

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

Judgment Reserved on: September 01, 2015

% *Judgment Delivered on: September 03, 2015*

+ **LPA 697/2014**

THE MANAGEMENT OF RAMJAS PUBLIC
SCHOOL (DAY BOARDING) REPRESENTED BY:
ITS CHAIRMAN

..... Appellant

Represented by: Mr.H.K.Chaturvedi and
Mr.B.K.Singh, Advocates.

versus

DHARMENDER & ORS

..... Respondents

Represented by: Mr.Anil Kumar Chandel,
Advocate for R-1 to 8.
Mr.Pradeep Derodya, proxy
counsel for Mr.Jitinder Mehta,
Advocate for R-9.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Respondent Nos.1 to 8 raised an industrial dispute against M/s Ramjas Public School (Day Boarding), Anand Parbat, New Delhi and Smt.Promila Mehta, Proprietor of M/s Promila Mehta Caterers alleging illegal termination of their services on July 01, 2002 without any notice and without being paid any bonus for the last three years, EL and arrears of minimum wages w.e.f August 01, 2000.

2. It was the claim of respondent Nos.1 to 8 that they were appointed by Ramjas Public School however, the wages were paid to them through the contractor Vishwanath Mehta, Proprietor of M/s Karan Caterers. The workmen were protesting against this illegal contract policy of the

Management of Ramjas Public School. When Vishwanath Mehta died in May 2002 Ramjas Public School terminated their services as noted above. After the death of Vishwanath Mehta Ramjas Public School started taking work from the newly appointed workmen through Management No.2, that is, M/s Promila Mehta Caterers run by daughter-in-law of late Vishwanath Mehta, Proprietor of Karan Caterers. Ramjas Public School and M/s Karan Caterers were registered under the Abolition of Contract Act as principal employer and registered contractor, this contract, if any, was not valid under the law and the respondents No.1 to 8 were actually employees of Ramjas Public School.

3. After the evidence was led the learned Labour Court vide the award dated November 20, 2010 held that the services of respondent Nos.1 to 8 were illegally terminated granting the relief of reinstatement with continuity of service and 70% back wages. Challenging the award dated November 20, 2010 Ramjas Public School filed a writ petition being W.P.(C) No.3495/2011 which was dismissed vide the impugned order dated September 26, 2014 hence the present appeal.

4. Learned counsel for Ramjas Public School submits that no evidence was led by the workmen respondent Nos.1 to 8 to show that the salary was paid directly by the appellant. The only evidence led was of the payment of provident fund which was deposited by Ramjas Public School being the principal employer as per the Section 8A of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (in short 'the EPF Act') and as the contractor Vishwanath Mehta was not registered with the Employees Provident Fund. Merely by depositing the provident fund Ramjas Public School could not be fastened with the liability of reinstatement and back

wages in respect of respondent Nos.1 to 8. Learned counsel urged that under Section 8A of the EPF Act, even for contract labour the management of the school had to deposit the provident fund of the contract labour and could recover the same from the contractor while making payment to the contractor. Section 8A referred to by learned counsel, reads as under:-

“8A. Recovery of moneys by employers and contractors –

(1) The amount of contribution (that is to say the employer's contribution as well as the employee's contribution in pursuance of any Scheme and the employer's contribution in pursuance of the Insurance Scheme, and any charges for meeting the cost of administering the Fund paid or payable by an employer in respect of any employee employed by or through a contractor may be recovered by such employer from the contractor, either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor.

(2) A contractor from whom the amounts mentioned in sub-Section (1) may be recovered in respect of any employee employed by or through him, may recover from such employee the employee's contribution under any Scheme by deduction from the basic wages, dearness allowance and retaining allowance if any payable to such employee.

(3) Notwithstanding any contract to the contrary, no contractor shall be entitled to deduct the employer's contribution or the charges referred to in sub-Section (1) from the basic wages, dearness allowance, and retaining allowance (if any) payable to an employee employed by or through him or otherwise to recovery such contribution or charges from such employee.”

5. Respondent Nos.1 to 8 in their affidavits assert that they were appointed by the management of Ramjas Public School though the salary was paid through the contractor. Further no notice was given at the time of termination of the services on July 01, 2002 nor was the bonus amount paid for the last three years nor the minimum wages w.e.f August 01, 2000. There was no break in the service of the workmen and Ramjas Public School had full control and supervision on the day-to-day work of the respondent Nos.1 to 8 and the contractor was only kept to save itself from the stringent provisions of labour law.

6. In cross-examination respondent No.8 also pointed out that Shri Vishwanath Mehta was the father of the Principal of Ramjas Public School and after his death the daughter-in-law, that is, the sister-in-law of the Principal continued with the catering business. The evidence adduced by respondent Nos.1 to 8 which is reaffirmed by them in their cross-examination would reveal their stand that their supervision and control was with the Ramjas Public School. They were supposed to mark their attendance in school register which was separately maintained.

7. The workmen had called upon Ramjas Public School Management to produce the decision taken to invite offers from contractors to run the canteen, the contract if any entered into and the terms thereof. Vide order dated March 13, 2008 the Tribunal directed the management to produce the said record, which was not produced.

8. Whilst it may be true that under Section 8A of the EPF Act the principal employer is obliged to deposit the provident fund of the contract labour with the Employees Provident Fund Commissioner and can adjust the same while making the payment to the contractor, but no evidence has been

led by the appellant to prove that it adjusted the amount while making payment to the contractor. It also assumes importance that the appellant withheld best evidence i.e. the decision to invite offers from contractors to manage the canteen. It led no evidence to prove payments made to the contractor. This withholding of evidence assumes importance because concededly the so called contractor Sh.Vishwanath Mehta was admittedly the father of the principal of the school. The non-production of the record by the school certainly suggests that to siphon away some funds of the school payments were being made to Sh.Vishwanath Mehta but the canteen was being directly run by the management of the school.

9. From the evidence on record it can safely be held that the Ramjas Public School Management had the control and supervision over the respondent Nos.1 to 8 and were not merely paying provident fund being the principal employers as per Section 8A of the EPF Act, thus the contract if any between Ramjas Public School and the contractor is sham and a camouflage.

10. The Supreme Court in 2009 (13) SCC 374 International Airport Authority of India vs. International Air Cargo Workers' Union & Anr. dealing with Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 (in short 'CLRA Act') held:

“20. But where there is no abolition of contract labour under Section 10 of CLRA Act, but the contract labour contend that the contract between principal employer and contractor is sham and nominal, the remedy is purely under the ID Act. The principles in Gujarat Electricity Board continue to govern the issue. The remedy of the workmen is to approach the industrial adjudicator for an adjudication of their dispute that they are the direct

employees of the principal employer and the agreement is sham, nominal and merely a camouflage, even when there is no order under Section 10(1) of CLRA Act. The industrial adjudicator can grant the relief sought if it finds that contract between principal employer and the contractor is sham, nominal and merely a camouflage to deny employment benefits to the employer and that there is in fact a direct employment, by applying tests like: who pays the salary; who has the power to remove/dismiss from service or initiate disciplinary action; who can tell the employee the way in which the work should be done, in short who has direction and control over the employee. But where there is no notification under Section 10 of the CLRA Act and where it is not proved in the industrial adjudication that the contract was sham/nominal and camouflage, then the question of directing the principal employer to absorb or regularize the services of the contract labour does not arise. The tests that are applied to find out whether a person is an employee or an independent contractor may not automatically apply in finding out whether the contract labour agreement is a sham, nominal and is a mere camouflage. For example, 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.”

11. Looked at from any angle there is no merit in the appeal which is dismissed but without any order as to costs.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

SEPTEMBER 03, 2015
‘vn’