

I/192762/2022

Government of West Bengal
Labour Department, I.R. Branch
N. S. Buildings, 12th Floor
1, K.S. Roy Road, Kolkata - 700001

No. Labr./...../491/(LC-IR)/22015(16)/460/2018 Date 12-05-...../2022

ORDER

WHEREAS an industrial dispute existed between (1) M/s. Lalbaba Seamless Tubes Pvt. Ltd., Bardhanya Ghata, Debhog, Dist. Purba Medinipur, PIN-721657 (2) M/s. Haldia Construction, Mohini Complex, Sukanta Colony, Debhog, Haldia, Plot No. 211, Dist. Purba Medinipur, PIN-721628 (3) M/s. Mallick Enterprise, Sridharpur, Kukrahati, Sutahata, Haldia, Dist. Purba Medinipur and their workman Sri Rabindra Nath Giri, S/o. Late Srikanta Giri, Vill. Bardhanya Ghata P.O. Debhog, P.S. Bhabanipur, Dist. Purba Medinipur, PIN-721657 regarding the issues being a matter specified in the Second schedule of the Industrial Dispute act, 1947 (14of 1947);

AND WHEREAS the workman has filed an application directly under sub-section 2 of Section 2A of the Industrial Dispute act, 1947 (14of 1947) to the Second Labour Court Specified for this purpose under this Department Notification No. 101-IR dated 2.2.12;

AND WHEREAS the Second Labour Court heard the Parties and framed the following issues as the "Issue" of the said dispute;

AND WHEREAS the Second Labour Court has submitted to the State Government its Award dated 20/04/2022 on the said Dispute vide memo no. 632 – L.T. dated. 05/05/2022.

NOW, THEREFORE, in pursuance of the provisions of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Governor is pleased hereby to publish the said Award as shown in the Annexure hereto.

ANNEXURE

(Attached herewith)

By order of the Governor,



Joint Secretary
to the Government of West Bengal

I/192762/2022

(2)

No. Labr/491/...../1(2) – IR

Dated 12-05-...../2022

Copy forwarded for information to:

1. The Judge, Second Labour Court with reference to his Memo No. 632 – L.T. dated. 05/05/2022.
2. The Joint Labour Commissioner (Statistics), W.B., 6, Church Lane, Kolkata-700001.


Joint Secretary

No. Labr/491/...../2(7) – IR

Dated 12-05-...../2022

Copy with a copy of the Award is forwarded for information & necessary action to:

1. M/s. Lalbaba Seamless Tubes Pvt. Ltd., Bardhanya Ghata, Debhog, Dist. Purba Medinipur, PIN-721657.
2. M/s. Haldia Construction, Mohini Complex, Sukanta Colony, Debhog, Haldia, Plot No. 211, Dist. Purba Medinipur, PIN-721628.
3. M/s. Mallick Enterprise, Sridharpur, Kukrahati, Sutahata, Haldia, Dist. Purba Medinipur.
4. Sri Rabindra Nath Giri, S/o. Late Srikanta Giri, Vill. Bardhanya Ghata P.O. Debhog, P.S. Bhabanipur, Dist. Purba Medinipur, PIN-721657.
5. The Assistant Labour Commissioner, W.B., In-Charge of Labour Gazette.
6. The O.S.D. & E.O. Labour Commissioner, W.B., New Secretariat Building (11th Floor), 1, Kiran Sankar Roy Road, Kolkata – 700001.
- ✓ 7. The Deputy, IT Cell, Labour Department, with the request to cast the Award in the Department's website.


Joint Secretary

In the matter of an application under section 2A(2) of The Industrial Disputes Act, 1947 filed by Sri Rabindra Nath Giri, S/o. Late Srikanta Giri, Vill. Bardhanya Ghata, P.O. Debhog, P.S. Bhabanipur, Dist. Purba Medinipur, PIN-721 657 against (1) M/s. Lalbaba Seamless Tubes Pvt. Ltd., Bardhayaghata, Debhog, Dist. Purba Medinipur, PIN-721657, (2) M/s. Haldia Construction, Mohini Complex, Sukanta Colony, Debhog, Haldia, Plot No. 211, Dist. Purba Medinipur, PIN – 721 628 & (3) M/s. Mallick Enterprise, Sridharpur, Kukrahati, Sutaahata, Haldia, Dist. Purba Medinipur.

[Case No. 01/2015 u/s. 2A(2)]

BEFORE THE SECOND LABOUR COURT, WEST BENGAL, KOLKATA

PRESENT: SRI ARGHA BANERJEE, JUDGE

SECOND LABOUR COURT

KOLKATA.

DATED: 20.04.2022.

A W A R D



The present case was being initiated u/s 2A(2) of The Industrial Disputes Act, 1947 that was filed by the applicant, Sri Rabindra Nath Giri praying thereby for reinstatement in service with full back wages and other consequential reliefs.

The fact of the case in a nutshell is that M/s. Lalbaba Seamless Tubes Pvt. Ltd. is an establishment within the meaning of Section 2 of the West Bengal Shops and Establishment Act, 1965 and is also an industry within the meaning of Section 2(j) of The Industrial Disputes Act, 1947. That accordingly the employees employed therein are "Workmen" within the meaning of Section 2(s) of The Industrial Disputes Act, 1947.

It has been contended by the applicant that M/s. Lalbaba Seamless Tubes Pvt. Ltd. is a highly prosperous unit earning huge profit every year out of the business conducted by the management of the said Company. Many workmen are being employed for running the administration of the said business including Officers, Supervisors, Clerks, Darwans, Skilled, Semi-skilled, unskilled etc. It is the contention of the applicant that the said concern does not follow the laws of the land and indulges in unfair labour practices and victimization, in so far as administration of disciplines are being concerned. The O.P company does not tolerate trade unionism and/or any type of association of employees/workmen and always tries to punish the leading trade union and /or association activists operating in the organization by different means.

That this applicant was appointed on or about 06.01.2011 in the post of un-skilled worker after conducting interview through their contractor M/s. Haldia Construction (herein referred as the OP no. 2). The applicant was asked to join at M/s Lalbaba Seamless Tubes site on 06.01.2011. The applicant further stated that the O.P. No. 2 had stated in the respective letter of appointment that the terms and conditions of wages and other facilities was given as per the schedule of the O.P. no. 1.

That the applicant stated that the same had maintained good, clean, spotless, meritorious and unblemished record during the tenure of his service since the date of his appointment and that the O.P. no. 1 had suddenly without giving any prior notice to the applicant and without following the principles of natural justice had terminated the service of the same on 31.12.2014 without any reason whatsoever and without offering him any opportunity of self defence which is a blatant violation of the principles of natural justice. That before termination the applicant summarily the Company never cared to substantiate the allegations, if any, against the same through properly constituted domestic enquiry and was not given any opportunity to defend his case. Thus, the principles of natural justice had been grossly violated in the present case and the

order given over phone by the Company terminating the applicant workman from the service of the Company was wanton, arbitrary, capricious and vindictive.

That the applicant workman along with other terminated workmen by their letter dated 03.01.2015 requested the Opp. Party No. 1 Company to withdraw such unjustified and illegal termination of service and reinstate him in his service immediately but the Company did not pay any heed to his request. That the applicant thereafter finding no other alternative raised an industrial dispute along with other terminated workmen on 05.01.2015 to the Deputy Labour Commissioner, Government of West Bengal, Basudevpur, Khanjanchak, Haldia, Purba Medinipur for his intervention and taking necessary action. Your petitioner further states that the Assistant Labour Commissioner, Haldia by his letter dated 06.01.2015 convened a meeting on 07.01.2015. That subsequently applicant had given reminders to the Deputy Labour Commissioner, Haldia on 13.01.2015 and 15.01.2015 but no effective result came out from the Conciliation Officer. That after waiting for over 45 days the applicant had filed this instant application before this Court for adjudication of the instant case on merit as per provision u/s. 2A(2) of The Industrial Disputes Act, 1947.

That applicant prior to his termination was drawing a wage of **Rs. 8,970/- per mensem** and submitted that from the date of the said unjustified and illegal termination of service the same is out of employment and has been passing his days along with his family members with great hardship due to want of money. That the applicant further submitted that the monthly wages were paid to him by the principal employer Opp. Party No. 1 through the Opp. Party No. 2 Company from the date of appointment, thereafter through the Opp. Party No. 3 Company from January, 2012. The applicant further contended that his appointment vide a contractor was a camouflage from the part of the O.P no. 1 as the management of the Company used to appoint different contractors and the same workers were working under them.

That the applicant further contended that the purported termination of his service is in essence a case of retrenchment as defined under section 2(oo) of The Industrial Disputes Act, 1947 and in this case of retrenchment the Company did not observe the statutory precondition as provided in section 25F of The Industrial Disputes Act, 1947. That the purported termination of service of your petitioner workman is therefore void abinitio, irregular, illegal and inoperative and he entitled to reinstatement with full back wages and other consequential benefits as if no action was taken by the Company against your petitioner workman.

The O.P No. 1 had appeared in the instant matter and had filed his Written Objection, however, the O.P No. 2 and O.P. No. 3 had not appeared in the instant case and matter was heard ex-parte against them.

The O.P. No. 1 in his written objection stated that the applicant was not a direct employee of the O.P. No. 1. The O.P. No. 2 M/s. Haldia Construction, was a contractor appointed by the O.P. No. 1 for completion of certain specific projects/jobs and the said contractor for its own interest recruits skilled/ unskilled labours for completion of the specific projects/jobs and those labours were paid by the contractors and not by the O.P. No. 1. That such skilled/unskilled labours are in a habit to hop from the job of one contractor to another contractor for financial gain but the job as contended might be of the same Company. Such labours were in no way the responsibility of the O.P. No. 1. and were purely temporary labours of the contractors who are not at all habituated to a continuous job in a fixed manner.

In the instant matter as contended by the O.P. No. 1 the applicant had admitted in Para No. 12 of the application that the same had received salary first from O.P.No. -2 from his date of appointment up to Dec. 2011 and thereafter from January 2012 the same had received salary from O.P. No. 3 which supports the contention of the O.P.-1 as stated by him. Thus, as stated by the O.P. No. 1 the instant application under section 2A(2) of the W.B.I.R. 1958 so filed by the applicant suffers in nullity and this Court has no jurisdiction to try the instant application. That the applicant as contended by the O.P. No. 1 was never a direct employee of the O.P. No. 1 - 1



but a contract labour working for different contractors. That the same often change their allegiance from one contractor to another according to their own benefits and this applicant is one such person who was once an employee of O.P. No. - 2 and thereafter of O.P. NO. - 3 and at no point of time the applicant was under the direct payroll of the O.P. No. - 1.

That, this O.P. No. - 1 had in his knowledge from DLC, Haldia office that due to the bad market conditions many contractors had released some of it's workers at the termination of contract tenure on 31st De. 2014 that was for one year and as requested by the DLC on humanitarian ground contractor had also paid all dues along with the retrenchment benefit. That the O.P. No. 1 further contends that whatever benefits the applicants seek, has to seek from the O.P. No. 2 and O.P. No. 3 and not from O.P. No. - 1.

ISSUES

The following issues were framed to come to a decision of this instant matter:—

- 1) Whether this application u/s 2A(2) of the Industrial Disputes Act, 1947 is maintainable in its present form and prayer?**
- 2) Whether there is any jural relationship between the applicant and the O.P. No. 1?**
- 3) Whether the termination of service of the applicant Shri Bidyut Giri with effect from 31.12.2014 as claimed is justified?**
- 4) To what other relief/reliefs, if any, the applicant is entitled to as per law and equity?**

EVIDENCE ON THE RECORD

In order to substantiate the case the applicant had adduced himself as the sole witness to the case. That the O.P. no. 1 had cross examined the P.W. 1. in full. The documents produced before this Court were marked in the following manner:

- 1) Exhibit – 1: Appointment Letter dated 24/02/2011;**
- 2) Exhibit – 2: Transfer Letter dated of Mallick Enterprise;**
- 3) Exhibit – 3: Safety training certificate and gate pass issued by Lal Baba Seamless Tubes Pvt. Ltd;**
- 3) Exhibit – 4: Family Identity Card;**
- 4) Exhibit – 5: Representation to Deputy Labour Commissioner, Haldia dated 02/01/2015;**
- 5) Exhibit – 6: Representation to General Manager, Lalbab Seamles dated 03/01/2015;**
- 6) Exhibit – 7: Representation to Deputy Labour Commissioner, Basudevpur dated 13/01/2015;**

EVIDENCE

From the substantive evidence of the P.W. 1 Shri Rabindra Nath Giri who happens to be the applicant of this instant application it is clear that: -

- a) This applicant had appeared before an interview before the O.P. No. 1 for getting service and was thereafter appointed by the O.P. No. 2 M/s Haldia Constructions to work for the O.P. No. 1 vide the Exhibit - 1. Thereafter the same was transferred under M/s Mallick Enterprise which is clear from Exhibit - 2,



b) The applicant had joined the service on 06/01/2011. That the O.P. No. 1 had issued the Exhibit – 3 and 4 which are respectively the Safety Training Certificate, Gate Pass and the Family Identity Card of the said concern. However no agreement was signed in between the applicant and the O.P. No. 1, 2 and 3 in regard to the service conditions, rules and wages.

c) Since 06/01/2011 the applicant had been giving his service towards the O.P. No. 1 company and subsequently on 31/12/2014 the service of the applicant was terminated by the O.P. No. 1 without issuing any show cause notice or charge sheet upon this applicant.

d) The applicant along with other co-workers had written a letter marked as exhibit – 5 to the Deputy Labour Commissioner, Haldia and had also send a representation vide exhibit - 6 to General Manager, M/s Lalbaba Seamless Tubes stating the fact that all of them were illegally dismissed from their services and were not given advanced notice. They had also requested for reinstatement.

e) The applicant along with other co-workers had also issued the exhibit 7 that is a letter to the Deputy Labour Commissioner, Basudevpur, Khanjanchak, Purba Medinipur in regard to their sudden termination of service with a further prayer for his interference in the said matter. However, no proper action was taken from his end.

That after conclusion of the examination-in-chief of P.W. 1 even after giving several opportunities the O.P. No. 1 had failed to conclude the cross-examine the P.W. 1. Accordingly, the evidence of P.W. 1 was closed and the date was fixed for adducing evidence of O.P.W. That, the O.P even after being given several opportunities had failed to adduced any evidence to negate the claim of the applicant. Accordingly, the evidence of O.P. No. 1 was closed and the matter was fixed for argument.

ARGUMENT MADE BY THE PARTIES

In the argument made by the Learned Counsel for the applicant the Ld. Counsel had highlighted the fact that this applicant had appeared before an interview before the O.P. No. 1 for getting the instant service and was thereafter appointed by the O.P. No. 2 M/s Haldia Constructions to work for the O.P. No. 1 vide the Exhibit - 1. Thereafter the same was transferred under M/s Mallick Enterprise vide the Exhibit No. 2. That the applicant had joined the service on 06/01/2011 and the O.P. No. 1 had issued the Exhibit – 3 and 4 which are respectively the Safety Training Certificate, the Gate Pass of the said concern and the Employees State Insurance Family identity card issued by M/s Mallick Enterprise. That this applicant since 06/01/2011 had been giving his service towards the O.P. No. 1 company and subsequently on 31/12/2014 without issuing of any show cause notice or prior notice of one month the service of the applicant was terminated by the O.P. No. 1.

That after the sudden termination the applicant along with other co-workers had written a letter marked as exhibit – 5 to the Deputy Labour Commissioner, Haldia and had also send a representation vide exhibit - 6 to General Manager, M/s Lalbaba Seamless Tubes stating the fact that himself along with all the other co-workers were illegally dismissed from their respective services without giving any advance notice. They had also requested for reinstatement. The applicant along with other co-workers had also send the exhibit - 7 which is a letter to the Deputy Labour Commissioner, Basudevpur, Khanjanchak, Purba Medinipur in regard to their sudden termination of service with a further prayer for his interference in the said matter. However, no proper action was taken from his end.

The Learned Counsel had further argued upon the fact that the O.P. No. 1 had adopted an unfair, camouflaged means and had appointed the O.P. No. 2 and 3 to appoint unskilled workmen to work for the same and had not made any direct agreement with the applicants. That apart from the exhibit – 1 an 2 no other documents were given to the applicant to substantiate their respective claims. The Learned Counsel further argued upon the point that the applicants were



working for the O.P. No. 1 since 06/01/2011 and were terminated on 31/12/2014 and have thus given a service to the O.P. No. 1 for 1456 days. The Learned Counsel thus prays for Justice.

DECISION WITH REASONS

For proper adjudication of the matter all the issues are taken up separately for coming to a just decision of the instant matter: -

1) Whether this application u/s 2A(2) of the Industrial Disputes Act, 1947 is maintainable in its present form and prayer?

That from the application filed by the applicant, the written statement filed by the O.P. No. 1 the witnesses in the present matter, the exhibits and other materials on the record it is clear that the applicant was a contract labour appointed by the O.P. No. 2 and 3 to work for the O.P. No. 1. The system of employment of contract labour lends itself to various abuses and the question of its abolition had been under the consideration of the Government for a long time. Accordingly, in the Second Five Year Plan, The Planning Commission made certain recommendations, namely undertaking of studies to ascertain the extent of the problem of contract labour, progressive abolition of system and improvement of service conditions of contract labour where the abolition was not possible. Thus, it is clear that the **Contract Labour (Regulation and Abolition) Act of 1970** was enacted with a view to abolish wherever possible or practicable the employment of contract labour. This Act is a piece of social legislation for welfare of labourers and to be construed liberally. The primary object of the Act is to prevent exploitation of contract labourers by contractor or establishment where the arrangement to engage labourers through contractor is a mere camouflage. However such question of fact is what that is to be determined in the present case.

That, the section **2(b) of The Contract Labour (Regulation and Abolition) Act, 1970** defines a workmen who shall be deemed to be employed as "contract labour" in or in connection with the work of an establishment when he is hired in or in connection with such work by or through a contractor, with or without the knowledge of the principal employer. That the term "Contract Labour" is a species of workmen who has been hired in or in connection with the work of an establishment by or through a contractor, with or without the knowledge of the principal employer. A workmen may be hired

- a) in an establishment by the principal employer or by his agent with or without the knowledge of the principal employer; or
- b) may be hired in connection with the work of an establishment by the principal employer through a contractor or by a contractor with or without the knowledge of the principal employer.

The Hon'ble Apex Court in Hussainbhai vs Alath Factory Thezhilali Union (1978)6 SCC 257 and in Indian Petrochemicals Corpn. Ltd. Vs Shramik Sena (1999)6 SCC 439 was of the opinion that where a workman is hired in or in connection with the work of an establishment by the principal employer through a contractor, the contractor merely acts as an agent so there will be master and servant relationship between the principal employer and the workman. But where a workman is hired in or in connection with the work of an establishment by a contractor, either because he has undertaken to produce a given result for the establishment or because he supplies workmen for any work of the establishment, a question might arise whether the contractor is a mere camouflage.

The Hon'ble Court further in Steel Authority of India vs National Union Waterfront Workers (2001)7 SCC 1 also highlighted the fact that if the answer is in affirmative in regard to the fact that the workman is hired in or in connection with the work of an establishment by the principal employer through a contractor, the contractor merely acts as an agent so there will be master and servant relationship between the principal employer and the workman; the workman so hired will



be in fact an employee of the principal employer; but if the answer is in the negative, the workman will be a contract labour.

The Hon'ble High Court of the Judicature of Gujrat in State of Gujrat vs. Sarabhai Chiman Lal Sheth & Co. (1984)11 LLJ 334 (Guj) had opined that if the contractor is part and parcel of the work of the establishment, and is not a separate activity carried on by the contractor for his own purpose, such work would be the work of that establishment. But in each particular case, it has to be seen as to what is the main purpose of the activity.

Section 1(4)(a) & (b) of The Contract Labour (Regulation and Abolition) Act, 1970 clearly specifies to whom the aforesaid Act is binding upon. It states that "(4) It applies-

(a) to every establishment in which twenty or more workmen are employed or were employed on any day of the preceding twelve months as contract labour;

(b) to every contractor who employs or who employed on any day of the preceding twelve months twenty or more workmen:

Provided that the appropriate Government may, after giving not less than two months' notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any establishment or contractor employing such number of workmen less than twenty as may be specified in the notification."

In the current scenario it seen from the exhibit 4 that this applicant alongwith many others were being appointed as contract labours to work for the O.P. No. 1 and had been working in the said concern (that is evident from the exhibit 3) for more than a period of twelve months. Neither any evidence were adduced by the O.P. No. 1 to show the fact that less number of workmen than that of the prescribed limit were working for the establishment nor any documents were produced before this Court to highlight the fact that the same does not fall under the category mentioned in the above mentioned section.

Furthermore section 7 of The Contract Labour (Regulation and Abolition) Act, 1970 clearly states that

"(1) Every principal employer of an establishment to which this Act applies shall, within such period as the appropriate Government may, by notification in the Official Gazette, fix in this behalf with respect to establishments generally or with respect to any class of them, make an application to the registering officer in the prescribed manner for registration of the establishment: -

(1) Every principal employer of an establishment to which this Act applies shall, within such period as the appropriate Government may, by notification in the Official Gazette, fix in this behalf with respect to establishments generally or with respect to any class of them, make an application to the registering officer in the prescribed manner for registration of the establishment\:"

Provided that the registering officer may entertain any such application for registration after expiry of the period fixed in this behalf, if the registering officer is satisfied that the applicant was prevented by sufficient cause from making the application in time.

(2) If the application for registration is complete in all respects, the registering officer shall register the establishment and issue to the principal employer of the establishment a certificate of registration containing such particulars as may be prescribed."

Thus, from a reading of the above mentioned section it is clear that the O.P. No. 1 fall under the category of getting itself registered to appoint contract labour. No evidence or documents were produced by the O.P. No. 1 to show the fact that the same is registered under section 7 of the The Contract Labour (Regulation and Abolition) Act, 1970 and a certificate as stated in the said Act



had been obtained. Though the O.P. No. 1 had appeared in the instant case yet the same had not shown any authority to appoint contract labour. Thus, as per the principles of law if a document is being withheld or has not been produced; if produced would be un-favourable to the person who withholds the same.

Section 9 of The Contract Labour (Regulation and Abolition) Act, 1970 clearly states that "No principal employer of an establishment, to which this Act applies, shall-

(a) in the case of an establishment required to be registered under section 7, but which has not been registered within the time fixed for the purpose under that section;

(b) in the case of an establishment the registration in respect of which has been revoked under section 8,

employ contract labour in the establishment after the expiry of the period referred to in clause (a) or after the revocation of registration referred to in clause (b), as the case may be."

It is further seen that the O.P. No. 1 has not produced any document to show the fact that the same is being registered under the provisions of The Contract Labour (Regulation and Abolition) Act, 1970 and had appointed contract labours to work for their establishment. It is being admitted by the O.P. No. 1 in the written statement filed by them that they had appointed contract labours vide the O.P. No. 2 and 3 to work for their establishment.

No documents were also produced before this Court to show the fact that the O.P. No. 1 being duly registered under the section 7 of The Contract Labour (Regulation and Abolition) Act, 1970 had an agreement with the O.P. No. 2 and 3 to supply contract labour to the establishment of the O.P. No. 1.

Section 12 of The Contract Labour (Regulation and Abolition) Act, 1970 clearly states that:-

"(1) With effect from such date as the appropriate Government may, by notification in the Official Gazette, appoint, no contractor to whom this Act applies, shall undertake or execute any work through contract labour except under and in accordance with a licence issued in that behalf by the licensing officer. -

(1) With effect from such date as the appropriate Government may, by notification in the Official Gazette, appoint, no contractor to whom this Act applies, shall undertake or execute any work through contract labour except under and in accordance with a licence issued in that behalf by the licensing officer."

(2) Subject to the provisions of this Act, a licence under sub-section (1) may contain such conditions including, in particular, conditions as to hours of work, fixation of wages and other essential amenities in respect of contract labour as the appropriate Government may deem fit to impose in accordance with the rules, if any, made under section 35 and shall be issued on payment of such fees and on the deposit of such sum, if any, as security for the due performance of the conditions as may be prescribed."

That, from a clear reading of the above mentioned section it is clear that a contractor who is to appoint contract labour under this act ought to have a license in such regard and has no authority to appoint a contract labour without issuance of a license from an appropriate authority as mentioned in the act. In the current scenario it is seen that neither the O.P. No. 2 nor the O.P. No. 3 had appeared in this instant case and had filed their respective license to show the fact that the same had license to appoint contract labour.

Now the question comes as to whether such a contract is sham and bogus or not. The Hon'ble Apex Court in Nilgiri Co-operative Marketing Society Ltd vs State of Tamil Nadu 2004(101) FLR 137 SC was of the opinion that while considering the relevant factors for reaching the conclusion that the contract is a sham and bogus contract, the principal which emerges is that the prima facie



test for determination is the right of master to supervise and control the work done by the servant not only in the manner of directing work the servant is to do but also the manner in which he shall do the work.

In Mahanandi Coal Fields Ltd. Vs Presiding Officer, Industrial Tribunal 2017 (152) FLR 100
The Hon'ble Court was of the opinion that the proper test is whether or not the hirer had authority to control the manner of execution of the act in question. Further it is observed that the correct method of approach would be to consider whether having regard to the nature of work there was due control and supervision by the employer.

Thus, keeping in view the above discussions in the present scenario it is evident on the record

a) that this applicant though having the colour of a workmen was a contract labour who has been employed by the O.P. No. 2 and O.P. no. 3 who as stated were the contractors of the O.P. No. 1, the principal employer. The said contractors had been hiring contract labours to perform the work of O.P. No. 1.

b) This applicant was hired by the O.P. No. 2 by executing the exhibit – 1 and 2. No documents were being filed by the O.P. No. 1, 2 and 3 to the fact that the same had complied with the provisions of Section 1(4)(a) & (b), Section 7, Section 9 and Section 12 of the Contract Labour (Regulation and Abolition) Act, 1970.

c) Thus, in the absence of such documents it clear that the O.P. No. 1 had no authority to appoint a contract labour and the O.P. No. 2 and 3 are merely the agents of the O.P. No. 1 who happens to be the principal in the instant case.

d) The O.P. No. 1 was in absolute control over the applicant during his tenure of service in the O.P. No. 1 company and thus the right of master the O.P. No. 1 to supervise and control the work done by the servant the applicant in this case is not only in the manner of directing work the servant is to do but also the manner in which he shall do the work.

Thus, in conclusion it is clearly established that the applicant being a workman was hired in connection with the work of an establishment by the principal employer the O.P. No. 1 in this case; through a contractor the O.P. No. 2 and thereafter the O.P. No. 3, and as observed by The Hon'ble Apex Court the contractor had merely acted as an agent and so there will be a master and servant relationship between the O.P. No. 1 and the applicant. The applicant being a workman was hired in connection with the work of an establishment the O.P. No. 1 by a contractor (O.P. No. 2 and 3) because the same supplied workmen for any work of the establishment (M/s Lalbaba Seamless Tubes Pvt. Ltd); accordingly, such a question of contract labour in the absence of any proper authorisation is a mere camouflage to deceit the applicant from being in an employer employee relation with the O.P. No. 1.

From the above discussion it can thus, clearly be said that there was an employer and employee relation in between this applicant and the O.P. No. 1 and this application u/s 2A(2) of the Industrial Disputes Act, 1947 is maintainable in its present form and prayer. Thus, this issue is decided in favour of the applicant.

2) Whether there is any jural relationship between the applicant and the O.P. No. 1?

From the discussions made in regard to the Issue no. 1 it is quite clear that: -

a) that this applicant though having the colour of a workmen was a contract labour who has been employed by the O.P. No. 2 and O.P. no. 3 who as stated were the contractors of the O.P. No. 1, the principal employer. The said contractors had been hiring contract labours to perform the work of O.P. No. 1.

b) This applicant was hired by the O.P. No. 2 by executing the exhibit – 1 and 2. No documents were being filed by the O.P. No. 1, 2 and 3 to the fact that the same had complied with the



provisions of Section 1(4)(a) & (b), Section 7, Section 9 and Section 12 of the Contract Labour (Regulation and Abolition) Act, 1970.

c) Thus, in the absence of such documents it clear that the O.P. No. 1 had no authority to appoint a contract labour and the O.P. No. 2 and 3 are merely the agents of the O.P. No. 1 who happens to be the principal in the instant case.

d) The O.P. No. 1 was in absolute control over the applicant during his tenure of service in the O.P. No. 1 company and thus the right of master the O.P No. 1 to supervise and control the work done by the servant the applicant in this case is not only in the manner of directing work the servant is to do but also the manner in which he shall do the work.

The applicant being a workman was hired in connection with the work of an establishment the O.P. No. 1 by a contractor (O.P. No. 2 and 3) because the same supplied workmen for any work of the establishment (M/s Lalbaba Seamless Tubes Pvt. Ltd); accordingly, such a question of contract labour in the absence of any proper authorisation is a mere camouflage to deceive the applicant from being in an employer employee relation with the O.P. No. 1. From the above discussion it can thus, clearly be said that there was an employer and employee relation in between this applicant and the O.P. No. 1 and accordingly there is clearly a jural relationship between the present applicant and the O.P. No. 1. Accordingly, this issue is being decided in favour of the applicant.

3) Whether the termination of service of the applicant Shri Rabindra Nath Giri with effect from 31.12.2014 as claimed is justified?

The applicant had appeared before an interview before the O.P. No. 1 for getting the instant service and was thereafter appointed by the O.P. No. 2 M/s Haldia Constructions to work for the O.P. No. 1 vide the Exhibit - 1. Thereafter the same was transferred under M/s Mallick Enterprise. That the applicant had joined the service on 06/01/2011 and the O.P. No. 1 had issued the Exhibit - 3 which are the Safety Training Certificate and the Gate Pass of the said concern. That this applicant since 06/01/2011 had been giving his service towards the O.P. No. 1 company and subsequently on 31/12/2014 without issuing of any show cause notice or prior notice of one month the service of the applicant was terminated by the O.P. No. 1.

Section 25B of the Industrial Disputes Act states that *".....a workman is said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;*

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer--

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than--

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case; "

In the present situation it is seen that this applicant was appointed in the service of the O.P. No. 1 on and from 06/01/2011 and his service was terminated 31/12/2014 and had been in service of the establishment for a period of three years eleven months and twenty six days (1456 days). Thus, it is proved that the present applicant was a workman who was working permanently under the opposite party Company. No notice was being issued by the O.P. No. 1 in regard to the termination of service by the O.P. No. 1.



Section 25F. Of the Industrial Disputes Act, 1947 clearly lays down the conditions precedent to retrenchment of workmen

“ Conditions precedent to retrenchment of workmen:- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until--

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service] or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette].”

Thus, in accordance to section 25F of the Industrial Disputes Act, 1947 the retrenchment of the applicant Sri Rabindra Nath Giri is unjustified and in-operative. Accordingly, this issue is decided in favour of the applicant.

4) To what other relief/reliefs, if any, the applicant is entitled to as per law and equity?

The Hon'ble Apex Court in Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and ors., reported in (2013) 10 SCC 324 was of the opinion that

i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee / workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of particular fact lies on the person who makes a positive averments about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

Thus, keeping in mind the present market conditions it will be highly justified to pass an award of full back wages along with other consequential benefits if any to the applicant from the day his service was terminated (31/12/2014). Accordingly the applicant is entitled to get full back wages along with all other consequential benefits (if any) from 01/01/2015.

This court now carefully goes through the decisions held by the Hon'ble Courts in AIR 1992 Supreme Court 573 (C.E.S.C Ltd. Vs. Subhash Chandra Bose & Others), 1978 SCR (3) 1073 (Hussain Bhai Vs. Alath Factory Thozhilali Union, Kojhikode& Others), 2004) 1



Supreme Court cases 126 (Ram Singh & Others Vs. Union Territory, Chandigarh & Others).

The Hon'ble Courts were pleased to give emphasis on many factors in determining the relationship of employer and employee. According to those referred decisions, it can be mentioned clearly that

“in determining the relationship of employer and employee, no doubt “control” is one of the important tests but is not to be taken as the sole test. In determining the relationship of employer and employee, all other relevant facts and circumstances are required to be considered including the terms and conditions of the contract. It is necessary to take a multiple pragmatic approach weighing up all the factors for and against an employment instead of going by the sole “tests of control”. An integrated approach is needed. “Integration” test is one of the relevant tests. It is applied by examining whether the person was fully integrated into the employer’s concern or remain apart from and independent of it. The other factors which may be relevant are – who has the power to select and dismiss, to pay remuneration, deduct insurance contribution, organize the work, supply tools and materials and what are the “mutual obligations” between them”.

Thus, keeping in view the above discussions and the Principles laid down by The Hon'ble Apex Court it can be clearly said that: -

- That this applicant was being employed by the O.P No. 1 on and from 06.01.2011 as a contract labour vide the O.P. No. 2 and 3 who were having no proper authorization to appoint contract labour.
- Since such appointment being without proper authorization and the applicant being in absolute control of the O.P. No. 1 was deemed to be an employee by the applicant who had been rendering his service as an unskilled labour in the said concern.
- That the applicant had performed his duties towards the O.P. No. 1 till 31/12/2014 and the same was refused from his employment by the opposite party without following the provisions of The Industrial Laws.
- That the Opposite Party Company had failed to comply with the conditions laid down u/s 25F(b) of the Industrial Disputes Act making the whole act of the opposite party illegal and unjustified.
- The reason for retrenchment of service of the applicant by the Opposite party Company could not be properly justified by the same.
- The applicant was not working for gain for other employer in any other concern.

Hence, it is

ORDERED

The application **u/s. 2A(2) of the Industrial Disputes Act, 1947** be and the same is thus **allowed on contest without costs**. The Opposite party was not justified in dismissing the applicant and is thus, directed to cause reinstatement of the applicant **Sri Rabindra Nath Giri** at once. The applicant shall receive full back wages for the period from 01/01/2015 till the present date (@ Rs.8,970 /- per month) along with all other consequential benefits if any. The O.P is directed to comply with the Award.



This is my award.

Let the copies of this award be sent to the concerned authority of the Government of West Bengal.

Dictated & Corrected by me

Sd/ —

Judge
Second Labour Court



Sd/ —

(Argha Banerjee)
Judge
Second Labour Court
20.04.2022.