

Shri Mahadev K. Naik ... Petitioner
Talsal, Talaulim,
Ponda, Goa – 403 401

versus

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| 1 | M/s. Cidade de Goa,
Vainguinim Beach,
Dona Paula, Goa | |
| 2 | M/s. Fomento Resorts Pvt. Ltd.
Vainguinim Beach,
Dona Paula, Goa | |
| 3 | Presiding Officer,
Labour Court – II, Govt. of Goa,
Panaji – goa. | ... Respondents |

Shri Shivaraj Gaonkar, Advocate for the petitioner.

Shri G.B. Kamat, Advocate for the respondents.

CORAM : NUTAN D. SARDESSAI, J.

RESERVED ON : 20th March 2018.

PRONOUNCED ON : 11th April, 2018.

JUDGMENT :

1. This Writ Petition takes exception to the Award dated 24/05/2010 passed by the learned Presiding Officer of the Respondent No.3 under Articles 226 and 227 of the Constitution of India
2. Briefly, it was the petitioner's case that he was working for

M/s. Fomento Resorts and Hotels Ltd. ('Fomento Resorts', for short) for the construction of the Cidade de Goa Hotel from 1979. He had requested the respondent No.1 to confirm his services since he was working for them since 1979 and in view of his hard work and expertise a recommendation note dated 28/11/1983 was issued by the Project Manager instead of the appointment letter. The Director of M/s. Fomento Engineering and Construction Ltd. ('Fomento Engineering', for short) had obtained an application dated 30/11/1983 from him which was not voluntarily made by him and obtained by the exercise of fraud. Fomento Engineering had issued a letter dated 20/12/1983 and offered the post of 'Civil Supervisor' to the petitioner. He had then requested for the confirmation of his service in Fomento Engineering vide his letter dated 20/11/1984 and they had confirmed his services on 29/01/1985 and subsequently his services were transferred to the respondent No.2 in 1988. Fomento Engineering wrote to the respondent No.2 on 22/03/1988 that the services of the petitioner were lent to them w.e.f. 01/03/1988. Fomento Engineering by its letter dated 02/03/1989 wrote to the respondent No.2 informing them that the services of the petitioner were already transferred to them and they had not received any remittance. On 01/08/1989 the respondent No.1 informed him that his designation, grade and

salary had been revised in view of his valuable contribution for several years. His emoluments were revised on 21/12/1990 as per the agreement between the Management and the Employees Union of the respondent No.1.

3. He was awarded a Certificate of merit in 1990 and a special recognition award was also issued in that year. He was issued a Certificate for meritorious service of 10 years by the respondent Nos.1 on 06/07/1982 thereby acknowledging his long service. All contributions like Employees State Insurance and Provident Fund of the petitioner were paid by the respondent No.1. It is only 13 years later on 20/06/2005 the respondent no.1 wrote a letter to the Fomento Engineering that they were sending the petitioner back to them. He had written to the respondent No.1 in that context on 23/06/2005 that the question of reporting back to Fomento Engineering did not arise as his services were taken over vide the letter dated 01/08/1989 and giving him continuity in service from 01/02/1982. The Management of the respondent No.1 wrote to him on 30/06/2005 that his services were lent by Fomento Engineering and that he was merely a 'transferee employee' and not their employee. On 01/07/2005 Fomento Engineering wrote a letter to him indicating that they were informed by the respondent No.1 that his services were no longer

required and that as Fomento Engineering also ceased operations, they could not continue his services.

4. He had learnt on visiting the office of Fomento Engineering that its operations had been closed for the last 10 years. The Management of the respondent No.1 under the pretext of sending him to Fomento Engineering had in fact terminated his services. He had maintained that he was an employee of the respondent No.1 and no question arose of reporting to Fomento Engineering. He had made representation to the Assistant Labour Commissioner requesting him to intervene in the matter of illegal termination by the Management of the respondent No.2. The matter was then taken up by him but it ended in a failure, as the respondent No.1 did not co-operate. A reference was made by the Government under Section 10(1)(c) of the Industrial Disputes Act, 1947, 'the Act' for short hereinafter and thereupon the proceedings continued before the Tribunal and which passed the award holding against him.

5. Shri S. Gaonkar, learned Advocate for the petitioner adverted to all these letters and submitted that the petitioner was absorbed in the service of the respondent No.2 with retrospective effect from 01/02/1982 pursuant to the letter dated 01/08/1989. He made a reference to the impugned award and relied in

Manager, Pyarchand Kesarimal Porwal Bidi Factory v/s. Onkar Laxman Thenge [AIR 1979 SC 823] to buttress his plea that no tripartite agreement was required to be entered into between Fomento Engineering, the petitioner and the respondent No.1. The letter dated 22/03/1988 of Fomento Engineering to the respondent No.2 indicating that his services were lent to the respondent No.2 did not specify any time limit or duration of employment. He made a reference to the letter of the respondent No.1 dated 21/12/1990 pursuant to which he was given an increment to clearly indicate that he was integrated in service with the respondent No.1. The settlement arrived at between the Management and the Union under Section 12(3) of the Act dated 17/12/1990 was also made applicable to the petitioner and therefore it also showed that the petitioner was a part and parcel of the respondent No.1 from 1989 till his services came to be terminated in 2005. He made a reference to the Certificate of merit and other certificates to canvas the case that he was an employee of the respondent No.1 and referred to the ESI Code of the respondent No.1 which matched with the card issued to the petitioner. He also adverted to the evidence on record of the witness of the respondent Nos.1 and 2 to show that there was a clear admission of his case and relied in **B.L. Sreedhar and others v/s. K.M. Munireddy (Dead) and others [2003 2 SCC**

355] The impugned award was bad and had to be quashed and set aside and the matter remanded to the Tribunal to consider the backwages to which he was entitled, since in the meantime he had already reached the age of superannuation.

6. Shri G.B. Kamat, learned Advocate for the respondents referred to the letter of Fomento Engineering and Constructions dated 01/07/2005 pursuant to which the petitioner was informed that his services were being terminated and that his services were no longer required by them. This letter was not issued by the respondent Nos.1 and 2 but by Fomento Engineering which referred to the letter dated 20/06/2005 addressed to them by the respondent no.1 conveying that his services were no longer required. The Government had referred the dispute as there was termination of the services of the petitioner by the respondent Nos.1 and 2 when no termination letter was issued by the respondent Nos.1 and 2. Besides, Fomento Engineering was admittedly not a party to the reference and the petitioner could not take any benefit to canvas his case in that context. It was his contention that there was no employer employee relation between the petitioner and the respondent Nos. 1 and 2 nor was he a workman as defined under Section 2(f) of the Act. The Tribunal held that the reference was bad as there was no employer

employee relation between the petitioner and the respondents and that he was neither an employee of Fomento Constructions in that context and therefore the Tribunal did not proceed to decide the issue No.2.

7. Shri G. B. Kamat, learned Advocate for the respondents referred to the claim statement of the petitioner in which he had not spelt out how he was made the payment by Fomento Engineering when he was claiming to be an employee of the respondent Nos.1 and 2. It was their case in defence that the petitioner was an employee of Fomento Engineering and Constructions all along and at no point of time his services were transferred to the respondent No.1. He referred to the written statement in answer to the claim statement where Fomento Engineering had considered his appointment to the post of 'Civil Supervisor' vide the letter dated 30/11/1983 and confirmed his services in the said post w.e.f. 01/07/1984 vide the letter dated 29/01/1985. They had also specifically carved a case in defence that his services were lent by Fomento Engineering to its associate concern i.e. the respondent No.2 as per the letter dated 22/03/1988 with retrospective effect from 01/03/1988 and that the relationship between the company and him was that of borrowing employer and transferee employee. At all times he

continued to be their employee and his services were lent to the respondent No.2 for work at their hotel establishment. It is only pursuant to the letter dated 20/06/2005 addressed to Fomento Engineering that the respondent No.2 terminated the arrangement for lending of services at the hotel establishment and he was required to report back to them before 30/06/2005.

8. Shri G. B. Kamat, learned Advocate for the respondents submitted that an application was made by the petitioner dated 30/11/1983 to Fomento Engineering applying for the post of "Civil Supervisor". He was subjected to cross-examination and during which time he admitted that he had made such a letter and also identified the letter of appointment issued to him by Fomento Engineering dated 26/12/1983 which he had earlier not produced before the Tribunal. The petitioner had made another letter to Fomento Engineering dated 20/11/1984 revealing that he had completed the probationary period and requesting for his confirmation in service and which they had confirmed vide the letter dated 29/01/1985. None of these letters were produced by him before the Tribunal and which were brought on record in the course of his cross-examination. He next referred to the letter of Fomento Engineering dated 22/03/1988 by virtue of which the services of the petitioner were lent to the respondent No.2 and

therefore for all purposes and effects, his services with Fomento Engineering had not been terminated nor did he become an employee of the respondent Nos.1 and 2. It was therefore necessary that in the circumstances a tripartite Agreement had to be entered into to show the termination of service with Fomento Engineering and entering into a new contract with the respondent Nos.1 and 2.

9. The petitioner's case was that vide the letter dated 01/08/1989 his services were absorbed by the respondent Nos.1 and 2 but the letter did not give any such indication. It was incumbent on the petitioner to show when his services with Fomento Engineering came to an end. It was also not the case of the petitioner that the respondents had marked a copy of this letter to Fomento Engineering for approval and/or their consent and which was in clear ignorance of the earlier letter of Fomento Engineering dated 22/03/1988. Therefore, it was incumbent on the petitioner to show that there was a tripartite Agreement between Fomento Engineering, the petitioner and the respondents where under the earlier contract of employment stood terminated. The theory of the petitioner that he was absorbed in service was also brought to naught in the absence of such agreement. He also referred to the admission of the petitioner in the cross-

examination in which he had clearly stated that Fomento Engineering had not addressed any letter to him stating that his services with them had come to an end and that he had become an employee of the respondent Nos. 1 and 2. He placed further reliance in **Umapati Choudhary v/s. State of Bihar and another** [(1999) AIR (SC) 1948] to buttress his plea that there was no basis in the contention on behalf of the petitioner that his services were absorbed with the respondent nos.1 and 2. The consent of all the three parties was necessary to accept such a theory and the letter dated 01/08/1989 written by the respondent Nos.1 and 2 to the petitioner did not convey the consent of Fomento Engineering that his services stood absorbed with the respondents. It was also not the case of implied consent which was besides the fact that there were neither any pleadings in the claim statement nor in the rejoinder.

10. Shri G.B. Kamat, learned Advocate for the respondents invited attention to the letter dated 02/03/1989 addressed by Fomento engineering to the respondent Nos.1 and 2 to convey that the transfer of services of the petitioner to the respondents No.1 and 2 had to be read in conjunction with his services being "lent" vide the letter dated 22/03/1988 and read the relevant paragraphs of the award 14 and 15. The petitioner had relied on

three circumstances to claim himself to be an employee of the respondent Nos.1 and 2 namely that he was a member of the ESI, that his Provident Fund contributions were paid by the respondent Nos.1 and 2, that Certificates of merit were issued to him by the respondent Nos.1 and 2 and besides they had extended the benefit of the settlement under Section 12(3) of the Act to him. In that context he adverted to the definition of an employee contained in Section 2(9)(iii) of the ESI Act which took within its sweep the case of the employees whose services were "lent on hire" and relied in **Ashoka Marketing Ltd. V/s. Addl. Registrar of Companies [(1985) 57 CompCas 187]** and **Employees' State Insurance Corporation Hyderabad v/s. Andhra Pradesh State Agro-Industries Corporation Ltd. [1985 FJR (Vol 67) page 65]**. The payment of ESI and Provident Fund contribution did not decide the status of the employee to consider the petitioner as an employee of the respondent Nos.1 and 2. Moreover, the respondent Nos.1 and 2 to whom his services were lent by Fomento Engineering were paying his salary qua the letter dated 22/03/1988 and therefore they had extended the benefit of settlement to him. Section 18 of the Act provided for the persons on whom settlements and awards were binding and did not deal with the cases of extension of benefit of settlement. The petitioner was working under the control of the respondents

and therefore they had issued the relevant certificates to him which did not by any stretch of imagination conclude that he was their employee.

11. Shri G. B. Kamat, learned Advocate for the respondents submitted that it was the petitioner's plea that by virtue of the letter dated 01/08/1989 he was absorbed in the services of the respondents which was legally ineffective when there was no termination of his employment with Fomento Engineering. He placed reliance in **Groupe Chimique Tunisien Sa v/s. Southern Petrochemicals Industries Corpn. Ltd. [(2006) AIR (SC) 2422]** and submitted that there was no estoppel against law. Fomento Engineering was also not stopped from contending that the petitioner continued in their service and which was otherwise borne out from their letter dated 02/03/1989. It was also not the case of the petitioner in his claim statement before the Tribunal that there was no time frame or duration for lending of his services and therefore such a plea could not be taken for the first time in the course of arguments. Insofar as the plea of estoppel was concerned it was his case that there were no pleadings in the claim statement nor any proof and which could also not be considered. Insofar as the implied consent qua the transfer of services from Fomento Engineering to the respondent Nos.1 and 2

were concerned, it was his contention that the petitioner had not produced any communication on record to show that his services with Fomento Engineering were terminated. The Tribunal had duly considered all the issues in the light of the pleadings and therefore there was no warrant for a reversal of the impugned award.

12. Shri S. Gaonkar, learned Advocate for the petitioner in reply in the context of implied consent by conduct adverted to Section 9 of the Contract Act and submitted that the petitioner had continued in the service of the respondent Nos.1 and 2 for 16 years and when Fomento Engineering was not in the picture. He referred to the claim statement to show there were adequate pleadings on the aspect of estoppel. He referred to the letter of Fomento Engineering to the respondents dated 02/03/1989 to canvas a plea that this services stood transferred to the respondent Nos.1 and 2. He relied in **Reddi Demudu v/s. Kannuru Demudamma [1996 SCC online AP 254]**, distinguished the judgment in **Umapati Chaudhary** (supra), and otherwise pressed for a reversal of the award with a remand of the proceedings for computing his entitlement to backwages while not pressing for reinstatement having attained the age of superannuation.

13. i would consider their submissions, the records of the case, various judgments relied upon by each of them and last but not the least the provisions of the Act as also the impugned award and decide the petition appropriately i.e. whether any interference is called for with the award or otherwise.

14. The Labour Court whose award is under challenge had considered the dispute referred to it for adjudication namely whether the action of the Management of the respondent No.1 unit of the respondent No.2 in terminating the services of the petitioner w.e.f. 01/07/2005 was legal and justified. In that context the primary question which would arise is whether the services of the petitioner were at all transferred to the respondent No.1 by Fomento Engineering after terminating his services or whether he continued to be in the employment of Fomento Engineering as was the case carved in defence by the respondents herein. In that context it would be pertinent to advert to the various correspondence referred to by Shri S. Gaonkar, learned Advocate for the petitioner and Shri G.B. Kamat, learned Advocate for the respondent Nos.1 and 2 to understand and interpret the real intention qua the services of the petitioner vis-a-vis the establishment of the respondent No.1 by Fomento Engineering. The reference to the letter dated 28/11/1983 by the

Project Manager of the respondent No.1 was primarily a Certificate of recommendation of the petitioner and which rests at that. The petitioner claimed that the letter written by him to Fomento Engineering dated 30/11/1983 seeking his appointment to the post of a "Civil Supervisor" was obtained by fraud. However, the correspondence referred to by both the learned Counsels in the context of such a contention would reveal to the contrary which would be fortified shortly hereinafter. Rather the letter of Fomento Engineering addressed to the petitioner dated 26/12/1983 would indicate that pursuant to his earlier application dated 30/11/1983, they had been pleased to offer him the post of a "Civil Supervisor" on the terms and conditions contained therein calling upon him to convey his acceptance of the offer and having been signed by the petitioner in token and agreement thereof. His services were confirmed in Fomento Engineering as apparent from the letter written by the petitioner himself dated 20/11/1984 which would belie his contention that the letter dated 28/11/1983 was obtained from him by fraud. This inference is also documented by Fomento Engineering vide its letter dated 29/01/1985 convening to the petitioner that his services as a Civil Supervisor had been confirmed on a satisfactory completion and indicating the scale of his pay and other terms and conditions.

15. The petitioner sought to take benefit of the letter dated 22/03/1988 addressed by Fomento Engineering to the respondent No.2 to set up a case that he was no longer in the employment of Fomento Engineering as his services had been lent to the respondent No.2 and further sought to be fortified on the basis of the star document namely the letter dated 01/08/1989 of the respondent No.1 addressed to him informing him about his salary from that date and that he would enjoy continuity in service w.e.f. 01/02/1982. In other words, it was his plea that his services were absorbed by the respondent No.1 vide the said letter dated 01/08/1989 giving him the benefit of continuity of service w.e.f. 01/02/1982. The learned Tribunal had dealt with this aspect of the matter and considering the judgment in **Manager, Pyarchand Kesarimal Porwal** (supra), and held that it applied to the case at large before him. Therefore, it would be appropriate to consider the judgment and find out whether it is applicable to the case and its effect on the services of the petitioner.

16. In **Manager, Pyarchand Kesarimal Porwal** (supra), the appellant-firm conducted a number of bidi factories at various places in Vidharba including the one at Kamptee, where its head office was also situated and the factory at Kamptee and the head

office were always treated as separate entities though owned by the same firm. The Respondent who was originally employed in the factory at Kamptee. Two or three years thereafter he was directed to work at the head office and worked therein for about six years prior to the impugned order of dismissal passed against him by the Munim of the head office. Aggrieved by the order he filed an application under Section 16 of the C.P. & Berar Industrial Disputes Settlement Act alleging that the order was incompetent and illegal. The appellant-firm took a stand that at the material time, the respondent was employed as a clerk in the head office, the head office was a separate entity and that the dismissal order had not been passed 'by the appellant-firm as the owner of the said factory and that the firm, as such owner, was wrongly impleaded and that the application was misconceived. The Assistant Commissioner dismissed the application holding that respondent at the material time was not the employee in the factory, but was employed in the firm's head office. He relied on the fact that the head office and the factory had separate rules, that the respondent used to sign his attendance in the register of the head office, he was being paid his salary by the head office, and lastly, his name was not on the muster roll of the factory. The Industrial Court before the revision application was filed by the respondent dismissed the application holding that the only

question raised before it was whether the respondent was the employee of the head office and that that being purely a question of fact, he could not interfere with the finding of fact arrived at by the Assistant Commissioner. The respondent took the matter in a writ petition in the High Court challenging the said orders. The High Court held that it was possible in law for an employer to have various establishments where different kinds of work would be done, in which case an employee in one establishment would be liable to be transferred to another establishment. But the High Court observed that unless it was established that the employment of the respondent in the factory was legally terminated, it could not be assumed merely because he was directed to work in the head office that his employment was changed and the head office was substituted as his employer in place of the said factory and remanded the case for disposal according to law giving rise to the appeal by special leave before the Apex Court.

17. In **Manager, Pyarchand Kesarimal Porwal** (supra), the Apex Court considered the contentions and dealt with the question which the Assistant Commissioner and the Industrial Court had to decide in view of the pleadings of the parties, was whether the respondent had ceased to be an employee of the

factory and was in the employment of the head office at the time when the impugned order was passed, or whether his services were simply lent to the head office and he continued all along to be the employee of the factory ? In that context, it was observed at paragraph 7 that the general rule in respect of relationship of master and servant is that a subsisting contract of service with one master is a bar to service with any other master unless the contract otherwise provides or the master consents. A contract of employment involving personal service is incapable of transfer. In certain cases, however, it is possible to say that an employee has different employers, as when the employer, in pursuance of a contract between him and a third party, lends or hires out the services of his employee to that third party for a particular work. Such an arrangement, however, does not affect a transfer of the contract of service between the employer and his employee, but only amounts to a transfer of the benefit of his services.

18. In **Manager, Pyarchand Kesarimal Porwal Bidi Factory** (supra), the Hon'ble Apex Court further held at paragraph 8 as thus :

"A contract of service being thus incapable of transfer unilaterally, such a transfer of service from one employer to another can only be effected by a tripartite agreement between the employer, the employee and

the third party, the effect of which would be to terminate the original contract of service by mutual consent and to make a new contract between the employee and the third party. Therefore, so long as the contract of service is not terminated, a new contract is not made as aforesaid and the employee continues to be in the employment of the employer. Therefore, when an employer orders him to do a certain work for another person the employee still continues to be in his employment. The only thing that happens in such a case is that he carries out the orders of his master. The employee has the right to claim his wages from the employer and not from the third party to whom his services are lent or hired. It may be that such third party may pay his wages during the time that he has hired his services, but that is because of his agreement with the employer. That does not preclude the employee from claiming his wages from the employer. The hirer may also exercise control and direction in the doing of the thing for which he is hired or even the manner in which it is to be done. But if the employee fails to carry out his directions he cannot dismiss him and can only complain to the employer. The right of dismissal vests in the employer.”

This judgment therefore supports the contentions of Shri G.B. Kamat, learned Advocate for the respondents that a tripartite agreement was required to be entered into between Fomento Engineering, the petitioner and the respondent No.1 and

not that of Shri Gaonkar, learned Advocate for the petitioner to the contrary.

19. The letter of the respondent No.1 dated 20/06/2005 addressed to Fomento Engineering was virtually to convey to them that the services of the petitioner which were lent to them were no longer required and calling upon him to report back to their establishment. This letter by itself signifies that the respondent No.1 did not want to continue with the arrangement which Fomento Engineering had with them while lending the services of the petitioner to the respondent No.1 pursuant to the letter dated 22/03/1988. Fomento Engineering vide their letter dated 01/07/2005 had conveyed to the petitioner acting on the basis of the letter of the respondent No.1 dated 20/06/2005 that their company had ceased to carry on any business for sometime where his services could have been utilised and conveying to him that he could not be in service any more and the same were terminated with immediate effect settling his claim finally as on 30/06/2005. Though much issue had been made by Shri Gaonkar, learned Advocate for the petitioner qua the letter of Fomento Engineering dated 02/03/1989 addressed to the respondent No.1 and being about 5 months prior to the letter of the respondent No.1 dated 01/08/1989, nothing substantially turns thereon since

even pursuant to the letter of Fomento Engineering dated 02/03/1989, they continued to pay his Provident Fund and ESI contribution and had written to the respondent No.2 in that context to pay his salary while they would continue to remit his contributions and regularise his payment from time to time.

20. The respondent No.1 vide its letter dated 21/12/1990 had given increment to the petitioner in consonance with the settlement dated 17/12/1990 arrived at under Section 12(3) of the Act apart from issuing Certificates of merit to the petitioner. However, nothing substantially turns in that regard inasmuch as Fomento Engineering continued to make the deduction towards the Provident Fund and ESI pursuant to their legal obligation towards the petitioner as its employee. The Certificates of merit were issued by the respondent No.1 in the normal course of his employment and so too the benefit of settlement was extended to him being an employee. Besides, in terms of Section 2(9) of the ESI Act defines an employee and takes within its sweep also an employee whose services are temporarily lent or let on hire. Therefore, in that view of the matter, the status of the petitioner qua the respondent No.1 would fall within this parameter and he would not be entitled to take any added benefit from the expression "lent on hire" to mean that he was absorbed in the

services of the respondent No.1 after severing those with Fomento Engineering. Moreover, Section 18 of the Act deals with the person on whom settlements and awards are binding and reads that a settlement arrived at by an agreement between the employer and workman otherwise than in the course of conciliation proceeding shall be binding on the parties to the agreement. Sub-section 3 contemplates that a settlement arrived at in the course of conciliation proceedings under this Act shall be binding on (a) all the parties to the industrial dispute; (b) all other parties summoned to appear in the proceedings as parties to the dispute; (c) where a party referred to in clause (a) or clause (b) is an employer, his heirs, successors or assigns in respect of the establishment to which the dispute relates; (d) where a party referred to in clause (a) or clause (b) is composed of workmen, all persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently became employed in that establishment or part. A reading therefore of Section 18 with all its trappings would show that it deals with the categories of the persons on whom settlements and awards are binding and in that view of the matter was the benefit thereof given to the petitioner by the respondent No.1. Therefore, the contention of Shri Gaonkar, learned Advocate

for the petitioner that extending the benefit of Provident Fund and ESI contribution as also the settlement under Section 12(3) of the Act apart from the increment given to him would indicate that he was integrated in service with the respondent no.1 cannot stand the test of legal scrutiny.

21. The petitioner therefore in the light of these documents cannot take the benefit of the stray admissions in the statement of Zarine Lobo examined on behalf of the respondent No.1 that the services of the petitioner were taken over by the respondent no.1 w.e.f. 01/02/1982. It has to be seen in the context of whether the services of the petitioner with Fomento Engineering were terminated before being taken over by the respondent no.1 or conversely whether there was a tripartite agreement between Fomento Engineering, the petitioner and the respondent no.1 pursuant to which his services stood transferred with the respondent no.1 and that he was no longer in the employment of Fomento Engineering.

22. B.L. Shreedhar (supra), held at paragraph Nos.13, 18 and 19 as below:

13. Estoppel is a rule of evidence and the general rule is enacted in Section 115 of the Indian Evidence Act, 1872 (in short 'the Evidence Act') which lays

down that when one person has by his declaration, act or omission caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.

18. Though estoppel is described as a mere rule of evidence, it may have the effect of creating substantive rights as against the person estopped. An estoppel, which enables a party as against another party to claim a right of property which in fact he does not possess is described as estoppel by negligence or by conduct or by representation or by holding out ostensible authority.

19. Estoppel, then, may itself be the foundation of a right as against the person estopped, and indeed, if it were not so, it is difficult to see what protection the principle of estoppel can afford to the person by whom it may be invoked or what disability it can create in the person against whom it operates in cases affecting rights. Where rights are involved estoppel may with equal justification be described both as a rule of evidence and as a rule creating or defeating rights. It would be useful to refer in this connection to the case of *Depuru Veeraghava Reddi vs. Depuru Kamalamma*, (AIR 1951 Madras 403) where Vishwanatha Sastri, J., observed: "An estoppel though a branch of the law of evidence is also

capable of being viewed as a substantive rule of law in so far as it helps to create or defeat rights which would not exist and be taken away but for that doctrine."

23. Admittedly, the letter dated 01/07/2005 of Fomento Engineering addressed to the petitioner terminating his services was not issued by the respondents. The Government had referred the dispute on the termination of the services of the petitioner by the respondent when no termination letter was issued by the respondent and besides Fomento Engineering was admittedly not a party to such reference. No employer employee relationship was also shown by the petitioner with the respondents nor was the petitioner workman as defined under Section 2(s) of the Act. The Tribunal from a bare reading of the award had held that the reference was bad as there was no relationship of employer and employee between the petitioner and the respondents. Rather, the Tribunal had rightly held on the basis of oral and documentary evidence on record that the petitioner was appointed by Fomento Engineering vide their letter dated 26/12/1983 and pursuant to his application dated 30/11/1983 and that they had confirmed his services vide the letter dated 29/01/1985. The Tribunal had held and rightly so on the basis of the material at large before it that the petitioner was the employee of Fomento Engineering and

therefore did not proceed to decide the issue no.2.

24. The petitioner had spelt out in his claim statement that he was employed with the respondent no.2 but did not account why his payments were effected through Fomento Engineering. The respondents in their defence had clearly disputed an employee employer relationship between them and rather that he was an employee of Fomento Engineering all along and at no point of time his services were transferred to the respondent no.1.

25. In **Umapati Choudhary** (supra), the Hon'ble Apex Court held that the deputation involves deputationist, lending authority in the parent department and borrowing authority in the borrowing department. The deputation is possible only with the consent and voluntary decision of all the three involved. Similar is the position in the case of absorption of the deputationist. If all give their consent for absorption in the borrowing department and there is no malafide or favouritism involved to vitiate absorption, the deputationist on his absorption will get all the benefits of the post before the post retirement from the borrowing department as per law. It held at paragraph no.9 that deputation can be aptly described as an assignment of an employee (commonly referred to as the deputationist) of one department or cadre or even an organisation (commonly referred to as the

parent department or lending authority) to another department or cadre or organisation (commonly referred to as the borrowing authority). The necessity for sending on deputation arises in public interest to meet the exigencies of public service. The concept of deputation is consensual and involves a voluntary decision of the employer to lend the services of his employee and a corresponding acceptance of such services by the borrowing employer. It also involves the consent of the employee to go on deputation or not.

26. At the cost of repetition the petitioner, has been harking on the letter dated 01/08/1989 to buttress his case of his services being absorbed with the respondent No.1. However, this letter does not advance his case inasmuch as for absorption, the consent of the three parties were necessary and there was no consent of Fomento Engineering nor could it be implied when it was neither pleaded in the claim statement nor in the rejoinder.

27. In **Ashoka Marketing Ltd.** (supra), it was alleged in the petition of complainant that the services of Shri D.N. Gupta after the appointment were lent and transferred to the accused company and in fact Shri Gupta became an employee of that company and was treated as such. But there could be no such transfer in law without a tripartite agreement which has not been

alleged in the complaint. This view was supported by the decision of the Apex Court in the case of **Manager, Pyarelal Kesarimal Porwal** (supra). It was further observed that it may be that such third party may pay his wages during the time that he has hired his services; but that is because of his agreement with the employer. That does not preclude the employee from claiming his wages from the employer. If the employee fails to carry out the direction of the third party, the latter cannot dismiss him and can only complain to the employer. The right of dismissal vests in the employer. In view of the legal position emerging from the aforesaid decision of the Supreme Court in **Manager, Pyarelal Kesarimal Porwal** (supra), payment of salaries and Provident Fund contribution by the accused company during certain period to Shri D.N. Gupta does not make him an employee of the accused company.

28. In **Andra Pradesh State Agro- Industries Corpn. Ltd.** (supra), certain employees of the Government of Andhra Pradesh working in its Agricultural Engineering Department were deputed to the A.P. State Agro Industries Corporation Ltd. The Corporation had also recruited directly its own employees to serve in its various departments. While the Corporation paid the contributions due under the Employees State Insurance Act in respect of its own

employees, it did not pay any contributions in respect of the employees who were working on deputation on the ground that the Act did not apply to Government servants. The demand for the contributions in respect of such deputationists was resisted by the Agro Industries Corporation which sought a declaration from the Employees' Insurance Court under Section 75 of the ESI Act, that it was not liable to pay any contributions under the Act in respect of the deputationists which was upheld by the Employees Insurance Court giving rise to an appeal by the Employees State Insurance Corporation and when the Division Bench held amongst others that (i) while considering the provisions of this beneficial legislation, the Court should avoid embarking upon hyper-technical constructions but should help to achieve the purpose for which the legislation is made. (ii) the language used in the definition of "employee" in section 2(9)(ii) of the Act is extensive and diffusive, imaginatively embracing all possible alternatives of employment by or through an independent employer. In such case, even though the principal employer has no direct employment relationship since the immediate employer of the employee concerned is someone else, if such an employee works (a) on the premises of the establishment, or (b) under the supervision of the principal employer or his agent "on work which is ordinarily part of the work of the establishment", or which is

preliminary to the work carried on in or incidental to the purpose of the establishment, he will fall within the definition of “employee”. In any event, the payment of ESI and Provident Fund does not decide the status of an employee.

29. In **Groupe Chimique Tunisien Sa** (supra), the Apex Court while interpreting Section 115 of the Evidence Act held that there is no estoppel when a party takes a stand by mistake or wrong understanding of law. It is true that the petitioner had contended before the Jordanian Court that there was no arbitration agreement between the parties. But the said contention was not accepted and the suit filed by the petitioner has been dismissed on the ground of want of jurisdiction. Thereafter, on reconsidering the matter and taking legal advise, with reference to the contentions of the respondent, the petitioner has now proceeded on the basis that an arbitration agreement exists between the parties. If, on account of mistake or wrong understanding of law, a party takes a particular stand (that is, there is no arbitration agreement), he is not barred from changing his stand subsequently or estopped from seeking arbitration. This was basically relied upon by Shri G.B. Kamat, the learned Advocate for the respondent to buttress his contention that there was no estoppel against law and Fomento Engineering was not

estopped from contending that the petitioner continued in service.

30. Though Shri Gaonkar, learned Advocate for the petitioner had invited attention to the claim statement to show all the pleadings on the aspect of estoppel, nonetheless, from the very correspondence relied upon by the petitioner and the respondents confronting him in the course of his cross-examination, it has been shown that the petitioner continued in the service of Fomento Engineering and that his services were merely lent to the petitioner. Besides, there was no tripartite agreement between the petitioner, Fomento Engineering and the respondent No.1 and hence it would not be open to the petitioner to invoke the principle of estoppel. The judgment in **Reddy Demudu** (supra), does not in any manner advance the case of the petitioner on the matter of question of interpretation or construction of a document.

31. The learned Tribunal had properly applied its mind and held that the petitioner had failed to produce on record any tripartite agreement entered into between himself, Fomento Engineering and the respondent No.1 thereby terminating the original contract of service and to make a new contract between him and the respondent No.1. In that view and in the absence of the execution of such agreement, he continued to be an employee of Fomento Engineering and hence any unilateral act or action on its

part of lending his services was ineffective, null and void and therefore the respondent No.1 could not absorb or takeover his services unilaterally without terminating the original contract of service by executing a tripartite agreement. In that view of the matter, the learned Tribunal had clearly held that the petitioner was not an employee of the respondent no.1 but of Fomento Engineering which was a separate, distinct and independent legal entity and therefore there was no employer employee relationship between the respondent No.1 and the petitioner. In that view of the matter, the Tribunal held that the petitioner had failed to prove that Fomento Engineering had terminated his services and consequently, the legality and justification for the termination of services did not arise and accordingly adjudicated the reference ultimately holding that the petitioner was not entitled to any relief. Considering the various letters adverted to by Shri S. Gaonkar, learned Advocate for the petitioner and Shri G. B. Kamat, learned Advocate for the respondents, the law on the point and the award under challenge, i do not find any merit in the petition to quash and set aside the impugned award. In view thereof, i pass following :

ORDER

The Writ Petition is dismissed with no order as to costs.

Rule discharged.

NUTAN D. SARDESSAI, J.