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IN THE HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition No. 5143 of 1999**

M/s Vishva Vishal Engineering Ltd. Industrial Area, Bhilai, Distt.Durg
(MP) (Now CG)

---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. Vinod Deshmukh, Advocate.

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

For Respondent No.2 : None.

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

And**Writ Petition No. 72 of 2000**

Pragatisheel Engg. Shramik Sangh, Labour Camp, Jamul, District
Durg (M.P.) (Now C.G.))

---Petitioner**Versus**

1. Vishva Vishal Engineering Ltd, Bhilai
2. The State Industrial Court, (M.P.), HIG-16, Shankarnagar, Raipur
(M.P.) (Now C.G.)

---Respondents

For Petitioner : Mr. Varun Sharma & Mr.Vikas Dubey
Advocates.

For Respondent No.1 : Mr. Vinod Deshmukh, Advocate.

For Respondent No.2 : None.

Hon'ble Shri Justice Sanjay K. Agrawal

C A V ORDER

11/05/2016

1. The above-stated writ petitions have arisen out of award dated 16.10.1999 passed by Industrial Court, Raipur in Reference Case No. 12/M.P.I.R. Act, 1996. W.P. No. 5143 of 1999 has been preferred by the second party-employer namely M/s Vishva Vishal Engineering Limited against the part of the award granting compensation of ₹ 20,000/- to the employee attached with Reference made by appropriate Government, whereas W.P.No.72/2000 has been filed by the first party-Workmen Union namely Pragatisheel Engineering Shramik Sangh challenging the part of award refusing reinstatement/other benefits and claiming reinstatement with full back wages along with other consequential benefits.

[For sake of convenience Pragatisheel Engineering Shramik Sangh herein will be referred as Workmen-Union-first party and M/s Vishva Vishal Engineering Limited will be referred as second party as their status before the Industrial Court.]

BRIEF FACTS AND TERMS OF REFERENCE

2. Since both the writ petitions arise out of one and same Reference Case No. 12/1996 referred by appropriate Government to the Industrial Court for adjudication and answered by impugned award dated 16.10.99 and since common question of law and fact is

involved in both the writ petitions, they were directed to be heard analogously and are being decided by this common order.

3. The aforesaid challenge has been made by the first party/Union and second party/employer questioning the legality, validity and correctness of the respective part of award which they are aggrieved 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 That 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 second party/employer raised preliminary objection questioning the competency of reference particularly to the term 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, the first party/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 (65) detailed in the Reference were in the employment of the Second Party-Employer. It was further pleaded that the M.P.I.R. Act, 1960 & the Standard Standing Orders were applicable to member of first party/Union and those workers (65) were not issued any 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 second party/employer and new employees were also recruited, and the action of the second party/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 references in favour of first

party/Union by granting reinstatement in service along with full back wages and consequential benefits.

4. The second party/employer filed its written statement before the Industrial Court denying the averments made in the statement of claim raised by first party/Union. It is submitted that out of 65 persons detailed in reference, only 1 person, as annexed in Annexure – A of the written statement, had only been employed by the second party/employer. It was also pleaded that the second party has awarded the job contract to different contractors for doing the job of fabrication, turning, machining, painting, packing etc.. It was the sole responsibility of the concerned contractors to engage their own labour/workers to carry out the contract work/job. It was also their responsibility to pay wages/salaries to such respective employees engaged by them and all other employees except 1 person mentioned in the list attached with the statement of claim (w.s.) and there was no privity of contract between the second party/employer and the first party/union except 1 employee whose services were terminated after holding domestic enquiry consistent with the principles of natural justice and the first party/union or its members are not entitled for any relief(s).

5. During the course of trial of reference, first party/union examined solitary witness namely Shri Nilandri and exhibited the documents **Ex.P-1** to **Ex. P-23** i.e. attendance cards to prove its

case, whereas on behalf of second party/employer, three witnesses namely Manager Shri K.K.Handa (DW-1), Shri G.C. Sharma (DW-2) and Mohd. Hamid (DW-3) were examined in support of their case and exhibited the documents Ex. **D-1 to Ex. D-7** to prove its case.

FINDINGS OF THE INDUSTRIAL COURT

6. Upon appropriation of oral and documentary evidence on record, the Industrial Court, by its impugned award dated 16.10.1999 answered the terms of reference as under:-

(i) The first party/Union has failed to establish by leading appropriate legal evidence that they are entitled for the pay scale, allowances and for grant of leaves as per terms of reference No.1 and 2.

(ii) With reference to terms of reference No.3 it was held that the first party/union has failed to establish the existence of employee/ employer relationship between them and further failed to establish that the services of workers (65) of first party/union were terminated by the second party/employer, but since the second party/employer has failed to establish that the workers of the first part/union as per list attached with the reference were the labourers of the contractors employed by the second party/employer and second party/employer also failed to justify their termination, therefore each of worker of the Union as per list total 65 workers will be entitled for compensation to the extent of ₹ 20,000/-.

(iv) With reference to terms of reference No.4 no order was passed

as is relates to grant of interim relief during the pendency of the reference petition.

WRIT PETITIONS AND RETURN

7. Feeling aggrieved and questioning the legality and validity of the award granting compensation to the first party/union, the second party/employer has filed this writ petition stating *inter alia* that the Industrial Court having held that the existence of Employer and Employee relationship is not established between the parties, the Industrial Court committed legal error in shifting the burden upon the second party/employer to prove the existence of relationship between the parties and thereby holding that the second party/employer has failed to establish that workers (65) of the first party/union were the employees of the contractors engaged by the second party/employer and further committed legal error in holding that the second party/employer has failed to justify termination of workers (65) of first party/Union and thereby committed a jurisdictional error in granting ₹ 20,000/- to each of the worker (65) as per list attached with reference and therefore that part of the award granting compensation deserves to be set aside with cost(s).

8. Return has been filed by the first party/Union opposing the writ petition stating *inter alia* that the workers (65) as per list attached with reference are entitled for reinstatement and back

wages rightly granted by the Industrial Court and prayer has been made for dismissal of the writ petition as it is substanceless and having no merit.

9. Dissatisfied with the part of the award refusing reinstatement with full back wages the first party/Union has filed W.P.No.72/2000 stating *inter alia* that the part of the award by which it has been held that relationship of employer and employee is not established, is *per se* illegal and perverse being contrary to the record, consequently impugned award declining to grant relief of reinstatement with back wages is liable to be set aside and they are entitled for reinstatement along with full back wages.

10. The second party/employer has filed its return opposing this writ petition filed by the first party/Union stating *inter alia* that the workers of the first party Union except 1 worker listed in Annexure-A of its statement of claim (written statement) is neither entitled for compensation nor for reinstatement and back wages as no evidence have been lead by the first party/union to establish the existence of relationship of employer and employee between them and it has further been stated that the Industrial Court has fallen into grave legal error in granting even compensation to the workers of first party/union as per list of reference after having held that the relationship of employer and employee is not established between the parties and prayed that writ petition so filed be dismissed with cost(s).

SUBMISSION OF THE PARTIES

11. Mr. Vinod Deshmukh, learned counsel appearing for the second party/employer while assailing the award granting compensation to the tune of ₹ 20,000/- and opposing the submission of the learned counsel for first party/union the relief of reinstatement and back wages would submit as under:-

(i) That the initial burden to prove that relationship of employer and employee existed was upon the first party/union representing the workmen. The first party/union only examined solitary witness Shri Nilandri to prove its case, whereas it is case of first party that services of 65 workers had been terminated by the second party/employer as such the first party/Union has failed to discharge its burden of proving the existence of relationship of employer and employee, therefore the first party/union is not entitled for any relief and finding of the Industrial Court in this regard granting ₹ 20,000/- as compensation is perverse and liable to be set aside.

(ii) That, the Industrial Court having held categorically in the impugned award that the first party/union has failed to prove the existence of relationship of employer-employee between the parties thereby leading cogent and reliable evidence, committed grave legal error in further holding in contradiction to its earlier finding by holding that the second party/employer has failed to establish the fact that 65

workers attached with list with the reference were the employees of their contractors engaged by them and further committed legal error in holding that second party/employer has failed to justify the termination of those 65 workers.

(iii) That, workers of the first party/Union are neither entitled for reinstatement nor for the back wages or any other consequential relief and no evidence was led by the first party/Union to establish their case except self-serving statement of Shri Nilandri. Other workers have not entered into witness box to prove their case nor first party/Union has taken any steps on their behalf to prove their case and as such, writ petition filed by the first party/Union deserves to be dismissed and writ petition filed by the second party deserves to be granted and order granting compensation to the tune of ₹ 20,000/- be set aside.

12. Mr.Varun Sharma and Mr.Vikas Dubey, learned counsel appearing for the first party/union in both the cases while supporting the award and further claiming the relief of reinstatement and back wages with consequential benefits would submit as under:-

12.1 That, onus to prove and to justify the removal of workers of first party/Union was upon the second party/employer and second party/Employer had absolutely failed to discharge its burden and therefore, the Industrial Court is absolutely justified in holding that

second party/employer has failed to establish that workers of first party/union were employees as per list attached with reference of the contractors of the second party/employer and further failed to establish that their termination was justified and relied upon the judgment of the Supreme Court in the matter **Amar Chakravarty and others v. Muruti Suzuki India Limited**¹ to bring home their submission.

12.2 That, workers as per list attached with reference were employees of second party-Principal Employer and not of their contractor(s) as the second party-employer has selectively chosen 1 out of 65 to be their employees.

12.3 That, the finding of the Industrial Court holding that workers of first party/Union (65) were employees of second party/employer is the finding based on evidence and therefore, no interference is called for in exercise of jurisdiction under Article 227 of the Constitution of India and they are neither perverse nor illegal and relied upon the judgments of the Supreme Court in the matters of **General Manager, Oil and Natural Gas Commission, Silchar v. Oil and Natural Gas Commission Contractual workers Union**² and **Mukund Ltd v. Mukund Staff & Officers Association**³.

QUESTIONS INVOLVED

1 (2010) 14 SCC 471

2 (2008) 12 SCC 275

3 (2004) 10 SCC 460

13. Upon hearing the learned counsel for the parties in both the writ petitions and after going through the record the following questions emerge for consideration:-

(A) Whether there is relationship of employee and employer existed between the workers as per list attached with reference and second party/employer except 1 employee with whom relationship of employer-employee is admitted by the second party/employer and finding in this regard by the Industrial Court is justified or liable to be interfered with being perverse to the record?

(B) Whether the second party/Employer has justified the termination of 1 employee with whom relationship is admitted as per list attached with written statement and whether finding recorded in that regard is justified or liable to be interfered with being perverse to the record

And

What relief/relief(s) the parties are entitled.

14. I have heard the 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.

CONSIDERATION / DISCUSSION

Re-question No.1 [Whether there is relationship of employee and employer existed between the workers as per list attached with reference and second party/employer except 1 employee with whom relationship is admitted by the second party/Employer and finding in

this regard by the Industrial Court is justified or liable to be interfered with being perverse to the record?]

15. 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:-

15.1 The Supreme Court in the matter of **General Manager (OSD), Bengal Nagpur Cotton Mills, Rajnandgaon v. Bharat Lal and another**⁴ held that it was for the employee to establish the existence of employer-employee relationship by averring and to prove the said fact by leading reliable legal evidence. Paragraphs 10 to 13 of the report states 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.

4 (2011) 1 SCC 635

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*⁵ 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 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

5 (2009) 13 SCC 374

direct employee of the appellant, and rejected the application of the first respondent.”

15.2 In the matter of **Balwant Rai Saluja and another v. AIR India Limited and others**⁶, 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**⁷, which pertains to employees of the school established by Nalco, held (in **Balwant Rai Saluja**) (supra) 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 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

6 (2014) 9 SCC 407

7 (2014) 6 SCC 756

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}.”

16. To judge the legality and correctness of the impugned award, it is appropriate 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. Verma** 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 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.

17. 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).

18. In the matter (2004) 8 SCC 195 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:-

⁸ (2004) 8 SCC 195

“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 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.”

19. 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.”

20. In the matter of **R.M. Yellatti v. Asstt. Executive**

9 (2006) 5 SCC 558

Engineer¹⁰, 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 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.”

10 (2006) 1 SCC 106

21. 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 of **Chief Engineer, Ranjit Sagar Dam and another v. Sham Lal**¹².

22. The Supreme Court in the matter of **General Manager, Oil and Natural Gas Commission, Silchar v. Oil and Natural Gas Commission Contractual Workers Union**¹³ 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, para3)

“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

11 (2006) 1 SCC 337

12 (2006) 9 SCC 124

13 (2008) 12 SCC 275

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.”

23. After having noticed the principles governing the determination of employee-employer relationship and also taking note 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 rendered by Their Lordships of the Supreme Court, I would turn to the question as to whether existence of relationship of employer and employee has been established between the parties.

24. In order to consider the correctness of the finding recorded by the Industrial Court in this regard, it is appropriate to reiterate the case of the first party/union that the second party/employer has terminated the services of 64 employees as per list annexed with the reference without holding any departmental enquiry, whereas it is case of the second party that the above-stated 64 employees were not the employees engaged by them and only one employee Shri Tapan Sarkar was the employee of the second party, who had voluntarily left the job w.e.f. 27.3.1991, therefore, the first party is not entitled for any relief.

25. In order to prove the relationship, the twin tests laid down in **Bengal Nagpur Cotton Mills** (supra) are relevant. First test is who pays the salary and second test is whether the principal

employer/second party controls and supervises the work of the employees. In **Balwant Rai Saluja** (supra), relevant factors to be taken into consideration to establish such a relationship is who appoints the workers, payment of salary, authority to dismiss and to take disciplinary action, exercise of control and supervises have been included.

26. 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 employee.- The following shall be entitled to act and appear in the order of preference specified below as the representative of the 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 any such party or the opposite party as the case may be.”

27. In order to discharge the burden to prove the existence of relationship between 64 employees with that of the second party, only one witness Shri Nilandri has been examined on behalf of the first party. He has denied the fact of having possession of the documents relating to his employment with the second party. He has filed the documents Ex.P/1 to Ex.P/3 attendance card which have been issued by the contractors Shri A. Koshe, Shri M.L.Sahu and Shri S.S. Singh. Except the above-stated attendance card, he has not produced any documents evidencing the relationship of employer-employee between them. No other workers out of 64 have been examined before the Industrial Court to prove the said fact and no office bearer of the Union have entered into witness box to prove the said fact in terms of Section 27 of the Act of 1960 with the Rules made thereunder.

28. On the other hand, on behalf of second party/employer, Shri K.K.Handa, Manager of the said employer has been examined. He has clearly stated that the employees attached with the reference were not the employees of the second party except Shri Tapan Sarkar and in the year 1990 Shri Sher Singh, Shri Samsher Singh, Shri A.Koshe, Shri Mohd. Hamid and Shri M.L.Sahu were the contractors engaged by them to whom the contract of fabrication, machining and painting were given and their licenses were filed vide Ex.D/1 to D/4 and Ex.P/1 to Ex.P/3 were issued by these contractors.

He has also stated that payments were made by these contractors and works were also supervised by them.

29. Likewise, Labour Officer was also examined on behalf of the second party and contractor Mohd. Hamid Murtaza has also been examined who has clearly stated that he was working as contractor with the second party at relevant point of time and he has also licensed Ex.D/2 and has engaged labours with the second party/employer and out of the labours listed in the reference, 7 labours were working under him and as such, they were not the labours of the first party.

30. Applying the law laid down by the Supreme Court in the matters of **Bengal Nagpur Cotton Mills** (supra) and **Balwant Rai Saluja** (supra), the ultimate test is who pays the salary, who has appointed the employees and whether the principal employer/second party exercises control and supervises the work over the employees etc., In this case, there is no evidence on record to hold that six employees were appointed by the second party/employer as no order of appointment has been issued, no order of termination has been filed and proved to be issued by the second party/employer. There is no evidence that they were paid by the second party/employer at any point of time or neither there is any evidence that at any point of time, they were subjected to disciplinary control by the second party/employer. As the solitary witness entered on behalf of the first

party has failed to state about the appointment of six employees including himself and their termination, payment of salary, disciplinary control and that they performed work under the control of second party/employer, as such, none of the tests laid down in **Bengal Nagpur Cotton Mills (supra) and Balwant Rai Saluja (supra)** have been proved to establish the relationship of employer-employee. No office bearer of the Union has entered into the witness box as required under Section 27 of the Act of 1960 read with Rule 60 of the Rules of 1961 to establish the relationship of master-servant between them. Thus, this court is the considered opinion that the first party has miserably failed to prove and established existence of employer-employee relationship between 64 employees of the first party with that of the second party by leading appropriate legal evidence and adverse and contrary finding recorded by the Industrial Court in this behalf is hereby set aside.

Re-reference question No.2

31. That, the second party has admitted that Shri Tapan Sarkar was working with them and he has voluntarily left his job w.e.f. 27.3.1991 after working for a brief period. The second party having admitted the relationship has failed to bring appropriate evidence on record to establish such a plea that he has voluntarily left the job and witness examined on behalf of the second party has also failed to state as to whether any domestic enquiry was held against him for

unauthorized absent and whether order of termination was passed against him as he was in service. Thus, the second party has failed to discharge its burden and further failed to establish that services of Shri Tapan Sarkar were terminated in accordance with law and therefore, termination of service of Shir Tapan Sarkar is held to be illegal and it is further held that award passed in his favour by the Industrial Court is required no interference.

CONCLUSION

32. (i) That, the first party-Workmen-Union has failed to establish the existence of relationship between their 64 workers with that of second party/employer by leading appropriate legal evidence. The adverse finding recorded by the Industrial Court placing burden of proof on the second party/employer and granting compensation is contrary to law and perverse to the record and therefore, deserves to be set aside and accordingly set aside.

(ii) That, termination of service of Shri Tapan Sarkar is held to be illegal and award passed by the Industrial Court in his favour is hereby maintained.

RELIEF AND COST(S):-

33. (A) As a fall out and consequence of above-stated discussion, the impugned award in part recording finding contrary to

what has been held hereinabove with regard to the existence of relationship of employer-employee between them except 1 employee as mentioned in sub-para (i) of paragraph 32 is hereby set aside and result to that, the order granting compensation to the extent of ₹ 20,000/- is hereby set aside in part. The second party/employer is directed to make payment of compensation ₹ 20,000/- to the above-stated 1 employee within four weeks from today if not already paid and resultantly, Writ Petition No.5143 of 1999 filed by the second party/employer would stand allowed to the extent indicated hereinabove and Writ Petition No.72 of 2000 filed by the first party/union is hereby dismissed.

- (B) It has been stated at the Bar that some monetary benefit has been extended to the workers of the workmen-union/first party pursuant to the interim order of this Court, keeping in view the long pendency of this petitions and they have been litigating for fairly long time since 1999, it would be appropriate to direct that such a benefits given to them shall not be recovered by the second party-employer in the interest of justice.
- (C) I shall make no order as to cost(s) leaving the parties to bear their cost(s).

Sd/-

(Sanjay K. Agrawal)
JUDGE

B/-