

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. 05/2016**

**Date of Passing Award- 16<sup>th</sup> May 2023**

Between:

The General Secretary,  
Mazdoor Sabha, Opp. Tulsi Zarda,  
Sector-5, Harola, Noida,  
G.B Nagar, Uttar Pradesh.

Workman

Versus

The Director General,  
ESIC Hospital,  
Sector 24, Noida,  
G.B. Nagar, Uttar Pradesh

Management

Appearances:-

Shri Bharat Saini, Ld. A/R for the Claimant.

Shri Abhik Mishra, Ld. 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 (i) The Director General, ESIC Hospital, 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-15011/7/2015-(IR(M)) dated 07/01/2016 to this tribunal for adjudication to the following effect.

“Whether the given workmen as per the list attached are justified in demanding reinstatement for their contract period with the ESI Hospital, Noida? If so, what remedy can be given at this late stage?”

As stated in the claim petition, the claimants (as per the list attached) with the reference received from the appropriate Govt. were working in the ESIC Hospital Noida as paramedical staff of different categories. Their date of appointment was different and the pay scale granted were also different. Since the date of appointment they were working continuously in the establishment of the Mgt Hospital. Their appointments were made by the mgt of the ESIC Hospital sector 24 Noida after proper interview and verification of the documents relating to their educational qualification. All these claimants were working under the complete supervision and control of the mgt Hospital through its officers. Every day, the mgt was taking the signature of the claimants to record their attendance on plain papers but not on proper attendance register. At the time of payment of the remuneration, the mgt was also obtaining the signature of the claimants on some papers affixed with revenue stamp as acknowledgment of receipt. But the mgt was adopting anti-workman policy by not issuing appointment letter, attendance card, holiday card, Identity card and salary slip. Not only that the mgt was also paying less than the minimum wage as notified by the Govt. On account of this, the workmen were often raising their legitimate

demands. Not only that the mgt was also not paying the wage regularly and the same was often paid 15 to 20 days after the commencement of the following calendar month. All the rightful demand raised by the claimants were being ignored by the mgt. In the month of March and April 2015, no wage was paid to the claimants, though verbal assurance was given for early payment. When the claimants did not get the said outstanding wage till June 2015, they made a complain in the office of the labour commissioner through their union. This caused annoyance in the mind of the mgt and suddenly the services of all the claimants were illegally terminated with effect from 29.07.2015. At the time of termination no notice of termination, notice pay or termination compensation were paid to the claimants. The provisions of the ID Act were visibly violated. For the complaint lodged by the claimant, notice was issued to the mgt by the labour commissioner. The mgt appeared there and assured that the outstanding wage shall be paid soon. Thereafter the mgt called the workmen to his office and paid the unpaid wage from the month of March 2015 to 28.07.2015. This payment was not made directly by the mgt but through their agency named M/s Vishaka Facilities (P) Ltd. The workmen had no knowledge about the relationship of that agency with the mgt nor ever they had worked under the said agency. Being jobless for the illegal retrenchment, they again raised a dispute before the labour commissioner and the matter was referred to this Tribunal for adjudication. In the claim petition the claimants have stated that a direction be given to the mgt i.e. ESIC Hospital, to reinstate them in service with full back wages and grant them continuity of service. Though the reference was received with the list of 71 retrenched employees, 27 employees filed the claim statement whose names have been mentioned in annexure A filed along with the claim statement.

The mgt, i.e. the Director ESIC Hospital, sector 24 Noida being noticed appeared and filed written statement denying the employer employee relationship between the said mgt and the claimant. It has been stated that the claimants of this proceeding had never worked

with the mgt as its employees. The mgt had published open tender for supply of nursing and paramedical staff. After proper scrutiny, the tender was awarded to an independent agency namely M/s Vishaka Facilities (P) Ltd. Delhi. The said agency M/s Vishaka Facilities (P) Ltd. had supplied the required number of paramedicos. These claimants were working in the Hospital of the ESIC as the employees M/s Vishaka Facilities (P) Ltd. mgt and not as the employees of ESIC. Hence, the claim advanced by them against the Mgt ESIC is liable to be dismissed. It is further stated that the contract between the mgt of ESIC and M/s Vishaka Facilities (P) Ltd. mgt was terminated on 29.07.2015 with immediate effect, due to its unprofessional conduct. Before termination of the contract, show cause notices were served on the said M/s Vishaka Facilities (P) Ltd. for not supplying proper number of men power to the Hospital. These claimants were getting salaries directly from M/s Vishaka Facilities (P) Ltd. and the agency was not giving them salary in time. After receipt of the show case notice, though M/s Vishaka Facilities (P) Ltd. promised to pay the salary in time, failed to fulfill the promises. On 25.07.2015 M/s Vishaka Facilities (P) Ltd. submitted a letter to the director of ESIC hospital stating that the agency cannot supply the manpower to the hospital as agreed and requested to remit the withheld amount against the Garnishee order of Recovery Officer RO Delhi. On receipt of this letter the contract of M/s Vishaka Facilities (P) Ltd. stood terminated and a fresh contract was awarded to M/S Vayudoot Security Services Pvt. Ltd. for providing nursing and paramedical staff. Hence, the claim of the claimants is liable to be dismissed.

The claimants filed rejoinder stating therein that they had never worked M/s Vishaka Facilities (P) Ltd. they are not aware of any relationship between M/s Vishaka Facilities (P) Ltd. and the Director of ESIC. They being employed to work under the direct supervision and control of the Mgt of ESIC were the employees of ESIC and entitled to the relief sought for in this claim petition.

On these rival pleading the following issues are framed for adjudication.

### **Issues**

1. Whether the workmen mentioned in the attached list are justified in demanding reinstatement for their contract period with the ESI Hospital, Noida? If so, its effect?
2. Whether there exist relationship of employer and employee between E.S.I Hospital, Noida, and workmen? If so, its effect?
3. Whether there is non-rejoinder of M/s Vishaka Facilities management Pvt. Ltd. 30/42 Street No.8, Main Road, Vishaka Nagar, Shahdra, Delhi 110092 as respondent/management in the claim by workmen? if so its effect?
4. Whether contract/tender awarded M/s Vishaka Facilities (P) Ltd. and the management No. 1 ESI, Hospital Noida has been terminated on 29.07.2015 with immediate effect due to its conduct, behavior and non-compliance? If so, its effect?
5. To that relief the workmen is entitled to?

Out of 27 claimants 19 claimants testified as witnesses by filing their separate affidavits and other claimants adopted the evidence adduced by them. But none of the witnesses were cross examined by the mgt in spite of proper and adequate opportunity granted. The mgt was then called upon to adduce evidence and for the said purpose two adjournments were allowed offer which right to adduce evidence was closed. On 21.02.2023 the A/R for the mgt appeared and made an oral submission for recall of the order dated 19.01.2023 by which the right of the mgt to adduce evidence was closed. The Ld. A/R took the stand that he has been newly appointed and the case has suffered for the negligence of the previous counsel. But the stand taken by him was not found convincing since the claimants were found litigating demanding reinstatement since the year 2015. For the negligence of the mgt and intervention of covid lockdown their suffering was worst. The matter was then adjourned for argument. Argument was heard being advanced by the A/R for both the parties. Be it stated that that during the pendency of the proceeding the claimants had filed an application invoking the provisions of section 11(3) of the ID Act

praying a direction to the mgt for production of the documents from the custody of the mgt. They had asked for production of the details relating to the vacancy position of staff nurses, pharmacists, O.T Assistant, and to technician working with the mgt since 2014 and continuing, the copies of the nursing note of 2014 to 2015, copies of the record book, attendance register, admission and discharge register from the custody of the mgt. After hearing objection raised by the mgt this Tribunal by order dated 24.05.2019 passed the order was passed allowing the petition and directing the mgt to produce the documents. The matter suffered several adjournments for production of the document from the custody of the mgt. Subsequently, the mgt apprised that the documents are voluminous in nature and cannot be produced. Thereby the mgt admitted possession of the documents at their end. This Tribunal by order dated 12.09.2019 gave liberty to the claimants to adduce secondary evidence in respect of the said documents.

### **Finding**

#### **Issue no. 2,3 & 4**

For the objection taken by the mgt challenging the employer employee relationship between it and the claimants these are the most important issues to be decided. The workmen have filed affidavit stating that they were appointed after proper interview and verification of the certificate by the officers of the mgt of ESIC Hospital. Their specific stand is that the appointment was made after completing all administrative formalities, but no letter of appointment was given. That was the main cause of dissatisfaction and grievance of the claimants. The witnesses have further stated that the introduction of the Agency named M/s Vishaka Facilities (P) Ltd. while filing w.s is only intended to camouflage their legal rights. The mgt was making them to work under their direct supervision and control. This oral statement of the workmen has remained

uncontroverted, since the mgt in this proceeding failed to cross examine the witness and adduce any evidence contrary to the stand taken by the claimants. Though the employer employee relationship has been denied in the written statement, the same will not outweigh the oral statement of the workmen in absence of proof to that effect by the mgt. In this proceeding claimants had asked for a direction to the Mgt for production of documents from it's custody which could have thrown light on the employer employee relationship. As stated in the preceding paragraph, the mgt though admitted possession of the documents like the attendance register vacancy position duty seat etc, later on, denied to produce on the plea that the documents being voluminous cannot be produced. The law is well settled that the party in possession of documents which could have thrown light on the point of controversy is bound to produce the same. If the documents are not produced, adverse inference is to be drawn. In this case the mgt is guilty of suppressing the documents which could have thrown light on the disputed employer employee relationship.

The statement of the claimants is supported by few pages of the attendance register in respect of the nursing staff and pharmacists. The witnesses examined by the claimants have also filed photo copies of their Bank statement which clearly show that arrear pays were being paid by the mgt ESIC. In absence of any rebuttal evidence, the oral and documentary evidence adduced by the claimants clearly proves that during the relevant period the claimant were working under the mgt ESIC who was recording their attendance and paying their wage. The fact that there was an intermediary named M/s Vishaka Facilities (P) Ltd. between the mgt and the claimants is a misnomer since no evidence at all has been adduced by the mgt in this regard.

In the case of **Steel Authority of India vs. National Union Waterfront Worker Union** reported in (2001)7SCC page 1, the Hon'ble Apex Court have also prescribed for the effective control test to ascertain about the relationship of the workman with the management or the contractor. Not only that in the case of **Chintaman Rao vs. State of M.P AIR1958, 388** the Apex Court

ruled that the concept of employment involves 3 ingredients (i) Employer (ii) Employee (iii) Contract of Employment. The employer is one who employs or engages the service of other person. The employee is one who works for another for hire. The employment is the contract of service between the employer and employee, where under the employees agrees to serve the employer subject to his control and supervision. In the case of **Workmen of Food Corporation of India vs Food Corporation of India AIR 1985 (SC) 670** the Hon'ble Apex Court pronounced that the contract of employment always discloses a relationship of command and obedience between them. Where a contractor employs a workman to do the work which he contracted with a third person to accomplish, the workman of the contractor would not become more than the workman of the third person. Hence in this case there being no evidence about the contractor the statement in the written statement denying the employer employee relationship cannot be accepted.

In this case the claimants have all along maintained that they were working under the supervision and control of the mgt of ESIC. This statement alone is sufficient to negative the statement made by the mgt in the w.s. Hence it is concluded that the claimants have successfully proved their relationship as the employees of the mgt. These issues are accordingly answered in favour of the claimants.

### **Issue no. 1 & 5**

It is a decided principal of law that the employer and employee relationship is a question of fact and the burden lies on him who asserts existence of the same. While answering the previous issues it has been held that the workmen have successfully established their relationship as employees of the employer ESIC Hospital. It is now to be seen if the termination of the workmen was made following the procedure of law or illegal for non compliance of the same. Reference can be made to section 25-F of the ID Act 1947 which precisely speaks that no workmen employed in any Industry, who has been in continuous service for not less than 1 year under an employer, shall be



retrenched until the workman has been given one month notice in writing, or has been paid retrenchment compensation. In this case in the written statement the management has taken a plea that no such notice was served since the workmen were not the employees of management. Thereby management has admitted non compliance of the provision of section 25-F. In the preceding paragraph it has already been held that the contract of the management with M/s Vishaka Facilities (P) Ltd. was sham and in fact the workmen were the employee of the management. In that case, the mandatory provisions of section 25-F was required to be complied before the termination. The non compliance of the same has made the termination of the workmen in the hands of management illegal. Thus, the moot question which remains to be replied is what would be the relief that can be granted to the workmen.

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 or a contractual worker is not entitled automatically to

regularization came to hold that in appropriate cases regularization can be ordered.

Here is a case where the workmen have prayed for the relief simpliciter for reinstatement to service by the management which shows their anxiety for reemployment. The basic issue in the present case is the status of the workmen and whether they were the employees of ESIC. As seen from the evidence these workmen were appointed on different dates of 2014. Their services were terminated on 29.07.2015. There is absolutely no evidence if there are still vacancies in the posts they were working before their termination. Though they have worked for more than 240 days continuously, the period of employment was not very long. In such a situation it cannot be concluded that the claimants are entitled to reinstatement.

Thus considering the evidence, the length of service rendered by the claimants and the periods spent between the date of termination and this award it is felt justified to direct the mgt to suitably compensate the claimant instead of reinstating them into service. These two issues are accordingly answered. Hence ordered.

### **Order**

The claim petition be and the same is allowed on contest. It is held that the termination of the workmen by the mgt is illegal. But for unclear evidence about the existence of vacancies and time gap between the termination and passing this award and for the brief tenure of service of the claimants, it is directed that the mgt for such illegal termination shall pay compensation to each of the claimants. Each of the claimants shall be paid one month last drawn salary as the notice pay, and 15 days salary for each completed year of service toward retrenchment compensation and an amount of Rs.60,000/- towards compensation and litigation expenses by the mgt. This amount shall be paid to the individual workmen within two months from the date of the publication of the award without interest falling which the amount shall carry interest at the rate of 6% from the date

of termination and till the final payment is made. The list of the claimants is attached herewith as annexure-A:-

**List of the workmen**

S. No	Name	Father/Husband Name	Post	Salary	Date of Appointment
1	Deepshika	Sh. Anil Kumar	Pharmacist	16,560	10.03.2014
2	Parveen	Sh. Mahinder Sharma	Pharmacist	16,560	10.03.2014
3	Jai Shankar patel	Sh. Jagdish Chander	Pharmacist	16,560	15.03.2014
4	Munis Kumar	Sh. Nem Singh	Pharmacist	16,560	15.03.2014
5	Nand Kishore	Sh. Chand	Pharmacist	16,028	22.03.2014
6	Manoj	Sh. Amed Singh	Pharmacist	16,560	20.05.2014
7	Ravinder	Sh. Shiv Kumar	O.T Asstt.	14,900	04.04.2014
8	Ramveer	SH. R.M Tomar	O.T Asstt.	14,900	05.04.2014
9	Rajpal Kaur	Sh. Angrej	Staff Nurse	28,000	15.04.2014
10	Pooja Kakkar	Sh. Ravi Kakkar	Staff Nurse	28,000	15.04.2014
11	Ajay	Sh. Johar Singh	Staff Nurse	28,000	12.04.2014
12	Naveen Sharma	Sh. Murari Lal	Staff Nurse	28,000	03.04.2014
13	Pallavi	Sh. C.L Bhatia	Staff Nurse	28,000	02.06.2014
14	Pooja	Sh. Kishan Lal	Staff Nurse	28,000	21.04.2014
15	Gurvinder kaur	Sh. Hoshiar Singh	Staff Nurse	28,000	05.04.2014
16	Remika	Sh. W/o Vikas	Staff Nurse	28,000	21.06.2014
17	Devender Kumar	Sh. Suresh Kumar	Staff Nurse	28,000	05.04.2014
18	Goldy	Sh. Balraj Dhama	N.O.	14,000	11.05.2014
19	Sangeeta	Sh. Vishnu Kumar	N.O.	14,000	10.06.2014
20	Parvesh Devi	Sh. Dinesh	N.O.	14,000	12.06.2014
21	Rinka	Sh. Aryan Kumar Tiwari	N.O.	14,000	15.04.2014
22	Gyanendra	Sh. Jabar Singh	N.O.	14,000	21.04.2014
23	Divanshu	Sh. Fateh Singh	N.O.	14,000	21.05.2014
24	Ankit	Sh. Ashok Kumar	N.O.	14,000	14.04.2014

25	Parminder	Sh. Devender Kumar	N.O.	14,000	08.04.2014
26	Kuldeep	Sh. Ramesh Chander	N.O.	14,000	10.04.2014
27	Monika	Sh. Shushil	Staff Nurse	28,000	21.06.2014

Send a copy of this award to the appropriate government for notification as required under section 17 of the ID act 1947.

Dictated & Corrected by me.

Presiding Officer.  
CGIT-Cum-Labour Court.  
16<sup>th</sup> May, 2023.

Presiding Officer.  
CGIT-cum-Labour Court.  
16<sup>th</sup> May, 2023.