IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Sambuddha Chakrabarti

W. P. No. 18127 (W) of 2014

Indian Oil Petronas Private Limited.
Vs.
Union of India & Others.

For the petitioner	:	Mr. Arijit Chaudhuri, Senior Advocate Mr. Soumya Majumder, Advocate Mr. Ranajit Talukdar, Advocate
For the respondents	:	Mr. J. Dasgupta, Advocate Mr. R. Guha Thakurta, Advocate
Heard on	:	15.01.2016
Judgement on	:	08.04.2016

Sambuddha Chakrabarti, J.:

It so happens at times, even if not very frequently, that litigants with motivations as diverse as ranging from abundant precaution to over-scared defensive response or even as a foolproof mode of attack, bred in turn by either fear pschyosis or a bid to ensure an absolute safety without leaving any loose end, choose to canvass more points than necessary or assail more aspects or

orders passed in a proceeding not strictly required for the end-product. Such acts, for the very purpose they seek to achieve, are explicable and, therefore, not blameworthy. If on one count litigants get relief from a court of law the other point or points become redundant or even not worthy of any serious consideration.

The case in hand is a perfect example of our shared experience of one such *defensive* attack.

The petitioner has assailed an order of reference by the Government of India by which it referred the dispute between the employer in relation to the management of M/s. Navnil Enterprise and their workmen in respect of matters specified in the schedule for adjudication to the Central Government Industrial Tribunal-cum-Labour Court, Kolkata as well as an order dated March 12, 2014 passed by the learned Presiding Officer, Central Government Industrial Tribunal ('the Tribunal' for short) in Reference no. 9 of 2012.

The petitioner is a private company which had an L.P.G. import and export terminal at Haldia till August 4, 2011. Ramalesh Das carrying on business in the name and style of Navnil Enterprise, i.e., respondent no. 3 herein, was engaged by the

petitioner as a contractor to carry out the works of operation and maintenance of the petitioner's bottling plant and statutory testing plant at Haldia. The respondent no. 3 is a contractor and has the requisite license under the Contract Labour (Regulation and Abolition) Act, 1970 to carry out the said work.

The petitioner alleges that by a letter dated August 4, 2011 it had terminated the contract with the respondent no. 3 with immediate effect. Consequently, the respondent no. 3 terminated the employment of its workmen employed to discharge his contractual obligations in respect of the plant in question.

The workmen raised an industrial dispute.

The conciliation proceeding having failed the Central Government by an order dated 04.06.2012 referred the dispute to the Tribunal, as mentioned earlier. The issue to be adjudicated was "Whether an action of the management of M/s. Navnil Enterprise, an agency of M/s. Indian Oil Petronas Pvt. Ltd. Midnapore (East), West Bengal in termination of the service of Shri Sanjoy Guria and nine others (as per list attached) by virtue of order/letter no. IPPL/HAL/ST Plant dated 04.08.2011 of M/s. Indian Oil Petronas Pvt. Ltd. w.e.f. 08.08.2011 is legal and justified? What relief the workmen are entitled to?"

The workmen of the respondent no. 3 made an application for adding the petitioner as a party to the dispute. By an order dated March 12, 2014, the Tribunal allowed the application and added the petitioner as a party to the reference case.

The petitioner has challenged both the order as well as the reference.

The respondent no. 4, i.e., the workmen of Navnil Enterprise, represented by the Indian Oil Petronas Pvt. Ltd. Sramik Union, has contested the writ petition by filing an affidavit-in-opposition affirmed by the General Secretary of the said Union. According to the respondent no. 4, the writ petition is not maintainable as the finding of facts reached by the Tribunal has been sought to be re-opened and the adequacy and sufficiency of evidence have been sought to be raised which is not permissible in a writ proceeding.

The said respondent has also denied that the respondent no. 3 had the requisite license under Section 12 of the Contract Labour (Regulation and Abolition) Act to carry out any work on behalf of the petitioner. It has been their specific case which is necessary to be taken care of for the purpose of disposal of present writ petition is that the writ petitioner had already involved itself in the dispute by participating in the conciliation proceeding and had

made out its case by filing the written comments. The respondent no. 4 has denied the stand of the petitioner that the order of reference was beyond the power of the Central Government.

Apart from denying the contentions of the petitioner, the respondent no. 4 supported the order passed by the Tribunal as legal and valid.

In its reply, the petitioner denied the contentions of the respondent no. 4 and reiterated its stand in the writ petition. Specifically it denied that the respondent no. 3 did not have the requisite license and submitted that even if it is assumed that there was a violation of Section 12 of the Contract Labour (Regulation and Abolition) Act, it does not have any effect of rendering the contract labours as employees of the petitioner. Mere participation of it in the conciliation meeting does not make it an employer of the contract labours when the respondent no. 3 is the contractor. It has again reiterated that Central Government is not the appropriate Government to refer the industrial dispute between the respondent no. 3 and respondent no. 4.

Before adjudicating the issues involved in the writ petition, it is necessary to appreciate the scope of the application made by the respondent no. 4 for adding the writ petitioner as a party to the

proceeding. It was the contention of the workmen that the respondent no. 3, i.e., M/s. Navnil Enterprise, is an agent of the writ petitioner and the petitioner herein from time to time had engaged different agents to camouflage the real state of affairs and engaged different sham contractors in contravention of the statutory requirement of the Act. The petitioner was never registered as a principal employer nor the so-called contractor did obtain any license to supply labour to the petitioner which is a mandatory requirement under Section 12 of the relevant Act.

The workmen contended in their application that they used to perform their works under the direct control and supervision of the officers of the petitioner. But to conceal the real state of affairs the petitioner used to pay the workmen through the contractor on behalf of the company. Except making payment of wages, the respondent no. 3 had nothing to do with the day to day function and business of the workmen. The contract between the writ petitioner and the respondent no. 3 was sham. The workmen were all employed by the petitioner at different times from January 2008 to discharge perennial nature of jobs and they worked continuously till their termination of service.

It was further contended by the respondent no. 4 in its application before the tribunal that the action of the company in terminating the workmen amounted to retrenchment within the meaning of Section 2 (OO) of the Industrial Dispute Act and the action impugned by the workmen in the industrial dispute was invalid and void in law.

The name of the petitioner company has been mentioned in the order of reference but company has not been made a party to the dispute. The union contended that the petitioner was the principal employer and as such an effective party for proper adjudication of the issues under reference and the company was required to be added as a party to the present case.

The respondent no. 3 contested the application by filing a written objection. It was contended by the respondent no. 3 that the writ petitioner had awarded contracts from time to time to different agencies by inviting public tenders and by observing all the necessary norms and as such it cannot be described as a camouflage to conceal the real state of affairs. Without amending the terms of reference of the Ministry, the application for addition of parties could not be allowed by the Tribunal and the union was

required to approach the concerned Ministry for addition of parties.

The learned Presiding Officer of the Tribunal had *inter alia* held that the management of the respondent no. 3 company had not stated that it was not a necessary party in the case and its presence was not required for proper adjudication of the case. He relied on two decisions for the proposition that an industrial tribunal can always summon a necessary party if not mentioned in the order of reference and can always ignore the party which has been mentioned wrongly. He also quoted a passage from the judgment in the case of *Hochtief Gammon Vs. Industrial Tribunal, Bhubaneswar, Orissa and Others*, reported in *1964 (II) LLJ 460* where it has been held that if it appears to a tribunal that a party to the industrial dispute does not completely or adequately represent the interest either on the side of the employer or on the side of the employee, it may direct that the other persons should be joined who would be necessary to represent such interest. The Tribunal has further relied on the case of *Steel Authority of India Ltd. Vs. Hindustan Steel Employees Union and Others,* reported in *1997 LAB. I. C. 987,* for a proposition that a tribunal has all the power to add a party to a proceeding. Quoting these two decisions

the Tribunal below had allowed this application adding the present petitioner as a party to the case.

Although the petitioner company has assailed both the impugned orders as well as the order of reference the petitioner in course of its submission clarified that it was putting greater stress on assailing the order of Tribunal than the order of reference.

In support of the order passed by the Tribunal Mr. Das Gupta, the learned Advocate for the respondent no. 4, submitted that the kind of arrangement that the petitioner had entered with the respondent no. 3 being more in the nature of a camouflage the writ petitioner must be considered to be the principal employer and the adjudication of the case would remain incomplete in its absence in the Tribunal below. Moreover, the company has been named in the order of reference and, therefore, the presence of the same in the case before the tribunal is imperative and necessary for disposal of the case.

In support of his contention, Mr. Das Gupta placed strong reliance on the case of *Hochtief Gammon (Supra).* The ratio of this judgment has been relied on by the Tribunal and it is not necessary to repeat the same at the present stage.

Mr. Das Gupta next relied on the judgement of Supreme Court in the case of *Hussain Bhai Vs. The Alath Factory Tezhilali Union and Others,* reported in *1978 LAB I.C. 1410* for a proposition that where a worker or a group of workers labours to produce goods or services and these goods and services are for the business of another, that other is, in fact, the employer. He has the economic control over the workers' subsistence, skill and continued employment. If he, for any reason, chokes off, the worker is virtually laid of. The presence of the intermediate contractors with whom alone the workers have immediate or direct relationship *ex contractu* is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, it is found, though draped in different perfect paper arrangement, that the real employer is the management and not the immediate contractor.

Based on this, the respondent no. 4 had argued that in the present case also if the veil is lifted the identity of the real employer would be exposed. The service that the workmen had rendered were for the business of the petitioner and, therefore, it was the real employer in the present case.

Mr. Das Gupta next relied on a Full Bench judgment of the Supreme Court in the case of *Steel Authority of India Limited and Others Vs. National Union Water Front Workers and Others,* reported in *2001 (91) FLR 182*. The Supreme Court had held that the questions raised in the said case required enquiry into disputed questions of facts which could not conveniently be made by the High Court in exercise of jurisdiction under Article 226 of the Constitution of India. Therefore, in such cases, the appropriate authority to go into those issues would be the industrial tribunal or the court whose determination is amenable to judicial review. Likewise, Mr. Dasgupta argued, since the issues involved in the present case raise questions of factual disputes it would not be proper for a writ court to re-open and re-adjudicate them after the Tribunal has held in favour of the said respondent on a finding of fact.

The case of *Steel Authority of India Limited Vs. Union of India and Others*, reported in 2006(III) FLR 483 follows the previous decision. The supreme Court held that when a contention was raised that the contract entered into by and between the management and the contractor was a sham one, an industrial adjudicator would be entitled to determine the said issue as in that

event, if it be held that the contract purportedly awarded by the management in favour of the contractor was really a camouflage or a sham one, the employees appointed by the contractor would, in effect and in substance, be held to be direct employees of the management.

Mr. Das Gupta lastly relied on a case of *The KCP Employees' Association, Madras Vs. The Management of the KCP Limited, Madras and Others*, reported in *1978(36) FLR 217*. Justice V. R. Krishna Iyer had held that in industrial law, interpreted and applied in the perspective of part IV of the Constitution, the benefit of reasonable doubt on law and facts, if there be such doubt, must go to the weaker section, the labour.

The submission of the respondent no. 4 leaves a very major area of the issue unanswered. If the respondent no. 4 insists that a finding of fact is not to be assailed in any writ proceeding, they have an equal obligation to discharge how the finding of fact had been arrived at. In other words, it is also a responsibility cast upon the court to examine whether the finding so arrived at is by a reasoned order and if so whether the reasoning has any inherent flaw.

A careful examination of the order impugned cannot leave any doubt that not only the order is an unreasoned one, there is absolutely nothing in the order why the Tribunal had considered the petitioner a necessary party to the proceeding before it.

Admittedly, the contractor of the petitioner is Navnil Enterprise. Admittedly, the petitioner terminated the contract and also admittedly the Navnil Enterprise terminated the service of the workmen.

Examining the issues in the backdrop of these undisputed facts it is difficult to find why in a dispute between Navnil and its workmen must the petitioner figure as a necessary party or why the presence of the petitioner is considered necessary for the adjudication of the proceeding. The learned Presiding Officer of the Tribunal appears to have proceeded primarily on the basis that the management had not specifically submitted that the petitioner was not a necessary party or its presence was not required for proper adjudication; and, secondly, on the basis of an undeniable legal position that a tribunal has always the power to summon the necessary party if not mentioned in the order of reference and can always ignore the party which has been mentioned wrongly.

Relying on the ratios of two judgments referred to above in recognition of the right of a tribunal that in appropriate cases it may direct some persons to be joined who would be necessary to represent the interest if it appears to it that a party to the industrial dispute is not completely or adequately represented the Tribunal had passed the order impugned in the writ petition.

The ratios of the judgments are certainly past any dispute; but have, however, little application independent of the respective facts. The order impugned gives no indication how the judgments are applicable to the facts of the case or the circumstances necessitating reliance on them. After quoting some portions of the two judgments and after observing that the management of the company did not specifically state that it was not a necessary party, the learned Presiding Officer concluded that "considering the facts and circumstances and the discussions made above" the presence of the petitioner for the adjudication of the case was necessary. There is no denying that the Tribunal has not discussed anything about the facts and circumstances of the case leading to the inexorable conclusion that the writ petitioner was a necessary party to the proceeding, except that the present respondent no. 4

had taken out an application for addition of a party and the management of Navnil Enterprise had opposed it.

Except the faint reference to this, there is no discussion either of the facts of the case or how the presence of the petitioner is necessary for the adjudication of the dispute. As such, discussion regarding the facts and circumstances claimed to have been made in the order impugned appears to be more a claim than reality.

Mr. Chowdhury, the learned Senior Counsel appearing for the petitioner, relied on the case of *Steel Authority of India Ltd. and others, etc., etc., Vs. National Union Water Front Workers and others, etc.,* reported in AIR 2001 SC 3527. A five-judge Bench of the Supreme Court had very specifically held that the principle that while discharging public functions and duties the government companies or corporations or societies which are instrumentalities or agencies of the Government must be subjected to the same limitations in the field of public law – constitutional or administrative law – as the Government itself, does not lead to the inference that they become agents of the Central or State Government for all purposes so as to bind such Government for all

their acts, liabilities and obligations under various central and/or states Acts or under private law.

The subtle difference, though frequently overlooked or slightly underplayed, between an agent and an agency is a relevant consideration for the present purpose. An agent is one who acts for his principal and represents him before others whereas, as laid down in the judgment referred to above, if the Government acting through its officers was subject to certain constitutional limitations, a fortiori, the Government acting through the instrumentality or agency of a corporation should equally be subject to the same limitations. Otherwise the Government would be enabled to overwrite the fundamental rights by adopting this stratagem of carrying out its function through the instrumentality or agency of a corporation while retaining control over it.

That apart, the letter written on behalf of the writ petitioner to the respondent no. 3 makes it very clear that in view of the operational difficulties and unviability in running of the LPG Cylinder Statutory Testing Plant at IPPL, Haldia, it had decided to discontinue the statutory testing plant activities there with immediate effect. How, if on the basis of such communication the respondent no. 3 had terminated the employment of its workmen,

the petitioner becomes a necessary party in a dispute between the respondent no. 3 and its workmen is difficult to appreciate. The Tribunal below also decided not to enter into the issue and come to any finding before it concluded that the presence of the petitioner is necessary in the present dispute.

The judgment in the case of *Hochtief Gammon (Supra)* has no application to the facts of the case. This is not a case where a party to an industrial dispute is not completely or adequately represented so that the ratio decided therein may be pressed into service. Moreover, the portion of the judgment quoted by the Tribunal specifically starts with an advebal pre-condition"……. if it appears to the Tribunal……". If the ratio of this judgment is to be relied by any tribunal or court it is equally imperative for the said court or tribunal to record why it appears to it that the presence of the party is necessary.

So far as the ratio decided in *Steel Authority of India Ltd. (Supra)* is concerned the existence of the power of the tribunal is an undisputed fact. But the existence of a power and its exercise are not synonymous. Merely because a court or tribunal has power to do certain thing does not, merely as a corollary of the existence of the power, mean that the same should be exercised irrespective of

the factual basis. This is not the position in law. This can never be so. In order to exercise the power, the court has to decide why it is in the facts of that particular case necessary that such power should be exercised.

The legal tests for holding a party necessary for an adjudication has also not been followed by the Tribunal. There is no discussion whether the petitioner has a direct or substantial interest in the subject matter of reference or whether its presence is necessary for answering the issues arising out of it. When the Tribunal held that for adjudication of the dispute the presence of the petitioner herein is necessary, it has obviously meant it to be a necessary party. For deciding whether a party is necessary it is essential to come to a finding that without him no order can be effectively made. But here there is no determination by the Tribunal whether, and, if so, why the presence of the petitioner was necessary for effective and complete adjudication of the reference. Without any such effort the conclusion arrived at by the Tribunal has been rendered rather vulnerable.

The only observation about the merit of the case is that the management of the respondent no. 3 had not specifically submitted that the petitioner was not a necessary party. This

observation has been factually belied by recording of the facts of the case in the earlier paragraphs of the order which mentioned that the management had opposed the prayer of the union on the grounds as taken in the written objection. The management had also specifically objected to the application of the respondent no. 4. It recorded that the petitioner awarded contracts from time to time to different agencies by inviting public tenders and by observing all norms so that the same could be doubted as a camouflage. The other objection was that without amending the terms of reference the application for addition of party could not be allowed and the union was required to approach the concerned Ministry for addition of party.

If this is not regarded as an objection to an application for addition of party, one wonders what it was. The management had factually, very specifically and unequivocally opposed the prayer for addition of party by the union of the respondent no. 3.

That apart, it cannot be glossed over that the petitioner herein was added as a party without giving it an opportunity of being heard. It should have been given a chance to rebut the allegations, or at least to respond to it. If it had been given an

opportunity to contest much of what it says now could have been agitated in the Tribunal.

That apart, the Tribunal appears to have approached this issue from an incorrect perspective. A party cannot be added as a necessary party to a proceeding upon the failure of the respondent to show that it is not a necessary party. The onus entirely and exclusively lies on the applicant who seeks an affirmative in the form of a juridical order of its contention. The rule is best expressed in the maxim *ei qui affirmat non ei qui negat incumbit probatio,* i.e., the burden of proving a fact is on the party who asserts the affirmative of an issue and not upon him who denies it. Lord Maughm justified the adherence to this ancient rule in *Joseph Constantine steamship Line Ltd. Vs. Imperial Smelting Corporation Ltd. The Kingswood.,* reported in (1941) 2 All ER 165, being "founded on considerations of good sense and should not be departed from without strong reasons". Thus, even if the respondents had not shown any cause or had not even used any rejoinder to the application, the primary onus of the applicant to prove the necessity of the party sought to be added is never shifted. The question of showing cause to the application will arise

only after the applicant discharges its initial onus. Therefore, the observation that the management of the respondent did not submit that the writ petitioner was not a necessary party is not a relevant consideration. The learned Judge of the Tribunal had erred in placing the onus on the respondents to come to a conclusion not based on a sound legal position.

The judgment relied on by Mr. Das Gupta in the case of *Hussain Bhai (Supra)* has no application to a case where the principal employer has no economic control over the workers' subsistence or employment. The workmen did not produce any goods or service for the business of the writ petitioner here. They were after all discharging their duties for the respondent no. 3 who had employed them. It is immaterial for the present purpose if the respondent no. 3 had entered into a contract with the petitioner. It cannot also be said from the facts and the relation between the parties *inter se* that on lifting the veil or looking at the conspectus of factors governing employment that the contract is a camouflage or the real employer was the management of the petitioner.

Mr. Dasgupta's reminder that disputed questions of fact cannot be enquired into by the High Court is too well-settled a proposition of law. But a writ court has all the powers to judge the

legality of an order passed by a tribunal. It is not a case that the Tribunal based on certain data had reached a factual conclusion which cannot be disturbed by a writ court. On the contrary, it is a case where facts largely remain elusive and virtually no conclusion based on facts has been arrived at. The application of law is also not above board. The judgment in the case of *The KCP Employees' Association, Madras (Supra),* laying down that in the case of any dispute the benefit of doubt must go to the weaker section again has no application for reasons far too obvious to explain. The order does not admit of any doubt arising out of the dispute or calling for an interpretation of any particular clause or provision of law. The question of making a beneficial interpretation in favour of the weaker section applies only in the case of a doubt about two possible interpretations. The facts of the present case are entirely different. The proposition has no relevance while judging an application for addition of party.

For the reasons aforesaid, I find sufficient merit in the writ petition so far as the challenge to the order impugned is concerned. The order of the Tribunal below is set aside.

Since the order impugned has been set aside it is not necessary for this Court to examine the other issue raised by the

petitioner about the validity of the reference. As a matter of fact once the order of addition of party is set aside and the petitioner is delinked from the case, it automatically loses the locus to challenge the reference. Now its status is no better, or for that matter, no worse than that of a stranger to the reference.

The writ petition is, thus, allowed on the point indicated above.

There shall, however, be no order as to costs.

Urgent Photostat certified copy of this order, if applied for, be supplied to the parties on priority basis upon compliance of all requisite formalities.

(Sambuddha Chakrabarti, J.)

S. Banerjee