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IN THE HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition No.4978 of 1999**

M/s. Simplex Engineering & Foundry Works Ltd., Unit I, 65, Industrial Estate, Bhilai, Madhya Pradesh (Now Chhattisgarh)

---Petitioner**Versus**

1. Pragatisheel Engineering Shramik Sangh, M.I.G. 1/5, HUDCO, Bhilai, M.P. (Now C.G.)
2. State Industrial Court, Bench at Raipur
3. State of Madhya Pradesh through the Secretary, Department of Labour, Bhopal.

---Respondents

For Petitioner : Mr. Prashant Jaiswal, Senior Advocate with Mr. K. S. Khanuja, Mr. Himanshu Sinha, Mr. Ashutosh Shukla and Mr. Yashwant Shrivastava, Advocates.

For Respondent No.1 : Mr. Anup Mazumdar & Mr. Varun Sharma, Advocates.

For Respondent No.2 : None.

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

For Intervener : Mr. Gautam Khetrapal, Advocate

And**Writ Petition No.51 of 2000**

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

---Petitioner**Versus**

1. Simplex Engg. & Foundry Works Unit I, Bhilai
2. The State Industrial Court, (M.P.), HIG-16, Shankarnagar, Raipur (M.P.) (Now C.G.)

---Respondents

For Petitioner : Mr. Anup Mazumdar and Mr. Varun Sharma,
Advocates.

For Respondent No.1 : Mr. Prashant Jaiswal, Senior Advocate
assisted by Mr. K. S. Khanuja, Mr. Himanshu
Sinha, Mr. Ashutosh Shukla and
Mr. Yashwant Shrivastava, Advocates.

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 the Industrial Court, Raipur in Reference Case No.1/M.P.I.R. Act, 1996. W.P.No.4978/1999 has been preferred by the second party-employer namely M/s. Simplex Engineering & Foundry Limited against the part of the award granting compensation of ₹ 20,000/- to the employees attached with Reference made by appropriate Government, whereas W.P. No.51/2000 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 will be referred as Workmen-Union-first party and Simplex Engineering & Foundry Works 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. 1/1996 referred by appropriate Government to the Industrial Court for adjudication and answered by impugned award dated 16.10.1999 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 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 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 the matter was remanded to the Industrial Court, Raipur for adjudication on merits, but thereafter the 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 (8) 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 the workers of first party/Union and those workers (8) 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 their 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 8 persons detailed in reference, 2 persons, 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 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 2 persons mentioned in the list attached with the statement of claim (w.s.) that they may have been engaged by the contractors and there was no privity of contract between the second party/employer and the first

party/Union except 8 employees. It was also pleaded that there is no relationship of employee and employer exists between the parties; and the services of employees except 2 employees had not been terminated by the second party/employer. Services of Ashim Das were terminated on account of grave misconduct whereas, Ramnath Deshmukh is still continuing in service, and as such the first party/union is not entitled for any relief.

5. During the course of trial of reference, first party/Union examined solitary witness namely Shri Keshav Ram Sahu, whereas on behalf of second party/Employer one witness namely Shri Yogesh Mukund Prasad Dave was examined. In support of their case, second party-employer exhibited documents (Ex.D-1 to Ex.D-12) to prove their 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 (8) 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 party/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 8 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 it relates to grant of interim relief during the pendency of the reference petition.

WRIT PETITIONS AND RETURN

7. Feeling aggrieved, 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 a 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 (8) 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 (8) of first party/Union and thereby committed a jurisdictional error in granting ₹ 20,000/- to each of the worker (8) 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 (8) 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.51/2000 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 his return opposing this writ petition filed by the first party/Union stating *inter alia* that the workers of the first party Union except 2 workers listed in Annexure-A of their 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. Prashant Jaiswal, learned Senior counsel appearing for the second party/employer, while assailing the award granting compensation to the tune of ₹ 20,000/- and opposing the submission of learned counsel for Union/first party, 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 Keshav Ram Sahu to prove their case, whereas it is case of first party

that services of 8 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, out of 8 employees listed in Annexure-A of the written statement, 2 employees were reported back for duty and they are still in service, whereas remaining 6 employees of the second party-employer despite the order of the Labour Court did not join their duty and have voluntarily and of their accord relinquished their services and as such, they are not entitled for any compensation.

(iii) That, the Industrial Court having held categorically in paragraph 17 of the 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 paragraph 52 of the award in contradiction to its earlier finding that the second party/employer has failed to establish the fact that 8 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 8 workers.

(iv) 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 Mr. Keshav Ram Sahu. 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. Anup Mazumdar & Mr. Varun Sharma, 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 (para 17 of the award) 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 of **Amar Chakravarty and others v. Muruti Suzuki India Limited**¹ to bring home his 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 2 out of 8 to be their employees.

12.3 That, the finding of the Industrial Court holding that workers of first party/Union (8) 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

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

1 (2010) 14 SCC 471

2 (2008) 12 SCC 275

3 (2004) 10 SCC 460

(A) Whether there is relationship of employee and employer existed between the workers as per list attached with reference and second party/employer except 2 employees 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 2 employees 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 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 2 employees 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 judgments 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, has 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 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

4 (2011) 1 SCC 635

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

5 (2009) 13 SCC 374

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 manner of execution of the act in question”.’

6 (2014) 9 SCC 407

7 (2014) 6 SCC 756

(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**⁸ 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,

⁸ AIR 1957 SC 882

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**⁹, 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 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

⁹ (2004) 8 SCC 195

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 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, 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, 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*¹⁰, 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

10 (2006) 5 SCC 558

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 Engineer**¹¹, 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

11 (2006) 1 SCC 106

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.”

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**¹² and further in the matter of **Chief Engineer, Ranjit Sagar Dam and another v. Sham Lal**¹³.

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**¹⁴ 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 is 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

12 (2006) 1 SCC 337

13(2006) 9 SCC 124

14 (2008) 12 SCC 275

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.”

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, 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 findings recorded by the Labour 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 eight employees as per the

list annexed with the reference without holding any departmental enquiry, whereas it is the case of the second party-employer that it has only two persons out of eight employees i.e. one Ashim Das and another Ramnath Deshmukh. Services of Ashim Das were terminated on account of grave misconduct by order of dismissal dated 20-1-1992 and he died subsequently on 1-7-1992, whereas Ramnath Deshmukh is still continuing his services. Therefore, the first party is not entitled for any relief.

25. In order to prove 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 employee. In **Balwant Rai Saluja** (supra), relevant factors to be taken into consideration to establish such a relationship, who appoints the workers, payment of salary, authority to dismiss and to take disciplinary action, exercise of control and supervises have been included.

26. In this case, in order to discharge the burden, which admittedly lies upon the first party-union who represents workmen. 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:-

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 the present case, on behalf of the first party, the only solitary witness Keshav Ram Sahu has been examined, he states before the Court on oath that no appointment order was issued to him, other co-employees were also working with him, he was brought in service in September, 1991, he has not been served with charge-sheet, he has not been served with order of dismissal and no retrenchment compensation was paid to him. On the other hand, in cross-examination, he has stated that no such appointment order was issued in his favour or in favour of other co-workers and there is no certificate of employment with him, he is also unable to state date, month and year of appointment of other five co-workers and he is

also not able to state the reason for dropping from service. On the other hand, Mr. Yogesh Mukund Dave has been examined as witness on behalf of the second party who has stated that the appointment order was issued to the worker who was engaged/employed on behalf of the second party-Union, only Ashim Das and Ramnath Deshmukh were issued with the appointment orders and remaining six workers attached with the reference was never employed by the second party. He has further stated that Ex.D-1, charge-sheet, was issued to Ashim Das, Ex.D-2 is his reply to charge-sheet, Ex.D-3 is order of appointment of enquiry officer, Ex.D-5 is additional reply to charge-sheet, Ex.D-7 is statements of witnesses, Ex.D-8 is order of dismissal and by Ex.D-9, he was served with the order of dismissal and same was also published in newspaper vide Ex.D-10. Dismissal order is dated 20-1-1992 but unfortunately, he died on 1-7-1992. In cross-examination, nothing has been brought out to establish the existence of employer-employee relationship with those employees with whom the relationship is denied by the second party-employer.

28. Applying the law laid down by the Supreme Court in the matters of **General Manager (OSD), Bengal Nagpur Cotton Mills** (supra) and **Balwant Rai Saluja** (supra), the ultimate test is who pays the salary, who has appointed the employee 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-Union 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 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 **General Manager (OSD), Bengal Nagpur Cotton Mills** (supra) and **Balwant Rai Saluja** (supra) have been proved to establish the relation 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.

29. Thus, this Court is of the considered opinion that the first party has miserably failed to prove and establish existence of employer-employee relationship between six workers of the first party with that of the second party by leading appropriate legal evidence

and though the Industrial Court has recorded a finding that both the parties have not lead the cognate evidence to prove the relationship, but yet, in paragraph 52 have recorded a finding that since the second party has failed to prove that workers were the employees engaged by the contractors and further proved that determination is justified and therefore, they are entitled for relief. In the considered opinion of this Court, the award is liable to be set aside.

Answer to question No.2: -

30. The second party has admitted that Ashim Das and Ramnath Deshmukh were their employees. However, it has been pleaded that services of Ashim Das were terminated on the ground of grave misconduct. It is their case that he was served with charge-sheet, he was subjected to regular domestic enquiry and after full-fledged enquiry, he has been dismissed vide order dated 1-7-1992 Ex.D-8 and the said order was published in the newspaper dated 3-5-1992 vide Ex.D-10. The Labour Court has also recorded a categorical finding in paragraph 28 of the award that the services of Ashim Das were terminated on account of misconduct in accordance with law. The said finding is in accordance with law and it is hereby affirmed.

31. So far as the second employee Ramnath Deshmukh is concerned, he himself has appeared in the Industrial Court and has

made statement that he is continuing in service, he does not want any relief and his case need not be adjudicated. Since he is already working with the second party-employer as he himself stated before the Court, no direction can be given to the second party with regard to Ramnath Deshmukh and direction given by the Labour Court deserves to be set aside

CONCLUSION

32. (i) That, the first party has failed to establish the existence of relationship between six workers with that of the second party by leading appropriate legal evidence. The adverse finding recorded by the Industrial Court placing burden to prove on the second party is contrary and perverse to the record and deserves to be set aside.

(ii) That, the second party has justified the termination of Ashim Das with whom relationship is admitted and Ramnath Deshmukh is already on job.

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 herein-above with regard to the existence of relationship between employer-employee is hereby set aside and result to that, the order granting compensation to the extent of ₹ 20,000/- is hereby set aside and resultantly, Writ Petition No.4978 of 1999 filed by the second party-employer would stand allowed.

(B) The writ petition filed by the Workmen-Union/first party bearing Writ Petition No.51 of 2000 would stand dismissed, being meritless as well as substanceless.

(C) 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.

(D) I shall make no order as to cost(s) leaving the parties to bear their cost(s).

Sd/-
(Sanjay K. Agrawal)
JUDGE

B/-