

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.193 OF 2007

Gulf Air Employees Association
through the General Secretary
having his office at Lok Bharati,
A2/206, IInd Floor, Marol Maroshi
Road Andheri (East)
Mumbai 400 059

...Petitioner

Versus

1. Gulf Air Company through
Manager India Maker Chamber 6
Ground Floor Nariman Point,
Mumbai 400 001.

...Respondents

2. M/s. Randive D/21 Bal Govind
Hsg. Society Taikal Wadi Mahim
Mumbai 400 016.

**WITH
WRIT PETITION NO.544 OF 2007**

M/s. Randive
a partnership concern registered
under the Indian Partnership Act,
having its office at
D/21 Bal Govind Hsg. Society
Taikalwadi Road, Mahim,
Mumbai 400 016.

...Petitioner

Versus

1) Gulf Air Employees Association a
Trade Union having its office at
having its office at Lok Bharati,
A2/206, 2nd Floor, Marol Maroshi
Road Andheri (East)
Mumbai 400 059
1. Gulf Air Company
Maker Chambers V, Ground Floor,

Nariman Point, Mumbai 400 021.

...Respondents

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Mr. V.P. Vaidya for the Petitioner in WP/193/2007 and for the Respondent No.1 in WP/544/2007.

Mr. Piyush Shah for the Petitioner in WP/544/2007 and for the Respondent No.2 in WP/193/2007.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

JUDGMENT RESERVED ON : 5/12/2017

JUDGMENT PRONOUNCED ON :11/12/2017

JUDGMENT :-

Both these Petitions arise from the award dated 23rd May, 2006 passed by the Presiding Officer, Industrial Tribunal in Reference CGIT -20 of 2001.

2. The Central Government in exercise of powers under clause (d) of Sub Section 1 and Sub Section 2-A of Section 10 of the Industrial Dispute Act, 1947, had by order No.L-11012/65/2001 (IR (C-I)) dated 23rd November, 2001 made the following reference :-

“Whether the demand raised by the Gulf Air Employees Association that Shri Laxman Martand Bhise and 15 other employees listed in the annexure thereto be reinstated and given benefits of regularization and permanency in the employment of Gulf Air Company is

legal and justified? If yes, the said employees are entitled to what relief and from which date?”

3. The Petitioner in Writ Petition No.193 of 2007 is a Trade Union registered under the Trade Unions Act, 1926 whereas, the Respondent No.1 is an Air Transport Company. The Petitioner-Union is representing 16 employees employed by the Respondent No.2- Contractor and who are engaged by the Respondent No.1-Company as loaders.

4. The Petitioner claims that these employees had put in service for about 12 to 21 years despite which the Respondent No.1- Company did not regularize their services contending that they were the employees of the contractor. The Petitioner-Union, therefore, filed a complaint of unfair labour practice. The Petitioner-Union had also filed an application seeking interim protection, which was granted from time to time. The said application for interim relief was heard and came to be dismissed. The Petitioner claims that after the dismissal of the said application, the services of the said employees came to be orally terminated. Subsequently, in view of the judgment of the Apex Court in *Steel Authority of India Ltd. and Ors. Vs. National Union Water Front Workers & Ors.*, the complaint came to be

dismissed. After several rounds of litigation and in view of the demands raised by the petitioner-Union, the Central Government referred the above reference to the Industrial Tribunal for its adjudication.

5. The case set out by the Petitioner-Union in the statement of claim is that the services of the concerned employees were engaged by the Respondent No.1-Company through the Respondent No.2-Contractor. The said employees were engaged to unload the luggage of the passengers. The services rendered by the employees were of permanent and perennial nature. The Petitioner-Union claimed that despite the employees rendering services for a period ranging from 12 to 21 years, the Respondent No.2-Contractor orally terminated their services during the pendency of proceedings for regularisation and permanency, without following due process of law. The Petitioner-Union claims that the termination of the employees is per se illegal and unjustified.

6. The Respondent No.1-Company has questioned the locus of the Union to raise the dispute stating that the concerned employees were not the employees of the Respondent No.1-Company and were not the members of the Petitioner-Union. The Respondent No.1-

Company has stated that there is no employer-employee relationship between the Respondent No.1-Company and the said employees. The services of these employees, who were employed by the Respondent No.2-Contractor as loaders, were availed by Respondent No.1-Company and several other air transport companies. These employees were protected under various statutes like ESI and Payment of Bonus Act, none of them were deprived of any legitimate benefits. The Respondent No.1-Company claimed that they had neither employed the employees nor terminated their services. Hence, the demand of the Petitioner-Union against the Respondent No.1-Company is not maintainable.

7. The Petitioner-Union herein filed his rejoinder wherein it has denied that the employees were not in the employment of the Respondent No.1-company. The Petitioner-Union reiterated that the said employees were employed by Respondent No.1-Company through the Respondent No.2-Contractor and that their services were also illegally terminated by the Respondent No.1-Company through the Respondent No.2-contractor, during the pendency of the complaint of unfair labour practice. The Petitioner-Union denied that the employees were working for other air transport companies. The Petitioner-Union

claimed that the contract between the Respondent No.1-Company and the Respondent No.2-Contractor was sham and nominal.

8. The Petitioner-Union herein thereafter filed an application to summon the Respondent No.2-Contractor and to produce documents including the records of the employees. Pursuant to the application filed by the Petitioner-Union, summons was issued to the Respondent No.2-Contractor for production of certain documents. The Respondent No.2 appeared before the Tribunal and filed an application to implead it as a party to the reference. Accordingly, the Respondent No.2 came to be impleaded as a party Respondent No.2.

9. The Respondent No.2-Contractor filed his written statement dated 2nd May, 2003 and contended that the said employees are not the members of the Petitioner-Union and as such the Petitioner-Union has no *locus standi* to espouse the cause of these employees. The Respondent No.2 further claimed that it is a partnership firm, which is providing ground handling services to the Respondent No.1-Company and other airlines in Mumbai. The Respondent No.2 claimed that the concerned employees were employed by them and that they were under their supervision and control. These employees alongwith several other employees are on its regular payroll and are offered all

benefits under the Provident Fund Act, ESI Act, Payment of Bonus Act, etc. The Respondent No.2-Contractor claimed that the services of loaders can be utilized from any of the ground handling agencies, which are cross utilized between various airlines for optimum operational use. The Respondent No.2-Contractor has claimed that the concerned employees were not working exclusively for the Respondent No.1-company and that their services as loaders were also made available to other airlines. The Respondent No.2 further claimed that it had not terminated the services of the employees but the employees had themselves failed to report for duty. These Respondents have claimed that the demand raised by the Petitioner-Union is not legal, valid or justified.

10. The Petitioner as well as the Respondents adduced evidence in support of their respective claims. The learned Presiding Officer, after analyzing and appreciating the evidence on record, held that :-

- (i) The concerned employees were not employed by the Respondent No.1-Company but were employed by the Respondent No.2-Contractor and that they worked under the supervision and control of the Respondent No.2-Contractor.

(ii) The Respondent No.1-Company had engaged the services of these employees under the contract with the Respondent No.2-Contractor. The said contract is not camouflage or sham.

(iii) The Respondent No.2-Contractor was also using the services of the concerned employees for other airlines depending on the exigencies of work.

(iv) The concerned employees were not the employees of the Respondent No.1-Company and are not the members of the Petitioner-Union. The Petitioner-Union had no *locus standi* to raise the industrial dispute. Hence, the reference is not maintainable as against the Respondent No.1-Company.

(v) Since the Respondent No.2 contractor has admitted that the concerned employees were their employees and that they have not terminated their services, the Respondent No.2 should provide work to the said employees.

11. Aggrieved by this award, the Petitioner-Union has filed the Writ Petition No.193 of 2007. The Respondent No.2-Contractor has also challenged the findings recorded in paragraph 15 of the award as well as the directions for providing work to the concerned employees.

12. It is not in dispute that the Respondent No.1-company is engaged in the business of air transport. As an air transporter, it is required to take care of the baggage of the passengers as well as the cargo. Once the passenger is issued a boarding pass, it is the duty of the airline to put the baggage of the passenger as well as the other cargo in the aircraft and to deliver the same to its destination. Loaders are engaged for transferring, loading, and unloading the luggage from the Aircraft.

13. The employees represented by the Petitioner-Union were working as loaders for the Respondent No.1-company. The Petitioner-Union had claimed that employees were employed by the Respondent No.1-company through the Respondent No.2-Contractor. Considering the nature of the dispute raised, it would be necessary to refer to the decision of the Apex Court in *Steel Authority of India Ltd. &Ors. National Union Water Front Workers & Ors. 2001(7) SCC 1* wherein the constitution Bench of the Apex Court has held that :-

"(3) Neither Section 10 of the CLRA Act nor any other provision in the Act whether expressly or by necessary implication, provides for automatic absorption of contract labour on issuing a notification by appropriate Government under Sub Section (1) of Section 10, prohibiting employment of contract labour, in any process, operation or other work in any establishment. Consequently the principal employer cannot be required to order absorption of the contract labour working in the concerned establishment.

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(5) On issuance of prohibition notification under Section 10(1) of the CLRA Act prohibiting employment of contract labour or otherwise, in an industrial dispute brought before it by any contract labour in regard to conditions of service, the industrial adjudicator will have to consider the question whether the contractor has been interposed either on the ground of having undertaken to produce any given result for the establishment or for supply of contract labour for work of the establishment under a genuine contract or is a mere ruse/camouflage to evade compliance of various beneficial legislations so as to deprive the workers of the benefit thereunder. If the contract is found to be not genuine but a mere camouflage, the so-called contract labour will have to be treated as employees of the principal employer who shall be directed to regularise the services of the contract labour in the concerned establishment subject to the conditions as may be specified by it for that purpose in the light of para 6 hereunder.

(6) If the contract is found to be genuine and prohibition notification under Section 10(1) of the CLRA Act in respect of the concerned establishment has been issued by the appropriate Government, prohibiting employment of contract labour in any process, operation or other work of any establishment and where in such process, operation or other work of the establishment the principal employer intends to employ regular workmen he shall give preference to the erstwhile contract labour, if otherwise found suitable and, if necessary, by relaxing the condition as to maximum age appropriately taking into consideration the age of the

workers at the time of their initial employment by the contractor and also relaxing the condition as to academic qualifications other than technical qualifications."

14. In *International Authority of India Vs. International Air Cargo Workers Union and Anr.* 2009(13) SCC 374 the Apex Court has held thus:-

"37. The industrial adjudicator can grant the relief sought if it finds that contract between the principal employer and the contractor is sham, nominal and merely a camouflage to deny employment benefits to the employer and that there is in fact a direct employment, by applying tests like: who pays the salary; who has the power to remove/dismiss from service or initiate disciplinary action; who can tell the employee the way in which the work should be done, in short, who has direction and control over the employee. But where there is no notification under Section 10 of the CLRA Act and where it is not proved in the industrial adjudication that the contract was a sham/nominal and camouflage, then the question of directing the principal employer to absorb or regularise the services of the contract labour does not arise.

38. The tests that are applied to find out whether a person is an employee or an independent contractor may not automatically apply in finding out whether the contract labour agreement is a sham, nominal and is a mere camouflage. For example, if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer; if the salary is paid by 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."

15. Reverting to the facts of the present case, Narayan More, General Secretary of the Petitioner-Union has admitted that the employees represented by the Petitioner-Union are the loaders and employed by the Respondent No.2-contractor. He has stated that the Respondent No.2-contractor provides ground handling services to various airlines. He has further admitted that all the employees of the Respondent No.2 are covered under ESI and other statutory benefits. He has made a vague statement that even assuming that there is a contract between the Respondent No.1-Company and the Respondent No.2-Contractor, the said contract can be termed as sham, bogus or camouflaged. He has not substantiated the said statement in any manner on the contrary, he has admitted in his cross examination that the Respondent No.1 has not issued any appointment letter or identity

card to the employees. He has further admitted that wages of the loaders are paid by the Respondent No.2-Contractor. He has admitted that the allocation of work of loaders is done by the Respondent No.2-contractor. The evidence of this witness does not indicate that the Respondent No.1-Company had any control over the employees employed by the Respondent No.2-Contractor, particularly as regards appointment, payment of salary, allocation of duties, supervision or in the matter of disciplinary action.

16. The evidence of RW1 Shailesh Muzumdar, who at the relevant time was working as HR and Administrative Officer and used to look after personnel and administrative matters of the Respondent No.1-Company indicates that the concerned employees were employed by the Respondent No.2-Contractor. The Respondent No.2-Contractor was supervising and controlling the work of workers. He was paying their monthly wages. This witness has further stated that said employees were not working exclusively for the Respondent No.1-Company and that they were also working as loaders for other Airline Companies.

17. He has deposed that at the relevant time the Respondent No.1-Company was operating very few flights in a week. The

concerned loaders were therefore, required to work only for few hours in a week. The Respondent No.1-Company therefore, did not require any loaders on permanent basis. He has further stated that as and when required Air India and Cambata Aviation also used to carry out loading work of the Respondent No.1-Company through their employees/loaders. He has stated that the Respondent No.1-Company does not have any post of loaders and that there is no mention about loaders in long term settlement signed between the Respondent No.1-Company and the Petitioner-Union. The work is therefore, not permanent or perennial in nature. He has also deposed that the employees engaged by the Respondent No.2-Contractor were getting the benefits under ESI, Payment of Bonus Act and Gratuity Act, etc. He has further stated that there is a valid contract between the Respondent No.1-company and the Respondent No.2-contractor for providing services of the loaders. This witness has denied the suggestion that the concerned employees were assigned for duties only of the Respondent No.1-Company and that they were not assigned the duties as loaders of other Airlines.

18. The evidence of this witness which has virtually gone unchallenged amply proves that the concerned employees are

employees of the Respondent No.2-Contractor and that there is a contract between the Respondent No.1-Company and the Respondent No.2-Contractor. It was not even suggested to this witness that the said contract was bogus and sham. The evidence of this witness is also supported by Dilip Randive, one of the partners of the Respondent No.2-Contractor. He has deposed that apart from the Respondent No.2-Contractor several other agencies viz. Cambata Aviation, Oberoi Flight Services and Air India were also providing ground handling services at Mumbai Airport. He has deposed that the Respondent No.2-Contractor has several employees on its regular pay roll and that all these employees are getting statutory benefits under the Provident Fund Act and ESI and Bonus Act, etc. He has stated that employees of the ground handling agencies including that of the Respondent No.2-Contractor are utilised by various Airlines including the Respondent No.1-company. Similarly, the Respondent No.1-Company has also used the services of other ground handling agencies even at Mumbai Airport. He has further stated that the Respondent No.2-contractor does not provide services exclusively to the Respondent No.1-Company and that it also provides services to other customer airlines. Hence, the Respondent No.1-company cannot regularise the employees of the Respondent No.2-contractor. He has further stated that the Petitioner-

Union has no locus standi to pursue any of the demands of the employees employed by the Respondent No.2-Contractor. In his cross examination, he has stated that the Respondent No.2-Contractor was supervising the work of said employees. The Respondent No.2-Contractor was also giving day-to-day instructions to these employees. The Respondent No.2-Contractor was rotating the shifts and were allocating duties to the said employees. The wages of the said employees were also paid by the Respondent No.2-Contractor. There is absolutely no challenge to this evidence.

19. The evidence of RW1 and RW2 amply proves that these employees were appointed by the Respondent No.2-Contractor, which was providing ground handling services to several Air Transport Companies. There was an agreement between the Respondent No.1-Company and the Respondent No.2-Contractor for providing services of the loaders. Pursuant to the said agreement the Respondent No.2-Contractor had provided ground handling services to the Respondent No.1-Company. Though the Petitioner-Union has claimed that the agreement is bogus, sham and nominal and merely a camouflage, the Petitioner-Union has neither examined any of these employees nor adduced any other evidence to substantiate the said claim. On the

contrary, the evidence on record amply proves that the duties of these employees were allotted and shifts were rotated by the Respondent No.2-Contractor. Their salaries were paid by the Respondent No.2-Contractor. They were working under direct control and supervision of the Respondent No.2-Contractor and their services were regulated by the Respondent No.2-Contractor. In short, the primary control was with the Respondent No.2-Contractor. The real employer of these employees was therefore the Respondent No.2-Contractor and there was no employer-employee relationship between the Respondent No.1-Company and the concerned employees.

20. The evidence adduced by the Respondents also proves that the Respondent No.1-company used to also utilise services of the employee /loaders provided by other ground handling agencies viz. Air India and Cambata Aviation. The evidence further reveals that the Respondent No.2-Contractor used to assign and allot services of these employees to other Airlines. As stated earlier, none of the employees have stepped into the box to refute the said evidence. There is no evidence to prove that these employees were working exclusively for the Respondent No.1-Company and that they were under direct control and supervision of the Respondent No.1-Company and that the

contract between the Respondent No.1-Company and the Respondent No.2-Contractor was sham. The Petitioner-Union having failed to prove that the concerned employees were the direct employees of the Respondent No.1-Company or that the agreement was sham, nominal or camouflage, the question of directing the Respondent No.1-Company to regularise and/or to give permanent status to these employees of the Respondent No.2-Contractor does not arise. The findings recorded the learned Presiding Officer are based on evidence on record and hence, do not warrant any interference in a limited jurisdiction of Judicial Review under Article 227 of the Constitution. The Writ Petition No.193 of 2007 is devoid of merit and is liable to be dismissed.

21. In Writ Petition No.544 of 2007, the Respondent No.2-Contractor has challenged the directions given by the Tribunal to provide work for these employees. In paragraph 15 of the award the Tribunal has observed that the concerned employees continued to be the employees of Respondent No.2-Contractor. In view of the statement made by the witness for the Respondent No.2 that it had not terminated the services of the employees in reference and the employees had themselves stopped reporting for the duty, the Tribunal

directed the Respondent No.2-Contractor to provide work to the concerned employees.

22. It is pertinent to note that the dispute raised by the Petitioner-Union as well as the reference made by the Central Government was relating to reinstatement and regularisation of the concerned employees as against the Respondent No.1-Company. Since the Petitioner-Union had not made any claim against the Respondent No.2-Contractor, no issue in this regard was framed. Consequently, no evidence was adduced either by the Petitioner-Union or by the Respondent No.2-Contractor on the issue of termination of the employees and the liability of the Respondent No.2-Contractor to provide work or to reinstate the concerned employees. The only issue in the reference was whether the concerned employees were entitled for reinstatement, regularisation and permanency of their services by the Respondent No.1-Company. It is well settled that the jurisdiction of the Tribunal in industrial dispute is restricted to the points specifically referred for its adjudication and the matters incidental thereto. In the instant case, for the reasons stated above, the Tribunal has held that the concerned employees were not entitled for any reliefs or directions as against the Respondent No.1-Company. The Tribunal having

dismissed the claim against the Respondent No.1-Company, could not have issued directions to the Respondent No.2-Contractor, who was not even a party to the reference, to provide work to the concerned employees. Needless to state that by issuing such directions, the Industrial Tribunal has traversed beyond the scope of the reference. Thus, the observations made and directions given in paragraph 15 of the award are in contravention of well settled principles and the same cannot be sustained.

23. Under the circumstances and in view of discussion supra, the Writ Petition No.193 of 2007 is dismissed and the Writ Petition No.544 of 2007 is allowed. The observations made and directions given in the paragraph No.15 of the impugned award 23rd May, 2006 are hereby quashed and set aside.

(ANUJA PRABHUDESSAI, J.)