

Santosh Devi vs.union of India & Anr

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Court : Delhi

Decided On : Dec-11-2018

Appellant : Santosh Devi

Respondent : Union of India & Anr

Advocate for Pet/Ap. : Ms. Rajdipa Behura, Mr. Aly Mirza, Ms. Arti Bansal, Ms. Rajdipa Behura Amicus Curiae. UNION, Mr. Harish Kumar Garg

Judgement :

\$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI Date of decision:

11. h December, 2018 LPA6712016 11 to 23 + MUNNA LAL Appellant
Through: Ms Rajdipa Behura, Amicus Curiae. UNION OF INDIA & ANR.

... RESPONDENTS

versus Through: Mr Aly Mirza, Advocate for R-2/IGNOU. Ms Arti Bansal, Advocate
for UOI. LPA6722016 + RAM SAHAI (NOW DECEASED) THR RESHAM DEVI
Appellant Through: Ms Rajdipa Behura Amicus Curiae. UNION OF INDIA & ANR
.....

... RESPONDENTS

Through: Mr Aly Mirza, Advocate for R- versus 2/IGNOU. Ms Arti Bansal,
Advocate for UOI. LPA6732016 + MONIKA Appellant Through: Ms Rajdipa
Behura, Amicus Curiae. UNION OF INDIA & ANR.

... RESPONDENTS

versus Through: Mr Aly Mirza, Advocate for R- 2/IGNOU. Ms Arti Bansal, Advocate for UOI. LPA6712016 & connected matters Page 1 of 14 LPA6762016 + BABITA Appellant Through: Ms Rajdipa Behura, Amicus Curiae. UNION OF INDIA & ANR

... RESPONDENTS

Through: Mr Aly Mirza, Advocate for R- versus 2/IGNOU. Mr Harish Kumar Garg, Advocate for UOI. LPA6772016 + PRABHU DAYAL Appellant Through: Ms Rajdipa Behura, Amicus Curiae. UNION OF INDIA & ANR.

... RESPONDENTS

Through: Mr Aly Mirza, Advocate for R- versus 2/IGNOU. Ms Arti Bansal, Advocate for UOI. LPA6782016 + SANTOSH DEVI Appellant Through: Ms Rajdipa Behura, Amicus Curiae. UNION OF INDIA & ANR

... RESPONDENTS

versus Through: Mr Aly Mirza, Advocate for R- 2/IGNOU. Mr Harish Kumar Garg, Advocate for UOI. LPA6792016 + SATNOSH DEVI Appellant Through: Ms Rajdipa Behura, Amicus Curiae. LPA6712016 & connected matters Page 2 of 14 versus UNION OF INDIA & ANR.

... RESPONDENTS

Through: Mr Aly Mirza, Advocate for R- 2/IGNOU. LPA6802016 & CM453392016 + SURAJ (NOW DECEASED) THR LR KIRAN Appellant Through: Ms Rajdipa Behura, Amicus Curiae. UNION OF INDIA & ANR

... RESPONDENTS

Ms Arti Bansal, Advocate for UOI. versus Through: Mr Aly Mirza, Advocate for R- 2/IGNOU. Mr Harish Kumar Garg, Advocate for UOI. LPA6812016 + PAPPU SINGH Appellant Through: Ms Rajdipa Behura, Amicus Curiae. UNION OF INDIA & ANR

... RESPONDENTS

Through: Mr Aly Mirza, Advocate for R- versus 2/IGNOU. LPA6822016 + RAHUL Appellant Through: Ms Rajdipa Behura, Amicus Curiae. UNION OF INDIA &

ANR

... RESPONDENTS

versus Through: Mr Aly Mirza, Advocate for R- 2/IGNOU. Mr Harish Kumar Garg, Advocate for LPA6712016 & connected matters Page 3 of 14 UOI. LPA6832016 + SAVITA Appellant Through: Ms Rajdipa Behura, Amicus Curiae. UNION OF INDIA & ANR.

... RESPONDENTS

Through: Mr Aly Mirza, Advocate for R- versus 2/IGNOU. Mr Harish Kumar Garg, Advocate for UOI. LPA6842016 + MUKESH Appellant Through: Ms Rajdipa Behura, Amicus Curiae. UNION OF INDIA & ANR

... RESPONDENTS

versus Through: Mr Aly Mirza, Advocate for R- 2/IGNOU. Ms Arti Bansal, Advocate for UOI. LPA6852016 + SAROJ DEVI Appellant Through: Ms Rajdipa Behura, Amicus Curiae. UNION OF INDIA Respondent Through: Mr Aly Mirza, Advocate for R- versus 2/IGNOU. Mr Harish Kumar Garg, Advocate for UOI. CORAM: JUSTICE S.MURALIDHAR JUSTICE SANJEEV NARULA LPA6712016 & connected matters Page 4 of 14 %

JUDGMENT

Dr. S. Muralidhar, J.:

1. These appeals are directed against the common impugned judgment dated 5th August, 2015 of the learned Single Judge allowing the writ petitions of the Indira Gandhi National Open University (IGNOU), which had challenged an award dated 9th December, 2011 passed by the Central Government Industrial Tribunal-1 (the Tribunal) in the industrial dispute raised by the present Appellants. 2.The background facts are that IGNOU entered into a contract with Sybex Computer Systems (Pvt.) Ltd. (hereafter, the Contractor) on 1st November, 2004 for outsourcing housekeeping services. The contract was subsequently extended up to 31st October, 2007. The present Appellants were engaged by the Contractor to provide the housekeeping services in the campus of IGNOU.

3. With effect from 1st November, 2007, the contract for providing housekeeping services was given by IGNOU to Spick & Span Facilities Management Pvt. Ltd. (hereafter the new Contractor). It is stated that the new Contractor had brought its own housekeeping staff for the duration of its contract. Protesting against the engagement of a new Contractor, the Appellants resorted to a strike in the IGNOU campus.

4. IGNOU then filed CS(OS) No.83/2008 in this Court in which a learned Single Judge of this Court on 15th January, 2008 issued an interim injunction LPA6712016 & connected matters Page 5 of 14 restraining the Appellants from protesting within a distance of 500 meters from the IGNOU campus. Ultimately, on 13th March, 2009, the said suit was decreed. In the said order, it was, inter alia, observed that in view of the terms of the agreement entered into between IGNOU and the new Contractor, the workers employed by the Contractor could not be held to be the employees of IGNOU and consequently they could not seek any benefit from IGNOU. It was further observed that the agreement between IGNOU and the Contractor having coming to an end, those employed by the Contractor ceased to have any connection with IGNOU. Consequently, it was held that the agitation resorted to by the Appellants was uncalled for, illegal and without any justification. A decree of permanent injunction was accordingly granted in favour of IGNOU.

5. The Appellant raised an industrial dispute against the termination of their services. On failure of the conciliation proceedings, the appropriate government made a reference to the Tribunal on 7th January, 2010 in case of Smt. Saroj Devi, the Appellant in LPA685 of 2016, as under: Whether the action of the management of Indira Gandhi National Open University, in terminating the services of their workman Smt. Saroj w.e.f. 01.11.2007 is legal and justified: If not, what relief the workman is entitled to?. 6. There were identical terms of reference vis-a-vis the other Appellants.

7. The above dispute was disposed of by the Tribunal by the Award dated 9th December, 2011. A perusal of the said Award reveals that during the pendency of the reference, IGNOU had filed an application to implead the LPA6712016 & connected matters Page 6 of 14 Contractor as a party. However, this application

was rejected by the Tribunal by an order dated 24th April, 2010. The Tribunal, on the basis of the pleadings, framed the following issues for determination: 1. Whether there was relationship of employer and employee between the claimant and the management?.

2. Whether the claimant was an employee of Sybex System Pvt. Ltd., the Contractor?.

3. As in terms of reference. 8. On behalf of the claimants, many of them examined themselves as witnesses. On behalf of IGNOU, four witnesses were examined.

9. The Tribunal first considered the Issue Nos. 1 and 2 together and came to the following conclusions: (i) From the wage-sheets produced by the Contractor and the admission of the signatures thereon by the Appellants themselves, it is apparent that the Appellants were employees of the Contractor. (ii) Payments were made by IGNOU to the Contractor through cheques. The statements of contribution filed by the Contractor in the Regional Office of the Employees Provident Fund Organization also showed that the present Appellants were the employees of the Contractor. Consequently, a finding was returned by the Tribunal that the Appellants were the employees only of the Contractor and not of IGNOU.

10. The Tribunal then proceeded to take on another question, which did not LPA6712016 & connected matters Page 7 of 14 form part of the issues framed by it, namely, Whether the claimant, who was an employee of the Contractor, can maintain a dispute against the University?. 11. At this juncture, it must be noticed that the original term of reference which was referred to the Tribunal for adjudication was itself not correctly worded as it was premised on the existence of an employee-employer relationship between IGNOU and the present Appellants by terming them to be the workmen of IGNOU, whereas the entire dispute was on account of IGNOU not being prepared to acknowledge any such relationship and maintaining throughout that the Appellants were the employees of the Contractor. In any event, when issues were settled by the Tribunal for determination, this hurdle was overcome and the two issues, as already noticed hereinbefore, were correctly framed and both issues, as noticed hereinbefore, were answered in favour of the Appellants.

12. It is in this context that IGNOU contended successfully before the learned Single Judge that in venturing beyond the two issues already framed by it, the Tribunal exceeded the scope of terms of reference itself. There appears to be some justification for this criticism of the Award of the Tribunal.

13. In seeking to answer the additional question framed by it, viz., whether the Appellants, as employees of the Contractor, could maintain a dispute against IGNOU, the Tribunal came to the following conclusions: (i) Clause 24 of the Contract which prohibited the Appellants from LPA6712016 & connected matters Page 8 of 14 forming associations or unions is inconsistent with Article 19 (4) of the Constitution of India and violative of Fundamental Right guaranteed to the Appellants. (ii) Clause 23 of the contract which prohibited the Appellants from making any claim against IGNOU, directly or indirectly, for any monetary benefits including wages, was not in conformity with Section 21 (4) of the Contract Labour (Regulation and Abolition) Act, 1970 (Act) and, therefore, was violative of law. (iii) The backing of evidence which disabled the Tribunal from working out the rates at which the Contractor was paid by IGNOU led to the inference that IGNOU could not establish factors in favour of genuineness of the contract agreement. (iv) The specific clauses of the contract when analysed showed that the effective supervision and control of the Appellants was in fact in the hands of IGNOU. (v) Further, the disciplinary control was also sought to be exercised over the Appellants by IGNOU. As a result, the Tribunal concluded that the veil of the contract was smoke-screen, which would not snap relationship between the University and the claimant and her colleagues. 14. It was further held by the Tribunal that in the garb of awarding housekeeping services to the new Contractor, IGNOU had dispensed with the services of the Appellants and therefore, this action squarely fell within the ambit of the definition of retrenchment as defined under Section 2 (oo) of the Industrial Disputes Act, 1947 (ID Act) entailing the concomitant LPA6712016 & connected matters Page 9 of 14 benefits to the Appellants upon satisfying the conditions set out in Section 25-F of the ID Act. The Tribunal then held that the retrenchment of the Appellants was void ab initio and directed their reinstatement with 20% back-wages from the date of retrenchment till the date of reinstatement with continuity and all consequential benefits.

15. As noticed hereinbefore, aggrieved by the above Award, IGNOU filed the aforementioned writ petitions which were disposed of by the learned Single Judge by the impugned judgment. After agreeing with the Tribunal that the relationship of employee and employer was not established between IGNOU and the Appellants, the learned Single Judge was of the view that when no dispute was raised by the workmen that the contract entered into between IGNOU and the Contractor was sham and bogus and in absence of the specific reference to the Tribunal on that issue, the findings thereon by the Tribunal was beyond the scope of reference and must have consequently failed.

16. After discussing the decision of the Supreme Court in *Steel Authority of India Limited v. National Union Waterfront Workers* (2001) 7 SCC1 the learned Single Judge concluded that the Tribunal being bound by the terms of the reference could not have enlarged the scope. The Award of the Tribunal was accordingly set aside. The learned Single Judge also noted in paragraph 28 of the impugned judgment that in certain other industrial disputes raised by similarly placed workmen, the Tribunal had in fact declined to decide the question whether the contract between IGNOU and the Contractor was sham and bogus holding that the said issue was not LPA6712016 & connected matters Page 10 of 14 referred to it for adjudication by the appropriate government.

17. In the present appeals, on 1st February, 2018, Ms. Rajdipa Behura, learned counsel was appointed as *amicus curiae* to assist the Court on behalf of the Appellants. At a subsequent hearing on 20th April, 2018, the appeals were adjourned to enable Mr Ali Mirza, learned counsel appearing on behalf of IGNOU, to obtain instructions on whether the cases of the Appellants for regular appointment could be reconsidered by IGNOU. On 13th September, 2018, Mr Mirza, on instructions, informed the Court that there was no post for housekeeping at IGNOU and, therefore, it may not have been possible for IGNOU to regularly appoint the Appellants as housekeeping staff.

18. On the question whether the Tribunal had exceeded the scope of reference made to it, Ms. Behura, after referring to the decision of the Supreme Court in *Steel Authority of India Limited v. National Union Waterfront Workers* (supra)

submitted that the Tribunal was perhaps justified in not stopping with examining whether there was an employee- employer relationship between IGNOU and the Appellants, but also whether the contract in terms of which the Appellants were engaged as contract labourers was itself as sham and a camouflage and whether in fact the Appellants were employees of IGNOU itself. In particular, she referred to the following passage in *Steel Authority of India Limited v. National Union Waterfront Workers* (supra) where the Supreme Court held that there cannot be automatic absorption of contract labour by the principal employer on issuance of a notification by the Appropriate Government on abolition of contract labour system under Section 10 (1) of the Act: LPA6712016 & connected matters Page 11 of 14

They fall in three classes: (1) where contract labour is engaged in or in connection with the work of an establishment and employment of contract labour is prohibited either because the industrial adjudicator/Court ordered abolition of contract labour or because the appropriate government issued notification under Section 10 (1) of the CLRA Act, no automatic absorption of contract labour working in the establishment was ordered, (2) where 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 case do not relate to the abolition of contract labour but present instances where in the court pierce the veil and declared the correct position as a fact at the stage after employment of contract labour stood prohibited, (3) where in discharge of a statutory obligation of maintaining a canteen in an establishment, the principal employer availed the services of the contractor, the Courts have held that the contract labour would indeed be employees of the principal employer. 19.

The above observations of the Supreme Court pre-supposes a situation where there is in fact a notification issued under Section 10 (1) of the Act by the appropriate government prohibiting the employment of contract labour in the establishment in question. When a specific query was posed to Mr Mirza by the Court, whether there was any notification issued by the appropriate government under the Act prohibiting it from engaging contract labours, he answered in the negative. He pointed out that in the same decision in *Steel Authority of India Limited v National Union Waterfront Workers* (supra), the Supreme Court had quashed the notification dated 9th December,

1976 issued by the Central Government prohibiting the employment of contract labours for sweeping, cleaning, dusting and washing of buildings (housekeeping services) in buildings owned or occupied by LPA6712016 & connected matters Page 12 of 14 establishments in respect of which the appropriate government under the Act was the Central Government. The Supreme Court held that the said notification, apart from being an omnibus notification, does not reveal compliance of sub section (2) of Section 10. It was held to be ex facie contrary to Section 10 of the Act. Besides, it also exhibits non-application of mind by the Central Government. He pointed out that there was no other notification issued subsequent thereto which prohibited IGNOU from engaging contract labour.

20. The observations of Supreme Court in Steel Authority of India Limited (supra) pre-supposes there being such a notification prohibiting the employment of contract labour. If the services of the employee engaged by the contractor are terminated as a result of such notification, the question then arises whether such workman has a right for absorption in the establishment of the principal employer itself. It is in that context that an exercise would have to be undertaken by the Tribunal/Court while the dispute is raised whether the contract itself is a sham or bogus contract.

21. In the present case, without appreciating whether in fact there was any prohibition on the employment of contract labour, the Tribunal misdirected itself in proceeding to examine, only on the basis of the above observations in Steel Authority of India Limited (supra), whether the contract between IGNOU and the Contractor was a sham or bogus contract. In other words, there was no occasion for the Tribunal to have undertaken that exercise at all. LPA6712016 & connected matters Page 13 of 14 22. The Court further notices that apart from the fact that no issue was framed by the Tribunal itself to that effect, even the evidence placed on record did not support the conclusion of the Tribunal that the contract between the contractor and IGNOU was sham or bogus. In fact, the clauses discussed by the Tribunal appear to reinforce the fact that the Appellants were not to be treated as employees of IGNOU, but only of the Contractor, which incidentally is also the finding of the Tribunal. Consequently, even on merits, the Tribunal erred in concluding that the contract between IGNOU and the contractor was a sham or

bogus contract and the Appellants therefore should be considered to be the employees of IGNOU itself giving them a right to be treated as such.

23. For the aforementioned reasons, the Court does not find any error committed by the Single Judge in setting aside the Award of the Tribunal and allowing the writ petitions filed by the

... RESPONDENTS

herein. The appeals are accordingly dismissed, but in the circumstances, with no order as to costs. Pending application, if any, also stands disposed of.

24. The Court expresses its appreciation for the through presentation of the case by Ms Rajdipa Behura, learned amicus curiae. DECEMBER11 2018/rd S. MURALIDHAR, J.

SANJEEV NARULA, J.

LPA6712016 & connected matters Page 14 of 14

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