

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION***

WRIT PETITION NO. 10989 OF 2012

Jupiter Life Line Employees Union]
Maruti Mahadik Chawl, Chirag Nagar,]
J.K. Gram, Thane - 400606] ... Petitioner

Versus

1 State of Maharashtra,]
Through its Secretary,]
Ministry of Labour, Mantralaya,]
Mumbai 400 032]

2 Jupiter Life Line Hospitals Ltd.,]
Eastern Express Highway,]
Thane (W) 400606]

3 Rare Hospitality & Services Pvt. Ltd.]
10, Aishwarya Tower, Ground Floor,]
C.S.T. Road, Kalina, Santacruz (E),]
Mumbai 400 098] ... Respondents

Ms. Jane Cox i/b Mr. Manmohan A. Amonkar for the Petitioner.

Ms. Sushma S. Bhende, AGP, for the Respondent No.1-State.

Mr. Sudhir K. Talsania, senior counsel with Mr. Ravindra V. Paranjpe for the Respondent No.2.

***CORAM : S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.***

THURSDAY, 23RD MARCH, 2017

ORAL JUDGMENT : [Per S.C. Dharmadhikari, J.]

1 When this matter was argued on the earlier occasion
and even today, Ms. Bhende appearing for the State seeks an
adjournment to file an affidavit and secondly to produce the
record.

2 The petition is pending in this Court from 2012. The
order impugned in this writ petition is dated 30th January, 2012.

3 The private party had enough time to file an affidavit
and it placed on record its affidavit. We do not see why the State
despite having a stand of the private party before it, did not deem
it fit and proper to put in an affidavit-in-reply. In the
circumstances, the application for adjournment is rejected.

4 We have heard all the parties. We have perused the
writ petition and the annexures thereto. We have also perused
the affidavits placed on record by the second respondent.

5 The petitioner is a Trade Union. It has its registered

office at the address mentioned in the cause title. It represents the workmen in the establishment of the second respondent.

6 The petitioner claims to represent also those workmen who were working in the same establishment earlier. The first respondent is the State of Maharashtra.

7 The first respondent is sued in its capacity as an appropriate Government within the meaning of section 2(a)(ii) of The Maharashtra Contract Labour (Regulation and Abolition) Act, 1970 (for short "the Act of 1970").

8 The second respondent is a private limited company registered under the provisions of the Companies Act, 1956. This company is engaged in the business of providing medical health care so also related services. It had engaged the workers of the petitioner-union to work in its hospital at Thane. The third respondent is projected by the second respondent to be a contractor through whom the employees, who carry on the work of house keeping, cleaning and ward services were employed. Though the argument of the petitioner is that this contractual

arrangement is sham and bogus, that aspect need not detain us and for obvious reasons. The agreement is termed as a camouflage.

9 The petitioners state that the challenge is to the order dated 30th January, 2012. About 70 members were employed by the second respondent to carry out the above work and ancillary activities. They had been employed since the inception of the hospital in 2006. Some of the duties amongst others require and as part of housekeeping, ward boy, cleaning / maintenance activities, of removing the dirt in the hospital through sweeping, dusting, mopping on routine regularly basis, routine and regular cleaning of toilets, scrubbing of floors both manually and with equipment, cleaning of waste bins and collection of waste from the public areas. The duties of the ward boys amongst other range from transferring patients from ambulances to the wheelchair or on stretcher, internal shifting of patients, transferring various collected samples of blood, urine, stool, Biopsy to the Diagnostic Department of the hospital, transferring of different files and administrative records etc.. The hospital has various departments. It is in these circumstances that the work

is of permanent and perennial nature. It is carried out in three shifts, all seven days a week and fifty two weeks in a year. Given its nature, this work continues even on National holidays. The second respondent's officers, particularly its Manager Administration supervises this work.

10 The petitioner alleges that earlier the second respondent depicted these workmen as appointed through M/s. All Services, but from 2007, the records of the second respondent reflected that the workmen were employed and appointed through the third respondent. It is in these circumstances that the allegations of the arrangement being sham and bogus and a camouflage to get over the Parliamentary statute, namely, the Act of 1970, are made. Then, in paragraph 5 there is a reference to the wages and coverage under the Employees State Insurance Act, 1948, and a scheme for payment of provident fund. It is in these circumstances that the work is stated to be of a perennial and permanent nature.

11 In or about July, 2009, an application under section 10 of the Act of 1970 was made to the first respondent for

abolition / prohibition of the so called contract labour system. There is a State Advisory Contract Labour Board set up under section 5 of the Act of 1970. There were various meetings held after such an application was made. Paragraph 9 of the writ petition gives the details of these meetings. The petitioner alleges that when the second respondent became aware of the meetings held in January and July, 2010, it started terminating the services of the workmen. During the pendency of that application, services of 70 workmen were illegally terminated. The petitioners state that industrial disputes were raised and the matter is pending before the Assistant Labour Commissioner, Thane.

12 The State Advisory Contract Labour Board convened a meeting on 23rd December, 2010, wherein it recommended to the State Government that it should abolish / prohibit the contract labour system within the establishment of the second respondent. Annexure-B is a copy of this recommendation.

13 The petitioner also refers to the abolition of such contract labour in the hospital of Employees State Insurance

Corporation. It refers to a Central Government Notification. A writ petition was filed, being Writ Petition No.11290 of 2011 and directions were issued to take a decision under section 10 of the Act of 1970. However, it is stated that the first respondent took the impugned decision not to abolish or prohibit the contract labour system. In substance, it has rejected the recommendations of the State Advisory Board. The reasons, purportedly assigned, refer to an undertaking from the Management to absorb the contract labour / workmen against vacancies and on regular basis.

14 The petitioner states that there are 47 persons employed as house keepers / cleaners and ward boys. They have remained members of the union and they are presently without any employment and sustenance. The petitioner made a demand in writing on 22nd March, 2012, to provide them the status of permanent employees, but it is stated that a reply was given to the same on 6th April, 2012, denying that the ward boys and housekeepers were the employees of the second respondent. They denied any master-servant relationship.

15 We are not concerned with the allegations in that regard and set out in paragraph 13 of the petition.

16 The only contention raised before us by Ms. Cox appearing for the petitioner is that the decision of the State Government, as reflected from the impugned communication, is vitiated by total non-application of mind. It is contrary to the scheme of the Act of 1970. There is no reason and which would enable this Court to conclude that the factors and as appearing in sub-section (2) of section 10 were present to the mind of the State. The State could not have refused to discharge its obligation and in terms of the statute. The petitioner, therefore, prays that this decision be set aside.

17 As already stated above, there are two affidavits which have been filed by the second respondent. The first affidavit which has been filed by one Prashant P. Sawant working as Chief Manager - Human Resources, points out that the concerned Minister in the State Government has already passed an order mentioning that the contract labour system cannot be abolished. This order was followed by series of meetings and

discussions in the Labour Commissioner's office so also site visits. The competent authorities have visited the site, observed the nature of the work and it is identified as not of perennial nature. The contract of Rare Hospitality & Services Private Limited, namely, the third respondent, is terminated by the second respondent on 18th December, 2012. The charge has been handed over by the third respondent completely to the second respondent. Now, there is a new contractor from 1st February, 2013, namely, Dusters Total Solutions Services Private Limited. The new contractor has taken over. The petitioner's grievances and allegations as raised in the writ petition cannot be considered in writ jurisdiction. They raise a disputed question and of fact. On merits, it is stated that the work is not of perennial nature. The contracts are valid, legal and binding. There is absolutely nothing which would enable this Court to conclude that the arrangement is sham, bogus or a camouflage. Eventually, the second respondent says that it is managing and administering a full fledged hospital. The patient care and 24 X 7 requires that there is competent staff and particularly the ward staff. Therefore, it is not as if the situation prevailing in the hospital and the interest of the general public was not present to the mind

of the State. This is the stand in the first affidavit of 20th March, 2013.

18 An additional affidavit was also filed and affirmed by one Manisha Shah. She is employed as Corporate General Manager - Human Resources with the second respondent. She is serving since March, 2008. She has affirmed the contents of the earlier affidavit. She has also affirmed on oath that the members / workers concerned in the present petition approached through the petitioner-union, the competent Commissioner of Labour on 16th July, 2012. They raised the demand for reinstatement with full back wages and continuity of service. The conciliation meetings were held by the Assistant Commissioner of Labour and Conciliation Officer under the provisions of the Industrial Disputes Act, 1947. No conciliation or settlement was possible. A report indicating failure of talks was submitted on 10th May, 2016. Based on the contents of this report, the dispute between the parties was referred for adjudication to the Industrial Tribunal. The second respondent relies upon the contents of the failure report and the proceedings which are now registered as Reference (IT) No.32 of 2016, pending on the file of

the Industrial Court, Thane. The petitioner has committed several illegalities and those are highlighted in this affidavit from page 71 onwards. It is stated that there are intermittent instances of threat and intimidation to the employees of the second respondent.

19 Both these affidavits were present with their contents on record. There was sufficient time, therefore, for the statutory authorities to indicate as to how compliance is made with the Act of 1970. It must be clarified and at the outset that the pending reference in the Industrial Court involves an altogether different facet of the controversy. Whether the contract of employing labour on contractual basis is sham, bogus and a camouflage will be decided in these proceedings. Assuming that it is valid and legal, whether that arrangement should continue forever or whether that should be prohibited given the object and purpose of the Act of 1970, is the sole consideration for the appropriate Government in the present proceedings. That has to be determined by finding out whether the State / appropriate Government has discharged its obligation and duty in law. In *AIR 1972 SC 1942 [Veg Oils (Pvt) Limited vs. The Workmen]*, the

Hon'ble Surpeme Court has emphasized the object and purpose of the Act of 1970 (See paragraphs 26, 31, 41 and 42). We need not highlight and all over again the object and purpose of this Act. It is an Act to regulate the employment of contract labour in certain establishments and to provide for its abolition in certain circumstances and for matters connected therewith. The Act extends to the whole of India. It applies to every establishment in which twenty or more workmen are employed or were employed, on any day of the preceding twelve months, as contract labour. It also applies to every contractor or employer who employed, on any day of the preceding twelve months, twenty or more workmen. There is a proviso to sub-section (4) of section 1 whereby the appropriate Government may, after giving not less than two months' notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any establishment or contractor employing such number of workmen less than twenty as may be specified in the notification. By sub-section (5) of section 1, it is clarified vide clause (a) that the Act shall not apply to establishments in which work only of an intermittent or casual nature is performed. By clause (b) it is clarified that if a question arises whether work performed in an

establishment is of an intermittent or casual nature, the appropriate Government shall decide that question after consultation with the Central Board or, as the case may be, a State Board, and its decision shall be final. By the Explanation it is further amplified as to what can be styled as a work of intermittent nature. For the purpose of the sub-section, work performed in an establishment shall not be deemed to be of intermittent nature if it was performed for more than one hundred twenty days in the preceding twelve months or if it is of a seasonal character and is performed for more than sixty days in a year. Clause (c) has been introduced in sub-section (5) of section 1 under Maharashtra Act No.XIII of 2006. That is with effect from 2nd May, 2006. We are not concerned with the applicability of this amended provision. The term "*appropriate Government*" is defined in section 2 (a)(ii) to mean in relation to any other establishment, the Government of the State in which the other establishment is situate. The Act also states in this very definition that a workman shall be deemed to be employed as "contract labour" in or in connection with the work of an establishment when he is hired in or in connection with such work by or through a contractor, with or without the knowledge

of the principal employer. The term "*contractor*" is defined in section 2(c) and equally the term "*establishment*" in section 2(e). The terms "*principal employer*" is defined in section 2(g) and equally the term "*workman*" is defined in section 2(i). Each of these definitions would have a bearing when the issue of employment and engagement of the contract labour and particularly the conditions of their work and whether that system of extracting work at all should be permitted or, if permitted for sometime, should be abolished or prohibited.

20 What we have before us is Chapter II. That is titled as The Advisory Boards. Central Advisory Board is contemplated by section 3 and by section 4 The State Advisory Board. Section 4 reads as under :

"4. State Advisory Board.- (1) The State Government shall may constitute a Board to be called the State Advisory Contract Labour Board (hereinafter referred to as the State Board) to advise the State Government on such matters arising out of the administration of this Act as may be referred to it and to carry out other functions assigned to it under this Act.

(2) The State Board shall consist of -

(a) a Chairman to be appointed by the State Government;

(b) the Labour Commissioner, ex-officio; or in his absence any other officer nominated by the State Government in that behalf;

(c) such number of members, not exceeding eleven but not less than nine, as the State Government may nominate to represent that Government, the industry, the contractors, the workmen and any other interests which, in the opinion of the State Government, ought to be represented on the State Board.

(3) The number of persons to be appointed as members from each of the categories specified in sub-section (2), the term of office and other conditions of service of, the procedure to be followed in the discharge of their functions, by and the manner of filling vacancies among, the members of the State Board shall be such as may be prescribed:

Provided that the number of members nominated to represent the workmen shall not be less than the number of members nominated to represent the principal employers and the contractors."

21 A bare perusal of this provision would indicate as to how the State Government may constitute a board called as the State Advisory Contract Labour Board, to advise the State Government on such matters arising out of the administration of this Act as may be referred to it and to carry out functions assigned to it under this Act. The composition and constitution of the Board is dealt with in sub-section (2). By Chapter III, registration of establishments employing contract labour is contemplated. Sections 6, 7, 8 and 9 fall within this Chapter and

those sections deal with appointment of registering officers, registration of certain establishments, revocation of registration in certain cases and effect of non-registration. Then, comes section 10 which reads as under :

'10. Prohibition of employment of contract labour.- (1) *Notwithstanding anything contained in this Act, but, subject to the provisions of Clause (c) of sub-section (5) of section 1 the appropriate Government may, after consultation with the Central Board or, as the case may be, a State Board, prohibit, by notification in the Official Gazette, employment of contract labour in any process, operation or other work in any establishment.*

(2) *Before issuing any notification under sub-section (1) in relation to an establishment, the appropriate Government shall have regard to the conditions of work and benefits provided for the contract labour in that establishment and other relevant factors, such as -*

(a) *whether the process, operation or other work is incidental to, or necessary for the industry, trade, business, manufacture or occupation that is carried on in the establishment;*

(b) *whether it is of perennial nature, that is to say, it is of sufficient duration having regard to the nature of industry, trade, business, manufacture or occupation carried on in that establishment;*

(c) *whether it is done ordinarily through regular workmen in that establishment or an establishment similar thereto;*

(d) *whether it is sufficient to employ considerable number of whole-time workmen.*

Explanation.- If a question arises whether any process or operation or other work is of perennial

nature, the decision of the appropriate Government thereon shall be final.”

22 A perusal of this section reveals that it begins with a non-obstante clause. It is only subject to the provisions of clause (c) of sub-section (5) of section 1. The appropriate Government may, after consultation with the Central Board, or, as the case may be, a State Board, prohibit, by notification in the Official Gazette, employment of contract labour in any process, operation or other work in any establishment. Thus, the status of the State Advisory Board and its position in the enactment cannot be diluted and in the manner done. In the instant case, the State Government has failed to apply its mind and, as rightly contended by Ms. Cox, to the report and recommendations of the State Board. If the State Board recommends, then the appropriate Government before us may exercise its powers in terms of sub-section (1). It can issue the notification in the Official Gazette either prohibiting the employment of contract labour in any process, operation or other work in any establishment. Therefore, it is expected that there would be an application of mind to the process, operation or other work in a hospital, namely, the respondent No.2.

23 The section itself provides sufficient guidelines in the form of sub-section (2) and before the notification is issued in relation to an establishment, the appropriate Government shall have regard to the conditions of work and benefits provided for the contract labour in that establishment and other relevant factors. We wish to impress upon all concerned that this statute does not allow, much less, permits continuation or perpetuation of arrangements which are aimed at exploiting the workmen. If a regular work and/or work of a permanent or perennial nature is required to be performed in such establishment, it is common ground that the State is not expected to encourage violation of or contracting out from welfare and beneficial laws. The regular welfare legislations meant for protection of labour, the work force and the workmen in particular assure them certain benefits. The benefits of permanency and which are guaranteed by these legislations cannot be, therefore, taken away by an indirect process. In an indirect and oblique manner, the mandate of the legislation cannot be defeated. Similarly, when contract labour is permitted and within the four corners of the Act of 1970, then, its prohibition is contemplated as well and in the very statute.

Before a decision is taken to prohibit the contract labour, the appropriate Government is mandated to consider the conditions of work and benefits provided for the contract labour in a particular establishment and other relevant factors, the relevant factors are also enumerated in clauses (a) to (d) of sub-section (2). The work process, or operation or other work is of perennial nature or otherwise and if such question arises, a decision is also expected to be taken by the appropriate Government and which is given a finality. The other chapters ensure and particularly Chapter IV - Licensing of contractors and by Chapter V - Welfare and health of contract labour. Penalties are carved out for violating the provisions of the Act. By Chapter VI and VII which enacts miscellaneous provisions there is an obligation to appoint inspecting staff, maintain registers and other records. By section 30 it is clarified that the provisions of this Act shall have effect, notwithstanding anything inconsistent thereto contained in any other law or in the terms of any agreement or contract of service, or in any standing order applicable to the establishment whether made before or after the commencement of the Act. There is a proviso to sub-section (1) of section 30 which states that where under any such agreement, contract or service or standing

orders, the contract labour employed in the establishment are entitled to benefits in respect of any matters which are more favourable to them than those to which they would be entitled under this Act, the contract labour shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that they receive benefits under other matters under this Act. Further nothing contained in the Act of 1970 shall be construed as precluding any such contract labour from entering into an agreement with the principal employer or the contractor, as the case may be, for granting them rights or privileges in respect of any matters which are more favourable to them than those to which they would be entitled under this Act (See sub-section (2) of section 30). By section 31, there is a power conferred in the appropriate Government to exempt in special cases the establishment or class of establishments or class of contractors from the operation of the Act. There is a protection of action taken under the Act and granted to the statutory authorities. There is a power to give directions and that is conferred by section 33 in the Central Government. By section 34, there is a power to remove difficulties. There is a power to make rules and for the matters enumerated in sub-section (2) of

section 35. Thus, the enactment carves out a complete scheme. The Maharashtra Contract Labour (Regulation and Abolition) Rules of 1971 have also been framed. The registration and licensing is governed by Chapter II of these Rules. By Rule 25, form and terms and conditions of license and which form part of the license are enumerated. Then, various provisions enabling exercise of the powers conferred by the substantive provision of the Act are made.

24 If in the light of the above the impugned order is perused, it is apparent that the State Advisory Board made very detailed recommendations. The detailed recommendations, copy of which is at page 19 of the paper-book reveals that there was a meeting and which was convened. The meeting was presided over by the Hon'ble Minister of Labour, Government of Maharashtra, who is also the Chairman of the State Advisory Board. However, the other members and invited were the Minister of State for Labour, a special invitee, the Labour Commissioner who is also the Member Secretary of the State Board. There were five other members. They were representatives of workmen. Then, the Additional Commissioner

of Labour and Deputy Commissioner of Labour were present. The detailed findings in regard to M/s. Jupiter Life Line Hospital Limited, Express Highway, Service Road, District Thane, are then referred. It is stated that from 2006, the operations in the said hospital have commenced. There are about 600 regular work force. Apart from that, the Management has for the cleaning, maintenance and security, employed 260 contract labourers through five contractors. The work is performed annually (yearly basis) and is essential in nature. The proposal for abolition of the contract labour was placed before this meeting. The proposals are dated 19th January, 2010 and 1st July, 2010. The two meetings in which these proposals were discussed are extensively referred to in the minutes. After a reference to all these materials, the State Advisory Board observes and holds that whether the existing contract employees remain in service or otherwise, contract labour needs to be abolished. After a discussion, it was recorded that the establishment has reiterated that the contract labour is employed for cleaning, security and maintenance. These are permanent work force for these works. That is how it was unanimously agreed to recommend to the Government, abolition of contract labour.

25 What we have, therefore, before us is the impugned communication. The impugned communication refers to the minutes of the meeting of the State Advisory Board. On 23rd December, 2010, the State Advisory Board met and made the recommendations and which we have referred to above.

26 However, the impugned communication refers to some internal union of the contract employees and functional in the establishment of the second respondent. It is supposed to have made a request and based on that request on 27th September, 2011, the then Hon'ble Minister of Labour convened a meeting. He convened a meeting after issuing directions to the establishment, the concerned contractors and the representatives of the workmen. That meeting was convened by the Deputy Commissioner of Labour, Thane, on 15th November, 2011, and 25th November, 2011. It is in that meeting that the hospital establishment is supposed to have stated that if the concerned workmen whose cause was espoused, are ready and willing to come and report for work through contractors, the Management is ready and willing to allow them to work and in

future, in phases, they would be appointed on permanent basis. It is in these circumstances that a written undertaking was executed. It is in these circumstances that it is reported that the Government considered the larger public interest, the convenience of patients and the public unemployment resulting from abolition of contract labour, and decided not to abolish the contract labour for the time being.

27 We do not see how this could be the basis for a conclusion inasmuch as if there was a report of the State Advisory Board of which the Minister is the Chairman or Head, in the meeting of this statutory Board, duly convened, all the representatives were present, including the Commissioner and Deputy Commissioner of Labour, the recommendations were extensive. In such circumstances how, in individual capacity, the Minister of Labour entertained a request from an internal union of contract employees and directed the Deputy Commissioner of Labour to convene a meeting in his chamber of all concerned has never been explained or clarified. We do not think that the Act can be reduced to a nullity or its object and purpose defeated by such an exercise as is undertaken in the instant case. There is a

complete abdication of powers and conferred by the Act of 1970 in the competent authorities. We do not think how some assurance or undertaking of the Management was deemed enough. We do not see how any of the factors, and which are extremely relevant and to be found in section 10, can be permitted to be displaced by such an exercise as is brought before us. We do not think that the State has applied its mind in arriving at the conclusion. The reason assigned by Mr. Talsania, learned senior counsel appearing for the respondent No. 2 now is that the State Advisory Board did not obtain the views of the contractor and employer. That is why the Hon'ble Minister's intervention as above is justified. Equally, the patients' interests are paramount. We are sorry we cannot expect such a justification of the State's action by a private party who is a beneficiary. Ordinarily, it is not for this Court to substitute its views with that of the competent authorities and administering the Act. However, when the the mandate of the Act is sought to be defeated by taking into consideration such factors which are not relevant, but wholly irrelevant or extraneous, then, this Court would have to interfere so as not to allow the Act to be reduced to a paper legislation. Before the notification is issued, the relevant factors enumerated

in section 10(2) have to be considered. However, the State Government has discretion, and after consulting with the State Board, of prohibiting by issuing notification in the Official Gazette, employment of contract labour in any process, operation or other work in any establishment. Therefore, it is the nature of the employment, namely, hospital in this case, which would have to be considered and firstly. Secondly, which of the process, operation or other works involves employment of the contract labour and whether that work is of the nature specified in sub-section (2) of section 10 or otherwise, and lastly the conditions of the work and benefits provided for the contract labour in that establishment. Most importantly, when there was a recommendation made and a unanimous one by the State Advisory Board, then, what was the reason for discarding it, why was it not taken to its logical end and why the discretion in the State Government was not exercised in consonance therewith has not been clarified at all. We cannot have a justification for the order of the Government and provided by the establishment and which we can accept in the given facts and circumstances.

28 As a result of the above discussion, we quash and set

aside the impugned communication - Exhibit-D page 26 to the paper-book. We direct that the State Government shall take a fresh decision based on relevant factors and as expeditiously as possible. The State must enumerate why it is of the opinion that the contract labour in any process, operation or other work of the second respondent establishment should not be prohibited. Why it is not thinking it fit to prohibit this employment or contract labour must be indicated and with sufficient clarity. We are not laying down any absolute principle of law and for every case. We have found that if the State has proceeded to accept some assurance or undertaking in writing of the establishment, then, what has been the fate of such assurance or undertaking and the events post furnishing of the same ought also be taken into consideration as they are extremely relevant. It is in this light and in facts peculiar to this case that we quash and set aside the impugned communication and direct the fresh exercise in terms of the Act and the Rules.

29 The Writ Petition is, accordingly, disposed of. There shall be no order as to costs.

B.P. COLABAWALLA, J.

S.C. DHARMADHIKARI, J.