Government of India
Ministry of Labour & Employment,
Central Government Industrial Tribunal-Cum-Labour Court-II, New Delhi.

Present:

Smt. Pranita Mohanty,
Presiding Officer, C.G.I.T.-Cum-Labour
Court-II, New Delhi.

INDUSTRIAL DISPUTE CASE NO. 18/2013

Date of Passing Award- 22nd August, 2022.

Between:

Shri Narender Singh & Ors., Workmen
S/o Shri Govind Singh,
R/o Village-Jeevangarh,
Ward No. 9, P.O. Dakpatthar,
Distt. Dehradun, Uttrakhand.

Versus

1. Chief General Manager, Management
   Bharat Sanchar Nigam Limited,
   Windlass Shopping Complex,
   Rajpur Road, Dehradun- 248001.

2. The General Manager,
   Bharat Sanchar Nigam Limited,
   E-10, Exchange, Patel Nagar,
   Dehradun.

3. Sub Divisional Manager,
   Bharat Sanchar Nigam Limited,
   Vikas Nagar,
   Dehradun.

Appearances:-

Shri Rajesh Ranjan (A/R) For the Workman.

Shri Ajay Gupta (A/R) For the Management.

A W A R D

The Government of India in Ministry of Labour & Employment has referred the present dispute existing between employer i.e. the management of Bharat Sanchar Nigam Limited, and its workman/claimant herein, under clause (d) of sub section (1)and sub section (2A) of section 10 of the Industrial Dispute Act 1947 vide letter No. L-40011/25/2012 (IR(DU) dated 05.03.2013 to this tribunal for adjudication to the following effect.

> "Whether the action of the management of BSNL, Vikas Nagar, Dehradun by not regularizing 18 workmen (list enclosed) is unjustified? If so, what relief the workmen are entitled to?

Though the reference received from the Government had enclosed a list of 18 workmen, only 6 of them, (list appended to this award) filed the claim statement and contested the Industrial Dispute.

The claimants in the claim statement have stated that they had been working with the management as a daily wage/casual worker since the year 2000 till their illegal termination on 23.03.2012. Initially the remuneration paid to them was Rs. 100/- per day and for the accumulated amount for a month they were being paid under payment voucher. Subsequently they were getting approximately Rs 2500/- per month which was much less than the minimum wage prescribed by the government from time to time. Their last drawn salary was approximately 2500/- per month. The workmen had worked for the management for more than 12 years diligently leaving no scope for compliant. During this period despite their demand no appointment letter was issued to them though they had completed work for more than for 240/- days in each calendar year. Not only that during the course of their employment they were being asked to work for more than 7/8 hours a day. The provisions of PF leave salary etc where never made available to them. When the management did not consider their request to regularize them in the post they were working, a complaint was made by them before the Central Labour Commissioner in the year 2012 praying regularization of their job and payment of Appropriate salary. The conciliation proceeding failed. With a view to take revenge the management without issuing any show-cause notice and conducting domestic inquiry terminated the services of the present workmen w.e.f. 23.03.2012 for the failure of the conciliation the Appropriate Government referred the matter to this tribunal for adjudication. The further stand of the workmen is that since, the date of termination they are unemployed having no other source of income. Hence, they have prayed for an award to be passed holding the termination of their service by the management to be illegal with a further direction to the management for reinstating them in service with full back wage since the date of termination and till the date of reinstatement. The further prayer is that their service with the management be regularized.

The management BSNL filed the written statement rebutting the stand of the workmen. While denying the employer employee relationship between them, the management has pleaded that the proceeding is not maintainable as allegation doesn't amount to an industrial dispute. The specific stand of the management is that the workmen were working for a BSNL through a contractor who has been awarded with a contract to do certain work for the management. The said contractor is a necessary party and for his non-joinder the proceeding is liable to be dismissed. In the WS it has also been mentioned that the workmen were never engaged by the management either as daily wager or casual workers. All the claims advanced by the workmen are illegal and not tenable in the eye of law. While denying the alleged termination of service, the stand of the management is that when the workmen were not employed by the management the question of their termination doesn't arise. On the same ground the management has denied the necessity for serving any termination notice on the workmen. Thereby the management has prayed for dismissal of the proceeding.

On the rival pleadings the following issues were framed for adjudication.

ISSUES

1. Whether the action of the management of BSNL, Vikas Nagar, Dehradun by not regularizing 18 workmen (list enclosed) is unjustified? If so its effect?

2. Whether relationship of employer an employee exits between respondent and workman? If so its effect?
3. To what relief the workmen is entitled to?

During hearing the management even though filed written statement and partly cross examined the witness of the claimant, subsequently did not participate and the hearing was closed without any evidence by the management being recorded. When the award was passed on 25th April 2019 the management being aggrieved filed an application seeking an opportunity for adducing evidence. That application was heard and disposed of by order dated 08.02.2022 wherein a direction was given to the management to adduce evidence. Accordingly on 20.05.2022 the management examined one of its Engineer as MW1 and produced some documents marked as MW1/1 to MW1/3.

During the hearing, on behalf of the workmen all the 6 claimants had testified as WW1/1 to WW1/6. Out of them only WW1 and WW2 were cross examined at length by the management before it was proceeded exparte. After setting aside of the exparte award the remaining witnesses did not appear to face the cross examination. Hence, their evidence was espoused by order dated 20.05.2022. On behalf of the claimants several documents were filed and marked in a series of WW1/1 to WW1/11. These documents include payment receipt issued to the claimants on different dates, letter correspondence between the workmen and the management ventilating their grievance complaints made by the claimants collectively and the attendance register etc.

FINDINGS

ISSUE NO.2

This issue has been taken up for consideration at the first instance since it will have a considerable influence on the decision of other issues. The workmen have claimed that since the year 2000 they had been working for the management continuously till the date of their illegal termination made on 23.03.2012. The oral evidence adduced by WW1 and WW2 fully support the claim statement in this regard. To render documentary evidence in support of the same on the behalf of the workmen the attendance register marked as WW1/10 and WW1/11 have been filed. These are the photocopies of the register in which the names of the claimants of this proceeding clearly appears and marks their presence on different months and dates starting from 2004 to 2011. On behalf of the workmen the Ld. A/R during course of argument submitted that during examination of the witnesses the photocopy of the attendance register was filed and exhibited. The Ld. A/R for the management did not object to the admissibility of the same. He also argued that the management is the custodian of all the registers and when the original was not filed by the management to dispute the authenticity of the photocopies the one and only conclusion is that the said copies are authentic documents.

The law of evidence provides that any document proposed to be proved should be produced in original as primary evidence and the secondary evidence is permissible only when the original is proved to be lost or not within the reach of the party relying on the same or the same cannot be produced without in ordinate delay and difficulty. In this case admittedly the claimants are the poor workmen who have no link with the management on account of their alleged retrenchment. In such a situation it cannot be insisted upon them to produce the original document from the custody of the management. The management in this case was participating in the proceeding when the document that is the photocopy of the attendance register was exhibited. Hence, this tribunal feels it proper to accept the photocopies of the documents as secondary evidence.

The workmen have asserted that they were working directly under the management having no intermediary contractor. Though in the written statement a reference has been made by the management about the contractor through whom these workmen were engaged, there is absolutely no evidence adduced by the management to prove the identity of the contractor or the nexus between the contractor and the workmen. Pleading however elaborate may be cannot take the place evidence which is required to be proved by evidence. In this proceeding the AGM of BSNL while testifying as a witness had produced a document marked as MW1/1 which is a photocopy of the work order issued to a contractor for supply of maintenance and upkeep of parts of Telecom Infrastructure in Dehradun for a period of one year commencing from 01.03.2012 to 28.02.2013. Another document has been filed and marked as MW1/2. This is another work order for supply of maintenance and upkeep of parts of Telecom Infrastructure for the period 01.07.2011 to 03.06.2012. On the basis of these documents the Ld. A/R for the management emphatically argued that the claimants were the employees of the contractor and working in the premises of the management. But these documents in no way prove the employability of the claimants under the contractor as the documents do not establish the employer employee relationship between the contractor and the claimants. Another document marked as MW1/3 has been filed. This seems to be a photocopy of the attendance register for the period 01.06.2010 to 30.06.2010 maintained by ACME Enterprises. No relevancy of this document is proved with regard to the present claim as neither the said document contains the names of the claimants nor any other evidence has been placed on record to establish that ACME Enterprises was at any point of time had entered into a contract with the management BSNL for supply of maintenance and upkeep of parts. The document marked as MW1/1 and MW1/2 are the photocopies of the work order issued to M/s RN Infratech Pvt. Ltd. and M/s Aftab Infocom Pvt. Ltd. These two documents do not establish that the claimant were at any point of time working in the premises of BSNL being employed by the said contractor. Hence, these two documents are of no assistance to the management. In this regard the oral evidence of the management witness is important. The claimants have stated that during the course of their employment they were working in the BSNL offices at Harbert Pur and Vikas Nagar. But surprisingly the management witness during cross examination admitted that he was neither posted at Harbert Pur or Vikas Nagar BSNL Office in the year 2000 when the claimants started working for BSNL. He has also admitted that neither the joining nor the termination of the claimants had happened in the office where he was working and his evidence is based upon the documents available in the office only. The witness though clarified that from 2002 to 2007 when he was posted at Vikas Nagar the claimants were working under the contractor, no documents to that effect has been filed or placed on record. He also admitted that the documents filed by him and marked as MW1/1 to MW1/3 nowhere contains the name and reference of the claimants. On the other hand on behalf of the claimants besides the oral evidence several documents have been filed to prove their relationship with BSNL as its employees. These documents include the payment vouchers issued by the Junior Telecom Officer of BSNL to workmen for their remuneration in respect of the work done. Some of the vouchers marked in a series of exhibit WW1/1 have been issued by the SDE Phones Vikas Nagar Dehradun. Copies of the complaint register for the relevant period showing resolution of the complaints of the customers by the workmen from time to time has been filed. In addition to that the claimants have filed photocopies of the attendance register for the relevant period wherein the names of all the 6 claimants clearly appear. These attendance register are for the period 2004 to 2011. The management has disputed the same on the ground that the document attendance register cannot be relied upon since it does not contain any endorsement of the BSNL Officials. But surprisingly the management witness during cross examination has admitted that the photocopies of the documents filed by the claimants at page No. 12 to 22 are the duty registers of the claimants showing deputation and discharge of duty on different dates and those documents contain the names of the

claimants. He also admitted that the work diary produced by the claimants is maintained by the BSNL and the same has nothing to do with the contractor and the name of the contractor nowhere finds place in the said diary. This oral evidence of the witness clearly proves that the claimants during the relevant period of dispute were working in the premises of BSNL and the claim of the workmen find support from the documents filed by the claimants which purports to have been maintained during an undisputed point of time. Thus, all these documents together with the oral evidence adduced by the claimant and the management clearly lead to a conclusion that during the relevant period between 2000 to 2012 all the 6 workmen/claimants were the employees of the management and there exists a relationship of employer and employee between them.

In this regard reliance has been placed on behalf of the workmen in the case of **BSNL vs. Bhurumal decided by the Hon'ble Supreme Court of India in Civil appeal No. 10957 of 2013** where in by an award passed by the CGIT a diary containing the details of the job undertaken by the workmen on different dates were accepted as evidence for determining the employer employee relationship. The tribunal on the basis of the said documents have come to hold that the entries in the diary legally prove that the workmen were working under the direct and administrative control of the management and thus, they were the employees of the management. The Hon'ble Apex Court while analyzing the reasons assigned by the Presiding Officer of CGIT came to hold that there is no reason to disbelieve the diaries maintained during ordinary course of business and thereby discarded the argument advanced by the of BSNL management that the diary being a self serving document cannot be relied as evidence. In this case in the similar manner the workmen have relied upon the entries made in a diary showing the work and job discharged by them. This tribunal finds no reason of discarding the said diary. On the contrary it is held that the entries in the said diary were made during an undisputed point of time and clearly proves how during the relevant time period i.e. between 2000 to 2012, these workmen were working under the effective administrative control of the management which gives rise to a presumption of employer employee relationship which has not been rebutted by the management in this case. The plea of the management that the claimants were the employees of the contractor in absence of proof is rejected. This issue is accordingly answered in favour of the workmen.

ISSUE No.1 and 3

The grievance of the claimants is that they had worked for the management for 12 years without being paid the minimum wage. When they raised a genuine and lawful demand before the Labour Commissioner the management got annoyed and terminated their service w.e.f. 23.03.2012. The management had denied the alleged termination on the ground that when there was no employer employee relationship the question of termination doesn't arise. Both the witnesses examined as WW1 and WW2 in their oral statement have stated that the management orally terminated their service and at the time of termination neither any termination notice, notice pay, or termination compensation was paid. Not only that no show-cause notice was served nor any Domestic Enquiry was conducted against them before termination. Both the witnesses were cross- examined at length by the Ld. A/R for the management. But nothing substantial has been elicited to discredit their testimony.

Now it is to be examined if the said act of termination and not regularizing them in service by the management is illegal. Be it stated here that the evidence of the claimants have not been controverted by the management. While answering issue No.2 it has already been held that the workmen were working for the management and discharging their duty for the period between 2000 to 2012. In the case of ONGC vs. ONGC contractual workers union reported in 2008 LLR page 801 it has been held that in

order to ascertain the status of the workmen the period of work rendered by him is also taken into consideration. In this case the workmen have stated that they were employees of the management and later illegally terminated their service.

The law is well settled that when the workman successfully establishes his relationship as a n employee of the management it is to be seen if the termination was made illegally. Reference can be made to section 25-F of the Act 1947 which precisely speaks that no workmen employed in any industry who has been in continuous service for not less than 1 year shall be retrenched unless and until the said workmen has been give one month notice in writing, or notice pay or retrenchment compensation. In this case in the written statement the management has taken a plea that no notice was required to be served since there was no employer employee relationship. This gives an impression that no notice was served. Thereby the management has admitted non compliance of the mandatory provision of section 25-F of the ID act. This act itself makes the order of termination illegal and not sustainable in the eye of law. Thus, the moot question which remains to be replied is what would be the relief that can be granted to the workmen once his termination is held to be illegal.

Way back in the year 1980 the Hon'ble Apex Court of India in the case of Surendra Kumar Verma and Others vs. CGIT Delhi had observed that

> "Plain commonsense dictates that the removal order terminating the service of the workman must ordinarily lead to the reinstatement in the service of the workman. It is as if the order was never been made and so it must ordinarily lead to back wages. But there may be exceptional circumstance which makes it impossible for the employer to direct reinstatement with full back wages."

In such cases the Hon'ble Apex Court held that the appropriate order would be for payment of compensation in lieu of reinstatement. But in the case of **G.M ONGC Silchar vs. ONGC Contractual Worker Union reported in 2008 LLR 801** the Hon'ble Apex Court after giving due consideration to several observations in different pronouncement which suggest that a workman who was put in 240 days of work or a contractual worker is not entitled automatically to be regularized, came to hold that in appropriate cases regularization can be ordered.

Here is a case were the workmen have prayed for a relief of reinstatement simplicitor by the management no.1. They have further stated that the work done by them were perennial in nature. While adducing evidence the workmen have successfully proved that for the relevant calendar year of their engagement they have completed 240 days of work and there by duly discharged the burden put on them to prove that during a calendar year they had discharged work for 240 days more**(2006 SCC page 967, municipal counsel Sujanpur vs. surinder kumar relied)**

A question may come up regarding the regularization of casual or contractual employees against regular vacancies in view of the restriction imposed in the case of **Secretary of state karnatak vs. Uma devi reported in 2006) 4 SCC Page1**. In the said judgment the constitution bench of the Hon'ble Supreme Court have held that the appointment of the contractual employees and their regularization in service is not an automatic process but the case of Uma devi referred supra came to be discussed in a later judgment by the Hon'ble Supreme Court

in the case of **Maharashtra SRTC vs. Casteribe Rajya Parivahan Karmchari Sangathana (2009) 8 SCC Page 556.** In that judgment the issue before the Hon'ble Supreme Court was with regard to the jurisdiction of the industrial court to give status wages and all other benefits of permanency to the workman who had been serving for years as cleaners in the corporation in temporary capacity. Relying upon Uma Devi a plea was raised that granting of permanent status to the casual workers/daily wager was not sustainable in law. Repealing the aforesaid argument the supreme court in Para No. 32 and 33 of the judgment of Maharashtra SRTC observed as under:-

> "32. The power given to the Industrial and Labour Courts under Section 30 is very wide and affirmative action mentioned therein is inclusive and exhaustive. Employing badlis, casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees is an unfair labour practice on the part of the employer under Item 6 of Schedule IV. Once such unfair labour practice on the part of the employer is established in the complaint, the Industrial and Labour Courts are empowered to issue preventive as well as positive direction to an erring employer.
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> "33. The provisions of MRTU and PULP Act and the powers of Industrial Labour Courts provided therein were not at all under consideration in the case of Uma Devi1. As a matter of fact, the issue like the present one pertaining to unfair labour practice was not at all referred, considered or decided in Umadevi1. Unfair labour practice on the part of the employer in engaging employees as badlies, casuals or temporaries and to continue them as such for years with the object of depriving them of the status and privileges of permanent employees as provided in Item 6 of Schedule IV and the power of Industrial and Labour Courts under section 30 of the Act did not fall for adjudication or consideration before the constitution Bench".

Again the Hon'ble Supreme Court in another case **Hari Nandan Prasad vs. employer I/R to management of Food Corporation of India and another reported in AIR 2014 SC 1848,** wherein the issue was as to whether the Labour Court Tribunal has the jurisdiction to order regularization of the workman was considered in the context of the provision of the Act and the decision of the constitution bench in the case of Uma Devi and the Hon'ble Court came to hold that the powers conferred upon the Industrial Tribunal/Labour Court under the ID Act are quite wide. The Act deals with industrial Disputes, provides for conciliation, adjudication, and settlements, and regulates the rights of the parties and the enforcement of the award and settlement. Not only that way back in the year 1950 in the case of Bharat Bank Limited vs. Employees of Bharat Bank reported in (1950) LLJ 921 The Hon'ble Supreme Court had observed:

> "In settling the disputes between the employers and the workmen, the function of the Tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace."

In the above said background and on considering the different pronouncements of Hon'ble Apex Court, while reverting to the facts of the present case, the grievance of the claimants is that they were working as casual workers against the permanent vacancy and the nature of the duty discharged by them was perennial in nature. But the management in order to deprive them of their right of permanency and regularization illegally terminated their service. They have also pleaded that the principle of last come first go was not followed by the management which amounts to violation of the provision of 25-G of the ID Act. No valid reason has been assigned by the management in this regard.

Reliance has been placed on behalf of the workman in the case of Mackinon Mackenzie & Co. Ltd. vs. Mackinon Employees Union reported in **AIR 2015 SC 1373 and in the case of Workman of Sudder Workshop of Jorehut Tea Co. Ltd. vs. Jorehut Tea Co. Ltd. reported in AIR 1980 SC 1454**. In these two judgments the Hon'ble Supreme court have held that last come first go is not an inflexible rule and extraordinary situation may justify variation. In such a case the management has to assign the reason for departure from the rule. In this case no explanation has been offered by the management as to why the juniors were allowed to continue whereas the present workman being the senior was terminated.

Hence, for the foregoing reasons it is concluded that the claimant/workmen were subjected to unfair labour practice by the management. There was a gross violation of the provision of Section 25-G of the ID Act. They having discharged the duty perennial in nature, for more than 240 days in a calendar year, this tribunal while following the judgment of the Apex Court in the case of Hari Nandan Prasad referred supra feels it proper to exercise its jurisdiction to order the regularization of the workmen who were initially appointed as a casual workers and continued to work for 12 years and also worked for more than 240 days in the calendar years preceding to their termination. The issue is accordingly answered in favour of the workmen. Hence, ordered.

ORDER

The reference is accordingly answered. The management is directed to regularize the service of all the workmen/claimant as per the list annexed with this award against the post they were working w.e.f. the date of their termination i.e. 23.03.2012 with back wages at par with the regular employees of the BSNL in that cadre. The exercise of reinstatement of the workmen shall be completed within 3 months from the period when this award would become enforceable. The management is further directed to pay the arrear wage accrued in favour of the claimant/workmen within the above said 3 months period failing which the accrued amount shall carrying interest @ 12% per annum from the date of accrual till final payment is made. Send a copy of this award to the appropriate government for notification as required under section 17 of the ID act 1947.

LIST OF WORKMEN

Sr. No.	Name & Father/husband's Name	Date of joining/year of joining	Designation
1.	Shri Narender Singh S/o Shri Govind Singh	01.08.2000	Line man
2.	Shri Mukesh Kumar S/o Shri Arjun Gupta	05.03.1998	Line man
3.	Aslam Shah S/o Bhura Shah	2000	Line man
4.	Shri Deepak Kumar S/o Shri. Arjun Gupta	01.10.2000	Line man
5.	Shri Virender Singh S/o Shri. Govind Singh	10.10.2000	Line man

6.	Shri Subhash Chauchan S/o Shri Guman Singh Chauchan	15.05.2002	Line man

The reference is accordingly answered.

Dictated & Corrected by me.

Presiding Officer.
CGIT-Cum-Labour Court.
22nd August, 2022.

Presiding Officer.
CGIT-cum-Labour Court.
22nd August, 2022.