

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

No. Labr./1009/(I.R.)

Date : 24.12.18

ORDER

WHEREAS an industrial dispute existed between (1) M/S.: Kirloskar Brothers Ltd, Udyog Bhaban , Tilok Road, Pune-411002 (2) MA FOI Management Consultants Limited at 505, 5th Floor, Central Plaza, 2/6 , Sarat Bose Road, Kolkata-20 and their workman, Smt. Debjani Chakraborty, Merlin Laurel Garden, Ruby-2G, 71 Nrishingha Dutta Road, P.S- Thakurpukur, Kolkata-08 regarding the issue, being a matter specified in the second schedule of the Industrial Dispute Act, 1947 (14 of 1947);

AND WHEREAS the workman has filed an application under section 10(1B)(d) of the Industrial Dispute Act, 1947 (14of 1947) to the Judge, Second Labour Court specified for this purpose under this Deptt.'s Notification No. 1085-IR/12L-9/95 dated 25.07.1997.

AND WHEREAS, the Judge of the said Second Labour Court heard the parties under section 10(1B)(d) of the I.D. Act, 1947 (14of 1947) and framed the following issue dismissal of the workman as the "issue" of the dispute.

ISSUE

- 1. Is the application U/s. 10(1B) (d) of the Industrial Dispute Act, 1947 (West Bengal amendment) filed by the applicant maintainable in law?**
- 2. Whether the service of the applicant came to an end with effect from the end of June, 2000 and was justified and proper?**
- 3. Whether there is jural relationship between the applicant and O.P. as employee-Employer?**
- 4. Whether the applicant is entitled to get relief/ reliefs as per law and equity ?**

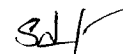
AND WHEREAS the said Judge Second Labour Court has submitted to the State Government its Award under section 10(1B)(d) of the I.D. Act, 1947 (14of 1947) on the said Industrial Dispute.

Now, THEREFORE, in pursuance of the provisions of Section 17 of the Industrial Dispute Act, 1947 (14of 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,



Deputy Secretary

to the Government of West Bengal

: 2 :

No. Labr./1009/1(6)/(LC-IR)

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Copy with a copy of the Award forwarded for information and necessary action to :-

1. M/s : Kirloskar Brothers Ltd, Udyog Bhaban , Tilok Road, Pune-411002
2. M/S:MA FOI Management Consultants Limited at 505, 5th Floor, Central Plaza, 2/6 , Sarat Bose Road, Kolkata-20
3. Smt Debjani Chakraborty, Merlin Laurel Garden, Ruby-2G, 71 Nrishingha Dutta Road, P.S- Thakurpukur, Kolkata-08.
4. The Asstt. Labour Commissioner, W.B. In-Charge, Labour Gazette.
5. The Labour Commissioner, W.B., New Secretariat Buildings, (11th Floor), 1, Kiran Sankar Roy Road, Kolkata - 700001.
- ✓ 6. The O.S.D., IT Cell, Labour Department, with the request to cast the Award in the Department's website.



Deputy Secretary

No. Labr./1009/2(2)/(LC-IR)

Date24-12-18

Copy forwarded for information to :-

1. The Judge, Second Labour Court, West Bengal, with respect to his Memo No. 1952 dated 25.09.2018.
2. The Joint Labour Commissioner (Statistics), West Bengal, 6, Church Lane, Kolkata - 700001.

Deputy Secretary

An application U/s. 10(1B)(d) of the Industrial Disputes Act, 1947 filed by **Smt. Debjani Chakraborty** wife of Ashim Chakraborty residing at Merlin Laurel Garden, Ruby-2G, 71 Nrishingha Dutta Road, P.S-Thakurpukur, Kolkata-700 008 against **(1) M/s. Kirloskar Brothers Ltd** having its Registered and Corporate Office at Udyog Bhaban, Tilok Road, Pune- 411002 and, inter alia, a Branch Office at 8, Camac Street, Shanti Niketan Building, 2nd Floor, Space No.1 Kolkata-700 017 and **(2) MA FOI Management Consultants Limited** having its Corporate Office at 1st Floor, 49, Cathedral Road, Chennai-600086 and Branch Office at 505, 5th Floor, Central Plaza, 2/6, Sarat Bose Road, Kolkata-700 020.

(Case No. 20/2010 U/s. 10(1B)(d) of Industrial Disputes Act, 1947)

BEFORE THE SECOND LABOUR COURT, WEST BENGAL, KOLKATA

PRESENT: **SRI ARABINDA PANTI**, JUDGE
SECOND LABOUR COURT
KOLKATA.

Date: 19.09.2018

A W A R D

The case of the applicant Smt. Debjani Chakraborty in brief is that she was appointed by Opposite Party No. 1 namely M/s. Kirloskar Brothers Limited and she joined in service under O.P No.1 on 4th May, 1998 and worked at the office at No. 8 Camac Street, Shanti Niketan Building, Kolkata-700 017 up to 30th June, 2000 without any suspension of work, without any blemish and to the satisfaction and interest of the O.P No.1.

It is further stated by the applicant that she was appointed as the Receptionist-cum-Telephone Operator. She had to attend all incoming telephone calls through EPABX of O.P No.1 and to distribute properly to the concerned officers, to provide first information about the products of O.P. No.1 to its customers, including information regarding the pump manufacturing and forwarding the pump enquiries to its dealers and various officials of O.P.No.1.



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It is further ventilated by the applicant that she was authorized to sign the letters of O.P. No.1 in the letter head for necessary correspondence in that behalf. She had to arrange for traveling, hotel accommodation or ticket booking relating to the tour for the officers of the O.P.No.1 and its guests. She had to arrange for dealers' conference, customers conference, interviews to receive all incoming mails, parcels of goods and other items and to distribute the same to the concerned officers, to send all letters to the different locations and to different branches, to fill up Central Tax Forms and Way Bills as per instruction of O.P.No.1. The applicant has further stated that she had to write letters to the dealers, agents in consultation with the concerned officers.

It is specifically averred in the written statement of the applicant that her day to day activities and performances were entirely controlled by the concerned authorities/officers of O.P.No.1. The O.P.No.2 MA FOI Management Consultants Limited never had interference with the activities of the applicant and in no manner the O.P.No.2 had no control in the day to day performance of the applicant in the office of O.P.No.1. The O.P.No.2 never enjoyed any benefit out of the performance of the applicant under the O.P.No.1 who had the absolute controlling power over the applicant. The O.P.No.1 had the absolute power and control to decide and fix the salary, increment and incentive of the applicant. The O.P.No.2 had no manner of say in this regard. Actually, the applicant had to perform her duties for the benefit of O.P.No.1 only.

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It is further stated in the application that at the time of appointment, O.P.No.1 informed that the appointment or any matter relating to her service for the work would be regulated by any contractor or service provider. The O.P.No.1 introduced one Industrial Security Consultant and services as a contractor and service provider of O.P.No.1 on or about July, 2000, without any intimation to the applicant. The Industrial Security Consultant and services accorded the applicant provident fund benefits which continued up to March 31, 2006. Therefore, according to the applicant her service since May, 1998 up to the end of June, 2000 was directly under the control and management of O.P.No.1 which would, inter alia, be evident from the fact that the O.P.No.1 issued certificate in respect of the contribution of the applicant



to Employees' State Insurance Corporation, confirming that the applicant has paid proportionate insurance contribution up to 31st March, 1999.

It is further stated by the applicant that she discharged her duties to the entire satisfaction and interest of O.P.No.1. Thereafter on 1st April, 2006 the applicant was served with a letter of O.P.No.2 purporting to be a letter of her appointment for the same post in which she was working for the O.P.No.1 since her joining. The applicant has further stated that she did not apply to O.P.No.2 for her appointment under O.P.No.1, as she was working there in the same capacity. But the applicant was not in a position to raise objection against such appointment letter. The O.P.No.2 as a service provider issued correspondence to the applicant for her service under O.P.No.1 at its office at 8, Camac Street, Shanti Niketan Building, Kolkata-17. The said letter exclusively proved that the O.P.No.2 had no manner of control or say over the work of the applicant under O.P.No.1.

It is alleged by the applicant that the opposite parties acted illegally in furtherance of unfair labour practice as it is evident from the fact that in spite of deducting a considerable amounting of money as and by way of contribution for the Employees State Insurance dues but without making any payment of ESI contribution to the concerned authority.

Thereafter, on 18th July, 2008 the O.P.No.2 wrote a letter to the applicant which she received on 24.07.2008 wherein it was depicted that her service for O.P.No.1 will be terminated after 15 days from the date of the said letter. After receipt of that letter, the applicant wrote a letter against her illegal termination from service without making full payment of her legal dues.

It is further stated that she did not get any relief from the opposite parties. Then she referred the matter to the labour department. Conciliation proceedings was started, but to no effect. Therefore, on prayer of the applicant a certificate was issued by the authority under number 459/136/08/LCC, dated 10th March, 2010.



The applicant further depicted her allegations stating that the opposite parties have acted in collusion an conspiracy with each other to deprive the applicant, although she rendered her service to the entire full satisfaction of O.P.No.1 for more than 10 years. The acts of the opposite parties proved that they had adapted unfair labour practice in violation of the contract labour (Regulation and Abolition) Act, 1970. The opposite parties did not pay her the legitimate dues which she was entitled for her arrear salary, Provident Fund dues, Medical Allowances, Leave Salary and other attendant benefits as a permanent employee under O.P.No.1.

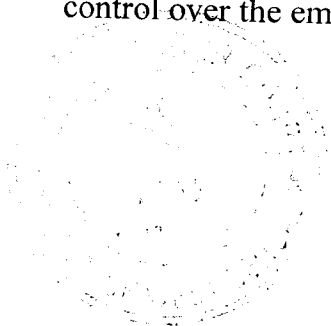
Therefore, the applicant by filling the instant application prayed for passing award declaring the termination of service is illegal, arbitrary, unjust, void and void-ab-initio and for making direction upon the opposite parties for reinstating her in service and to pay full back wages and other allowances as she was entitled to.

After receiving notice, both the opposite parties entered appearance in this case and filed their written objection separately contending inter-alia the allegations and demand made by the applicant.

As per the case of M/s. Kirloskar Brothers Ltd, the O.P.No.1 the instant application is not maintainable as there is no industrial disputes within the meaning of the section 2 (K) of the Industrial Disputes Act, 1947 and as there is no employer-employee relationship between the parties. It is further stated in the written objection filed by O.P.No.1 that the Conciliation Officer without applying his mind mechanically issued certificate under Form-S.

It is the specific case of O.P.No.1 that priorly this company entered into an agreement from 30.06.2000 with Industrial Security Consultants and Services of No.1 Netaji Subhash Road, Calcutta, a contractor for providing manpower services to execute and discharge the work of the company and engaged by the name of M/s. Shram Udyog, having its office at 19, Strand Road, Calcutta-700 001 by the company. It is evident from the agreement that the responsibility for proper manpower services shall be that of the contractor and the contractor will have full control over the employees. It is further stated that the applicant of this case was

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initially under the employment of the D.C.Shram Udyog and thereafter applied for employment in the contractor's office viz. Industrial Security Consultants & Services vide her application dated 01.07.2000. The concerned applicant was there by appointed by the said contractor and deputed under M/s. Kirloskar Brothers Ltd. The applicant submitted nomination and declaration form (Form-2-Revised) to the P.F authorities and Declaration Form (Form-1) to the ESI authorities wherein she has given the name of Industrial Security Consultants & Services as her employer. The said contractor by letter dated 04.09.2000 informed O.P.No.1 the codes of their employees deputed in the company.

It is further stated that in the year 2003 the said contractor proposed for revision of the compensation of the employees, employed by the contractor. The said proposal was accepted vide letter dated 05.08.2003 and the company sent a revised rate chart of the deputed employees including the present applicant. Thereafter, the agreement was not renewed and the applicant was terminated by M/s. Industrial Security Consultants & Services. Then O.P.No.1 entered into an agreement on 30.03.2006 with M/s. MA FOI Management Consultants Limited similar to that with M/s. Industrial Security Consultants & Services. The concerned applicant also applied for her job in the said concerned M/s. MA FOI Management Consultants Limited and she was appointed on contractual basis in the office of O.P.No.1 vide the said contractors letter dated 01.04.2006. The contractor also extended the contract of employment of the applicant vide their letter dated 28.08.2007. The concerned applicant submitted her joining report on 01.04.2006. Thereafter, M/s. MA FOI Management Consultants Limited by its letter dated 18.07.2008 terminated the service of the applicant w.e.f 01.08.2008. Then the applicant sought for intervention of the Principal Secretary, Labour Department, Labour Commissioner and the Registering Authority under the Shops & Establishment Act. The applicant wrote a letter to O.P.No.1 on 06.11.2008 and the company sent its reply on 21.11.2008 stating that the applicant was never an employee of O.P.No.1.

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It is further stated that conciliation proceedings were initiated and the company submitted the same fact there. The applicant obtained certificate under Form-S and filed the present application.

The O.P.No.1 has further taken the defence that the applicant is gainfully employed in WPIL Ltd, situated at 4th Floor of No.6 Old Post office Street, Calcutta-700 001, since after termination by O.P.No.2.

The O.P.No.1 has categorically denied and disputed all the claims and allegations labeled against and the remedies sought for against it and has prayed for rejection of the application.

M/s. MA FOI Management Consultants Limited, the O.P.No.2 here in this case has also submitted written objection categorically denying and disputing the allegations made against it by the applicant. It is the specific case of O.P.No.2 that the instant applicant is not maintainable as the applicant was terminated w.e.f 1st September, 2008. It is specifically stated that O.P.No.2 was not aware of the fact that the applicant joined in the service of O.P.No.1 since 4th May, 1998 and worked up to 30th June, 2000 without any break. This fact was not brought to the notice of O.P.No.2 either by the applicant or by O.P.No.1. This O.P.No.2 has also stated that the applicant was never appointed as the Receptionist- cum-Telephone Operator. This O.P.No.2 is/was in no way concerned with the services of the applicant prior to 1st April, 2006.

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It is further depicted in the written objection submitted by O.P.No.2 that the applicant was appointed under a contract and her service was purely temporary, subject to extension at the discretion of the company. It was specifically stipulated in her appointment letter that **".....at the end of above period, the contract will stand terminated automatically without any notice or communication to you unless they are explicitly extended by us by a letter in writing"**

The appointment of the applicant was purely on temporary basis and the applicant had accepted the terms of contract. Accordingly, the applicant cannot claim reinstatement of service and back wages.



The O.P.No.2 has further stated that all the pre-requisite conditions of termination of service as per the Industrial Disputes Act, 1947 have been complied with. The applicant was paid one month's salary in lieu of 15 days salary applicable in this case for termination of service as stipulated in the terms of contract of employment. The termination of service w.e.f 31.08.2008 was communicated to the applicant by a letter which she received on 24th July, 2008. The O.P.No.2 is not aware of the applicant's letter dated 25th September, 2008. This contesting O.P.No.2 also denies about the ten year continuous service of the applicant. According to it the concerned applicant rendered her service to the company for a period commencing from 1st April, 2006 to 31st March, 2007 and for a further period from 1st April, 2007 to 31st August, 2008 i.e. for a total period of 2 years and 5 months.

In view of the about facts and circumstances, the O.P.No.2 prays for rejection of the application.

Upon pleadings of both parties, the following issues have been framed:-

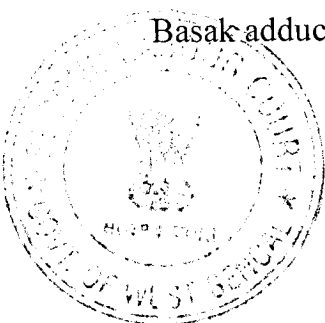
ISSUES

1. Is the application U/s. 10(1B)(d) of the Industrial Disputes Act, 1947(West Bengal amendment) filed by the applicant maintainable in law?
2. Whether the service of applicant came to an end with effect from the end of June, 2000 and was justified and proper?
3. Whether there is jural relationship between the applicant and O.P. as employee-employer?
4. Whether the applicant is entitled to get relief/reliefs as per law and equity?

ADDITIONAL ISSUE

Whether the applicant is an employee under O.P. No.1 or under O..No.2?

Both parties led evidence from their sides. The applicant namely Smt. Debjani Chakraborty has adduced evidence as P.W.1 from her side alone. Sri Subir Basak adduced evidence as O.P.W.1 from the side of Kriloskar Brothers, (O.P.No.1)



and Mr. Sudeep Kumar Chakraborty has adduced evidence as O.P.W.2 from the side of M/s. MA FOI Management Consultant Ltd. (O.P.2)

Documents submitted by the applicant are marked and exhibited as follows:-

Exbt. 1 - ESI Certificate of re-employment, dated 16.03.2011

Exbt. 2 - Letter of termination, dated 18.07.2008

Exbt. 3 - Workman's letter to O.P.1, dated 06.11.2008

Exbt. 4 - Workman's letter to O.P.2, dated 17.11.2008

Exbt. 5 - O.P.2's letter to Workman, dated 12.11.2008

Exbt. 6 - O.P.1's letter to Workman, dated 21.11.2008

Exbt. 7 - O.P.2's letter to Workman, dated 25.11.2008

Exbt. 8 - Email message of O.P.1, dated 03.01.2007

Exbt. 9 - Workman's letter of O.P.1, dated 16.05.2007

Exbt.10 - O.P.1's letter to Workman, dated 25.05.2007

Exbt. 11 - Confirmation letter of Park Hotel, Kolkata, dated 25.05.2007

Exbt. 12 - Email message of O.P.1, dated 10.10.2007

Exbt. 13 - Workman's letter to O.P.1, dated 12.10.2007

Exbt. 14 - Copy of leave application, dated 29.09.2011

Exbt. 15 - Workman's letter to Labour Commissioner, dated 25.09.2008

Exbt. 16 - Workman's letter to D.L.C, dated 02.12.2008

The Opposite Parties filed some documents and those have been marked and exhibited as follows:-

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Exbt. A – Fixed term contract of employment, dated 01.04.2006

Exbt. B – Letter of deputation, dated 01.04.2006

Exbt. C – Joining letter, dated 01.04.2006

Exbt. D – Letter to O.P.1 for renewal of contract, dated 05.08.2003

Exbt. D/1 – Revised Rate Chart, dated 12.12.2012

Exbt. E – Agreement letter between O.P.1 and O.P.2 dated 12.12.2012

Exbt. F – Application Form filed by applicant to O.P.2, dated 12.12.2012

Exbt. G – Appointment letter issued to applicant by O.P. 2, dated 12.12.20012

Exbt. H - Joining Report, dated 01.04.2006

Exbt. I – Extension of contract, dated 28.08.2017

Exbt. J – Termination letter issued by O.P.2, dated 18.07.2008

Exbt. K – Nomination Form of applicant, dated 07.02.2013

Exbt. L – ESI Declaration Form of applicant, dated 07.02.2013

Exbt. M - Letter issued by General Manager of O.P.1, dated 21.11.2008

Exbt. N - Workman's letter to D. L. C, dated 02.12.2008

Exbt. O - Agreement between O.P.1 and O.P.2, dated 04.06.2015

Exbt. P - Letter of termination of contract, dated 18.07.2008

Exbt. Q -Letter showing full & final settlement of the appointment,
dated 25.11.2018

Exbt. R – Letter to ALC, dated 16.07.2009.



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The applicant relied upon the decisions as mentioned below:-

1. AIR 1992 Supreme Court 573 (C.E.S.C Ltd. Vs. Subhash Chandra Bose & Others)
2. 1978 SCR (3) 1073 (Hussain Bhai Vs. Alath Factory Thozhilali Union, Kojhikode & Others)
3. (2004) 1 Supreme Court cases 126 (Ram Singh & Others Vs. Union Territory, Chandigarh & Others)
4. Appeal (Civil) 2459-2461 of 1999 (Supreme Court) (Bharat Heavy Electrical Ltd. Vs. State of U.P. & Others)
5. 1993 Scale (4) 277 (S.P. Chengalvaraya Naidu Vs. Jagannath)

On the other hand the Opposite Parties relied on the decisions as mentioned below:-

1. AIR 2016 Punjab & Haryana 240 (Rajesh Kumar Vs. Union of India & Others)
2. (2006) 12 Supreme Court cases 233 (Steel Authority of India Ltd. Vs. Union of India & Others)
3. (2016) 1 CAL LT 417 (HC) (The Indian Iron & Steel Company Ltd. Vs. State of West Bengal & Others)
4. AIR 2006 Supreme Court 387 (Punjab State Electricity Board Vs. Darbara Singh)
5. C.A No. 6221 of 2000. D/d 06.11.2000 (SC) (State of Orissa Vs. Chandra Sekhar Mishra).
6. Service single No. 4719 of 2015 (decided on 14.08.2015 by Allahabad High Court).

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DECISION WITH REASONS

ISSUE NO. 1

This issue is taken up alone for brevity of discussion and taking decision. This issue relates to maintainability of this case within the meaning of Industrial Disputes Act, 1947. Section 10 of this act empowers the appropriate Government to refer the dispute before a tribunal or a court for an enquiry to a dispute appearing in between the employer & employee. Since after termination of service, the applicant preferred an application to the Labour Department, Govt. of West Bengal ventilating her grievances and praying for relief. The copies of those said letters has been marked as Exbt.15 & 16. There is no denial to that effect by the O.P. Getting no relief as per her representation to the Labour Department, she preferred the application before this court. The applicant in her written statement has mentioned that the conciliation officer felt to conciliate the matter, he issued a certificate under No. 459/136/08/LCC, dated 10th March, 2010. But the applicant did not file the said certificate as required.

Fact remains that, neither sides pressed this issue. The Opposite Parties did not raise any objection regarding the limitation and for non submission of the certificate at the time of initiating this case. No argument was advanced from the side of this Opposite Parties in this regard. That apart, this court has jurisdiction to try this case.

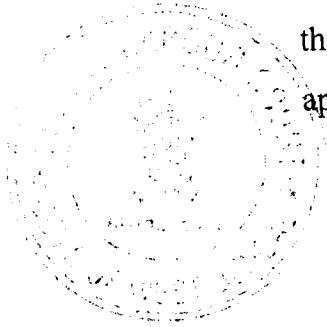
In view of the above this court thinks that this case is maintainable. Thus, this Issue disposed of.

ISSUE NO. 2, 3 & Additional Issue No. 1

All these three issues are taken up conjointly for convenience of discussion and taking decision as those issues are inter linked with each other.

In fact, it is the case of both sides that the service of applicant came to an end. But the period defers from the case of each other. As per the case of Opposite Parties the contractual service of the applicant came to an end w.e.f 01.08.2008. But the applicant in her written statement has claimed that her service on and from May,

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1998 up to the end of June, 2000 was directly under the control and management of Opposite Party No.1, which would according to the applicant's case be evident from the fact that the Opposite Party No.1 issued a certificate in respect of contribution to the applicant's Employees State Insurance Scheme. It seems, according to the applicant there is confirmation that the applicant has paid appropriate insurance contribution up to March 31, 1999. The applicant has also led evidence to that effect. In her deposition, she has stated that "I have filed the xerox copy of ESI Certificate of reemployment issued by the O.P. Management" That certificate has been marked as Exbt.1. On perusal of Exbt.1 it appears this court that that said certificate is in the name of one Mrs. D. H. Chowdhury not in the name of the applicant. The applicant either over looked and/or ignorantly or cleverly took attempt to use the Exbt.1 in her name.

Now, the fact comes before this court that the applicant failed to establish that her service came to end from the month of June, 2000. On the contrary her termination letter (Exbt.2) clearly shows that her contractual service came to an end w.e.f 01-08-2008.

The Opposite Party No.2 adduced evidence by one Sudip Kumar Chakraborty and he was examined as O.P.W.2. This witness categorically deposed that there was a fixed term contract of employment dated 01-04-2006. The said agreement was signed by one Priyanka Das Sarkar from the side of management of O.P.No.2 and by the applicant and that has been marked as Exbt. A. The applicant did not deny her signature on this fixed term contract of employment. The conditions as revealed from that contract that the service of the applicant was for one year i.e. from 01-04-2006 to 31-03-2007. The applicant signed on the joining report, marked as Exbt. C. Exbt. B is the letter of deputation where by M/s. MA FOI (O.P.2) deputed the service of the applicant under M/s. Kirloskar Brothers (O.P.1). Now, this court is to consider under whom the applicant was an employee.

Applicant all along claimed herself to be an employee under O.P.No.1. On the contrary O.P.No.1 did not admit it. On the other hand O.P.No.2 claimed that the applicant was contractual employee under it. In this regard, a marathon argument was heard from both sides. Ld. Advocate for the applicant depending upon his

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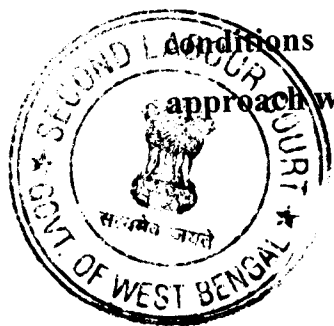


referred decisions time and again submitted that the O.P.No.1 had all along supervision and control over the service of the applicant. The agreement as has been produced by O.P.No.2 for proving that the applicant had entered into a contractual agreement for her service, but in fact, according to him that agreement was obtained by both the Opposite Parties by undue influence over the applicant. Apart from that, according Ld. Advocate for the applicant the agreement which was held in between O.P.No.1 & O.P.No.2 for providing outside manpower and remuneration for service rendered by Ma FOI, marked as Exbt."E" at the premises of O.P.No.1 (principal) was an eyewash. It was not genuine rather, sham and camouflage. Ld. Advocate for the applicant did not argue as to whether the termination of the service of the applicant by O.P.No.2 was in accordance with the provision of the Act, or not. He all along took the plea that O.P.No.2 had no authority to terminate the service. But in fact MA FOI Management Consultants Limited (O.P.No.2) terminated the service of the applicant by issuing termination letter marked as Exbt.2.

Ld. Advocate for the applicant during his course of argument relying upon the following decisions took attempt to convince this court to hold that the applicant is not an employee under the immediate employer but under the principal. 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



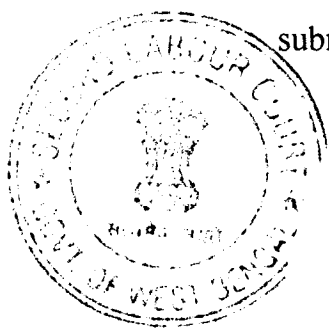
going by the sole "tests of control". An integrated approach is needed. "Integration" test is one of the relevant tests. It is applied by examining whether the person was fully integrated into the employer's concern or remain apart from and independent of it. The other factors which may be relevant are – 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".

It is the clear view of the Hon'ble Courts that "supervision and control" cannot be the only test for determining employer-employee relationship.

It is the case of O.P.No.1 that applicant was deputed under it by the first service provider namely, M/s. D.C.Shrama Udyog and thereafter by M/s. Industrial Security Consultant and Services and lastly by the service provider namely, M/s. MA FOI Management Consultant Limited.

P.W.1 the applicant in her cross examination admitted that she received salary from D.C.Shrama Udyog for the month from May, 1998 to June, 2000. She has further admitted that she received salary from the month of July, 2000 to March, 2006 from M/s. Industrial Security Consultants and for the month of April, 2006 to 01.08.2008, she received salary from M/s. MA FOI Management Consultant Limited. Therefore, it is clear that the applicant never received salary from O.P.No.1. The applicant in her cross examination has candidly admitted that she did not get any appointment letter from O.P.No.1. Exhibit A is the fixed term contract of employment which was executed in between the applicant and O.P.No.2 on 01.04.2006. It seems that the appointment letter was issued by O.P.No.2 and that was a fixed term contract from 01.04.2006 to 31.03.2007. Exhibit B is the letter of deputation upon which the applicant signed voluntarily for her service on deputation under O.P.No.1. Exhibit C is the joining report executed by the applicant and O.P.No.2.

Ld. Advocate for O.P.No.1 argued time and against basing on the Indian Contract Act, 1872. By reciting Section 11 of this Act, Ld. Advocate time and again submitted that the applicant is major, sound mind and not disqualified for entering



into a contract. She is qualified as it appears from her bio-data, marked exhibit B/1. But she did not disclose this fact in her application that she entered into an agreement with O.P.No.2 for getting service under it. She also accepted her contractual service with O.P.No.2 and her deputation under O.P.No.1.

In arguing so, Ld. Advocate for the O.P.No.1 attracted the notice of this court towards the reported decision held in **AIR 2016 Punjab & Haryana 240**. It appears from the decision of Hon'ble Court that **"..... despite knowing fully well that he was not eligible, petitioner tried to over reach this court by withholding this material fact at the time of filing the present writ petition. In fact the petitioner has made an attempt to mislead this court, with a view to get favourable orders by concealing material fact from the notice of this court....."**

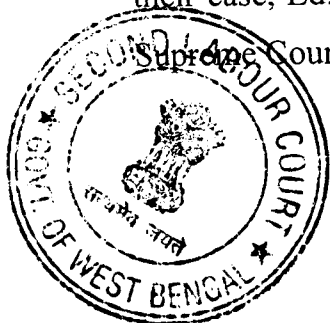
It is fact that the applicant entered into a service agreement with O.P.No.2 and she was deputed under O.P.No.1. She never got salary from O.P.No.1. She did not get appointment letter from O.P.No.1. She was not dismissed from service by O.P.No.1. Therefore, O.P.No.1 had no power to select and dismiss the applicant. It is further clear that O.P.No.1 did never pay her remuneration. Therefore, the relied decisions by the applicant goes against her. Rather, the decision of The Hon'ble Apex Court relied by the O.P.No.1 is one of the guiding principles of this case.

The applicant took the plea that she was continuous ten years in service under O.P.No.1. But the fact has come that she was appointed firstly by D.C.Shrama Udyog, then by M/s. Industrial Security Consultants and lastly by M/s. MA FOI Management Consultants Limited.

Ld. Advocate for the applicant took the defence that the agreement between O.P.No.1 and O.P.No.2 is sham agreement. It was executed between them in order to deprive the applicant. The agreement has marked as Exhibit E. As per this agreement MA FOI Management & Consultants Ltd was the service provider and appointed the applicant for a fixed term contract and deputed her service under O.P.No.1. This court does not find any illegality in this agreement. In support of their case, Ld. Advocate for the O.P. No.1 relied upon the decision of The Hon'ble

Supreme Court held in **(2006) 12 Supreme Court cases 233** and the decision taken

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by The Hon'ble High Court, Calcutta in (2016) 1 CAL LT 417 (HC). Both the decisions favour the Opposite Parties in entering into their own agreement. The applicant being the third party has nothing to say or interfere with their agreement.

The decisions of Hon'ble Courts referred by the Opposite Party No.1 go to show that the employee was appointed by the contractor. In taking such decisions Hon'ble Courts have opined that for the purpose of exercising jurisdiction U/s. 10 of the 1970 Act, the appropriate Government is required to apply its mind. Its Order may be an administrative one but the same would not be beyond the pale of judicial review. It must, therefore apply its mind before making a reference on the basis of the materials placed before it by the workmen and /or management, as the case may be. While doing so, it may be appropriate for the same authority on the basis of the materials that a notification U/s. 10(1)(d) of the 1947 Act be issued., although it stands judicially determined that the workmen were employed by the contractor. The state exercises administrative power both in relation to abolition of contract labour in terms of Section 10 of the 1970 Act as also in relation to making a reference for industrial adjudication to a labour court or a tribunal U/s. 10(1)(d) of the 1947 Act. While issuing a notification under the 1970 Act, the state would have to proceed on the basis that the principal employer had appointed contractors and such appointments are valid in law, but while referring a dispute for industrial adjudication, validity of appointment of the contractor would itself be an issue as the state must prima facie satisfy itself that there exists a dispute as to whether the workmen are in fact not employed by the contractor but by the management.

As per the agreement between O.P.No.1 & O.P.No.2, the O.P.No.1 has to pay the charges regularly to O.P.No.2 for providing service of the applicant under it. Therefore, it cannot be said that the agreement exhibit E is a sham.

Therefore, in the considered view of this court, the applicant was the employee under O.P.No.2, not under O.P.No.1.

Now, this court is to consider as to whether termination of service of the applicant was justified or not. The termination letter (Exhibit 2) clearly shows that the service of the applicant came to an end on 01-08-2008. Therefore, the plea taken



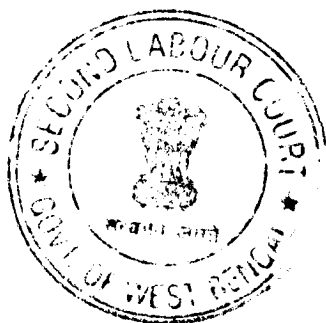
by the applicant that her service came to an end w.e.f the end of June, 2006 is baseless and remains unproved.

But the question arises as to whether the termination of service of the applicant either w.e.f 01.08.2008 was justified and proper, or not is to be decided now. Exhibit A is the fixed term contract of employment. In Exhibit 2 there is notice period starting from 18.07.2008 to 01.08.2008. Exhibit 7 shows that the full and final settlement amount was sent by O.P.No.2 vide cheque No. 105036 dated 13.11.2008 drawn on HDFC Bank filed by the O.P. Company for Rs. 8,442/-. The applicant admitted that she received the cheque but did not encash it. The applicant did not allege that she had more due towards full and final settlement. Since the applicant was appointed for a fixed period on the basis of mutual contact, the employer reserves the right to terminate the service of the applicant. It is the discretion of the employer either to remain in service or to terminate. There is no illegality. In view of the above the issues are disposed of against the applicant.

ISSUE NO.4

This only remaining issue is taken up for discussion and taking decision. It has come on record that the applicant has been working under M/s. W.P.I.L (Worthington Pump India Ltd.). O.P.W.1 has deposed this fact. He has further deposed that within one month from the date of termination of her service by MA FOI Management Consultants Limited, the applicant has joined under M/s W.P.I.L. This evidence has not been challenged or denied by the applicant. Rather, the applicant in her cross examination admitted this fact. Even Ld. Advocate for the applicant by submitting written argument did not claim for reinstatement of the applicant under any of the Opposite Parties. Rather, it has come from the written argument that the applicant claims a lump sum amount for her back wages. Ld. Advocate for the applicant by citing a decision of Hon'ble Supreme Court held on 25th July, 1986 in **Rashbehari Vs. Haryana Agricultural University** argued that this court has power to grant lump sum amount.

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In the decision reported in 2006 (1) LLJ, pages 775. It has been observed by Hon'ble Delhi High Court that if the workman claims the back wages it is for him/her to assert that he/she remained unemployed. This decision must govern this case. The applicant did not discharge her duty in proving that she remained unemployed. Rather, O.P.W.1 has clearly deposed that she joint in service under M/s W.P.I.L within one month from her termination of service. The applicant has also admitted this fact in her cross examination. Therefore it is clear that the applicant is in gainful employment soon after her termination from service by O.P.No.2. The applicant did not claim reinstatement. She has claimed a lump sum amount. In view of the above, decision of the Hon'ble Delhi High Court, the applicant is not entitled to get any relief.


Hence, it is

Ordered

that the instant petition U/s. 10 (1B)(d) of Industrial Dispute Act, 1947 filed by Smt. Debjani Chakraborty is here by rejected on contest but without cost. This is the Award passed by this court.

Dictated and corrected by me


Judge


(Arabinda Panti)
Judge, 2nd Labour Court
Kolkata
19.09.2018
Judge
Second Labour Court W.B.

