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IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P. (C) No.17546 of 2011

Oswal Sarakarakhana Shramika Sangha Trade Union ***Petitioner***

-versus-

State of Odisha and others ***Opposite Parties***

Appeared in this case:

For Petitioner : Mr. Milan Kanungo,
Senior Advocate

For Opposite Parties : Mr. Surya Prasad Mishra,
Senior Advocate for Opposite
Parties 2 and 3
and Mr. P. K. Muduli,
Additional Government Advocate

CORAM:
THE CHIEF JUSTICE संयमिक न्याये
JUSTICE R. K. PATTANAİK

JUDGMENT

19.07.2022

Dr. S. Muralidhar, CJ.

The reference

1. The Oswal Sarakarakhana Shramika Sangha Trade Union (hereafter 'Union') has filed this petition challenging an Award dated 4th May, 2011 passed by the Industrial Tribunal, Bhubaneswar (Tribunal) in Industrial Dispute (ID) Case No.15 of 2002, answering the reference made to it of the following dispute

in favour of the First Party-Management and against the Second Party-Union:

“Whether the workmen engaged in M/s. OSWAL Chemicals and Fertilisers Ltd., Musadia, Paradeep through M/s.Balaji Traders (list furnished by the L&E Deptt. vide Letter No.9854 dtd. 17.8.2002) are entitled to absorption in M/s. OSWAL Chemicals and Fertilisers Ltd., Musadia, Paradeep on expiry of contract on dt. 31.8.2001 or entitled to absorption/engagement under new contractors establishments entrusted with the execution of the said work?”

2. The Union is stated to be espousing the cause of 1139 Workmen, who were engaged to work in the fertilizer plant of OSWAL Chemical and Fertilizers Limited (OCFL) (Opposite Party No.2 herein) at Paradeep from 1997 onwards. The case of the Union was that the aforementioned 1139 workers were directly engaged by OCFL during the years 1997 to 2000 in a permanent and perennial nature of work. However, according to the Union, OCFL placed their services under a fictitious contractor-M/s. Balaji Traders (Opposite Party No.4 herein) in the month of September/October, 2000. The case of the Union was that there is no such Firm by the name of M/s. Balaji Traders in existence and such a fictitious entity was introduced only to deprive the Workmen of their status as regular workers of OCFL. The Union contended that the work of the 1139 Workmen was being controlled by officers of OCFL and, therefore, they should be treated as employees of OCFL.

3. The Union contended that with a view to suppressing the Union's activities, OCFL in January, 2001 refused employment to 18 members of the Union. This resulted in the Union calling for a strike with effect from 14th February, 2001. Despite intervention of the authorities, the dispute could not be resolved. Another strike took place on 21st June, 2001. The contract between OCFL and M/s. Balaji Traders expired on 31st August, 2001 and the services of the Workmen were terminated with effect from 1st September, 2001. The conciliation efforts on the Union's demand for absorption of the Workmen in the OCFL failed. A failure report was submitted on 15th July, 2002 by the Conciliation Officer-cum-Deputy Labour Commissioner, Cuttack.

4. Thereafter on 23rd July 2002, the Labour and Employment Department of the Government of Orissa (Opposite Party No.1) referred the aforementioned dispute for adjudication to the Tribunal. It may be noted here that according to the Union, it wrote a letter on 15th August, 2002 to Opposite Party No.1 whereby it sought amendment of the order of reference as under:

“Whether the 1139 workers who were directly working under the 1st Party Management are entitled to get the status of regular workers under the 1st Party management of M/s. O.C.F.L. and if not to what relief they are entitled to as workers under said M/s. Balaji Traders.”

5. The above amendment sought to alter the basic premise of a tripartite contract labour arrangement involving OCFL, the workman and M/s. Balaji Traders to a premise that “the 1139 workers who were directly working under the 1st Party

Management” i.e. OCFL. The alternate plea was about their entitlement if they were to be considered workers of M/s. Balaji Traders. However, as acknowledged by the Union itself, the amendment to the terms of reference as requested for was not carried out. The Union does not appear to have pursued the matter of the amendment further. Thus, the reference continued to be premised on the engagement of the workers “through” M/s. Balaji Traders and not directly with OCFL.

Union’s statement of claim

6. The Union filed its statement of claim in the Tribunal on 28th January, 2004. *Inter alia*, the contention of the Union was that M/s. Balaji Traders was a fictitious entity; that OCFL as well as the said contractor did not obtain the registration under the Contract Labour (Regulation and Abolition) Act, 1970 (‘CLRA Act’) and the act of placing the services of Workmen under the said contractor was only to deprive them of the legitimate and bona fide rights. It was contended that the so-called contract system was merely a camouflage; in fact, each of the Workmen was engaged on a permanent and perennial basis in OCFL. Without prejudice to the above contentions, it was submitted that even assuming 1139 workers were engaged by the said M/s. Balaji Traders then the OCFL-Management was under an obligation to comply with the provisions of Section 25-F of the Industrial Disputes Act, 1947 (‘ID Act’) and the Orissa Contract Labour (R & A Rules) 1975 (‘Rules’), which require notice and payment of wages in lieu thereof before terminating the services

of the Workmen. If the workers were hired to work through a contractor, who did not possess a valid licence under the CLRA Act, then the workers would be treated as Workmen of the principal employer.

7. The Union applied to the Tribunal for a direction to OCFL to produce the applications submitted by it for registration under the CLRA Act and M/s. Balaji Traders to produce the application made by it for being issued a licence under the CLRA Act. It was prayed in the application that the District Labour Officer (DLO), Jagatsinghpur should be asked to produce the relevant register, which would show whether the OCFL as well as the fictitious contractor in question were registered under the CLRA Act. It was further prayed that the Tribunal should direct reinstatement of the 1139 Workmen with OCFL.

Case of OCFL (Management)

8. A written statement was filed by OCFL stating that the Workmen were contract labourers governed by the CLRA Act and Rules thereunder. It was contended that OCFL had given various miscellaneous jobs to different contractors having valid licence to engage contract labourers. M/s. Balaji Traders was one such contractor having a valid labour licence, who was given the contract for supply of labourers. It is contended that the disengagement of the Workmen on the expiry of the contract between OCFL and M/s. Balaji Traders on 31st August, 2001 did not create a right in the workers for absorption in OCFL. It was

contended that the workers were under the direct control and supervision of M/s. Balaji Traders, who was liable to pay their wages. As regards the 18 workers who were not taken back, it was submitted that the said issue formed a subject matter of another reference being I.D. Case No.8 of 2001 before the Tribunal and did not form part of the present reference. It is pointed out that the alleged non-compliance of Section 25-F of the ID Act was not the subject matter of the reference and, therefore, did not come within the purview of adjudication of the present dispute. It was contended that Section 25-H of the ID Act also did not apply to contract labourers.

Case of IFFCO, the transferee

9. During pendency of the proceedings before the Tribunal, the ownership of the fertilizer plant was transferred from OCFL to Indian Farmers Fertilizer Co-operative Limited (IFFCO) (Opposite Party No.3). A Sale Agreement was executed on 13th March, 2006 between the OCFL and IFFCO.

10. Anticipating the Sale Agreement, an application was filed before the Tribunal on 28th September, 2005 to implead IFFCO as a party. After the said application was allowed by the Tribunal on 8th March 2006, IFFCO was impleaded as First Party No.2 and filed its written statement on 7th July, 2006. IFFCO adopted the written statement of OCFL and further contended that the Management of IFFCO, Paradeep was no way concerned with the engagement/non-engagement of the contract labourers engaged by

different contractors of OCFL. The dispute if any was between Union on the one hand and the OCFL and M/s. Balaji Traders on the other.

11. IFFCO pointed out that it had purchased the offered assets of OCFL on an “as is where is basis” under certain terms and conditions. IFFCO was not obliged in terms of the Sale Agreement to accept the liabilities of the contract labourers. Reference was made to Clause 2.3.3 of the Agreement, which stipulated as under:

“2.3.3 The Vendor has represented that the major litigations listed in Schedule D are pending in respect of and relating to the undertaking. The Vendor acknowledges and confirms that any liability arising out of these or any other pending or future litigation, relating to the period prior to 1st October 2005, shall be liability of the Vendor. The Vendor hereby agrees and undertakes to indemnify and keep indemnified and saved harmless at all times the purchaser against the same.”

12. Reference was also made to Section 11 of the Agreement whereby IFFCO had agreed to absorb OCFL's 1292 employees comprising 874 Workmen covered by the ID Act, 240 Officers and 178 trainees. Further, IFFCO agreed that all salaries and other emoluments relating to employees for the period after 1st October, 2005 shall be borne by it. Clause 11.6 was an Indemnity Clause, which stated as under:

*“11.6 **Vendor indemnity for employee matters:**
The Vendor shall indemnify the purchaser against each and every cost, claim, liability express or demand which relates to or arises out of any act or omission by the*

Vendor prior to the 1st October, 2005 and which the purchaser may incur in relation to any contract of employment or pursuant to the regulations or collective agreements concerning the employees including without limitation any such matter relating to or arising out of.”

13. The contention was that since the services of the members of the Union had been terminated prior to 1st October 2005, no liability attached whatsoever to IFFCO as regards the Union's claim for absorption/regularization. Clause 11.7 of the Agreement was an Indemnity Clause, which reads as under:

“11.7 Purchaser Indemnify for Employee Matters:

Save and except pending litigations as on 30th September, 2005. The purchaser shall indemnify the Vendor against each and every cost, claim, liability, expense, payment or demand arising from any act or omission of the purchaser in relation to any Employee relating to their employment at the undertaking after 1st October, 2005 including without limitation any act or omission which leads to a liability on account of wrongful termination, discharge, lay off, retrenchment or wrongful dismissal or compensation for race sex or disability discrimination occurring after 1st October, 2005.”

14. The contention was that IFFCO did not step into the shoes of OCFL vis-a-vis the liabilities towards the workmen of the Union.

Impugned Award of the Tribunal

15. On the basis of the above pleadings, the Tribunal, in the impugned Award, first took up the 1st issue whether the contract between OCFL and M/s. Balaji Traders was genuine and if not, whether the Workmen were liable to be treated as employees of

the principal employer i.e. OCFL was "not beyond the scope of the reference." The four issues framed by the Tribunal for consideration were as under:

1. Whether the workmen engaged in M/s. OSWAL Chemicals and Fertilisers Ltd, Musadia, Paradeep through M/s. Balaji Traders (list enclosed) are entitled to absorption in M/s. OSWAL Chemicals and Fertilisers Ltd., Musadia, Paradeep on expiry of Contract on dt. 31.8.2001 or entitled to absorption/engagement under new contractors establishments entrusted with the execution of the said work?

2. Whether the reference is maintainable?

3. Whether the workmen (list enclosed) working in M/s. OCFL were engaged through M/s. Balaji Traders or were engaged directly under Management OCFL and whether the contract is real or mere camouflage?

4. Whether M/s IFFCO is liable to accept any liabilities to arise out of this I.D. Case?"

16. The Tribunal took up Issues 2 and 3 first. It answered Issue No.2 in the affirmative by holding that the reference was maintainable. On Issue No.3, the Tribunal relied on the decision of the Supreme Court of India in ***Ram Singh v. Union Territory, Chandigarh AIR 2004 SC 969*** where it was held that if the contract is found to be not genuine then the so-called contract labourers will have to be treated as employers of the principal employer and they would be directed to be regularised in the establishment under the principal employer. Further, in determining the relationship of the employer and the employee, the two tests that had to be adopted were the 'control' test viz.,

whether the principal employer controls and supervises the work of the employees and the second was the 'integration' test viz., whether the person was fully integrated into the employer's concern or remained apart from and independent of it. In this context, the Tribunal also referred to the decision in ***General Manager (OSD), Bengal Nagpur Cotton Mills, Rajnandgaon v. Bharat Lal 2011 (128) FLR 560***, where it was held that the well-recognized tests to find out if the contract labourers were direct employees of the principal employer were as under:

“(i) whether the principal employer pays the salary instead of the contractors; and

(ii) whether the principal employer controls and supervises the work of the employee.”

17. Reference was also made by the Tribunal to the decision in ***International Airport Authorities v. International Airport Cargo Workers Union, 2009 (123) FLR 321 (SC)*** where it was emphasized that merely because the contract labourer is working under the direct supervision and control of the principal employer would not make him a direct employee of the principal employer particularly if the salary is paid by the contractor and right to regulate the employment is with the contractor, who will decide where employee will work and subject to what conditions.

18. The Tribunal next shifted its attention to question of the burden of proof which according to it fell on the Union to aver and prove that the workers were directly employed under OCFL.

It was noted that the Union “should have made a prayer to this Tribunal to direct the OCFL to cause production of any such Registers and/or documents wherefrom the second party could have obtained corroborative evidence to support their claim that they were directly recruited by the principal employer, they used to receive salary from the principal employer, and, any other facts that have a bearing on the status of the Workmen.”

19. The Tribunal next took up for discussion the evidence of the two workers witnesses (WWs) 1 and 2 being the General Secretary and Executive Member of the Union and that of the Management Witnesses (MWs), MW1 being the representative of OCFL and MW2 that of IFFCO. It was noted that except stating in their depositions that the Workmen had been working with the establishment of OCFL continuously for one to four years, the WWs had not adduced any specific evidence on whether the job performed by them was permanent or perennial in nature. There was no supporting material such as notices of recruitment, interview cards and appointment orders showing that the Workmen were directly recruited by OCFL. Further, “though it is claimed that the names of the Workmen were there in the Muster Roll of the OCFL and that the Workmen used to receive their salary from the OCFL by putting signatures on the Wage Register, it is not supported by relevant documents/ Registers. Even no prayer was made by the Second Party to direct the First party to produce such documents/Registers which may be supposed to be in the latter’s custody. There is no evidence on the points as to

who had the power to select and dismiss the Workmen, who used to pay remuneration, who used to deduct insurance or other contributions and who used to supply tools and materials to the workers.”

20. As regards the documents relied upon by the Union to show that M/s. Balaji Traders was a fictitious person, the Tribunal observed as under:

“....Simply picking up some anomalies from several documents that have not been subjected to the test of cross-examination, in that the person/authority who are executants/originators of the documents have not been brought before the Tribunal to explain on the facts contained in the documents and the circumstances under which the anomalies came to being, this Tribunal cannot give a finding as to whether the contractor is a fictitious person/ firm. That apart, merely because there are some variations in someone’s name, address and age mentioned in different forms/ documents, that some letters addressed to someone have been received back undelivered or someone has not made personal appearance in some proceedings, there cannot be a conclusion that no such person is in existence or that he is a fictitious person.”

21. The Tribunal noted that in I.D. Case No.8 of 2001 M/s. Balaji Traders had at one stage entered appearance before the Tribunal and sought time, but did not file a written statement. Thus, both in the said case as well as in the present case i.e. I.D. Case No.15 of 2002, M/s. Balaji Traders was set ex parte. It was concluded that in the circumstances “it is not possible to say that the contractor is a fictitious person.” The Tribunal then turned to examining whether the contractor (as a person or as a firm) was fictitious.

The term of reference only required the Tribunal to determine whether “the very contract system introduced by the principal employer is genuine or not.” In this context, the Tribunal noted that in terms of Section 10 (2) of the CLRA Act, the following factors had to be considered in addressing the question whether the contract was a sham or a genuine one:

“(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.”

22. The Tribunal then discussed the evidence produced. The Tribunal noted that although a number of attendance cards of some of the Workmen had been exhibited “there was nothing in the cards as to who used to take the attendance of the Workmen concerned.” Every card was signed by an ‘issuing authority’ but it was not explained whether this was an officer of the principal employer. There was no document to show that the remuneration of the Workmen was paid by the principal employer. It was noted “on the other hand, Salary Slips of some of the Workmen

exhibited by the Second party seem to have been issued by Balaji Traders and there is nothing on the body of the slips wherefrom it can be said that the principal employer used to pay remuneration to the Workmen.”

23. The Tribunal then examined the gate passes that had been exhibited. One was issued by M/s. Balaji Traders and another by a Chief Security Officer of OCFL. Then the Tribunal examined the mess/canteen passes, which by themselves did not show that the Workmen were the direct employees of the OCFL. Further, the gate passes were not going to show whether the Workmen were integrated with the establishment of the principal employer. Several other documents exhibited on behalf of the Workmen were then examined by the Tribunal but these were held to be insufficient to show that all 1139 Workmen were under the complete administrative control of OCFL and were integrated in its regular establishment. The duration of the employment of each of the Workmen during 1997 to 2000 was not ascertainable although the pay slips and attendance cards did show that some of the Workmen had been continuously engaged for years together.

24. The evidence placed on record led the Tribunal to conclude that the principal employer i.e. OCFL “used to exercise control over the Workmen with regard to the work they were to be assigned with.” However, this by itself was not sufficient to conclude that the principal employer had “absolute control over the Workmen.” It did appear that some of them had been

established during the construction phase of the factory and it was possible that they were not redeployed after this phase was complete. Further, there was no evidence to show that the work which used to be performed by the Workmen “is now being done ordinarily through the regular Workmen of the First Party.” The construction work would not be construed to be an integral part of the overall work to be executed by the establishment for production of fertilizer and other ancillary work. Therefore, the Tribunal concluded as under:

“Thus, it is found that the factors which are enumerated in sub-section (2) of Section 10 of the C.L.R.A. Act are absent. Even the ‘control test’ and ‘integration’ test fail. Consequently, the contract cannot be said to be sham or a mere camouflage. Accordingly, Issue No.3 is answered against the Second party. Once it is held that the contract is not proved to be sham or fictitious the reference becomes not maintainable.”

25. In view of the findings recorded in Issue No.3, it was held that the Workmen, who were engaged in OCFL through M/s. Balaji Traders, were not entitled to absorption either under OCFL or any other contractor.

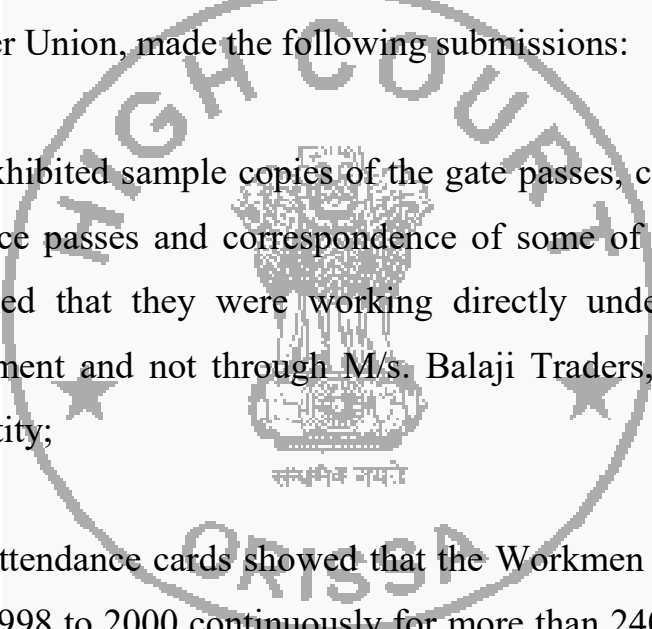
26. The Tribunal then turned to Issue No.4 concerning the liability if any of IFFCO. The Tribunal noted that the Union had not amended its claim statement to introduce any claim against the IFFCO. Relying on the decision of the Supreme Court in ***Shankar Chakravorti v. Britannia Biscuit and Co. AIR 1979 SC 1652***, the Tribunal had held that in the absence of pleadings in the claim statement, the issue could not be decided. Accordingly, the

reference was answered by the Tribunal against the Union and in favour of the Management.

27. Pursuant to the notice issued in the present petition, replies have been filed both by OCFL and IFFCO, which would be referred to in due course.

Submissions of counsel for the Union

28. Mr. Milan Kanungo, learned Senior Counsel appearing for the Petitioner Union, made the following submissions:

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- i. The exhibited sample copies of the gate passes, canteen passes, attendance passes and correspondence of some of the Workmen established that they were working directly under the OCFL-Management and not through M/s. Balaji Traders, which was a sham entity;
 - ii. The attendance cards showed that the Workmen were working during 1998 to 2000 continuously for more than 240 days in each year, which proved that they were directly employed under the OCFL;
 - iii. M/s. Balaji Traders did not appear before the Tribunal or this Court and throughout remained ex parte. The evidence of MW1 did not establish that the workers were contractual workers getting wages from M/s. Balaji Traders. Neither MW1 nor MW2 had produced any document in this regard. Once the Workmen were

able to show that they worked continuously under OCFL and for more than 240 days in a year, the onus of proof shifted to the Management, which had to show by positive evidence that the workers were in fact on the pay roll of the contractor. The Management failed to do so. Reliance is placed on the decision in ***M/s. IFFCO Ltd. v. Industrial Tribunal, Allahabad, 1991 LAB IC 1747 (All)***;

iv. The reference to the Tribunal appears to have been loosely worded but the real issue was whether the Workmen were employees of OCFL or the contractor. It was open to the Tribunal to lift the veil for determining the nature of the employment. Reliance is placed on the decision of the Supreme Court in ***General Manager, ONGC v. ONGC Contractual Workers Union, (2008) 12 SCC 275***. The Tribunal ought to have undertaken that exercise, and declared M/s. Balaji Traders to be a sham entity, and that the documents showing its involvement were all paper transactions and that one of the Managers of OCFL was himself responsible for creation of such fake entity;

v. The copy of the application form for licence under the CLRA Act dated 24th November, 2001 (Ext.20) showed that the contractor himself had signed it, and a correction had been made. This showed that it was Mr. B. K. Sukla, who was with the principal employer OFCL, who had himself applied for such licence. Ext. 21 was the certificate of the principal employer. There was no date with the signature.

vi. As regards the salary slip issued by M/s. Balaji Traders which indicated deduction of PF, it was submitted that the said PF was never deposited in the PF account of M/s. Balaji Traders, which had not obtained any code number from the Regional Provident Fund Commissioner, Bhubaneswar. The labour licence had been issued for 1000 Workmen whereas M/s. Balaji Traders had engaged 1139 Workmen and, therefore, all the Workmen should be presumed to be Workmen of the principal employer. If the entire evidence was carefully examined, the only conclusion possible was that the transactions were paper transactions staged in a pre-planned manner by the OCFL-Management to deny the legitimate rights of the Workmen. Therefore, retrenchment with effect from 21st June, 2001 was illegal and contrary to the provision of the ID Act. Reliance was placed on the decision of the Apex Court in ***Gujarat Electricity Board, Thermal Power Station Ukai v. Hind Mazdoor Sabha, AIR 1995 SC 1893;***

vii. Since IFFCO was the successor-in-interest of OCFL, all the 1139 Workmen were entitled to be absorbed by IFFCO with back wages. The name of the Union had been amended as IFFCO Sarakarakhana Shramika Sangha after OCFL was taken over by IFFCO;

viii. The control test and integration test would come into picture only after contractor's existence was established. Since the contractor was a sham entity, Section 10 (2) of the CLRA Act was

not applicable in the present case. There was no need to amend the claim statement to raise a claim against IFFCO, which had stepped into the shoes of OCFL by purchasing the plant by the Sale Agreement. IFFCO had adopted the statement of OCFL while filing a separate written statement. Therefore, there should have been no difficulty for the Tribunal to have answered Issue No.4 against the IFFCO. Reliance in this context was also placed on the decision of the Supreme Court in ***Dena Nath v. National Fertilisers Ltd.*** AIR 1992 SC 457.

Submissions of counsel for the Management

29. Mr. Surya Prasad Mishra, learned Senior Counsel appearing on behalf of both IFFCO and OCFL, submitted as under:

a. The scope of interference by this Court in exercise of its jurisdiction under Article 227 of the Constitution is limited. The power of superintendence had to be exercised sparingly; it is extended to quashing an Award only on the ground of mistake apparent on the face of the record. It was not an appellate power. This meant that findings of fact reached by the Tribunal as a result of appreciation of evidence could not be reopened in writ proceedings. Only where the findings of fact were based on no evidence that it could be regarded as an error of law. The adequacy or relevance of the evidence was an issue to be considered by the Labour Court and not the High Court in its writ jurisdiction;

b. The engagement of the contract labourers was temporary and once the contract itself came to an end on 31st August 2001, their engagement also came to an end. The principal employer i.e. OCFL was liable only in respect of such matters provided under the CLRA Act. The dispute as referred to in the schedule was only between M/s. Balaji Traders, OCFL and the workers' Union. There was no dispute as such between OCFL and its workmen;

c. Under the sale agreement between IFFCO and OCFL, the liability vis-à-vis the workers engaged prior to 1st October, 2005 was entirely that of OCFL. Again, the liability of IFFCO was not part of the reference and in any event, was beyond the scope of the Sale Agreement. The disengagement of the Workmen on expiry of the contract did not create any right in the Workmen to be absorbed by OCFL, much less by IFFCO.

d. It was wrong to contend that M/s. Balaji Traders was a sham entity. It had a valid labour licence issued by the competent authority and had been engaged to provide contract labourers. The only liability of OCFL was to ensure payment of wages to the contract labourers in the event of failure by the contractor to pay their wages from the contractor's bill. The contractor declined to take back the labourers on expiry of the contract as they had already gone on strike and abstained from duty at least two months prior thereto.

e. There was no provision in the CLRA Act or the ID Act to absorb the contract labourers of one contractor under another. Therefore, the claim for absorption under another contractor was not maintainable. There was no evidence on record that the work that used to be performed by the Workmen was being done ordinarily thorough regular workmen of OCFL or for that matter IFFCO.

f. The Workmen were employed during the period of construction of the plant and, therefore, were not integral to the overall work of the plant which produced fertilisers. In terms of Section 10(2) of the CLRA Act neither the control test nor the integration test was fulfilled. The onus on the Workmen to show that they were directly engaged by OCFL was not discharged by them and, therefore, the Tribunal rightly rejected their claim.

Analysis and reasons

30. The above submissions have been considered. At the outset, the Court would like to begin by noting that while dealing with this writ petition, its exercising jurisdiction under Article 227 of the Constitution to judicially review an Award of the Tribunal in an industrial dispute. The Tribunal has delivered the Award on merits, after closely examining the evidence adduced by the parties both oral and documentary. The scope of interference by a High Court in exercise of jurisdiction under Article 227 of the Constitution of India with an Award of the Industrial Tribunal is well settled in a large number of decisions.

31. In *Estralla Rubber v. Dass Estate (P) Ltd.*, (2001) 8 SCC 97, the Supreme Court explained the scope of the jurisdiction of a High Court under Article 227 of the Constitution and held as under:

“6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in number of decisions of this Court. The exercise of power under this Article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required by them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the courts subordinate or tribunals. Exercise of this power and interfering with the orders of the courts or tribunal is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this Article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or Tribunal has come to.

7. This Court in *Ahmedabad Mfg. & Calico Ptg. Co. Ltd vs. Ramtahal Ramanand and Ors.* [AIR 1972 SC 1598] in para 12 has stated that the power under Article 227 of the Constitution is intended to be used sparingly and only in appropriate cases, for the purpose of keeping the subordinate courts and tribunals within the bounds of their authority and, not for correcting mere errors.

Reference also has been made in this regard to the case *Waryam Singh & Anr. vs. Amarnath & Anr.* [1954 SCR 565]. This court in *Babhutmal Raichand Oswal vs. Laxmibai R. Tarte and Anr.* [AIR 1975 SC 1297] has observed that the power of superintendence under Article 227 cannot be invoked to correct an error of fact which only a superior court can do in exercise of its statutory power as a court of appeal and that the High Court in exercising its jurisdiction under Article 227 cannot convert itself into a court of appeal when the legislature has not conferred a right of appeal.”

32. Recently in *Garment Craft v. Prakash Chand Goel* 2022 SCC Online SC 29, the Supreme Court reiterated the above principles and held as under:

“15. The High Court exercising supervisory jurisdiction does not act as a court of first appeal to reappreciate, reweigh the evidence or facts upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own decision on facts and conclusion, for that of the inferior court or tribunal. The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice. The power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the court or tribunal has come to. It is axiomatic that such discretionary relief must be exercised to ensure there is no miscarriage of justice.”

33. To summarise the above principles:

(I) The jurisdiction under Article 227 of the Constitution has to be exercised sparingly and only in appropriate cases for the purpose of keeping the subordinate Tribunals within the bounds of the authority and not to correct factual or legal errors;

(II) In exercise of Article 227 of the Constitution, the High Court is not exercising an appellate function. The scope of judicial review is limited to correct the mistakes apparent on the face of the record or for gross irregularities where the procedure adopted by the Tribunal is opposed to the principles of natural justice or where the order itself is vitiated by mala fides.

(III) It is not open to the High Court in exercise of its jurisdiction under Article 227 of the Constitution, to interfere with an Award of a Tribunal merely because on the same evidence a different view is possible. It is also not open to the High Court to judicially review an Award of the Tribunal on the basis of relevancy or sufficiency of the materials. It is only where the findings rendered by the Tribunal are based on no evidence, could it be said that there is an error of law, which requires to be interfered with.

34. It must also be noted that both in the pleadings in the writ petition as well as in the oral submissions before this Court, the attempt on behalf of the Petitioner-Union has been to persuade this Court to re-appreciate the evidence on record and come to a different conclusion than that reached by the Tribunal. This is

precisely what is not permissible when the Court exercises jurisdiction under Article 227 of the Constitution of India.

35. To begin with, the Court would like to note that the reference before the Tribunal was on the basis of an assumption of relationships without questioning their validity. A careful scrutiny of the term of reference shows that the existence of M/s. Balaji Traders as a contractor through whom the members of the Union were engaged in OCFL appears to be a given. The only question was whether such workmen were entitled to absorption in OCFL on expiry of the contract dated 31st August, 2001. The alternative question was “whether they would be entitled to absorption/engagement under new contractors/establishments entrusted with the execution of the said work”.

36. In other words, the question posed was not whether M/s. Balaji Traders is a fictitious or sham entity and, therefore, whether the Workmen should be considered to have been directly employed by the OCFL? Such a question appears to be outside the scope of interference. This has also to be considered in the context of the failed attempt by the Union to have the term of reference amended as noted earlier. In the statement of claim, the Union mentioned that it had applied to the State Government for amending the term of reference precisely to include the above question namely “whether 1139 workers, who were directly working under the First Party Management are entitled to get the status of regular workers under the First Party Management”. The

second alternative prayer is that if the above question was answered in the negative then “what relief they are entitled to as the workers under the same M/s. Balaji Traders”. However, the above amendment to the terms of reference never took place. The Union also did not challenge the correctness of the term of reference before this Court and allowed it to remain as such. Interestingly, even when it moved for an amendment to the reference, the attempt by the Union was not to question the very existence of M/s. Balaji Traders. In fact, the attempt was an alternative prayer in case the prayer for regularization in OCFL did not succeed. The question was about the relief they were entitled to “as workers under the said M/s. Balaji Traders”. Therefore, the stand taken in the claim statement before the Tribunal that M/s. Balaji Traders itself was a sham entity appears to be a strategy thought of after the reference was made to the Tribunal without having the reference itself altered to include such a declaration.

37. Nevertheless in Issue No.3, the Tribunal did examine whether “the contract is real or mere camouflage”. The Tribunal has rightly noted that the question whether the contract is real and the question whether the contractor was a sham entity are two different issues. These are not one and the same issue. If indeed, as the Tribunal points out in the impugned Award, the contractor was found to be sham or camouflage, the workers may not get any relief. The test under Section 10 (2) of the CLRA Act presupposes the existence of a genuine contractor and for that matter a genuine

contract. It was explained by the Supreme Court in **Gujarat Electricity Board, Ukai, Gujarat v. Hind Mazdoor Sabha** (*supra*) as under:

“33. These decisions in unambiguous terms lay down that after coming into operation of the Act, (the C.L.R.A. Act) the authority to abolish the contract labour is vested exclusively in the appropriate Government which has to take its decision in the matter in accordance with the provisions of Section 10 of the Act. This conclusion has been arrived at in these decisions on the interpretation of Section 10 of the Act. However, it has to be remembered that the authority to abolish the contract labour under Section 10 of the Act comes into play only where there exists a genuine contract. In other words, if there is no genuine contract and the so called contract is sham or a camouflage to hide the reality, the said provisions are inapplicable. When, in such circumstances, the concerned workmen raise an industrial dispute for relief that they should be deemed to be the employees of the principal employer, the Court or the industrial adjudicator will have jurisdiction to entertain the dispute and grant the necessary relief.”

38. Therefore, the Tribunal was right in holding that reference was indeed maintainable but on Issue No. 3, the initial burden of proving that the workmen were directly engaged by the OCFL and not through the contractor, was entirely on the Union.

39. Here the Union appears to have run into difficulties because of the stand taken that the contractor itself was a sham entity. The attempt was to show that it was a mere paper entity and the entire contract itself was a camouflage erected by OCFL to avoid the liability arising under the CLRA Act. The difficulty with this

approach of the Union was that there were documents to show the existence of the contractor including the license issued to it by the Licensing Authority under the CLRA Act. There were also pay slips issued, gate passes issued by M/s. Balaji Traders. While it is true that some other documents including gate passes were shown to have been issued by OCFL, as rightly pointed out by the Tribunal, such documents by themselves did not demonstrate that each of the 1139 workers were directly engaged by OCFL.

40. The Court notes that on the crucial aspect of the salary slips, the Tribunal found that some of them exhibited by the Union, were shown to have been issued by M/s. Balaji Traders and there was nothing on the body of the slips from which it could be said that “the principal employer used to pay the remuneration to the workers.” This is a significant but adverse finding for which the Petitioner Union does not have a proper answer. The Union also does not appear to have succeeded in showing that the Workmen were being paid directly by OCFL particularly since they do not appear to have asked for the production of the wage register.

41. In the submissions made before this Court, detailed reference was made to each of the documents, which according to the Petitioner, would show that the Workmen were directly engaged by OCFL and further that the documents showing the license issued to M/s. Balaji Traders were actually make-believe documents when in fact the real person responsible for creating the fictitious entity, was working for OCFL. This Court is not

called upon to re-appreciate the evidence which has already been examined in depth by the Tribunal. Each of the documents referred to has in fact been discussed by the Tribunal. The Tribunal was not satisfied that the anomaly appearing in some of these documents could substitute for proof that the Workmen were in fact directly engaged by OCFL.

42. On the important aspect whether M/s. Balaji Traders is a fictitious person, the Tribunal did note that the said entity had appeared before Tribunal in I.D. Case No.8 of 2001 and filed a written statement in the said ID Case. Of course, in the case in hand, after appearing before the Tribunal, M/s. Balaji Traders sought time but did not file a written statement and then stayed away altogether. These facts are not consistent with the plea of the Petitioner-Union that the entity is itself fictitious.

43. It is not possible in exercise of the jurisdiction under Article 227 of the Constitution for this Court to undertake a detailed examination of the evidence only to come to a conclusion different from that reached by the Tribunal. The questions to be asked are whether the view taken by the Tribunal on the evidence can be said to be perverse? Whether its finding are based on no evidence? Is there anything in the impugned Award that shocks the judicial conscience as being perverse? On a careful examination of the entire Award of the Tribunal, this Court is not persuaded that any of the above questions can be answered in the affirmative. On the other hand, the Tribunal appears to have

undertaken an elaborate discussion in coming to the conclusion that Issue No.3 has to be answered against the Petitioner-Union. Indeed, the Union was unable to discharge the initial onus of showing as the Workmen were directly engaged under OCFL and that the contractor itself was a non-existent entity. As a corollary, the burden never shifted to OCFL to show that the workers were paid by the contractor and were under their control.

44. The Court is unable to agree with the submission on behalf of the Petitioner that neither the “control test” nor the “integration test” would apply in the present case. Such a submission presupposes that Section 10 (2) of the CLRA Act will have no application. If that be the case, then the reference itself should be held to be wrongly worded. However, the Tribunal was tasked with answering the reference as it was worded and not the reference as it should have, according to the Union, been worded. With the Union not having succeeded in getting the terms of reference amended, it is not open to the Union to now contend that Section 10 (2) of the OLRA Act has no applicability whatsoever or that the Tribunal erred in answering the question whether the twin requirements of “control test, and integrity test” were fulfilled in the present case.

45. On the basis of the evidence on record, the Tribunal came to the conclusion that the OCFL did exercise a degree of control over the workmen but not “absolute control”. It also came to the conclusion that many of the Workmen perhaps were engaged at

the construction stage and that kind of a work obviously did not continue once the production of fertiliser started in the plant. Consequently, the Tribunal was right in its conclusion that the Union had failed to discharge the burden of showing that the “integration test” stood fulfilled in the present case. In order to fasten the liability on OCFL, without fulfillment of the above tests, the workers could not have succeeded in getting the Tribunal to answer the claim for absorption in OCFL in their favour. As regards the decision in *Dena Nath (supra)*, the Court notes that the law since then has developed further with the judgment in *Steel Authority of India Ltd. v. National Union Water Front Workers (supra)* which lays down the parameters for absorption of contract labourers in the establishment of the principal employer. However, with two tests namely, the control test and integration test in terms of Section 10 (2) of the CLRA Act not having been fulfilled in the present case, the Petitioner-Union cannot take advantage of the above legal position.

46. Turning to Issue No. 4, it is surprising that although the Petitioner-Union was aware of the change of transfer of ownership, it only chose to implead IFFCO as a party but not amend the claim statement to seek any grievance against it. There could not have any presumption by the Petitioner-Union that the claim against OCFL would hold good against IFFCO as well and that in the case of IFFCO, it merely stepped into the shoes of OCFL. In the light of the written statement filed by IFFCO before the Tribunal, it ought to have been evident to the Petitioner-Union

that the clauses of the said agreement absolved IFFCO of any liability whatsoever. Without seeking a declaration that the said Agreement was opposed to public policy, it was not possible for the Union to simply contend without making any amendment to its statement of the claim, that IFCO should absorb all the 1139 Workmen. This is particularly since there is no relationship of master and servant or principal employer and contract labourer between the Members of the Petitioner-Union and IFFCO. The Tribunal was therefore, right in relying on the following passage in ***Britannia Biscuit and Co.*** (*supra*):

“32. Obligation to lead evidence to establish an allegation made by a party is on the party making the allegation. The test would be who would fail if no evidence is led. It must seek an opportunity to lead evidence and lead evidence. A contention to substantiate which evidence is necessary, has to be pleaded. If there is no pleading raising a contention there is no question of substantiating such a non-existing contention by evidence. It is well settled that allegation which is not pleaded even if there is evidence in support of it, cannot be examined because the other side has no notice of it and if entertained it would tantamount to granting an unfair advantage to the first mentioned party. We are not unmindful of the fact that pleadings before such bodies have not to be read strictly but it is equally true that the pleadings must be such as to give sufficient notice to the other party of the case it is called upon to meet.”

47. Consequently, the Court is unable to find any error having been committed by the Tribunal in answering the Issue No. 4 against the Petitioner-Union and in favour of the Management.

48. Viewed from any angle, the Court is not persuaded that the Tribunal has committed any error in passing the impugned Award. The writ petition is dismissed, but in the circumstances, with no order as to cost. The LCR be returned forthwith.

(S. Muralidhar)
Chief Justice

(R. K. Pattanaik)
Judge

*M. Panda/
S.K. Jena, Sec.*

