* v. *National Union Waterfront Workers and Ors.*, [2001] 7 SCC 116, referred to.

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2. It also does not appear that any contention was urged before the High Court that the respondents-workmen did not work for more than 240 days in 12 calendar months. Be that as it may, in view of the finding of fact recorded by the Labour Court as upheld by the High Court that the respondents-workmen worked for more than 240 days in 12 calendar G months, there is no good reason to take a different view. [632-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2459-2461 of 1999.

From the Judgment and Order dated 17.2.1999 of the Allahabad High H Court in C.M.W.P. Nos. 2109/97, 41787/98 and 1654 of 1999.

Sudhir Chandra, Ms. Indu Malhotra, Ms. Madhu Sweta and Achintya Dwivedi for the Appellants. A

Dr. Maya Rao and S.C. Patel, for the Respondents.

The Judgment of the Court was delivered by

B

SHIVARAJ V. PATIL, J. Respondent nos. 6-19 (in writ petition before the High Court) were engaged as Garndeners (Malis) to sweep, clean and maintain and look after the lawns and parks inside the factory premises and the campus of the residential colony of the appellant through the agency of respondent nos. 3-5. Their services were terminated on 1.12.1988. They raised industrial disputes before the Labour Court. The appellant took up a plea that C they were never employed by it and it was not liable to pay any amount of compensation or to reinstate them in service. The Labour Court, on consideration of respective contentions and the evidence placed before it, passed the award dated 5.7.1996 directing to re-employ them and for payment of compensation of Rs. 15,000 each for non-compliance of the provisions of D Section 6-N of Uttar Pradesh Industrial Disputes Act, 1947 (for short 'the Act') besides ordering Rs. 500 as costs to each one of them. Aggrieved by the award, the appellant filed Civil Misc. Writ Petition No. 2109 of 1997 before the High Court. On 30.11.1998, Deputy Labour Commissioner issued a certificate to the Collector for recovery of Rs. 2,17,000. Challenging the said certificate, Civil Misc. Writ Petition No. 41787 of 1998 was filed by the E appellant. In the 3rd Writ Petition No. 1654 of 1999, the appellant questioned the validity and correctness of the order dated 2.1.1999 under which the appellant was asked to show-cause why prosecution should not be launched under Section 14-A of the Act.

The High Court by the impugned common order dismissed Writ Petition F Nos. 2109 of 1997 and 41787 of 1998 concurring with the findings recorded by the Labour Court. Writ Petition No. 1654 of 1999 was disposed of directing no further action for initiating criminal proceedings under Section 14-A of the Act if the appellant deposited a sum of Rs. 2,17,000 within a period of one month and in the event of failure of depositing the amount, there would be G no impediment in launching criminal proceedings against the appellant.

Aggrieved by and no satisfied with this common impugned order, these appeals are brought before this Court.

On behalf of the appellant, the following contentions were urged:- H

A (1) That the findings recorded by the Labour Court as affirmed by the High Court are perverse being contrary to the evidence placed on record.

(2) That the High Court committed a serious error in applying test of control in relation to the work of the respondents-workmen
B having regard to the definition of 'employer' contained in Section 2(i)(iv) of the Act as the work of the respondents-workmen was not part of the industry.

(3) That the respondents-workmen had not worked for 240 days to complain violation of Section 6-N.

C Submissions were made on behalf of the respondent-workmen supporting the impugned order.

The Labour Court on the basis of the evidence concluded that the appellant was the principal employer. In the award, the Labour Court in this
D regard has state thus:-

"From the statements of Ram Swarup who is Head Mali under Employer No. 1. It appears that though the concerned workers were employed at work by the contractor but he himself used to take work from them in the capacity of Head Gardener and he also used to look
E after their work. The contractor used to pay salary only and their attendance were used to be marked in a separate Register by another Head Gardener Sadhu Ram and the Register was got torn by Manager Shri Varshney so that no proof may remain and after tearing of register workers were removed. From these, it appears that employer no.1 had control over the plaintiff workers and they cannot be said to be
F the workers only of the contractor. It appears that with the object to keep them out of the ambit of U.P. Industrial Dispute Act, this method was adopted that work was taken from them by the employee of the employer and payment should be shown to have been made by the contractor. From the statements of Shri K.P.S. Chauhan contractor it
G appears that he still has work contract in BHEL (Laying of Sewer Pipe Line). From the complaints made by workers in this regard this fact is confirmed. As per the statements of worker Vinond Kumar, before tearing of the Attendance Register, worker had got photocopies of these done by taking these registers from Head Mali which copies have been filed by the worker party in the Court.

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Not filing the records concerning the attendance of workers by both employer no. 1 and 2 and destroying the same and filing of photocopies of the same by the worker party prove that employer no.1 can also not escape from the liability of illegal termination of services of these workers. Hence, it is decided that the Respondent No.1 is also the employer of plaintiff-workers, though principle employer."

The High Court took note of the fact that the respondents-workmen were engaged for working as gardeners in the factory premises, campus and residential colony of the appellant; Ram Swarup, Head Mali was admittedly employed by the appellant; he used to supervise the work of the respondents-workmen; another employee of the appellant, namely, Sadhu Ram used to maintain the record of attendance of the respondents-workmen; when dispute arose consequent upon disengagement of the workman, he destroyed the attendance register by tearing it off at the instance of one Mr. Varshney who was working as Manager with the appellant. Further, in the impugned order, the High Court observed that if the respondents-workmen were in fact engaged by independent contractors, the record of their attendance should have been maintained by them and to show their control and supervision of the work performed by the workmen. Thus, considering the evidence, the facts and circumstances of the case and findings of fact recorded by the Labour Court, the High Court held that the workmen were under the direct employment, supervision and control of the appellant observing that sometimes, the employers, with a view to get over stringent provision of the labour law, resort to engage the workmen through some intermediary and such an arrangement has to be termined as artificial. Further after referring to the case of *Hussainbhai Calicut* v. *The Alath Factory Thizolali Union Kozhikode and Ors.*, [1978] 4 SCC 257, the High Court in the impugned order has stated thus:-

"The findings of facts recorded by the Labour Court cannot be scrutinized or sifted in this Writ Petition. The tone and tenor of the employment of the Respondent-workmen makes it amply clear that they were, for all practical purposes, were the employees of Petitioner. The Petitioner had retained directed control over the work and the duties of the Respondent-workmen. The attendance of the workmen was also recorded by an employee of the Petitioner. The involvement of the alleged direct contractors was merely a figurative. The engagement of the contractor was sham and not genuine. Therefore, if the fictitious agency, which was brought into existence as a device to camouflage the status of the Respondent-workmen, is ignored, they

would be treated to be in the direct employment of the Petitioner."

High Court did not find any illegality or irregularity in the award passed by the Labour Court so as to interfere with it exercising writ jurisdiction. We have no good reason or valid ground to upset the concurrent finding of fact recorded by the Labour Court as affirmed by the High Court in this regard.

It appears to us that the argument based on the definition of employer under Section 2(i)(iv) of the Act was not urged before the High Court. It was urged on behalf of the appellant that aforesaid *Hussainbhai Calicut* case was distinguishable and it has no application to the facts of the present case stating that the work done by the workmen in that case was an integral part of the industry concerned and in the present case, the workmen were engaged as Gardeners and their work was not an integral part of the industry. There is nothing in the said judgment to say that the workmen engaged for the work in the premises of the industry though their work was not an integral part of the industry, cannot be employees of the industry. The two tests stated in the said case are available in paragraphs 5 and 6 which read:-

> "5. The true test may, with brevity, be indicated once again. Where a worker or group of workers labours to produce goods or services and these goods or services are for the business of another, that other is, in fact, the employer. He has economic control over the workers' subsistence, skill, and continued employment. If he, for any reason, chokes off, the worker is, virtually, laid off. The presence of intermediate contractors with whom alone the workers have immediate or direct relationship ex contracts is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, we discern the naked truth though drapped in different perfect paper arrangement, that the real employer is the Management, not the immediate contractor, Myriad devices, half-hidden in fold after fold of legal form depending on the degree of concealment needed the type of industry, the local conditions and the like may be resorted to when labour legislation casts welfare obligations on the real employer based on Articles 38, 39, 42, 43 and 43-A of the Constitution. The court must be astute to avoid the mischief and achieve the purpose of the law an not be misled by the maya of legal appearances.
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> 6. If the livelihood of the workmen substantially depends on labour rendered to produce goods and services for the benefit and satisfaction of an enterprise, the absence of direct relationship or the presence of

dubious intermediaries or the make-believe, trappings of detachment from the Management cannot snap the real life-bond. The story may vary but the inference defies ingenuity. The liability cannot be shaken off."

Looking to what is stated in paras extracted above, it is clear that where workman-labour is engaged to produce goods or services and these goods or services are for the business of another, the other is employer. The work of the respondents-workmen is not totally disassociated in fact between them and the appellant to say that they were not employees of the appellant judged by what is stated in para 7 of the same judgment in the following words:-

"7. Of course, if there is total dissociation in fact between the disowning Management and the aggrieved workmen, the employment is, in substance and in real-life terms, by another. The Management's adventitious connections cannot ripen into real employment."

The definition of 'employer' given in Section 2(i)(iv) of the Act is an inclusive definition. If the respondents-workmen as a matter of fact were employed with the appellant to work in their premises and which fact is found established after removing the mask or facade of make-believe employment under the contractor, the appellant cannot escape its liability.

The learned counsel for the appellant wanted to take support from the Constitution Bench judgment of this Court in *Steel Authority of India Ltd. and Ors.* v. *National Union Waterfront Workers and Ors.*, [2001] 7 SCC 1. For that purpose he took us through paras 107 to 116. In the said judgment, the provisions of The Contract Labour (Regulation and Abolition) Act, 1970 came up for consideration and interpretation. After detailed analysis of the provisions and consideration of various decisions, in para 107 contract labours were classified in three categories. In para 108-116, the issue whether on a contractor engaging contractor, labour in connection with the work entrusted to him by a principal employer, the relationship of master and servant between him (the principal employee) and the contract labour emerges. An extreme stand was taken by learned Senior Counsel in that case that the engagement of contract labour by the contractor in any work of or in connection with the work of an establishment, the relationship of master and servant is created between the principal employer and the contract labour. In dealing with the said contention, various earlier cases decided by this Court were referred to including the case of *Hussainbhai Calicut* (supra). The extreme contention was rejected. From the preusal of paragraphs 107-116, it is clear whether a workman is an employee

A of principal employer or not depends on the facts and circumstances of a given case. The case of Hussainbahi Calicut (supra) is neither dissented nor diluted. On the other hand, it is held that the said case is covered by class (ii) of para 107 which reads:-

> "107.....
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> B (ii) where the contract was found to be a sham and nominal, rather a camouflage, in which case the contract labour working in the establishment of the principal employer were held, in fact and in reality, the employees of the principal employer himself. Indeed, such cases do not relate to abolition of contract labour but present instances
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> C wherein the Court pierced the veil and declared the correct position as fact at the stage after employment of contract labour stood prohibited....."

This apart, the finding that the respondents-workmen were the employees of the appellant, does not rest merely on the test of control. The other D evidence and facts and circumstance of the case were also kept in mind in recording such a finding including a vital fact that the appellant did not produce the records alleging that they were not available which led to drawing adverse inference against them. It is not possible for us to hold that such concurrent findings recorded by the Labour Court and the High Court that the workmen were to be treated as the employees of the appellant are either E perverse or based on no evidence or untenable at all.

From the impugned order, it also does not appear that any contention was urged before the High Court that the respondents-workmen did not net-work for more than 240 days in 12 calendar months. Be that as it may, in view of the finding of fact recorded by the Labour Court as affirmed by the High F Court that the respondents-workmen worked for more than 240 days in 12 calendar months, we do not find any good reason to take a different view.

Thus, we find no merit in any of the submissions made on behalf of the appellant. Consequently, these appeals are liable to be dismissed. Accordingly, G they stand dismissed with no order as to costs.

N.J. Appeals dismissed.