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IN THE HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition No.5142 of 1999**

M/s BEC Impex International Pvt. Ltd. Heavy Industrial Area, Hath Khoj, District Durg

---Petitioner**Versus**

1. Pragatisheel Engineering Shramik Sangh, Industrial State, Bhilai
2. Member Judge, Industrial Court, Raipur Bench
3. State of Madhya Pradesh, Department of Labour, Vallabh Bhawan, Bhopal

---Respondents

For Petitioner : Mr. Ashish Shrivastava and Mr. Soumya Rai,
Advocates

For Respondent No.1 : Mr. Varun Sharma and Mr. Vikas Dubey,
Advocates.

For Respondent No.2 : None.

For Respondent No.3 : Mr. Dhiraj Kumar Wankhede, Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal**C A V ORDER****13/05/2016**

1. Invoking the extra-ordinary jurisdiction of this Court, the instant writ petition has been preferred by the petitioner herein namely M/s. BEC Impex International Pvt. Ltd. against the part of the award granting compensation of ₹ 20,000/- to the employees attached with Reference made by the appropriate Government and also questioning the order granting compensation under Section 25-FFF of the Industrial Disputes Act, 1947, to them.

[For sake of convenience, respondent No.1 herein Pragatisheel Engineering Shramik Sangh will be referred as Workmen-Union/ respondent No.1 and petitioner herein M/s. BEC Impex International Pvt. Ltd. will be referred as employer as their status before the Industrial Court.]

BRIEF FACTS AND TERMS OF REFERENCE

2. The present writ petition arises out of Reference Case No.4/ MPIR/1996 referred by appropriate Government to the Industrial Court for adjudication and answered by impugned award dated 16.10.1999.

3. The aforesaid challenge has been made by the petitioner / employer questioning the legality, validity and correctness of the part of award on following factual back drop :-

3.1 The appropriate Government (erstwhile State of Madhya Pradesh) by reference order dated 26.02.1993 referred the following disputes for adjudication to the Industrial Court, Madhya Pradesh Bench at Raipur for adjudication, which state as under:-

1. क्या वेतन एवं भत्तों के पुनरीक्षण का औचित्य है? यदि हाँ तो वेतन, मंहगाई भत्ता एवं अन्य भत्तों की क्या योजना होना चाहिये एवं इस संबंध में नियोजक को क्या निर्देश दिये जाना चाहिए?
2. क्या प्रतिवर्ष 15 दिन का आकस्मिक अवकाश, 10 दिन का त्यौहारी अवकाश तथा 30 दिन का चिकित्सा अवकाश दिये जाने का औचित्य है? यदि हाँ तो इस संबंध में नियोजक को क्या निर्देश दिये जाना चाहिए?
3. क्या संलग्न परिशिष्ट में उल्लेखित एम्पलाईज का सेवा पृथकीकरण वैध एवं

उचित है? यदि नहीं तो इस सम्बन्ध में नियोजक को क्या निर्देश दिये जाना चाहिये?

3.2 Subsequently, vide order No. 6-1/93/16-A dated 31.07.1995 the Government has referred the following terms of reference also by adding to the earlier three terms of reference thus making the total four: -

4. क्या अनुक्रमांक 3 के संलग्न परिशिष्ट में उल्लेखित सेवा से पृथक किये एम्पलाईज को विवाद के निराकरण होने तक अंतरिम राहत प्रदान करने का औचित्य है? यदि हाँ तो इस संबंध में नियोजक को क्या निर्देश दिया जाना चाहिये?

3.3 The petitioner/employer raised preliminary objection questioning the competency of reference particularly to the terms of Reference No.3. These objections were decided by the Division Bench of the Madhya Pradesh Industrial Court, Indore by order dated 31.05.1995 rejecting the objection so raised and matter was remanded to the Industrial Court, Raipur for adjudication on merits, but thereafter matter was referred to the Full Bench of the High Court of Madhya Pradesh to decide the said question. The Full Bench of High Court of Madhya Pradesh by order dated 06.04.1999 directed the Industrial Court, Raipur to decide the reference so made on merits as per law on hearing the parties.

3.4 Upon notice being issued by the Industrial Court, Raipur, respondent No.1 / Workmen Union filed its statement of claim before the said court making their claim with reference to all four terms of the

reference separately as under:-

- (i) In respect of terms of reference No.1, it was claimed that they are entitled for pay scale, darkness allowance, cycle allowances, house rent allowances and shift allowance.
- (ii) In respect of terms of reference No.2, it was claimed that they are entitled for 15 days casual leave, 10 days festival holidays and 30 days medical leave.
- (iii) In respect of terms of reference No.3, it was claimed that the concerned workers (57) detailed in the Reference were in the employment of the petitioner / employer. It was further pleaded that the M.P.I.R. Act, 1960 & the Standard Standing Orders were applicable to members of the respondent / Union and those workers (57) were not served with charge sheet and no enquiry whatsoever was conducted before terminating their services and even the termination orders were not passed and not communicated to the concerned workers; they were neither paid any retrenchment compensation nor one month's notice or notice pay was paid to them. It was also pleaded that junior workers than the workers covered in the Reference were retained and they are still in the employment of the petitioner / employer and new employees were also recruited, and the action of the petitioner / employer is wholly illegal being in contravention of the Certified Standing Order. The workers were and

are always willing to work from whom they have been and are being deprived illegally and unjustifiably; and it was prayed that they be reinstated in services along with all benefits/wages/compensation.

(iv) In respect of terms of reference No.4; they may be granted interim relief till pendency of the reference before the Industrial Court.

Prayer was made for answering the reference in favour of the respondent / Union by granting reinstatement in service along with full back wages and consequential benefits.

4. The petitioner / employer filed its written statement before the Industrial Court denying the averments made in the statement of claim raised by the respondent / Union stating inter alia that petitioner M/s. BEC Impex International Private Limited was an export oriented independent unit newly setup in the month of September, 1989 and some foreign countries had placed orders for supplying to them some engineering items. For execution of those works, the petitioner / employer had awarded contracts of different types of engineering items to various contractors and in turn, those contractors had engaged their own labours / workers to independently carryout their respective job contracts awarded to them. The wages were to be paid by the respective contractors to their respective workers. They have to exercise the control and supervision over their respective workers engaged by them and the petitioner had no control over the

said contractors. Thus, there did not exist any privity of contract and relationship of master & servant between the contract labour engaged by their contractors and the petitioner / employer, and none of them were the employees engaged by the petitioner / employer. It was also pleaded that M/s. BEC Impex International Private Limited had ceased its functioning with effect from 8-5-1991 because the orders received from foreign countries have already been complied with and no further orders have been placed by the foreign countries. It was also pleaded that the workers whose names appear at serial No.1 to 33 of the list attached with the reference and who were daily rated and temporarily employed were stopped from work as there was no work available for them and in the month of August, 1990, an understanding was reached on 7-8-1990 that these persons will be on work by the respective contractors as and when work for them would be available. It was also stated that a layoff agreement dated 24-3-1991 (Ex.D-19) was entered into between the parties and they were paid layoff compensation for a period of 45 days by the respective contractors. It was pleaded that those contractors are necessary party as the labours employed were the contractors' labours and as such, the reference deserves to be answered in negative.

5. During the course of trial of reference, the respondent / union has examined only one witness namely Shailesh Kumar who

filed and exhibited no documents whereas, on behalf of the petitioner / employer, three witnesses namely Ajay Deshmukh, Kanti Gupta and R.K. Shukla were examined and documents Exs.D-1 to D-227C were brought on record to prove their case.

FINDING(S) OF INDUSTRIAL COURT

6. After appreciating oral and documentary evidence on record, the Industrial Court by its impugned award held that (1) the industry was closed from 8th May, 1991 and therefore they are entitled for retrenchment compensation under Section 25-FFF of the Industrial Disputes Act, 1947; (2) the petitioner / employer has failed to establish that the labours employed as per the list annexed with the reference were the labourers of the contractor and there was no such relationship of master & servant between the petitioner / employer and the respondent / Union; and (3) the workers listed in the reference are entitled for compensation and notice pay in accordance with Section 25-FFF of the ID Act, 1947 and each of them is also entitled for compensation to the extent of ₹ 20,000/-.

SUBMISSIONS

7. Mr. Ashish Shrivastava, learned counsel appearing for the writ petitioner, would submit that the impugned award passed by the Industrial Court holding that each of the employees attached with the reference are entitled for compensation of ₹ 20,000/- and further granting relief of compensation under Section 25-FFF of the Industrial

Disputes Act, 1947 is bad and unsustainable in law, as existence of relationship of master and servant / employer and employee between the parties is not established. He would further submit that the question of closure of the industry could not have been gone into by the Industrial Court in a reference made under the provisions of the Chhattisgarh Industrial Relations Act, 1953, as the scope of reference made by the appropriate Government was extremely limited to decide legality, validity and correctness of termination of those 57 employees. He would also submit that 57 employees were the employees of the contractors engaged by the contractors and they have received payment vide Exs.D-21 to D-27C and have left the job, therefore, the award granting compensation to the extent of ₹ 20,000/- as well as retrenchment compensation under Section 25-FFF of the Industrial Disputes Act, 1947 is liable to be set aside.

8. Mr. Varun Sharma, learned counsel appearing for the respondent / Union, would submit that the petitioner / employer having taken the plea that the workers attached with the reference were the employees of the contractor has failed to prove that they were employees of the contractors. He would refer to the definition contained in Section 2(c) of the Contract Labour (Regulation and Abolition) Act, 1970 and would also refer to the definition contained in Section 2(13) read with Section 2(14)(e) of the Chhattisgarh Industrial Relations Act, 1960 and would contend that since the Act of 1970

would prevail over the Act of 1960, the definition of contractor contained in the Act of 1970 has to be construed strictly and the petitioner / employer ought to have examined the said contractors in order to prove their stand and ought to have placed the contract agreement to prove that they were the employees of contractors. The documents filed Exs.D-127 to D-227 would not establish the fact that they were the employees of the contractors. An adverse inference has to be drawn against the petitioner for non-filing the documents maintained under Section 29 of the Act of 1970. Even the agreement entered into between the contractor and the petitioner / employer has not been produced and proved to establish such relationship and plea of such relationship has been taken only to avoid the responsibility from making payment and that be declared as sham. He would lastly submit that for closure of the industry, permission from the State Government under Section 25-O of the Industrial Disputes Act, 1947 is required to be taken which the petitioner / employer has not taken such permission after giving notice of intended closure under Section 25-FF (2) of the ID Act, 1947 and therefore the Industrial Court has rightly held the labours attached with the reference order to be entitled for retrenchment compensation under Section 25-FFF of the Industrial Disputes Act, 1947 in addition to compensation to the tune of ₹ 20,000/- and the writ petition is liable to be dismissed.

QUESTION INVOLVED

9. Upon hearing learned counsel for the parties and after going through the record the following question would emerge for consideration:-

“Whether the Industrial Court is justified in holding that the employees attached with the reference are employees of the petitioner / employer and further justified in granting compensation to the extent of ₹ 20,000/- plus retrenchment compensation under Section 25-FFF of the ID Act, 1947?”

10. I have heard learned counsel for the parties at length and considered their rival submissions made herein and gone through the record of the Industrial Court with utmost circumspection.

DISCUSSION

11. In order to consider the plea raised at the Bar and to determine the existence of employer-employee relationship, it would be appropriate to notice the relevant judgment of the Supreme Court on the subject as it is no longer res-integra and stand settled by authoritative judgment of the Supreme Court, which may be gainfully noticed herein:-

11.1 The Supreme Court in the matter of **General Manager (OSD), Bengal Nagpur Cotton Mills, Rajnandgaon v. Bharat Lal and another**¹ held that it was for the employee to establish the existence of employer-employee relationship by averring and to prove

¹ (2011) 1 SCC 635

the said fact by leading reliable legal evidence. Paragraphs 10 to 13 of the report state as under:-

“10. It is now well settled that if the industrial adjudicator finds that the contract between the principal employer and the contractor to be a 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-recognised tests to find out whether the contract labourers 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 the first respondent is a direct employee of the appellant.

11. 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 the 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 the 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.

12. 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*² thus: (SCC p. 388, paras 38-39)

“38. ... 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

2 (2009) 13 SCC 374

employer, if the salary is paid by a contractor, if the right to regulate the employment is with the contractor, and the ultimate supervision and control lies with the contractor.

39. 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.”

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

11.2 In the matter of **Balwant Rai Saluja and another v. AIR India Limited and others**³, Their Lordships of the Supreme Court having discussed almost all previous judgments on the subject and after referring the judgment in the matter of **National Aluminium Co. Ltd. v. Ananta Kishore Rout**⁴, which pertains to employees of the school established by Nalco, held in paragraphs 62 to 65 as under:-

“62. A recent decision concerned with the employer-employee relationship was that of Nalco case(supra). In this case, the appellant had established two schools for the benefit of the wards of its employees. The writ petitions were filed by the employees of each school for a declaration that they be treated as the employees of the appellant company on grounds of, inter alia, real control

3 (2014) 9 SCC 407

4 (2014) 6 SCC 756

and supervision by the latter. This Court, while answering the issue canvassed was of the opinion that the proper approach would be to ascertain whether there was complete control and supervision by the appellant therein. In this regard, reference was made to ***Dharangadhra Chemical Works*** case {AIR 1957 SC 264} wherein this Court had observed that: (Nalco case(supra), SCC pp. 768-69, para 22)

“22. ‘14. The principle which emerges from these authorities is that the prima facie test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work, or to borrow the words of Lord Uthwatt at p. 23 in ***Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Ltd.***, {(1946) 2 All ER 345 (HL)} “The proper test is whether or not the hirer had authority to control the manner of execution of the act in question”.’ (Dharangadhra Chemical Works case38, AIR p. 268, para 14)”

63. The Nalco case16 further made reference to ***Workmen of Nilgiri Coop. Mktg. Society Ltd. v. State of T.N.***{(2004) 3 SCC 514}, wherein this Court had observed as follows: (Nalco case16, SCC p. 771, para 27)

“27. ‘37. The control test and the organisation test, therefore, are not the only factors which can be said to be decisive. With a view to elicit the answer, the court is required to consider several factors which would have a bearing on the result: (a) who is the appointing authority; (b) who is the paymaster; (c) who can dismiss; (d) how long alternative service lasts; (e) the extent of control and supervision; (f) the nature of the job e.g. whether it is professional or skilled work; (g) nature of establishment; (h) the right to reject.

38. With a view to find out reasonable solution in a problematic case of this nature, what is needed is an integrated approach meaning thereby integration of the relevant tests wherefor it may be necessary to examine as to whether the workman concerned was fully integrated into the employer’s concern meaning thereby independent of the concern although

attached therewith to some extent.’ (Workmen of Nilgiri Coop. Mktg. Society case⁴¹, SCC p. 529, paras 37-38)”

64. It was concluded by this Court in Nalco case¹⁶ that there may have been some element of control with Nalco because its officials were nominated to the Managing Committee of the said schools. However, it was observed that the abovesaid fact was only to ensure that the schools run smoothly and properly. In this regard, the Court observed as follows: (SCC p. 772, para 30)

“30. ... However, this kind of ‘remote control’ would not make Nalco the employer of these workers. This only shows that since Nalco is shouldering and meeting financial deficits, it wants to ensure that the money is spent for the rightful purposes.”

65. Thus, it can be concluded that the relevant factors to be taken into consideration to establish an employer-employee relationship would include, inter alia:

- (i) who appoints the workers;
- (ii) who pays the salary/remuneration;
- (iii) who has the authority to dismiss;
- (iv) who can take disciplinary action;
- (v) whether there is continuity of service; and
- (vi) extent of control and supervision i.e. whether there exists complete control and supervision.

As regards extent of control and supervision, we have already taken note of the observations in **Bengal Nagpur Cotton Mills** case {(2011) 1 SCC 635}, **International Airport Authority of India** case {(2009) 13 SCC 374} and Nalco case {(2014) 6 SCC 756}.”

12. Very recently, the principle of law laid down in **Balwant Rai Saluja** (supra) has been followed by the Supreme Court in the matter of **Jiban Krishna Mondal and others v. State of West Bengal and others**⁵.

13. The principle enunciated and tests laid down by the

⁵ AIR 2015 SC 2417

Supreme Court in **Balwant Rai Saluja** (supra) has been followed by this Court in the matter of **President, Parent Teacher Association and others v. State of Chhattisgarh and others**⁶.

14. At this stage, it is appropriate also to consider the applicability of the provisions of the Evidence Act to Industrial adjudication. It is well settled law that provisions of the Evidence Act, 1872 *per se* are not applicable in an Industrial adjudication, however, its general principles do apply in proceeding before the Industrial Tribunal. The Constitution Bench of the Supreme Court in the matter of **Union of India v. T.R. Varma**⁷ while considering the applicability of Evidence Act to the Tribunal held as under:-

“10. Now, it is no doubt true that the evidence of the respondent and his witnesses was not taken in the mode prescribed in the Evidence Act; but that Act has no application to enquiries conducted by tribunals, even though they may be judicial in character. The law requires that such tribunals should observe rules of natural justice in the conduct of the enquiry and if they do so, their decision is not liable to be impeached on the ground that the procedure followed was not in accordance with that, which obtains in a Court of law.

Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no

⁶ Manu/CG/0171/2015

⁷ AIR 1957 SC 882

materials should be relied on against him without his being given an opportunity of explaining them.

If these rules are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in the Evidence Act for taking evidence was not strictly followed. Vide the recent decision of this Court in *New Prakash Transport Co. v. New Suwarna Transport Co.*, 1957 SCR 98: ((S) AIR 1957 SC 232) (C) where this question is discussed.”

15. Likewise, in the matter of **Municipal Corporation, Faridabad v. Siri Niwas**⁸, the Supreme Court has held that provisions of Evidence Act, 1872 *per se* are not applicable in Industrial adjudication, but the general principles are applicable. It has also been held that it is imperative for the Industrial Tribunal to see that principles of natural justice are complied with. The principle laid down in **Municipal Corporation, Faridabad** (supra) has been followed with approval by the Supreme Court in the matter of **Amar Chakravarty** (supra).

16. In the matter of **Municipal Corporation, Faridabad** (supra), it has been held by the Supreme Court that burden of proof lies upon the workman to show that he had worked continuously for 240 days in the preceding one year prior to his retrenchment and observed as under:-

“14..... As noticed hereinbefore, the burden of proof was on the workman. From the award it does not appear that the workman adduced any evidence whatsoever in support of his contention that he complied with the requirements of Section 25-B of the Industrial Disputes Act. Apart from examining

⁸ (2004) 8 SCC 195

himself in support of his contention he did not produce or call for any document from the office of the appellant herein including the muster rolls. It is improbable that a person working in a local authority would not be in possession of any documentary evidence to support his claim before the Tribunal. Apart from muster rolls he could have shown the terms and conditions of his offer of appointment and the remuneration received by him for working during the aforementioned period. He did not even examine any other witness in support of his case.”

17. In the matter of **Amar Chakravarty** (supra) it has been held that in any proceeding above the burden of proving a fact lies upon a party who substantially asserts it. It has further been held that when employer asserts misconduct of workman, then it was for him to prove that fact by leading evidence and observed as under:-

“12. In any proceeding, the burden of proving a fact lies on the party that substantially asserts the affirmative of the issue, and not on the party who denies it. (See *Anil Rishi v. Gurbaksh Singh*⁹, SCC p. 561, para 9.) Therefore, it follows that where an employer asserts misconduct on the part of the workman and dismisses or discharges him on that ground, it is for him to prove misconduct by the workman before the Industrial Tribunal or the Labour Court, as the case may be, by leading relevant evidence before it and it is open to the workman to adduce evidence contra. In the first instance, a workman cannot be asked to prove that he has not committed any act tantamounting to misconduct.”

18. In the matter of **R.M. Yellatti v. Asstt. Executive Engineer**¹⁰, Their Lordships of the Supreme Court have held that provisions of the Evidence Act in terms do not apply to the proceeding under Section 10 of Industrial Disputes Act and held as

9 (2006) 5 SCC 558

10 (2006) 1 SCC 106

under:-

“17. Analysing the above decisions of this Court, it is clear that the provisions of the Evidence Act in terms do not apply to the proceedings under Section 10 of the Industrial Disputes Act. However, applying general principles and on reading the aforesaid judgments, we find that this Court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workman stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily-waged earners, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (the claimant) can only call upon the employer to produce before the court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register, etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case. The above decisions however make it clear that mere affidavits or self-serving statements made by the claimant workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. The above judgments further lay down that mere non-production of muster rolls per se without any plea of suppression by the claimant workman will not be the ground for the Tribunal to draw an adverse inference against the management. Lastly, the above judgments lay down the basic principle, namely, that the High Court under Article 226 of the Constitution will not interfere with the concurrent findings of fact recorded by the Labour Court unless they are perverse. This exercise will depend upon the facts of each case.”

19. The decision rendered by the Supreme Court in **R.M. Yellatti** (supra) has been followed with approval in **ONGC Ltd. and another v. Shyamlal Chandra Bhowmik**¹¹ and further in the matter

¹¹ (2006) 1 SCC 337

of Chief Engineer, Ranjit Sagar Dam and another v. Sham Lal¹².

20. The Supreme Court in the matter of General Manager, Oil and Natural Gas Commission, Silchar v. Oil and Natural Gas Commission Contractual Workers Union¹³ laid down the parameters for judicial review of award of the Industrial Tribunal clearly indicating the grounds for interfering in the award. The relevant paragraph of the report as under:-

15..... It will be seen therefore that the interference would be limited to a few cases and as already noted above, in the case of a patent illegality or perversity. On the contrary, Mr.Sanyal's reliance on Sadhu Ram Case is more appropriate to the circumstances herein. It has been observed as under:- (SCC p.158, para 3)

“3.....The jurisdiction under Article 226 of the Constitution is truly wide but, for that very reason, it has to be exercised with great circumspection. It is not for the High Court to constitute itself into an appellate court over tribunals constituted under special legislations to resolve disputes of a kind qualitatively different from ordinary civil disputes and to readjudicate upon questions of fact decided by those tribunals. That the questions decided pertain to jurisdictional facts does not entitle the High Court to interfere with the findings on jurisdictional facts which the Tribunal is well competent to decide. Where the circumstances indicate that the Tribunal has snatched at jurisdiction, the High Court may be justified in interfering. But where the Tribunal gets jurisdiction only if a reference is made and it is therefore impossible ever to say that the Tribunal has clutched at jurisdiction, we do not think that it was proper for the High Court to substitute its judgment for that of the Labour Court and hold that the workman had raised no demand with the management.”

21. After having noticed the principles governing the determination of employee-employer relationship and also taking note

12 (2006) 9 SCC 124

13 (2008) 12 SCC 275

of the applicability of the provisions of the Evidence Act to the industrial adjudication and also taking note of scope of interference in industrial award, I would turn to the question as to whether existence of relationship of employer and employee has been established between the parties.

22. It is the case of the respondent / Union that their members listed in the reference were the employees of the petitioner / employer and their services have been terminated, they were neither served with any charge-sheet nor any enquiry was held against them, termination orders were neither passed nor communicated to them, even retrenchment compensation has not been paid nor notice pay has been paid, junior workers than the workers covered in the reference were retained and they are still in the employment of the petitioner / employer, new workers were also recruited and the entire action is wholly illegal being in contravention of the provisions of the Chhattisgarh IR Act, 1960 as also in contravention of the Standing Order and they have completed 240 days of service in preceding one calender year from the date than they were deprived of their work. However, it was also pleaded that if the Tribunal finds any lapse or misconduct on the part of the concerned workers, power and jurisdiction under Section 107 of the Chhattisgarh IR Act, 1960 may kindly be exercised, in the interest of justice.

23. On the other hand, it was pleaded on behalf of the

petitioner / employer that their Company namely M/s. BEC Impex International Pvt. Ltd., has ceased its functioning with effect from 8-5-1991 on account of the reason that the orders received from foreign countries have been completed, their respective contracts are over and no further orders have been placed by the foreign countries. It was also pleaded that the workers mentioned in the reference were engaged by the contractors employed by them for preparing the engineering items and it was the sole responsibility of the concerned contractors to engage their own labours/workers to carryout the contract work / job. It was also pleaded lastly that the functioning of M/s. BEC Impex International Pvt. Ltd., has ceased with effect from 8-5-1991 and it was specifically denied for want of knowledge that the persons whose names appear in the list attached with the reference have completed 240 days in the preceding one calender year as alleged and they be put to strict proof of the same and they are not entitled for any relief.

24. In order to prove the relationship, Shailesh Kumar has been examined on behalf of workmen / Union. He states that he and other 56 workers listed in the reference were working with M/s. BEC Impex International Pvt. Ltd., and all were getting ₹ 800/- per month as salary in the Time Office, and from March, 1990, he was dropped from service and from the year 1990 to 1991 other workers were also dropped from service. He has not filed any order of appointment, he

refutes having any document evidencing his appointment or his employment with the petitioner / employer. In cross-examination, he also states that he was not authorised on behalf of rest of the 56 workers to make a statement before the Tribunal, as such, this witness has failed to throw light on the relationship of employer and employee between the workmen / Union and the petitioner / employer and failed to state that payment of wages were made by the petitioner / employer or appointments were made by the petitioner / employer or dismissal order was passed by the petitioner or the petitioner exercised effective control over the workers of the respondent / Union. No documents have been filed demonstrating these relevant factors in line with the principle laid down by the Supreme Court in **Balwant Rai Saluja** (supra).

25. Chapter IV of the Chhattisgarh Industrial Relations Act, 1960 (hereinafter called as “the Act of 1960”) provides for Representatives of Employers and Employees and also provides for Appearance on their Behalf. Section 27 of the Act of 1960 provides for Representation of employees. Section 27 of the Act of 1960 provides as under:-

“27. Representation of employees.—The following shall be entitled to act and appear in the order of preference specified below as the representative of employees in an industry in any local area:-

(i) a Representative Union for such Industry;

(ii) any union of which the employee of such industry is a member;

(iii) Labour Officer.”

Rule 60 of the Chhattisgarh Industrial Relations Rules, 1961 provides as under:-

“60. A party or its representative in any proceeding before a Labour Court, the Industrial Court or a Board shall have the right of examination, cross-examination and re-examination of the witnesses called for by such party or the opposite party as the case may be.”

26. No person in line with the above-stated provision has been examined on behalf of the respondent workmen / Union except the self-serving statement of Shri Shailesh Kumar. On behalf of the petitioner / employer, Labour Officer Shri Ajay Hemant Deshmukh has been examined. He states that application Ex.D-1 was filed by the petitioner for issuance of license and he has proved Ex.D-1 – application for license made by the petitioner under the Contract Labour (Regulation and Abolition) Act, 1970 (for short 'the CLRA Act'). Ex.D-2 is order on such application, Ex.D-3 is an application for license by contractor J. James, Ex.D-4 is application for license by contractor Sanjay Tiwari, Ex.D-5 is application for license by contractor Bashir Ahmed, Ex.D-6 to Ex.D-8 is note-sheet of order granting license to these three contractors and Ex.D-9 to Ex.D-11 is copy of Form-5 issued by the petitioner for grant of license. Aforesaid licenses were granted to three contractors under the CLRA Act for the period from 1-9-1989 to 31-12-1989. Witness No.2 Kanti Gupta who

is Secretary of Metal and Engineering Works Union has also been examined. He has proved Ex.D-18 which is notice to the petitioner, Ex.D-19 is a letter for agreement dated 25-3-1991 and Ex.D-20 is certificate of registration of the Union. Whereas witness No.3 R.K. Shukla examined on behalf of the employer has proved that Ex.D-1 is lease deed, license is Ex.D-23, return filed with the Excise Department is Ex.D-26 to Ex.D-125 and letter sent to the Assistant Labour Commissioner is Ex.D-126. He has also filed copies of receipts Ex.D-127 to Ex.D-227 – final payment receipts of labours of Metal and Engineering Works Union in which only 5 workers referred in the reference namely Parmanand Dewangan (Ex.D-127), Krishna Kumar (Ex.D-128), Milan Ram (Ex.D-129), V. Shrinivas (Ex.D-156) and B.V. Ramanna Rao (Ex.D-163) have taken final payment. Shri R.K. Shukla further states that they used to issue appointment order to employees but such orders have not been produced in the Court, as he considered it unnecessary to produce the same before the Court. Upon being asked regarding submission of documents relating to CLRA Act, he states that they have not filed such documents as he considered it unnecessary.

27. After going through the pleadings of parties and after going through the evidence brought, I am of the considered opinion that the respondent / Union has failed to prove the relationship of employer-employee, as held by Their Lordships of the Supreme

Court in Bengal Nagpur Cotton Mills (supra) and Balwant Rai Saluja (supra). It is pertinent to note that out of two lines of defences taken by the petitioner, first line of defence is the labours engaged were the workers of the contractors. The documents brought on record would show that three contractors were granted license under the CLRA Act for the period from 1-9-1989 to 31-12-1989 vide Exs.D-3 to D-4 and vide Exs.D-6 to D-8. Exs.D-9 to D-11 are the forms filled by the petitioner under the CLRA Act, whereas, it is the case of the petitioner that their industry was closed with effect from 8-5-1991. Under Section 29 of the CLRA Act, every principal employer and every contractor is obliged to maintain such registers and records giving such particulars of the contract labour employed, the nature of work performed by the contract labour, the rates of wages paid to the contract labour and such other particulars in such form as may be prescribed. Though it is the categorical stand of the petitioner that the labours employed by them were labours of the contractor but no such documents have been filed to show that the employees were the employees engaged by the contractors. Ex.D-127 to Ex.D-227 is of no use as only five employees (as named in the preceding paragraph) out of 57 are said to have taken their final payment and rest of the employees were not shown to have even taken their final payment and no such documents showing them to be the contract labours maintained under Section 29 of the CLRA Act, were filed by

the petitioner / employer.

28. At this stage, plea of the respondent / Union that the petitioner / employer has failed to prove the compliance of the CLRA Act and contract, if any, by the petitioner with the contractor was sham and camouflage for not giving benefits to the members of the respondent / Union in garb of illegal contract amounted to unfair practice requires consideration. It was the obligation of the principal employer to comply with the provisions of Labour Law. The law in respect of Contract Labour is well settled. In the matter of **SAIL and Ors. v. National Union Waterfront Workers and Ors.**¹⁴, the Supreme Court has held that prohibition of contract labour can be considered only by the appropriate Government under Section 10 of the CLRA Act, 1970. Where the contract is alleged to be sham and camouflage, the industrial adjudicator has to adjudicate upon this issue and come to a conclusion if the contract was sham and camouflage.

29. It is the case of the respondent / Union that workmen listed in the reference were the direct employees of the petitioner / employer. They have not come-up with the reference or a plea in the statement of claim filed before the Industrial Court that the contract entered into between the contractor and the employer / management is sham and camouflage. Such a question has not been referred by

¹⁴ (2001) 7 SCC 1

the appropriate Government for adjudication and in absence of such reference, the nature of contract cannot be looked into collaterally in a reference made for adjudication of termination of the said employees.

30. It is well settled law that the Labour Court / Industrial Court is a creature of reference and they cannot go beyond the terms of reference except the questions incidental to the dispute and those who go to the root of the jurisdiction of the Labour Court / Industrial Court can be decided while answering a reference. The following passage from the judgment of the Supreme Court in the matter of **Mukand Ltd. v. Mukand Staff & Officers' Association**¹⁵ may gainfully be noticed herein: -

“36. We, therefore, hold that the reference is limited to the dispute between the Company and the workmen employed by them and that the Tribunal, being the creature of the reference, cannot adjudicate matters not within the purview of the dispute actually referred to it by the order of reference.”

31. Similarly, in the matter of **Pottery Mazdoor Panchayat v. Perfect Pottery Co. Ltd. and another**¹⁶, the Supreme Court again struck the similar proposition and it was held as under: -

“16. We are, therefore, of the view that the High Court was right in coming to the conclusion that the two Tribunals had no jurisdiction to go behind the references and inquire into the question whether the closure of business, which was in

¹⁵ (2004) 10 SCC 460

¹⁶ (1979) 3 SCC 762

fact effected, was decided upon for reasons which were proper and justifiable. The propriety of or justification for the closure of a business, in fact and truly effected, cannot raise an industrial dispute as contemplated by the State and Central Acts.”

32. Thereafter, in the matter of **The Workmen and others v. M/s Hindustan Lever Ltd.**¹⁷, Their Lordships of the Supreme Court have held that “the Tribunal derives its jurisdiction by the order of reference and not on the determination of a jurisdictional fact which it must of necessity decide to acquire jurisdiction”. Their Lordships have further held that “in industrial adjudication, issues are of two types : (i) those referred by the Government for adjudication and set out in the order of reference and (ii) incidental issues which are sometimes the issues of law or issues of mixed law and fact”.

33. Thus, on a reference made, the Tribunal is empowered to decide the dispute referred to it and also the matters incidental thereto. The question, therefore, that arises for consideration is whether the Industrial Court is justified in deciding the validity of the closure and further justified in directing compensation under Section 25-FFF of the ID Act to employees of the respondent / Union, and whether such an issue can be said to be falling within the meaning of the expression “incidental thereto”. The expression “incidental thereto” implies a subordinate and subsidiary point concerning main or principal point requiring some attention while considering the main

¹⁷ (1984) 1 SCC 728

point by the Tribunal. In the matter of **The Delhi Cloth and General Mills Co. Ltd. v. The Workmen and others**¹⁸, Their Lordships of the Supreme Court have considered the meaning of incidental occurring in sub-section (4) of Section 10 of the Industrial Disputes Act, 1947, and have held that something incidental to a dispute must mean something happening as a result of or in connection with the dispute or associated with the dispute. The dispute is the fundamental thing while something incidental thereto is an adjunct to it. Paragraph 9 of the report states as under: -

“9. From the above it therefore appears that while it is open to the appropriate Government to refer the dispute or any matter appearing to be connected therewith for adjudication, the Tribunal must confine its adjudication to the points of dispute referred and matters incidental thereto. In other words, the Tribunal is not free to enlarge the scope of the dispute referred to it but must confine its attention to the points specifically mentioned and anything which is incidental thereto. The word 'incidental' means according to Webster's New World Dictionary :

“happening or likely to happen as a result of or in connection with something more important; being an incidental; casual; hence, secondary or minor, but usually associated”:

“Something incidental to a dispute” must therefore mean something happening as a result of or in connection with the dispute or associated with the dispute. The dispute is the fundamental thing while something incidental thereto is an adjunct to it. Something incidental, therefore, cannot cut at the root of the main thing to which it is an adjunct.”

34. Following the principle of law laid down by Their Lordships

¹⁸ AIR 1967 SC 469

of the Supreme Court in the above-stated judgment, it is held that the submission of learned counsel for the respondent / Union that the alleged contract of the petitioner was sham and camouflage cannot be gone into in absence of valid reference by the appropriate Government to the Industrial Court for adjudication.

35. Now, I shall turn to the next plea raised by the petitioner / employer that the petitioner undertaking was closed on account of the reason that orders not having been received from foreign countries for which the industry was established which resulted in discharge of workmen engaged by the contractors. In para nine of the written statement, the management has clearly taken a stand that M/s. BEC Impex International Pvt. Ltd. ceased with effect from 8-5-1991 and has denied specifically for want of knowledge that the workers whose names appear in the list attached with the reference have completed 240 days of service in preceding two calendar years. The Industrial Tribunal relying upon the decision of the Supreme Court in the matter of **Management of Dandakaranya Project, Koreput v. Workmen through Rehabilitation Employees Union and others**¹⁹ has granted them compensation under Section 25-FFF of the ID Act.

36. It is not in dispute that the undertaking was closed with effect from 8-5-1991. Section 25-FF(2) of the ID Act provides that an employer who intends to close down an undertaking shall serve, at

¹⁹ AIR 1997 SC 852

least sixty days before the date on which the intended closure is to become effective, a notice, in the prescribed manner, on the appropriate Government stating clearly the reasons for the intended closure of the undertaking. Section 25-FFF provides for payment of compensation to workmen in case of closing down of the industry. Section 25-FFF(1) provides that where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure shall, subject to the provisions of sub-section (2), be entitled to notice and compensation in accordance with the provisions of Section 25-F, as if the workmen had been retrenched. In the present case, the question of closing down of industry was not referred for adjudication at all by the appropriate Government to the Industrial Court. It is appropriate to notice at this stage that by virtue of the provision contained in Section 110 of the Act of 1960, provisions relating to retrenchment and lay-off have been made applicable to the proceedings initiated under the provisions of the Chhattisgarh Industrial Relations Act, 1960. Section 110 of the Act of 1960 provides as under: -

“110. Saving of certain provisions of the Industrial Disputes Act.—Except Chapters V-A, V-B and V-C, and the other provisions with respect of lay-off, retrenchment compensation special provisions relating to lay-off, retrenchment and closure in certain establishment and unfair labour practices nothing in the Industrial Disputes Act, 1947 (No.XIV of 1947) shall apply to any

industry to which this Act is applied:”

Thus, the provision contained in the ID Act, 1947 including Section 25-FFF is applicable to the petitioner's industry to which the Chhattisgarh Industrial Relations Act, 1960 is applicable. However, since the petitioner itself has taken a plea to justify the termination of service, therefore, this question / issue is being examined.

37. The Supreme Court in the matter of **Management of Dandakaranya Project** (supra) has clearly held that if industry is closed, the employees thereof are entitled to compensation as provided under Section 25-FFF of the ID Act, and observed as under:-

“....This being the position the aforesaid decision cannot be of universal application in all cases where there has been a closure of the project which resulted in termination of the employees. Under the Industrial Disputes Act if an industry is closed the employees thereof are entitled to compensation as provided under Section 25-FFF of the Industrial Disputes Act.”

38. The Industrial Court has recorded a finding that the workmen of the respondent / Union are entitled for compensation under Section 25-FFF of the ID Act, as the industry was closed without following the procedure envisaged under the ID Act. In the case in hand, reference made by the appropriate Government was only to the extent that whether the termination of employees attached with the list in the reference was justified and proper, and to what

relief they are entitled for. There was no reference by the appropriate Government for adjudication whether the closure was justified or not. In the case in hand, the petitioner / employer raised a defence in his written statement that since the industry was closed down with effect from 8-5-1991, the workers employed in the industry were dropped. The question of closure of undertaking can be looked into for deciding the incidental question as to whether the termination of workmen of the respondent / Union is justified or not and compensation under Section 25-FFF of the ID Act can be granted only to workers in case of closing down of undertaking, and such closure is found to be illegal in a duly constituted reference made by appropriate Government to decide the validity of closure of the undertaking, but the validity of closure and grant of compensation under Section 25-FFF of the ID Act cannot be gone into collaterally in absence of valid reference by the appropriate Government in this regard while examining the validity of termination in a reference so made in that behalf by the appropriate Government.

39. Following the decisions of the Supreme Court in aforesaid judgments, the Industrial Court was entitled to examine the defence of the petitioner / employer as an incidental question to find out as to whether the termination of employees so made by the petitioner in the said undertaking is unjustified and ultimately, if it is found that the employees have wrongly been terminated without complying the

provisions of law on account of closure of undertaking, then the only relief the Industrial Court was entitled to grant was reinstatement of service and back-wages or compensation, but the Industrial Court without a valid reference under the Act of 1960 read with the ID Act, 1947 was not entitled to examine the non-compliance of procedural provisions for closure of the undertaking and after declaring the said closure illegal could not have awarded compensation under Section 25-FFF of the ID Act which is applicable to the undertaking of the petitioner, as it would amount to going beyond the terms of reference. Thus, for grant of compensation under Section 25-FFF of the ID Act in light of non-compliance of Section 25-FF(2) for closure of undertaking, valid reference by the appropriate Government under the provisions of the Chhattisgarh Industrial Relations Act, 1960 read with the Industrial Disputes Act, 1947 is *sine qua non* and admittedly, in this case, reference was not made by the appropriate Government for adjudication of closure of the petitioner's undertaking to the Industrial Court and as such, the order granting retrenchment compensation and notice pay under Section 25-FFF of the ID Act is wholly without jurisdiction and without authority of law. The Industrial Court is absolutely unjustified in granting compensation under Section 25-FFF of the ID Act for non-compliance of Section 25-FF(2) of the ID Act, as the Industrial Court went beyond the reference made by appropriate Government in directing payment of compensation

under Section 25-FFF of the ID Act, 1947 deserves to be quashed.

40. In the result, the writ petition is allowed in following terms:-

(A) The order passed by the Industrial Court granting compensation to the extent of ₹ 20,000/- to each of the workers listed in the reference and the order granting notice pay and compensation under Section 25-FFF of the ID Act are hereby quashed leaving the parties to bear their own cost(s).

(B) It has been stated at the Bar that some monetary benefit has been extended to the workers of the workmen-Union/ respondent No.1 pursuant to the interim order of this Court, keeping in view the long pendency of these petitions and they have been litigating for fairly long time since 1999, it would be appropriate to direct that such benefits given to them shall not be recovered by the petitioner / employer, in the interest of justice.

Sd/-
(Sanjay K. Agrawal)
JUDGE

B/-