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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment delivered on 26th September, 2014

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W.P.(C) 3495/2011

RAMJAS PUBLIC SCHOOL Petitioner

Represented by: Mr.H.K.Chaturvedi,
Advocate.

Versus

DHARMENDER AND ORS. Respondents

Represented by: Mr. Jitender Mehta,
Advocate for Respondent No.9.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

W.P.(C) 3495/2011

1. Vide the present petition, petitioner has assailed the award dated 20.11.2010, whereby the Ld. Labour Court has directed the petitioner to re-instate the respondents / workmen on their respective posts with 70% pay of their last drawn wages as back wages on the date of its enforceability, i.e., from the notification of award, failing which the respondents / workmen shall be entitled to recover the amount of back wages with interest @ 9% *per annum* from the date of award.

2. The present petition has been filed on the ground that respondents / workmen had pleaded that they were employee of Management no. 1, i.e, the petitioner whereas they admit in the claim

that they were paid wages through the Contractor Proprietor Mr. Vishwanath Mehta of M/s. Karan Caterers.

3. Mr. H.K. Chaturvedi, Ld. Counsel appearing on behalf of the petitioner submitted that the respondents / workmen admitted that Management No. 1 and M/s. Karan Caterers were not registered under Contract Labour (Regulation and Abolition) Act, 1970, so, the contract, if any, is not valid under the law and the workmen were not employees of Management No. 1.

4. Mr. Chaturvedi further submitted that respondents / workmen also admitted the death of Sh. Vishwanath Mehta in the month of May, 2002. However, stated that their services were terminated by the School on 01.07.2002.

5. Ld. Counsel submitted that in order dated 27.05.2003 passed by the Secretary, Labour, NCT of Delhi, recorded that the industrial dispute in respect of the matters specified in the Schedule exists between the Management of petitioner School (Day Boarding) and M/s. Promila Mehta Caterers, Ramjas Public School (Day Boarding). Whereas, the petitioner is not a party in any manner as the respondents / workmen were employees either of Vishwanath Mehta or his legal heir Ms. Promila Mehta. However, the Ld. Labour Court has held that the respondents / workmen were the employees of the petitioner and accordingly, directed to reinstate them in service with all back wages.

6. It is further submitted that the respondents / workmen have admitted that they were receiving salary from the Vishwanath Mehta. Therefore, they were employees of the contractor and hence the

petitioner being the principal employer cannot be held liable to pay compensation.

7. Ld. Counsel for the petitioner further submitted that the award has to be complied by Contractor Ms. Promila Mehta being daughter in law and legal heir of contractor Vishwanath, and she is a party to the instant petition as respondent no. 9. Even reference was also made against the Contractor, but not against the Petitioner School.

8. To strengthen his arguments, Id. Counsel has relied upon a case of ***General Manager (OSD), Bengal Nagpur Cotton Mills, Rajnandgaon v. Bharat Lal and Anr. (2011)ISCC635***, wherein the Apex Court has held as under:

“7. The Appellant relied upon the decisions of this Court in National Thermal Power Corporation v. Badri Singh Thakur : 2008 (9) SCC 377 where this Court held that the provisions of CLRA Act would override the provisions of the MPIR Act and Municipal Corporation of Greater Mumbai v. K.V. Shramik Sangh: 2002 (4) SCC 609 where this Court observed that merely because the principal employer and contractor have not complied with the provisions of the CLRA Act in regard to registration, the system of carrying out work through labour contract could not be termed as sham.

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.”

9. Also relied upon the case of ***Steel Authority of India and Ors. v. National Union Waterfront Workers***, (2001) 7 SCC 1 wherein the Apex Court held as under:

“The principle that a beneficial legislation needs to be construed liberally in favour of the class for whose benefit it is intended, does not extend to reading in the provision's of the Act what the legislature has not provided whether expressly or by necessary implication, or substitution remedy or benefits for that provided by the legislature. We have already noticed above the intendment of the CLRA Act that it regulates the conditions of service of the contract labour and authorizes in Section 10(1) prohibition of contract labour system by the appropriate Government on consideration of factors enumerated in Sub-section (2) of Section 10 of the Act among other relevant factors. But, the presence of some or all those factors, in our view, provide no ground for absorption of contract labour on issuing notification under Sub-section (1) of Section 10. Admittedly when the concept of automatic absorption of contract labour as a consequence of issuing notification under Section 10(1) by the appropriate Government, is not alluded to either in Section 10 or at any other place in the Act and the consequence of violation of Sections 7 and 12 of the CLRA ACT is explicitly in Sections 23 and 25 of the CLRA Act, it is not for the High Courts or this Court to read in some unspecified remedy in Section 10 or substitute for penal consequences specified in Sections 23 and 25 a different sequel, be it absorption of contract

labour in the establishment of principal employer or a lesser or a harsher punishment. Such an interpretation of the provisions of the statute will be far beyond the principle of ironing out the creases and the scope of interpretative legislation and as such clearly impermissible. We have already held above, on consideration of various aspects, that it is difficult to accept that the Parliament intended absorption of contract labour in the establishment of principal employer or a lesser or a harsher punishment. Such an interpretation of the provisions of the statute will be far beyond the principle of ironing out the creases and the scope of interpretative legislation and as such clearly impermissible. We have already held above, on consideration of various aspects, that it is difficult to accept that the Parliament intended absorption of contract labour on issue of abolition notification under Section 10(1) of CLRA Act.”

10. Further relied upon the case of ***Municipal Corporation of Greater Mumbai v. K.V. Shramik Sangh and Ors., (2002) 4 SCC 609*** wherein held as under:

“19. Now, we proceed to consider the validity and correctness of the impugned judgment and order in the light of judgment of the Constitution Bench in SAIL case (supra). The High Court held that the work entrusted to the members of the Union continued to be basically the work of the Corporation itself of perennial nature; the Corporation has chosen to carry out the work under so-called system of labour contract without complying with the provisions of the CLRA Act, and as such the labour contract was a camouflage. We must state here itself that the Union in the writ petition alleged that the labour contract was sham and the Corporation specifically denied it in its counter affidavit but the High Court did not go into this question and did not record a finding that the labour contract in the present case was sham or a camouflage considering the material on record; even otherwise this being a serious and disputed fact in terms of the Constitution Bench judgment aforementioned, the High court could not have appropriately adjudicated on the issue exercising jurisdiction under Article [226](#) of the Constitution. It appears to us that the

High Court proceeded to conclude that the labour contract was not genuine and the workers of the Union were employees of the Corporation because the Corporation and the contractors did not comply with the provisions of the CLRA Act. Conclusion that the contract was sham or it was only camouflage cannot be arrived at as a matter of law for non-compliance of the provisions of the CLRA Act but a finding must be recorded based on evidence particularly when disputed by an industrial adjudicator as laid down in various decisions of this Court including the Constitution Bench judgment in SAIL. The cases on which the High Court placed reliance were the cases where finding of fact was recorded by the labour courts on evidence. In Para 34 of the impugned judgment, it is stated:-

"This court is hardly competent to record evidence or appreciate it in exercise of its powers under Article 226 of the Constitution. This Court as well as the Supreme Court have always taken the view that writ jurisdiction should not be permitted to be invoked if disputed questions of facts are involved, is the submission of the learned counsel. The submissions are wholly unexceptionable. If the facts were not clear, we would have hardly allowed our writ jurisdiction to be invoked. The material which we have referred to at several places hereinbefore, is more than adequate, in our view, to come to the conclusion we have arrived at."

11. Accordingly, Ld. Counsel submitted that in view of the proposition of law as cited above, if the respondents / workmen were in the roll of a Company then the principal employer is not liable to pay compensation. Admittedly, reference before Labour Court was against Contractor because he had engaged the employees. Therefore, the award was wrongly passed against the petitioner and the same is liable to be set aside.

12. In addition, Contractor Vishwanath Mehta was not registered

with the Employees Provident Fund. Therefore, the provident fund for the period 2001-2002 was deposited by the petitioner being principal employer as per Section 8 (A) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952. Accordingly, the Ld. Labour Court has relied upon the provident fund deposited by the petitioner which is wrong in view of the settled law.

13. On the other hand, Mr. Jitender Mehta, Ld. Counsel appearing on behalf of the respondent no. 9 submitted that an application was moved by the workmen on 12.03.2008 to produce certain records, i.e., Provident Fund Register, w.e.f 1991 to 2002; contract for engaging the workmen through Contractor between Management No. 1 and Contractors w.e.f 1991 to 2002; Permission under contract labour; details for floating the tenders for engaging the contractor and details of security amount deposited by the contractors and details of workmen engaged through contractors w.e.f 1991 to 2002, however, the petitioner failed to do so.

14. Mr. Mehta submitted that in *M/s. Automobile Association of Upper India v. POLC-II and Ors. 2006 LLR 581* it is held that in spite of the Court Order, if any record is not produced, an adverse inference will be drawn against the said person. The Management / petitioner did not lead evidence despite opportunities given vide orders dated 27.09.2010, 25.10.2010 and 08.11.2010. They have also not produced the relevant records. Therefore, Ld. Labour Court held that the termination of services of the workmen were illegal and unjustified.

15. I have heard Ld. Counsels for the parties and given thoughtful

consideration.

16. The respondents / workmen have categorically stated that Contractor Sh. Vishwanath Mehta died in the Year, 2002. Thereafter, services of the respondents / workmen were terminated by the petitioner School on 01.07.2002.

17. There were two canteens in the Petitioner School. Respondent no. 9 was running the senior wing from the year 1996 to 1997 as stated by her counsel, whereas, respondents / workmen were terminated by the petitioner on 01.07.2002 and the Contractor Sh. Vishwanath Mehta died in the year 2002. Therefore, respondent no. 9 has nothing to do with the respondents / workmen and their service.

18. Admittedly, both the canteens were separate and their employees were separate. If it is believed that the respondent no. 9 is the daughter in law of Mr. Vishwanath Mehta and is the legal heir of Mr. Vishwanath Mehta, in that case, respondents / workmen should have impleaded the legal heirs of Mr. Vishwanath Mehta, whereas they failed to do so. Therefore, respondent no. 9 is not rightly held liable to pay compensation.

19. Moreover, Respondents / workmen appeared as WW1 to WW8 and proved deduction of PF at the instance of petitioner as Ex.WW1/8 to WW1/9, Ex.WW2/1 to WW2/2, Ex.WW3/1 to Ex. WW1/9, Ex.WW4/1 to WW1/2, WW5/1 to WW5/3, Ex.WW6/1 to WW6/2; Ex.WW7/1 to WW7/2 and Ex.WW8/1 to Ex.WW8/2.

20. In addition, WW10 Anil Babu in his cross-examination held

on 26.08.2009 admitted that PF contributions of the respondents / workmen were deposited by the Petitioner School up to 2001-2002.

21. It is also important to note that the respondents / workmen were working with the Management as cook for the last more than 8 years without any break. The petitioner used to pay wages to the respondents / workmen through Contractor Proprietor Vishwanath Mehta of M/s. Karan Caterers. Workmen were protesting against illegal contract policy of the petitioner. However, they were terminated after the death of Vishwanath. Moreover, the petitioner School did not discharge the onus that has been shifted by producing the relevant documents in order to establish the real nature of contract between the employer and employee. Therefore, this Court cannot presume or assume that the employee was not directly controlled or supervised by the Petitioner School. Hence, the ratio of judgments that has been relied by the petitioner is having no relevance in the present case.

22. In view of above discussion, this court finds no merit in the instant petition.

23. Accordingly, the same is dismissed with no order as to costs.

CM No.6460/2012 (U/s17-B of I.D. Act.)

With the dismissal of the instant petition itself, instant application has become infructuous and dismissed as such.

SURESH KAIT, J

SEPTEMBER 26, 2014/jg