Chandrakala and Others Vs. Marathwada Medical Research and Rural Development Institution Ltd.

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Court : Mumbai Aurangabad

Decided On : Oct-30-2015

Judge : Ravindra V. Ghuge

Appeal No. : Writ Petition Nos. 5634 of 2014, 5635 of 2014, 5640 of 2014

Appellant : Chandrakala and Others

Respondent : Marathwada Medical Research and Rural Development Institution Ltd.

Judgement :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. On 25.08.2015, this Court has passed the following order:

1. The learned Advocates submit on instructions from their respective clients present in the Court that they have no objection if this Court hears these matters.

2. These matters have been heard for almost two hours.

3. Stand over to 07.09.2015 at 02:30 pm as PARTHEARD, at the request of the learned Advocates.?

3. The Petitioners in the first petition challenge the judgment and order dated 11.12.2013 passed by the Industrial Court at Aurangabad by which Complaint (ULP) No.47/2008 filed by the Petitioners was dismissed.

4. The Petitioners in the second petition are aggrieved by the judgment and order dated 11.12.2013 passed by the Industrial Court, Aurangabad by which Complaint (ULP) No.97/2008 filed by these Petitioners has been dismissed.

5. The Petitioners in the third petition are aggrieved by the judgment and order dated 11.12.2013 passed by the Industrial Court, Aurangabad by which Complaint (ULP) No.50/2008 filed by these Petitioners has been dismissed.

6. The Petitioners in these petitions are identically placed. They have preferred the above referred three identical complaints against the same Respondent as in these petitions and which have been dismissed by the Industrial Court vide it's common judgment dated 11.12.2013.

7. The extensive submissions of Shri Prabhakaran, learned Advocate for the Petitioners, can be summarized in brief as follows:

(a) All the lady Petitioners were working as Aaya? and all the male Petitioners were working as Ward Boys?.

(b) None of them were deployed through any contractor.

(c) No prayer is made by the Petitioners seeking repudiation of contract/ contractor.

(d) The Respondent through it's Written Statement has claimed that all these Petitioners were working as contract labourers.

(e) At no point in time, had any contractor deployed these Petitioners as contract labourers.

(f) The contention of the Respondent that the Petitioners were engaged through two contractors, namely, Shri Subhash Dhoot and Shri Premchand Kokate, is a false plea.

(g) The contention of the Respondent that the Petitioners were working in the cleaning / sweeping activity under the Housekeeping Contract, is a false plea.

(h) The contention of the Petitioners through their evidence that they were working as Aaya and Ward Boys has not been denied.

(i) The original identity cards signed by responsible officer of the Respondent were issued to the Petitioners.

(j) Though it was admitted by the Petitioners in cross-examination that they are not in employment since 2008, their claim in the complaints could not be negated on this count.

(k) Though it is admitted that an appointment order as an Aaya or Ward Boy was not issued to the Petitioners, their claim of having actually so worked cannot be negated.

(l) Though the attendance record produced at Exhibit U/38 does not bear the signature of any responsible officer of the Respondent, it would indicate that they were working on the same nature of activity as was being performed by the regular employees.

(m) Experience certificates were issued by the Respondent to the Petitioners.

(n) Separate list for making the payment of wages to the Petitioners was not maintained.

(o) The Management Witness admitted in his cross-examination that the contract labourers were doing similar work as was being done by the permanent employees.

(p) The Industrial Court has erroneously dismissed the complaints on the ground that it has no jurisdiction merely because the Respondent has taken a stand of 'no employer-employee relationship'.

(q) The work of Aaya/ Ward Boy was never contracted by the Respondent and the defence taken in the Written Statement was only intended to oust the jurisdiction

of the Industrial Court.

(r) There is no dispute about the nature of work done by the Petitioners which was similar to the work done by the regular employees.

(s) There is no cross-examination on the nature of work done by the Petitioners.

(t) When original identity cards were produced, the same could not have been disbelieved.

(u) The inspection carried out by the various officers of the Labour Department would indicate that the Petitioners were working on the main activity.

(v) The PF contribution deposited by the Respondent would indicate the names of the Petitioners.

(w) The Industrial Court has lost sight of the fact that the Petitioners were doing the same work as like regular employees, I-Cards were issued identically to all and the PF contributions were deposited by the Respondent.

(x) The remarks of the Government Labour Officer were ignored by the Industrial Court.

(y) The Complaints deserve to be remitted back to the Industrial Court only for the reason that the Industrial Court needs to adjudicate upon the aspect that the work done by the Petitioners was never outsourced to a contractor.

(z) It has become a fashion for the employers to cite the judgments of the Apex Court delivered in the case of Vividh Kamgar Sabha v/s Kalyani Steels Limited, **2001 (1) CLR 532** and Cipla Limited v/s Maharashtra General Kamgar Union, **2001 LLR 305** so as to oust the jurisdiction of the Industrial Court.

(za) The complaints filed by the genuine workers like the Petitioners have suffered dismissal orders at the hands of the Labour Courts or the Industrial Courts merely on the basis of the judgments of the Apex Court in Kalyani Steels (supra) and Cipla Limited (supra).

8. Shri A.V.Patil with Shri A.R.Joshi, learned Advocates have opposed these petitions. Their submissions can be summarized as under:

(a) The judgments of the Apex Court in Kalyani Steels Limited and Cipla Limited cases (supra) are squarely applicable to this case.

(b) The work of an Aaya and a Ward Boy, falls under the category of housekeeping.

(c) The fact that the Petitioners were deployed through contractors has been brought on record.

(d) When there are disputed questions as regards the employer-employee relationship, the Industrial Court cannot resort to investigation in the matter.

(e) The Petitioners were not on the rolls of the Respondent right from the day they were deployed by the Contractors in the housekeeping activity.

(f) The dates of joining of the Petitioners as stated in Annexure A to the complaints is different from the dates mentioned in the certificate purportedly issued by the Respondent below Exhibit U/37.

(g) The signatures on the purported experience certificates are not in original.

(h) The Experience Certificates are forged documents.

(i) The report of the handwriting expert reflects a different picture as regards the signatures appearing on the experience certificates.

(j) Some of the officers whose signatures appear on the experience certificates, had resigned prior to the dates mentioned on such certificates.

(k) When none of the Petitioners had filed any application seeking experience certificate, there was no reason for any officer of the Respondent to issue such certificate.

(l) The Respondent produced agreements with the Contractors, payment registers and attendance registers.

(m) Sample bills of the contractors and ledger statements were also produced.

(n) Attendance registers of Class III and Class IV workers on the rolls of the Respondent were produced and which did not reflect the names of the Petitioners.

(o) In a limited enquiry conducted by the Industrial Court, it has been sufficiently established that the Petitioners were deployed through contract labourers.

(p) False attendance sheets were produced by the Petitioners which do not bear any stamp or signature or any identification mark of the Respondent.

(q) The attendance record is fabricated.

(r) The Petitioners are not remedyless as they can raise an industrial dispute under Section 2A or Section 2(k) of the Industrial Disputes Act, 1947 for the redressal of their grievance.

(s) An industrial dispute in this backdrop can be considered by the appropriate Government and the true employer of the Petitioners can be identified.

(t) The law as is crystallized would not permit the Industrial Court to enter into a roving enquiry so as to locate the actual employer of the Petitioners.

9. The learned Advocate for the Petitioners has relied upon the following judgments:

(a) Hindustan Coca Cola Bottling S/W Private Limited v/s Bhartiya Kamgar Sena, 2001 (3) CLR 1025.

(b) Bhojraj Tulsiram Gajbhiye v/s All India Reporter Limited, 2009 (4) Bom. C.R. 91.

(c) Akhil Bhartiya Shramik Kamgar Union v/s Buildtech Constructions, 2004 (Supp.2) Bom.C.R. 857.

10. The learned Advocate for the Respondent has relied upon the following judgments:

(a) Regional Manager, Central Bank of India v/s Madhulika Guruprasad Dahir, 2008 (9) AD (SC) 311 : 2008 (5) AIR Bom R (SC) 796.

(b) Sanket Food Products Pvt. Ltd. v/s Prabhakar Asaram Bhalerao, 2014 MCR 661.

(c) Indian Express Limited v/s P.P.Kothari, 2015 (4) AIR Bom R 672.

(d) Managing Director, Epitome Components Ltd. v/s Swarajya Kamgar Sanghatana, 2015 MCR 614 : 2015(2) AIR BOM R 76.

(e) Cipla Limited v/s Maharashtra General Kamgar Union, 2001 LLR 305.

(f) Vividh Kamgar Sabha v/s Kalyani Steels Limited, 2001 (I) CLR 532.

(g) Sarva Shramik Sangh v/s Indian Smelting and Refining Company Limited, 2004 (101) FLR 635.

(h) Maharashtra Engineering Plastic and General Kamgar Union v/s Little Kids and others, 2005 (I) CLR 658.

(i) Hydroflex (India) v/s A.D.Shelar and others, 2005 (I) CLR 48.

(j) Maharashtra State Cooperative Cotton Growers Marketing Federation Limited v/s Asha Joseph D'Mello, 2008 (116) FLR 183.

(k) Nashik Workers Union, Nashik v/s Mahindra and Mahindra Limited, Nashik, 2008 (I) LLJ 132.

(l) Sarva Shramik Sangh v/s Janprabha Offset Works, 2008 (I) LLJ 271.

(m) Bharatiya Kamgar Sena v/s Udhe India Ltd., 2008 (I) LLJ 371 (Bom.) : 2008 (116) FLR 457.

(n) Petroleum Workers Union, Hindustan Petroleum Corporation Ltd., Chennai v/s Hindustan Petroleum Corporation Ltd., 2004 (2) LLN 451.

(o) V.I.P. Industries Limited, Nagpur v/s Athar Jameel and others, 2010 (II) LLJ 83 (Bom.).

(p) International Airport Authority of India v/s International Air Cargo Workers' Union, 2009 (123) FLR 321.

(q) General Manager (OSD), Bengal Nagpur Cotton Mills, Rajnandgaon v/s Bharat Lal and another, 2011 (I) CLR 1.

11. The issue, therefore, is as to whether, the Industrial Court can consider disputed questions in the light of the claim of the Petitioners that they are employed directly by the Respondent/ Management, visavis the contention of the Respondent that the Petitioners were deployed through two Contractors, who were allotted the work of housekeeping.

12. In the Kalyani Steels case (supra) decided by the Apex Court on 19.01.2001, it has been observed in paragraphs 2, 3, 4, 5, 6 and 7 as under:

2. Briefly stated the facts are as follows:

The Appellants claim to be a Union representing the workmen of a Canteen run by the Respondents. The Appellant Union claimed that even though the Appellants are actually the employees of the Respondents, the Respondents are not treating them at par with other employees and have notionally engaged contractors to run the canteen. As the Respondents were not accepting the Appellants' claim to treat them as their employees, the Appellant filed a Complaint under Section 28(1) of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter called the MRTU and PULP Act) alleging that the Respondents had engaged in unfair labour practices under Item Nos. 1, 1(a), 1(b), 4, 4(a) of Schedule II and Items 3, 5, 6, 7, 9 and 10 of Schedule IV of the MRTU and PULP Act. This Complaint came to be dismissed by the impugned Order dated 20th August, 1996.

3. The Appellant Union has filed an SLP directly in this Court against this Order as the High Court of Bombay, in the case of Krantikari Suraksha Rakshak Sangathana v. S. V. Naik reported in (1993) 1 CLR Page 1002, has already held

that the Industrial Court cannot in a complaint under MRTU and PULP Act abolish contract labour and treat employees as direct employees of the company.

4. At this stage it must be mentioned that this Court has also in the case of Central Labour Union (Red Flag) Bombay v. Ahmedabad Mfg. and Calico Printing Co. Ltd. and Ors. reported in (1995) 2 LLJ 765 : 1995 Supp.(1) SCC 175, held that where the workmen have not been accepted by the Company to be its employees, then no complaint would lie under the MRTU and PULP Act. We are in full agreement with the above mentioned view.

5. The provisions of MRTU and PULP Act can only be enforced by persons who admittedly are workmen. If there is dispute as to whether the employees are employees of the Company, then that dispute must first be got resolved by raising a dispute before the appropriate forum. It is only after the status as a workmen is established in an appropriate Forum that a complaint could be made under the provisions of MRTU and PULP Act.

6. Faced with this situation it was submitted that the Respondent Company had always recognised the members of the Appellant Union to be their own workmen. It is submitted that a formal denial was taken only to defeat the claim. We see no substance in this submission. In the written statement it has been categorically denied that the members of the Appellant Union were employees of the Respondent Company. The question has been agitated before the Industrial Court. The Industrial Court has given a finding, on facts, that the members of the Appellant Union were not employees of the Respondent Company. This is a disputed fact and thus till the Appellants or their members, get the question decided in a proper forum, this complaint was not maintainable.

7. Accordingly, we dismiss this Appeal on the ground that the complaint was not maintainable. We clarify that it is open for the Appellant or their members to raise dispute in this behalf before an appropriate forum provided they are entitled to do so. If they get a declaration to the effect that they are employees of the Respondent Company, then it may be open to them to file such a complaint. It is also clarified that if a dispute as to their status is raised in an appropriate forum then the same will be decided on merits without taking into consideration any

observations made or finding given by the Industrial Court in the impugned Order.?

13. The Apex Court, in Kalyani Steel's Case (supra) has considered the ratio laid down in the Krantikari Suraksha Case (supra) and the Red Flag case (supra) and held that when the workmen have not been accepted by the Company to be it's employees, a complaint under the ULP Act would not be maintainable before the Labour or Industrial Court. In the Kalyani Steels Case (supra), the Apex Court concluded that the Industrial Court had given a finding on facts that the members of the Union were not employees of the Respondent Company. If this question was to be decided, the Industrial Court was not the proper forum.

14. In the Cipla Limited case (supra), the Apex Court has observed in paragraphs 3, 5, 6, 7, 8 and 9 as under:

3. The Labour Court on the basis of these pleadings framed the following issues:

1. Does the complainant prove that the company indulged in unfair labour practices as alleged?

2. ----deleted ----

3. Does he prove that he is entitled the relief as prayed for?

4. What order?

Additional Issues:

3A. Whether the complaint is maintainable?

3B. Whether the complainant prove that the names in Annexure A are the workmen of the Respondent No.1?

3C. Whether this Court has jurisdiction to entertain the complaint?

4. ....

5. After further examination, it was held that the arrangement between the appellant and the second respondent can only be termed as legal and bona fide and hence the matter of abolition of contract labour in the process of housekeeping and maintenance of the premises of the factory can be agitated only under the provisions of Contract Labour (Regulation and Abolition) Act, 1970. Therefore, the Labour Court dismissed the complaint filed by the first respondent-Union. When the matter was carried by revision under the Act the Industrial Court dismissed the revision application by reiterating the views of the Labour Court.

6. In the writ petition the Division Bench of the High Court took a different view of the matter and allowed the complaint. Before the High Court several decisions were referred to including the decision of this Court in General Labour Union (Red Flag), Bombay v. Ahmedabad Mfg. and Calico Printing Co. Ltd and Ors., 1995 Supp. (1) SCC 175. In that case the complaint of the Union was that 21 workmen who were working in one of the canteens of the respondent-company were not given the service conditions as were available to the other workmen of the company and there was also a threat of termination of their services. This Court proceeded to consider the case on the basis that their complaint was that the workmen were the employees of the company and, therefore, the breach committed and the threats of retrenchment were cognizable by the Industrial Court or the Labour Court under the Act. Even in the complaint no case was made out that the workmen had ever been accepted by the company as its employees. On the other hand, the complaint proceeded on the basis as if the workmen were a part of the work force of the company. This Court noticed that the workmen were never recognised by the company as its workmen and it was the consistent contention of the company that they were not its employees. In those circumstances, the Industrial Court having dismissed the complaint and the High Court having upheld the same, this Court stated that it was not established that the workmen in question were the workmen of the company and in those circumstances, no complaint could lie under the Act as was held by the two courts. In that case it was the admitted position that the workmen were employed by a contractor, who was given a contract to run the canteen in question. Thereafter, the High Court adverted to the decision of this Court in Gujarat Electricity Board, Thermal Power Station, Ukai, Gujarat v. Hind Mazdoor Sabha and Ors., 1995 (5)

SCC 27, wherein it was noticed that the first question to be decided would be whether an industrial dispute could be raised for abolition of the contract labour system in view of the provisions of the Act and, if so, who can do so. The High Court was of the view that the decision in General Labour Union (Red Flag), Bombay v. Ahmedabad Mfg. and Calico Printing Co. Ltd and Ors. (supra) would make it clear that such a question can be gone into and that the observations would not mean that the workmen had to establish by some other proceedings before the complaint is filed or that if the complaint is filed, the moment the employer repudiates or denies the relationship of employer and employees the court will not have any jurisdiction. The observation of this Court that it is open to the workmen to raise an appropriate industrial dispute in that behalf if they are entitled to do so has to be understood in the light of the observations of this Court made earlier. The High Court further held that the judgment in General Labour Union (Red Flag), Bombay v. Ahmedabad Mfg. and Calico Printing Co. Ltd and Ors. (supra) was confined to the facts of that case. On that basis the High Court proceeded to further consider the matter and reversed the findings recorded by the two courts and gave a finding that the workmen in question are the workmen of the appellant-company.

7. In this Court it was submitted that the High Court had proceeded entirely on wrong lines. In Gujarat Electricity Board, Thermal Power Station, Gujarat v. Hind Mazdoor Sabha (1995(5) SCC 27) the question raised was whether the workers whose services were engaged by the contractors but who were working in the thermal power station of the Gujarat Electricity Board at Ukai can legally claim to be the employees of the Gujarat Electricity Board. The industrial tribunal had adjudicated the matter and held that the workmen concerned in the reference could not be the workmen of the contractors and, therefore, all the workmen employed by the contractor should be deemed to be the workmen of the Board. The industrial tribunal also gave consequential directions to the Board for payment of wages, etc. The award of the industrial tribunal was upheld by the High Court in appeal. The contention put forth before this Court was that after coming into force of the Act it is only the appropriate Government, which can abolish the contact labour system after consulting the Central Board or the State Board, as the case may be, and no other authority including the industrial tribunal has jurisdiction

either to entertain such dispute or to direct abolition of the contract labour system and neither the appropriate Government nor the industrial tribunal has the power to direct that the workmen of the erstwhile contractor should be deemed to be the workmen of the Board. The Central Government or the industrial tribunal, as the case may be, can only direct the abolition of the contract labour system as per the provisions of the Act but it does not permit either of them to declare the erstwhile workmen of the contractor to be the employees of the principal employer. As to what would happen to an employee engaged by the contractor if contract employment is abolished is another moot question yet to be decided by this Court. But that is not a point on which we are called upon to decide in this matter.

8. But one thing is clear " if the employees are working under a contract covered by the Contract Labour (Regulation and Abolition) Act then it is clear that the labour court or the industrial adjudicating authorities cannot have any jurisdiction to deal with the matter as it falls within the province of an appropriate Government to abolish the same. If the case put forth by the workmen is that they have been directly employed by the appellant-company but the contract itself is a camouflage and, therefore, needs to be adjudicated is a matter which can be gone into by appropriate industrial tribunal or labour court. Such question cannot be examined by the labour court or the industrial court constituted under the Act. The object of the enactment is, amongst other aspects, enforcing provisions relating to unfair labour practices. If that is so, unless it is undisputed or indisputable that there is employer-employee relationship between the parties, the question of unfair practice cannot be inquired into at all. The respondent union came to the Labour Court with a complaint that the workmen are engaged by the appellant through the contractor and though that is ostensible relationship the true relationship is one of master and servant between the appellant and the workmen in question. By this process, workmen repudiate their relationship with the contractor under whom they are employed but claim relationship of an employee under the appellant. That exercise of repudiation of the contract with one and establishment of a legal relationship with another can be done only in a regular industrial tribunal/court under the I.D.Act.

9. Shri K.K. Singhvi, the learned senior Advocate appearing for the respondent, submitted that under Section 32 of the Act the labour court has the power to decide all matters arising out of any application or complaint referred to it for the decision under any of the provisions of the Act. Section 32 would not enlarge the jurisdiction of the court beyond what is conferred upon it by other provisions of the Act. If under other provisions of the Act the industrial tribunal or the labour court has no jurisdiction to deal with a particular aspect of the matter, Section 32 does not give such power to it. In the cases at hand before us, whether a workmen can be stated to be the workman of the appellant establishment or not, it must be held that the contract between the appellant and the second respondent is a camouflage or bogus and upon such a decision it can be held that the workman in question is an employee of the appellant establishment. That exercise, we are afraid, would not fall within the scope of either Section 28 or Section 7 of the Act. In cases of this nature where the provisions of the Act are summary in nature and give drastic remedies to the parties concerned elaborate consideration of the question as to relationship of employer-employee cannot be gone into. If at any time the employee concerned was indisputably an employee of the establishment and subsequently it is so disputed, such a question is an incidental question arising under Section 32 of theAct. Even the case pleaded by the respondent-Union itself is that the appellant establishment had never recognised the workmen mentioned in Exhibit A as its employees and throughout treated these persons as the employees of the second respondent. If that dispute existed throughout, we think, the labour court or the industrial court under the Act is not the appropriate court to decide such question, as held by this Court in General Labour Union (Red Flag), Bombay v. Ahmedabad Mfg. and Calico Printing Co. Ltd and Ors. (1995 Supp (1) SCC 175), which view was reiterated by us in Vividh Kamgar Sabha v. Kalyani Steels Ltd. and Anr., (2001) 2 SCC 381.?

15. It has, therefore, been held by the Apex Court that in such cases where the Employees contend that the Employer has taken a false or bogus stand of denying employer-employee relationship, the issue will have to be adjudicated upon by an appropriate forum which is not the Labour or Industrial Court under the ULP Act.

16. In the Indian Smelting Case (supra), the Apex Court once again considered a similar controversy and has observed in paragraphs 7, 8, 9 and 10 as under:

7. On the merits of the contentions raised on behalf of the appellants while reiterating the plea that the principles laid down in CIPLA's case (supra) are unexceptionable and well merited having regard to the scheme, purpose and object of the legislations under consideration and legislative intent as expressed in the language of the various provisions therein and do not call for any reconsideration, merely because there was no reference to a particular provision or other, wherein according to the respondents all relevant principles and criteria necessary for the purpose have been found effectively kept into consideration. According to the respondents the scope for the Maharashtra Act is limited in nature and confined to consideration of claims and grievances of unfair labour practices of certain kind by prohibiting employer or union and employees from engaging in any unfair labour practice and the existence of an undisputed or indisputable relationship of employer-employee is an essential prerequisite for the labour or Industrial Court under the Maharashtra Act to entertain any proceedings in respect of any grievance under the said Act. Section 32 of the Maharashtra Act, it is urged is to be considered in the context of Sections 26 and 27 read with the relevant entries in the Schedules in these cases, particularly items 5, 6, and 10 and in the absence of accepted or existing relationship of employer-employee duly declared in competent proceedings, neither Section 5 nor Section 7 or even Section 28 enabled a complaint to be entertained for consideration of such grievances as are sought or permitted to be agitated under the Maharashtra Act.

8. The further plea on behalf of the respondents was that the scope of adjudication under the ID Act is much wider in which all or any types and nature of industrial disputes including claims for declaration of status or relationship of "Master and Servant or Employer and Employee" can also be agitated and determined and not under the Maharashtra Act. Consequently, it is claimed that questions as to whether the contract under which contract labour was engaged was a sham and nominal or a mere camouflage and if so whether by piercing the veil they should be declared to be really the employees of the principal employer are matters which could be got referred to for adjudication by seeking a reference under ID Act only

and are totally outside the jurisdiction of the Courts constituted under the Maharashtra Act.

9. The decision of the Constitution Bench in Steel Authority of India Ltd. and Ors. v. National Union Waterfront Workers and Ors. (2001 (7) SCC 1) in several paragraphs particularly paras 65, 108, 112, 113, 117, 125 makes the position clear that a dispute of the nature previously projected has perforce to be adjudicated on the issue as to whether a person was a workman under the employer.

10. The relevant paragraphs so far as relevant read as follows:

"65. The contentions of the learned counsel for the parties, exhaustively set out above, can conveniently be dealt with under the following two issues :

A. Whether the concept of automatic absorption of contract labour in the establishment of the principal employer on issuance of the abolition notification, is implied in Section 10 of the CLRA Act; and

B. Whether on a contractor engaging contract labour in connection with the work entrusted to him by a principal employer, the relationship of master and servant between him (the Principal employer) and the contract labour, emerges.

108. The next issue that remains to be dealt with is :

B. Whether on a contractor engaging contract labour in connection with the work entrusted to him by a principal employer, the relationship of master and servant between him (the principal employer) and the contract labour emerges.

112. The decision of the Constitution Bench of this Court in Basti Sugar Mill's case (supra), was given in the context of reference of an industrial dispute under the Uttar Pradesh Industrial Disputes Act, 1947. The appellant-Sugar Mills entrusted the work of removal of press-mud to a contractor who engaged the respondents therein (contract labour) in connection with that work. The services of the respondents were terminated by the contractor and they claimed that they should be reinstated in the service of the appellant. The Constitution Bench held (AIR p. 357, para 7 :

"The words of the definition of workmen in Section 2(z) to mean "any person (including an apprentice) employed in any industry to do any skilled or unskilled, manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be express or implied" are by themselves sufficiently wide to bring in persons doing work in an industry whether the employment was by the management or by the contractor of the management. Unless however the definition of the word "employer" included the management of the industry even when the employment was by the contractor the workmen employed by the contractor could not get the benefit of the Act since a dispute between them and the management would not be an industrial dispute between "employer" and workmen. It was with a view to remove this difficulty in the way of workmen employed by contractors that the definition of employer has been extended by sub-clause (iv) of Section 2(i). The position thus is : (a) that the respondents are workmen within the meaning of Section 2(z), being persons employed in the industry to do manual work for reward, and (b) they were employed by a contractor with whom the appellant company had contracted in the course of conducting the industry for the execution by the said contractor of the work of removal of press-mud which is ordinarily a part of the industry. It follows therefore from Section 2(z) read with sub-clause (iv) of Section 2(i) of the Act that they are workmen of the appellant company and the appellant company is their employer."

113. It is evident that the decision in that case also turned on the wide language of statutory definitions of the terms "workmen" and "employer". So it does not advance the case pleaded by the learned counsel.

117. We find no substance in the next submission of Mr. Shanti Bhushan that a combined reading of the definition of the terms contract labour, establishment and workman would show that a legal relationship between a person employed in an industry and the owner of the industry is created irrespective of the fact as to who has brought about such relationship.

125(5). On issuance of prohibition notification under Section 10(1) of the CLRA Act prohibiting employment of contract labour or otherwise, in an industrial dispute brought before it by any contract labour in regard to conditions of service, the

industrial adjudicator will have to consider the question whether the contractor has been interposed either on the ground of having undertaken to produce any given result for the establishment or for supply of contract labour for work of the establishment under a genuine contract or is a mere ruse camouflage to evade compliance of various beneficial legislations so as to deprive the workers of the benefit thereunder. If the contract is found to be not genuine but a mere camouflage, the so-called contract labour will have to be treated as employees of the principal employer who shall be directed to regularise the services of the contract labour in the concerned establishment subject to the conditions as may be specified by it for that purpose in the light of para 6 hereunder.?

17. This Court has considered the law as laid down by the Apex Court in the above referred cases and has concluded in paragraphs 5 and 6 of it's judgment in the case of Maharashtra Engineering Plastic and General Kamgar Union (supra) as under:

5. At the hearing of this petition, on behalf of the Petitioners, their learned counsel points out that the judgment in Kalyani (supra) and Cipla Ltd. V. Maharashtra General Kamgar Union and ors. 2001 1 CLR 754 would not be attracted to the facts of the present case. It is pointed out that in both the cases admittedly relationship of employer and employee was with another employer. In the case of Kalyani (supra) the Canteen workers claimed to be direct workmen though they were employed in the canteen by the contractor. Similarly in Cipla, admittedly the complaint was filed contending that the contract was sham and bogus and that the employees were direct employees of Cipla. It is therefore, submitted that these judgments would not apply on the fact of the present case where the complainants had contested that respondents are their workmen. Merely denial would not be sufficient. It was open to the complainant to produce evidence and in fact there was prima facie evidence to establish relationship of employer and employee and in these circumstances, the order of the Labour Court ought to be set aside. It is secondly submitted that the workman who was examined by the complainant union was one of those who admittedly was admitted by the respondent to be their workman though his name was not listed in ESIS records. The workman had deposed that he was working along with other 16 workmen whose names were

listed in the complaint. Prima facie there was therefore, sufficient material and in the light of that, the learned Labour Court ought not to have proceeded to dispose of the issues without recording further evidence. It is submitted that petitioners did not have a fair opportunity of leading evidence. On the other hand, on behalf of the Respondents, their learned counsel submits that the complainants are not sure as to who is their employer considering the pleadings of the respondents themselves in the complaint and thereafter in the affidavit in rejoinder filed on behalf of the Respondent Nos. 1 and 2. It is pointed out that no material had been brought on record whatsoever to show any relationship between Respondent no. 1 and M/s. Dinesh Fashions or for that matter with M/s. Teenage Fashions. Considering the contention of the complainant themselves that the workmen were working for both the units, it is contended that it cannot be said that the findings recorded by the learned Labour Court suffers from any error.

6. With the above, we may first consider whether on the plea by the employer that the persons claimed to be workmen are not his workmen the complaint under the provisions of the MRTU and PULP Act is not maintainable and the remedy of such persons is to approach Industrial Tribunal on a reference by the appropriate Government. We may firstly consider the judgment in Kalyani and another. The learned Apex Court has been pleased to observe that the provisions of MRTU and PULP Act can only be enforced by persons who admittedly are workman. If there is dispute as to whether employees are employees of the company, then that must be got resolved by raising dispute before the appropriate forum. It is only after a proper forum decides the status will an application be maintainable under the provisions of M.R.T.U.and P.U.L.P. Act. The Judgment came to be delivered on 19.1.2001.

The matter once came up before the Apex Court in Cipla Ltd. V. Maharashtra General Kamgar Union and Ors, 2001 1 CLR 754. That was the case admittedly of Contractor and employees. The contention of the Union was that the contract was sham and consequently they were direct employees of the appellant before the Apex Court. This view found favour with the Division Bench of this Court. The Apex Court observed that the case put forth by the workman is that they have been directly employed by the appellant company. That the contract itself is sham

and therefore, needs to be adjudicated. It is a matter which can be gone into by Industrial Court or the Labour Court. The said question cannot be examined by the Labour Court constituted under the Act. The Apex Court then observed that the object of the enactment is, amongst other aspects, enforcing provisions relating to unfair labour practice. If that is so, unless it is undisputed or indisputable that there is employer-employee relationship between the parties, the question of unfair practice cannot be inquired into at all. The court then noted that the Respondent Union came to the Labour Court with a complaint that the workmen are engaged by the appellant through the contractor and though that is ostensible relationship the true relationship is one of master and servant between the appellant and the workmen in question. The court held that exercise of repudiation of the contract with one and establishment of a legal relationship with another can be done, only in a regular Industrial Tribunal/Court under the Industrial Disputes Act.

Subsequent to these judgments several judgments of the learned Single Judges of this Court came to be considered in Hindustan Coca Cola Bottling S/W pvt. Ltd. and anr. V. Narayan Rawal and Ors. 2001 II CLR 380. By considering the judgment in Kalyan Steel (supra) and in Cipla (supra) the learned Division Bench of this court held that if the relationship of employer and employee is established before the Industrial Tribunal or Labour Court under the Industrial Disputes Act or the employee/employer relationship is undisputed or indisputable, then the complaint under M.R.T.U. and P.U.L.P. Act would be maintainable. The court hastened to add that if any time the employee was recognised by the employer and subsequently repudiated such question would be incidental question arising under Section 32 of the Act and the Labour Court and the Industrial Court as the case may be is bound to decide the said question. However, in the case where the complaint is filed that employees of the contractors are direct employees of the Employer the court constituted under Section 28 of the MRTU Act will have no jurisdiction to entertain the complaint unless status of relationship gets determined in the proceedings under the Industrial Disputes Act.

From the above it will therefore, be clear that there must be at the time of entertaining the complaint, where relationship is disputed, strong material in the form of at least documentary evidence to show existence of relationship of

employer and workman. If such relationship does not exist or is disputed, it will not be open to the court under M.R.T.U. and P.U.L.P. Act to examine the matter. In a case where the employee claims that though he is employed by the contractor, the contract is sham, then the complaint would not be maintainable. In cases other than contract workers where the employee disputes the relationship, there must be strong prima facie evidence available before the court to entertain the complaint in order to determine the issue as to existence of relationship. If there is no documentary prima facie material, then it will not be open to the Labour Court to decide the issue.?

18. Similar view has been taken by this Court in the case of Hydroflex India (supra), Asha Joseph D'Mello (supra), Mahindra and Mahindra Limited (supra), Janprabha Offset (supra) and VIP Industries Limited (supra).

19. The Petitioners have placed reliance on the judgment of this Court (Division Bench) in the case of Hindustan Coca Cola (supra).

Paragraph 8 of the judgment which is pointed out, reads as under:

8. Mr.Cama also drew our attention to an unreported decision of the learned single Judge of this Court (Khandeparkar, J.) in Indian Seamless Metal Tubes Limited v. Sunil Iwale and Ors., Writ Petition No. 1433 of 2000 decided on 5th July, 2001. In that case the learned Judge has not agreed with the view taken by Kochar, J. in the present case and held that in view of the decisions of the Supreme Court in Cipla Ltd. and Kalyani Steels Ltd. that only precondition to seek remedy under the MRTU and PULP Act is necessity of existence of employer-employee relationship between the parties and when its existence is not already established or is disputable, the party has to first seek relief under the Central Act i.e. the Industrial Disputes Act or the Bombay Act i.e. the Bombay Industrial Relations Act, and if successful therein to seek remedy under the said Act thereafter. We are in agreement with the observations of the learned Single Judge but with a rider that in cases where the employer-employee relationship was recognised at some stage and thereafter it was disputed, the Industrial Court has jurisdiction to decide this issue as an incidental issue under Section 32 of the MRTU and PULP Act. In his judgment Khandeparkar, J. has referred to a judgment of another single Judge

Rebello, J. in Writ Petition No.1365 of 2001, Raigad Mazdoor Sangh v. Vikram Bapat. Rebello, J. has, inter alia, held that while deciding the question of maintainability of the complaint under MRTU and PULP Act, the Industrial Court is bound to frame an issue as a preliminary issue on that count and after framing the preliminary issue decide the point of jurisdiction. Khandeparkar, J. has, however, disagreed with this view and held that the question of framing such issue does not arise if on a perusal of the complaint under the MRTU and PULP Act it is found that there is no jurisdiction to try the complaint. He observed :

"20. It was also sought to be contended that mere denial of status of the complainant as that of employee by the opponent, cannot non-suit the employees and such denial would not oust the jurisdiction to the Industrial Court to ascertain the fact situation by framing issues and asking the parties to lead evidence in that regard, and to decide the same, possibly by summary manner. In fact, similar was the contention sought to be raised in Vividh Kamgar Sabha's case by saying that such denials can be raised in each and every case to defeat the claim of the employee, the contention was rejected by the Apex Court. Indeed, a question of framing of issue or holding of summary inquiry does not arise at all. Once, it is clear that the Industrial Court under the said Act has no jurisdiction to decide the issue relating to employer-employee relationship, the occasion for framing of issue on the point which is beyond its jurisdiction cannot arise. Once it is clear that the jurisdiction of the Industrial Court depends upon the fact of existence of employer-employees relationship between the parties which is a jurisdictional fact, which should exist to enable the Industrial Court to assume jurisdiction to entertain the complaint under the said Act, in the absence of the same, any attempt on the part of the Industrial Court to adjudicate upon the issue of such relationship would amount to mistake of fact in relation to jurisdiction."

We are in respectful agreement with the above view expressed by Khandeparkar, J. If, on a bare reading of the complaint, the Industrial Court or the Labour Court as the case may be, is satisfied that it has no jurisdiction to decide the complaint as there is no undisputed or indisputable employer-employee relationship, the occasion for framing an issue on that count would not arise. If the Industrial Court or the Labour Court is satisfied that there is no undisputed or indisputable the

employer/employee relationship, it cannot assume jurisdiction to entertain the complaint and the complaint will have to be dismissed as not maintainable.

In the light of the foregoing discussion, we have no hesitation in holding that in the instant case complaints filed by the Union and the employees are not maintainable and the Industrial Court has no jurisdiction to try these complaints.? (Emphasis is mine).

20. It is quite obvious that the consistent view in such circumstances has been that unless employer-employee relationship was recognized at some stage in between the litigating sides and it has then been disputed only to oust the jurisdiction of the Court, there cannot be an ouster of jurisdiction.

21. The contention of the Petitioners in the case on hand is that the work of Aaya and Ward Boy was never performed through contract labourers. However, the Petitioners have not produced any evidence which would indicate that, at some point in time, there was a direct relationship and which was recognized in between the Petitioners and the Respondent. Identity Cards cannot be indicative of such a relationship since an identity card is not the decisive/ determinative piece of evidence of an employer-employee relationship. It is an admit card on the strength of which regular employees as well as contract labourers are permitted to enter the premises of the Respondent. So also, the identity cards could not be proved by the Petitioners before the Industrial Court to be genuine documents.

22. It cannot be overlooked that the Respondent has brought voluminous record before the Industrial Court which has considered the oral and documentary evidence after framing preliminary issues. It may eventually appear that the housekeeping activity may not include the work of an Aaya or Ward Boy or it may also turn out that there was no valid licence and registration for deploying Aaya and Ward Boys in the housekeeping area, under the Contract Labour (Regulation and Abolition) Act, 1970 (herein after referred to as the CLRA Act?). However, this investigative exercise cannot be undertaken by the Industrial Court.

23. The Petitioner has relied upon the following observations of this Court in the case of Bhojraj Tulsiram Gajbhiye (supra):

He also makes a reference to Hindustan Coca Cola Bottling Vs, Bhartiya Kamgar Sena reported in 2002 (3) Bom. C.R. 129 (O.S.) : 2001(III) CLR 1025. Next Division Bench decision to which reference is made is reported in 2005 (1) Bom.C.R. 759 (O.S.) : 2004 LIC 3789 (M/s Quadricon Pvt. Ltd. Vs. Maxi D'Souza and Others). Dharmadhikari J. in M.I.D.C. case finally observes after taking stock of these decisions as follows:

"Both the above Division Bench rulings therefore hold that the Labour or Industrial Court functioning under the U. L. P. Act has to first find out whether the relationship which is being denied by employer is indisputable or unquestionable on account of its past acceptance by the employer and such past acceptance is to be found out on the basis of pleadings of parties and the available material. If it has any doubt about existence of such relationship, inquiry to clear it is not possible and the employee/complainant will be required to approach regular forum under either B. I. R. Act or ID Act. The judgments of Hon. Apex Court in this respect use two words i.e. "undisputed" or "indisputable". No problem arises when the relationship is undisputed. However, when employer denies and disputes the relationship which is beyond dispute, the question whether it is indisputable will arise. The complaint as filed may disclose necessary facts to show existence of such relationship and those facts may be corroborated by certain documents filed either with the complaint or later on. The employer even in this position can come up with plea of denial of relationship in his written statement. In fact, contingency of this nature will not arise till employer takes a stand in his reply or written statement. In that event apart from pleadings of parties, material produced may also be required to be gone into. If complainant/employee has such material with him, he will definitely produce it for consideration. However, if he does not possess such material and the same is available with his employer, he can requisition it to show that relationship exists and is being denied malafidely. Labour or Industrial Court will not be acting without jurisdiction in summoning documents like registers in which attendance of such employee is marked or vouchers through which payment has been made to him or production record containing his name. The Division Bench judgments do not prohibit such inquiry only to find out previous acceptance of such relationship. The judgments coupled with the other judgments mentioned above permit scrutiny by Industrial or Labour Court to find out

genuineness in the defence of denial of relationship by employer. The inquiry by Labour or Industrial Court will be only to find out whether relationship of employer and employee is indisputable. It cannot be forgotten that the jurisdictional fact to be decided in this matter is also the fact about which no decision can be taken by Labour or Industrial Court under U. L. P. Act if there is genuine dispute. While deciding whether the employer employees relationship is indisputable, it cannot record a finding that such relationship exists and therefore it is indisputable. Tests and factors determinative for aforesaid purpose as laid down by Hon. Apex Court from time to time cannot be applied to such material to create a relationship. These tests crystallised in recent judgments of Hon. Apex Court reported at AIR 2004 SC 1639 between Workmen of Nilgiri Cooperative Marketing Society Vs. State of Tamil Nadu and 2004(1) SCC 126 : AIR 2004 SC 969 between Ramsingh Vs. Union of India may be mentioned here. Briefly stated, in case of disputed relationship, several factors which would have a bearing on the result and the Court is required to consider are : (a) who is appointing authority; (b) who is the paymaster; (c) who can dismiss; (d) how long alternative service lasts; (e) the extent of control and supervisions; (f) the nature of the job e. g. whether, it is professional or skilled work; (g) nature of establishment; (h) the right to reject. The distinction in this respect while answering the issue of "indisputable relation" is very fine but will have to be maintained. The tests at (a), (b) and (c) above alone can be applied only to once accepted material and documents which Court finds employer is not in position to deny. Application of other tests i. e. tests at (d), (e), (f), (g), (h) and "integration test" even to admitted material will not be possible because it will be holding enquiry into a disputes province. The only purpose of such inquiry is to examine bona fides of employer who comes up with denial of relationship. If after perusal of pleadings and records, it finds that employer can possibly demonstrate that there is no such relationship, it will have to give up the exercise. The jurisdiction can be exercised to hold limited inquiry and at the end thereof, the Labour or Industrial Court has to be in position to draw only one inference that such relationship was and is accepted by employer earlier, and to deliver verdict that stand in defence raised by employer is totally false and malafide. Even if two views of the matter appear probable, it will have to direct employee to file proceedings under B. I. R. Act or Industrial Disputes Act.?

(Emphasis is mine).

24. Even going by the ratio laid down in the above stated case, I do not find that the Petitioners appear to sustain the test of who is the appointing authority, who is the pay master, who can dismiss, etc..

25. So also, there was nothing before the Industrial Court to indicate that the Respondent had earlier accepted employer-employee relationship with the Petitioners so as to be construed that the defence of the Respondent in the Written Statement is a malafide and a vexatious defence.

26. The ratio laid down by this Court in Buildtech Constructions case (supra) is of no assistance to the Petitioners since in the instant case and unlike in the Buildtech Case, the Respondent has produced evidence to indicate that the Petitioners were neither appointed by the Respondent nor are the Petitioners directly paid wages by the Establishment.

27. For the sake of clarity, it needs to be noted that the CLRA Act, 1970 and the Rules thereunder are aimed at regulating the deployment of contract labourers. If the contract labourers are performing work similar to the work performed by the regular employees, their wage structure has to be similar. The contractor has to pay wages directly to the contract labourer, but in the presence of a representative of the Principal Employer. The contractor has to raise a bill for service charges and the wages of the labourers are paid from such payments made by the Principal Employer to the contractor. If the contractor does not deposit the PF contributions, the Principal Employer is mandated to pay the same. Issuance of identity cards/ admit cards would not mean that a direct relationship is established between the labourers and the Principal Employer. Abolition of contract labour system by the competent authority does not lead to the automatic absorption of the contract labourers in the service of the Principal Employer.

28. The Apex Court, in the case of International Airport Authority of India case (supra), has concluded in paragraph 27 as under:

27. The last finding is that there were three indicators to show that contract labour for loading/unloading were direct employees of IAAI : direct payment of wages, direct penal action by IAAI against the contract labour, and direct control and supervision of contract labour by IAAI. Therefore, the contracts for supply of contract labour were `paper' contracts and a camouflage to deny benefits of labour laws to the members of first respondent Union.

We will first examine whether there was any material at all to hold that the wages were being directly paid by IAAI to the contract labour. The contracts between IAAI and the society make it crystal clear that a lump sum consideration was to be paid by the IAAI to the society and the society was responsible for payment to its members who were send as contract labour. The workers did not produce any document to show that the payment was made by IAAI directly to the workers. But The Tribunal wrongly held that Ex. W1 to W6 showed that the payment was directly made. Ex. W1 is an appointment letter dated 31.1.1978 issued to one Godaraman by Airfreight. Ex.W2 dated 31.10.1983 is a pay-slip of one D. Natarajan issued by Airfreight. Both these documents relate to the period prior to 31.10.1985 when the workers were the permanent employees of Airfreight, and had absolutely no connection with IAAI. Ex.W3 dated 18.4.1988 is a cash receipt for payment of ex-gratia amount paid to cargo loaders for the period 22.3.1986 to 9.5.1986 and 17.5.1986 to 23.5.1986. It shows that a sum of Rs.7,267.20 was paid as ex gratia amount. Though the said receipt is dated 18.4.1988, it clearly shows that the payment related to the work done between 22.3.1986 to 9.5.1986 and 17.5.1986 to 23.5.1986 when, admittedly, these workers were direct casual daily wage employees under IAAI and when the contract between IAAI and the society had not even come into existence. The contract labour arrangement admittedly came into existence only from 1.7.1986. This document has, therefore, no relevance to show that any payment was made to the contract labour directly. Ex.W4 is a Circular dated 18.2.1986 of IAAI notifying that wages of 82 loaders mentioned therein had been drawn from 1.1.1986 to 31.1.1986 and directed the said daily wage labourers to receive their wages immediately. This again is of no relevance as it related to the period prior to the contract labour agreement when the workers were working as casual daily wage employees directly under the IAAI. Ex.W5 is the pay-slip of one S.C. Yadav for May, 1990 who was working in the

Bombay Airport and Ex. W6 is a pay-slip of one Aseem Das, Cargo Loader for June, 1990 who was working in the Calcutta Airport. These two documents were produced only to show that the IAAI had employed some persons as direct labour in its cargo department in Calcutta and Bombay Airports and had nothing to do with the workers who were working at Madras. On the basis of these documents, the Tribunal has held that payments were being directly made to workers when they were contract labours. This is a finding based on absolutely no evidence and shockingly perverse and is liable to be rejected accordingly.

The Tribunal held that IAAI was taking penal and disciplinary action by suspending and punishing the contract labour and that was proof of direct employment. This finding is also based on no evidence. Not even a single document was produced to show that any notice of suspension or show cause notice for disciplinary action or order imposing punishment was passed by IAAI in regard to any of the contract labour. Reliance was placed on Ex.W-10, M-15 to M-17, M-21, M-23 as also M2, 24 to 31 and 34 to 40 to prove that IAAI was directly taking action against the contract labour. None of them is relevant. Ex.W-10 is a letter dated 7.3.1990 from IAAI to the society, stating that one Ram Chander, loader-cum-packer had given an assurance to work in a disciplined manner and therefore it was decided to allow him to work. This is not a communication addressed to the contract labour but to the society informing the society that Ram Chander may be permitted to work in view of his assurance to behalf properly. M-15 to M-17 are 3 letters dated 9.3.1987, 16.6.1988 and 11.6.1990 addressed by IAAI to the society regarding the allotment of contract labour and their identification. Ex.M-21 is a letter dated 20/22.2.1991 from IAAI to the society for supply of contract labour. Ex.M-23 is a letter dated 14.5.1991 from IAAI to the society regarding duty roster. Ex.M-24 is a letter dated 2.12.1987 from IAAI to the society informing that there is no improvement in the attendance of the contract labour, and requesting the society to take necessary action to improve their attendance. Ex.M25 to 31 and 34 to 40 are letters complaining about pilferage and other irregularities committed by the contract labour noticed by security personnel. These letters give the particulars of the irregularities committed and inform the society not to send them to work pending investigation. None of them relates to imposition of punishment by IAAI as employer against any employee. These are merely communications informing the

contractor society that some of the contract labour provided by it were guilty of some illegal acts and therefore directing the contractor not to send those employees. This was expressly provided for in clauses 20 and 25 of the Contract Labour Agreement. Thus, none of these documents is evidence of any penal or disciplinary action by IAAI against the contract labour. The next ground referred is that the contract labour were working under the direct supervision and control of officers of IAAI. This is not in fact disputed. The contract labour were engaged in handling cargo, that is loading, unloading and movement of cargo in the Cargo Complex of IAAI. Naturally, the work had to be done under the supervision of the officers of IAAI. Merely because the contract labour work is under the supervision of the officers of the principal employer, it cannot be taken as evidence of direct employment under the principal employer. Clause 17 of the Contract Agreement required a supervisor to be employed by the society also. Exercise of some control over the activities of contract labour while they discharge their duties as labourers, is inevitable and such exercise is not sufficient to hold that the contract labour will become the direct employees of the principle employer.

It is thus seen that all the three grounds mentioned by the Tribunal and which have found favour with the Division Bench as indicators of direct employment by IAAI and the contract labour agreement with the society being a camouflage, are wholly baseless.?

(Emphasis is mine).

29. As such, merely because there was supervision by the representative of the Principal Employer on the work activities of the contract labourers would not tantamount to the labourers being the employees of the Principal Employer.

30. The Apex Court in the case of General Manager (OSD), Bengal Nagpur Cotton Mills case (supra) has held in paragraphs 8 and 9 as under:

8. In this case, the Industrial adjudicator has granted relief to the first respondent in view of its finding that he should be deemed to be a direct employee of the appellant. The question for consideration is whether the said finding was justified. It is now well-settled that if the industrial adjudicator finds that contract between

the principal employer and contractor to be sham, nominal or merely a camouflage to deny employment benefits to the employee and that there was in fact a direct employment, it can grant relief to the employee by holding that the workman is the direct employee of the principal employer. Two of the well-recognized tests to find out whether the contract labour are the direct employees of the principal employer are (i) whether the principal employer pays the salary instead of the contractor; and (ii) whether the principal employer controls and supervises the work of the employee. In this case, the Industrial Court answered both questions in the affirmative and as a consequence held that first respondent is a direct employee of the appellant.

9. On a careful consideration, we are of the view that the Industrial Court committed a serious error in arriving at those findings. In regard to the first test as to who pays the salary, it placed the onus wrongly upon the appellant. It is for the employee to aver and prove that he was paid salary directly by the principal employer and not the contractor. The first respondent did not discharge this onus. Even in regard to second test, the employee did not establish that he was working under the direct control and supervision of the principal employer. The Industrial Court misconstrued the meaning of the terms `control and supervision' and held that as the officers of appellant were giving some instructions to the first respondent working as a guard, he was deemed to be working under the control and supervision of the appellant. The expression `control and supervision' in the context of contract labour was explained by this court in International Airport Authority of India v. International Air Cargo Workers Union [2009 (13) SCC 374] thus:

"If the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by contractor, if the right to regulate employment is with the contractor, and the ultimate supervision and control lies with the contractor.

The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise. In short, worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor."

Therefore we are of the view that the Industrial Court ought to have held that first respondent was not a direct employee of the appellant, and rejected the application of the first respondent.?

(Emphasis is mine).

31. Insofar as the visit of the Government Labour Officer is concerned, it is noteworthy that the visit was under the CLRA Act. His conclusion as regards payment of wages is also under the CLRA Act. If the Petitioners were the direct employees of the Principal Employer and were not contract labourers deployed by the contractor, I find no reason for these Petitioners to have approached the Labour Officer for making a statement to be recorded under the CLRA Act.

32. I have no reason to accept the contention of the Petitioners that the attendance record is a genuine document which is compilation of sheets of papers without any stamp or letter head or name of the establishment and without any signature of the officer concerned.

33. Considering the totality of the evidence before the Industrial Court, I find that the Respondent has taken a stand that the Petitioners were deployed as Aaya / Ward Boy under the housekeeping activity and the same was outsourced through a contractor. The submission of the Petitioner that the work of Aaya / Ward Boy is not outsourced and was never performed by any contractor, is in itself a contention aimed at repudiating/ disputing the existence of a contractor who is said to have

deployed the Petitioners in the Respondent Establishment.

34. In the light of the above, I do not find that the impugned judgment of the Industrial Court in the Complaints filed by the Petitioners could be termed as being perverse or erroneous. In view of the ratio laid down by the Apex Court regarding the scope of the jurisdiction of this Court, in the case of Syed Yakoob v/s K.S.Radhakrishnan reported in **AIR 1964 SC 477** and Surya Dev Rai v/s Ram Chander Rai reported in **AIR 2003 SC 3044**, I am of the view that grave injustice is not caused to the Petitioners by the impugned judgment. They are not rendered remedyless as the Apex Court in Kalyani Steels Limited and Cipla Limited judgments (supra) has laid down the law that the contract labourers like the Petitioners can raise an industrial dispute for the redressal of their grievance and for obtaining a declaration that the Principal Employer is the real employer. The Petitions are, therefore, dismissed.

35. In the event, the Petitioners raise an industrial dispute before the appropriate Government under the Industrial Disputes Act, 1947 within a period of SIX WEEKS from today, the time spent by the Petitioners before the Industrial Court and this Court shall be a ground for condonation of delay, if any. All contentions of the litigating sides are, therefore, kept open. In the event, the appropriate Government refers the dispute to the appropriate Court/ Tribunal, the said reference shall be decided on it's own merits and the concerned Tribunal shall not be influenced by the observations of the Industrial Court in the impugned judgment as well as the observations of this Court.

36. Rule is, therefore, discharged.

37. No order as to costs.