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. 45/2012

Date of Passing Award- 21.10.2022

Between:

Shri Vinod Kumar,
S/o Shri Suresh Chand,
R/o House No. DB-941, Near Manav Seva School,
Rathi Street, 27 Feet Road,
Dabua Colony, NIT,
Faridabad- Workman

Versus

The General Manager,
Bharat Sanchar Nigam Limited,
Sector-15, Faridabad Management

Appearances:-

Shri S.P Srivastava (A/R)	For the claimant
Shri Deepak Thukral (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-40012/37/2011 (IR(DU) dated 13/01/2012 to this tribunal for adjudication to the following effect.

> "Whether the contract awarded by GM BSNL, Faridabad is a sham contract in nature? Whether action taken by the management in terminating the service of Shri Vinod Kumar S/o Shri Suresh Chand,

ex-cable jointer, W.e.f 23/08/2010 is just fair & legal? What relief the workman is entitled to and from which date?"

The claimant in the claim statement has stated that he had been working with the management BSNL as Cable Jointer/MDF and internet/Generator operator w.e.f 01.01.2000. Initially his remuneration per month was Rs. 1650/- and the same was increased from time to time and his last drawn salary per month was Rs. 3000/-. The workman had worked with the management continuously for ten years diligently leaving no scope of complaint. During this period he was raising demand for nonpayment of wage as per the approved minimum wage rate, non extension of the benefits like PF, ESI, paid leave, bonus, overtime etc. This caused annoyance to the management who was in search of opportunity to terminate the service of the claimant. On 23/08/2010 when the claimant was on duty, the officials of the management misbehaved him and informed about termination of his service without assigning any reason. At the time of such termination no notice of termination, notice pay or termination compensation was paid to the claimant in clear violation of the provisions of section 25F of the Industrial Disputes Act. Being aggrieved the claimant made efforts to meet the officials of BSNL and to ensure reinstatement in service. The officials of BSNL did not listen to his grievance and finding no other way and for the arbitrary action of the management he served a demand notice on 31.08.2010 by Registered Post with AD. In the month of August when the management terminated his employment the remuneration for the said month was not even paid to him. After receipt of the demand notice the management gave a reply denying all the contentions raised by the claimant. Hence he raised a dispute before the labour commissioner where the management appeared but refused to reinstate him. For the failure in conciliation the appropriate government referred the matter for adjudication in terms of the reference. In the claim statement the claimant has thus, prayed for a direction to the management to reinstate him in service with continuity and full back wages alongwith all consequential benefits. The claimant has also advanced a prayer for release of his withheld remuneration for the month of August 2010 and to direct the management to extend all the service benefit like PF, ESI etc on reinstatement. The claimant has also

stated that the senior officers of BSNL for executing some urgent work used to take imprest in which the normal procedure like bidding and inviting quotation etc are not followed. For execution of the said urgent works persons like the claimants are engaged and paid out of the advance taken for those works. The works discharged by the claimant and persons like him are of perennial in nature since, these persons use to work as cable joinders, maintenance and upkeep of telephone exchanges, maintenance of telephone lines and attend the faults reported by the customers.

The management BSNL filed the written statement rebutting the stand of the claimant. While denying the employer and employee relationship between them the management has pleaded that the proceeding is not maintainable. The specific stand of the management is that BSNL has enough Group D employees having no occasion for engaging casual or daily wage temporary workers. If any petty work is to be undertaken usually the same are given to the contractors selected through proper bidding process. The said contractor might have engaged the claimant for execution of any such work but the same would not confer the right on the claimant to be treated as an employee of BSNL. The other stand of the management is that the claimant, since was never employed by the management the question of illegal termination by the management does not arise and the management is under no obligation of providing the benefits of PF and ESI etc to the claimant. The management has also denied the stand of the claimant that the senior officers of BSNL for execution of certain urgent work use to take imprest (advanced against some urgent work for which normal procedure like bidding, inviting quotation etc is not possible) and pay out of that amount to the concerned workman executing the work. Thus, the management has prayed for dismissal of the wrong and incorrect claim advanced by the claimant, claiming himself as an employee of BSNL.

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

ISSUES

1. Whether there existed relationship of employer and employee between the parties.
2. As in terms of the reference.

During hearing the claimant filed an application seeking a direction to the management for production of record in possession of the management. The documents sought by the claimant are:-

1. The paper relating to the contract if any entered between the BSNL and the contractors.
2. The original board resolution authorizing the person who has signed the WS.
3. Various grade and structure of employee applicable to the BSNL.
4. The original registration issued to the BSNL u/s 7 of the Contract Labour Regulation and Abolition Act 1970.
5. The license issued by the licensing officer u/s 13 of the Contract Labour Regulation and Abolition Act 1970 to the contractors engaged by BSNL.
6. List of licensed contractors working for BSNL in the year 2010.
7. Copy of the returns submitted by BSNL in respect of all such contractors to the Government Authorities i.e ESIC and EPFO etc.

But the management did not produce the documents as called for except the copy of a contract awarded to only one contractor, photocopy of the Board Resolution, the list of various Grade and structure of employees applicable to the BSNL alongwith an affidavit sworn by AGM Legal stating that the remaining documents are not within the custody of the management. Thus, the claimant by order dated 13.03.2019 passed by this tribunal was given liberty of producing secondary evidence in respect of the documents sought for.

During hearing the claimant examined himself as WW1 and produced the documents which have been marked in a series of document No.1 A to L containing various pages. The documents could not be exhibited being photocopies. These documents include various gate passes, challans, fault repair reports, money receipts and Gen Set repair reports containing the name of the claimant. In addition to this the claimant has also filed the photocopies of the complaint log book and the log book maintained for the Gen. Set, wherein in the remark column the name of the claimant and other workers standing in the same footing appears. On the basis of these documents the claimant has asserted to

prove that he was working for the management from 2000 to 2010 and during the undisputed point of time discharging various duties assigned to him as an employee of BSNL. But the management BSNL while denying his relationship as an employee illegally terminated his service. This witness was cross examined at length by the management. On behalf of the management the AGM Legal Smt. Nishi Bhalla testified as MW1 and also produced some documents which were marked as MW1/1 and MW1/2. These documents are nothing but authority letter issued to the witness to depose. The witness was confronted with the secondary evidence produced by the claimant and those documents were marked as WW1/M1, WW1/M2 and WW1/M3. The witness examined by the management admitted the contents of the said document. These documents are in the nature of the circulars issued by the AGM of BSNL directing the subordinate authorities to comply with the provisions of labour law strictly and to revise the wage of the temporary status Mazdoor/causal labour. WW1/M3 is another document filed by the claimant and confronted to the management witness. This is a reply given to the complaint made by the claimant demanding higher wage wherein the claimant was intimated by the AGM that the Cable maintenance work is being done by the labourer engaged through operation and maintenance tender for underground cable network in FBD SSA and all these labour are contractors workers and are getting remuneration as per Haryana Government minimum wages Rules.

At the outset of the argument the Ld. A/R for the claimant strenuously argued that this is a typical case of unfair labour practice meted to the workman. He was made to work as a contractual worker for 10 years when the job entrusted to him was of perennial nature. For the legitimate demand advanced by him with regard to the service condition, the management took revenge and terminated his service. Now when the claimant is fighting this litigation against the mighty employer, the later is trying to shed all the responsibility on the plea that no employer and employee relationship exists between them. The management has gone to the extent of denying that he was the employee of the contractor when there was no contract prevalent for engagement of daily rated workers. But the oral and documentary evidence adduced by the claimant as well as the management clearly shows that the management was engaging contractors without being registered under the Contract Labour Act and

the contractors so engaged where never having registration under the Contract Labour Act., Thus the contract if any between the management and the contractor were sham and intended to camouflage the legal and legitimate rights of the claimant workman. Infact the claimant was working in the premises of the management under its supervision and control and discharging perennial nature of work. But the management in gross violation of provisions of Id Act, in a revenge full manner terminated his service which amounts to unfair labour practice.

The counter reply of the Ld. A/R for the management was that the claimant has not produced any documents showing employer and employee relationship between the parties though the burden for the same heavily lies on the claimant. The claimant though had made a faint attempt of producing some documents to make the tribunal infer such a relationship, failed in his attempt. His further argument is that the BSNL is a state owned company having its own policy of recruitment. It has enough no. of Group D employees and as such there was never any need for employing causal/daily wage workers. Sometimes for some petty work the contractors are engaged through proper Bidding process and the said contractors engage their own manpower for execution of the work. The manpower engaged by the contractor in no way be treated as the employees of BSNL management. He thereby submitted that the claim advanced by the claimant is false, baseless and liable to be rejected.

FINDINGS

ISSUE No.1

This issue has been taken up for consideration at the first instance since it will have a considerable influence on the decision of the other issues. It has been claimed by the workman that he had worked for BSNL from 2000 to 2010 as a cable jointer/MDF and internet/gen operator till the year 2010 when his service was illegally terminated. During this period he had worked continuously and diligently for the management. In the oral evidence adduced by the claimant as WW1 he has fully supported the statement of claim filed by him. With regard to the documentary evidence adduced in support of the claim the workman has relied upon the series of documents marked as A to L. These are the documents though slender in evidentiary value have been relied upon by the claimant

to show that during the period between 2000 to 2010 he was working as an employee of management BSNL and his name appears in different papers created during that undisputed period of time. Serious objection was raised to the admissibility of the said document by the management. The Ld. A/R for the management argued that the documents which are the gate pass, log book, money receipts etc. are no way helpful in proving the employer and employee relationship. The claimant as PW1 stated that he was working as a cable jointer for the management at Faridabad. He was attending to the job of fault repair on the complaint of the customers. The copy of the log book and the certificate of fault repair given by the customers have been filed by the claimant and marked in series of H. These documents of the year 2006 to 2010 proves that the claimant Vinod Kumar on behalf of Pali Exchange of BSNL at Faridabad was attending to the work in respect of fixing the complaints and obtaining compliance report from the customers including the local MLA as one of the customer. Not only that the claimant has also filed several other documents which are the Gate Passes issued to the claimant by BSNL in the year 2008 and 2009, the vouchers showing payment the delivery challan fault repair report of the Gen. Sets and all these documents contain the name of the claimant as an employee of BSNL office at Faridabad.

The Ld. A/R for the management raised dispute to the relevancy of these documents in proving the employer and employee relationship. Be its stated here that the plea of the management BSNL is that the claimant was never employed by the management BSNL and he might have been engaged by the contractor who was engaged for executing petty works. In the written statement the management had furnished the list of such contractors engaged during the relevant period. The claimant thus, made a prayer for production of document relating to the contract awarded. But surprisingly the management produced incomplete copy of the contract documents relating to engagement of security guards and housekeeping staff. No document relating to engagement of cable jointer/MDF and internet/gen operator was ever filed though the management witness MW1 during cross examination has categorically admitted that all the records relating to the contractors working for BSNL are available in their office. She further stated that she cannot name the contractor under

whom the claimant was working or if he was at all working under any contractor.

The Ld. A/R for the claimant at this juncture disputed and challenged the credibility of the management evidence on the ground that the management is guilty of suppressing material evidence. When all the contracts related papers are available in the office of the management and when the claimant had demanded production of the same, the management should have produced those documents to prove that no daily wager are engaged directly by the BSNL and the work of cable jointing, maintenance of line and up keeping of the exchanges are done through contractors. Relying upon the judgment of the Hon'ble Supreme Court in the case of **Gopal Krishna Ji Ketkar vs. Mahomed Haji Latif and others (1968)AIR (SC)1413** and the case of **State Inspector of Police vs. Surya Shankaram Karri (2006)7SCC172,** he submitted that for non production of material document which could have thrown light on the dispute of employer employee relationship, the management is guilty of suppressing valuable evidence and adverse inference is bound to be drawn against them. To counter the stand of the management the Ld. A/R for the claimant argued that the stand about the contractor taken by the management is false and fabricated. For that reason the papers relating to the award of contract have been suppressed. He also submitted that if at all any paper relating to contract exists at the end of the management the same is sham and intended to camouflage the right of the claimant.

The claimant has stated that the plea of the contract awarded to execute petty work as claimed by the management is false since, the management despite the demand made by the claimant to show the registration of BSNL under the CLRA failed to produce the same. The management though admitted about engagement of contractors and furnished a list of the contractors in the WS, when called upon failed to justify if the said contractors were having license for engagement of contract Labour and if the claimant was a labour engaged through the said contractor. This argument of the Ld. A/R for the claimant sounds convincing.

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 workman has asserted that he was 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 engaged for executing petty work, as observed in the preceding paragraph the management has failed to prove the same. The documents filed by the AGM testifying as MW1 which are in the nature of the contract awarded to a contractor for supply of security guard or housekeeping staff has no connection with the claim of the claimant. Though on the basis of these documents the A/R for the management emphatically argued that the claimant was the employee of the contractor the same is not accepted. On the contrary the claimant has filed several photocopies of the log book for fault repair for maintenance of the gen. set the certificates issued by the customers after the fault of their telephones and internet connection were attended and fixed by the claimant. All these documents created during the undisputed period of time bear the name of the claimant. Hence, the tribunal as stated above has no hesitation in accepting the said secondary evidence which to some extendt throws light on the employer and employee relationship between the parties. NO contrary evidence has been adduced by the management to disproves the said documents which is turn becomes admissible to support the claim of the claimant. Thus, all these documents together with oral evidence adduced by the claimant and the management witness clearly lead to conclusion that during the relevant period between 2000 to 2010 the workman was the employee of the management, discharging perennial nature of work and there existed a relationship of employer and employee between them.

Of course the Ld. A/R for the management challenged the credibility of the evidence adduced by the claimant in proving the employer and employee relationship. But on behalf of the claimant reliance has been placed in the case of **Hussainbhai Calicut vs. the Alath Factory Thezhill Union Kozhikode and others (1978)AIR (SC) 1410** and in the case of **Bharat Heavy Electricals Ltd. vs. PO Labour Court VIII and others (2015)3CLR 363 Delhi High Court** to argue that when a worker produces goods and services for the employer and the employer has economic control over the workers subsistence, the presence of the intermediary contractor has no value or consequence and it is required for the courts and tribunals to lift the veil or looking at the conspectus of factors governing employment.

In this regard reliance can be placed 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 workman has relied upon the entries made in the log book showing the work and job discharged by him. This tribunal finds no reason of discarding the said log book. On the contrary it is held that the entries in the said log book were made during an undisputed point of time and clearly proves how during the relevant time period i.e. between 2000 to 2010, the workman was working under the effective administrative control of the management which gives rise to a presumption of employer employee relationship which has not been successfully rebutted by the management in this case. The plea of the

management that the claimant was the employee of the contractor in absence of proof is rejected. This issue is accordingly answered in favour of the workman.

ISSUE No.2

The grievance of the claimant is that he had worked for the management for 10 years without being paid the minimum wage. When he raised a genuine and lawful demand for the same the management got annoyed and terminated his service w.e.f. 23.08.2010. 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. The claimant examined as WW1 in his oral statement has stated that the management orally terminated his 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 him before termination. The witness was cross- examined at length by the Ld. A/R for the management. But nothing substantial has been elicited to discredit his testimony.

Now it is to be examined if the said act of termination and denial of service benefits by the management is illegal. Be it stated here that the evidence of the claimant has not been controverted by the management. While answering issue No.1 it has already been held that the workman was working for the management and discharging his duty for the period between 2000 to 2010. 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 workman the period of work rendered by him is also taken into consideration. In this case the workman has stated that he was the employee of the management for 10 years and the later illegally terminated his service.

The law is well settled that when the workman successfully establishes his relationship as an 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 workman has prayed for a relief of reinstatement simplicitor by the management No.1. He has further stated that the work done by him is perennial in nature. While adducing evidence the workman has successfully proved that for the relevant

calendar year of his engagement he had completed 240 days of work and there by duly discharged the burden put on him to prove that during a calendar year he 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 referred supra 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.

> "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 claimant is that he was working as casual workers against the permanent vacancy and the nature of the duty discharged by him was perennial in nature. But the management in order to deprive him of his right to be permanent and regularization illegally terminated his service.

Hence, for the foregoing reasons it is concluded that the claimant/workman was subjected to unfair labour practice by the management. There was a gross violation of the provision of Section 25-G of the ID Act. He 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 workman who was initially appointed as a casual workers and continued to work for 10 years and also worked for more than 240 days in the calendar years preceding to his termination. The issue is accordingly answered in favour of the claimant. Hence, ordered.

ORDER

The reference is accordingly answered in favour of the claimant. The management is directed to reinstate the claimant into service with continuity thereof from the date of illegal termination and pay the arrear salary for the intervening period between termination and reinstatement at the rate of 40% of the last drawn wage. The management is further directed to release the unpaid salary of the claimant for the month of August 2010 at the rate of his last drawn salary and to extend the benefits of EPF and ESI etc alongwith other service benefits like paid leave, bonus etc. on reinstatement. The management is further directed to give effect to the direction given in this award within one month from the date of publication of the award failing which the management shall be liable to pay the wage to the claimant at the rate of his last drawn wage from the

date of termination and till the reinstatement is made alongwith interest @ 9% per annum from the date of accrual and till the payment is actually made. Send a copy of this award to the appropriate government for notification as required under section 17 of the ID act 1947.

The reference is accordingly answered.

Dictated & Corrected by me.

Presiding Officer.	Presiding Officer.
CGIT-Cum-Labour Court.	CGIT-cum-Labour Court.
21st October, 2022.	21st October, 2022.