

18 October 2023.

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 12211 OF 2018**

KALYAN DOMBIVLI
MUNICIPAL CORPORATION,
Through its Municipal
Commissioner, Having office at
Shankar Rao Chowk, Kalyan,
Dist. Thane

**...PETITIONER
(Orig. 1st Party)**

V/s.

1. MUNICIPAL LABOUR
UNION, Having its Office at
Anand Bhavan, Veer Savarkar
Marg, Neer Teen Petrol Pump,
Thane (West)

2. SHRAMIK JANTA SANGH,
1st Floor, Haji Habib Building, A-
Wing, 182, Naigaon Cross Road,
Dadar (East), Mumbai-400 014.

**....RESPONDENTS
(Orig. II Party)**

Mr. Sudhir Talsania, Senior Advocate i/by. Mr. A.S. Rao, for the
Petitioner.

Ms. Jane Cox i/by. Mr. Ghanashyam Thombare, for Respondent
No.2.

CORAM : SANDEEP V. MARNE, J.

Judg. Resd. On : 9 October 2023.

Judg. Pron. On : 18 October 2023.

JUDGMENT :

1. **Rule.** Rule made returnable forthwith. With the consent of the parties, Petition is taken up for final disposal.

2. Kalyan Dombivali Municipal Corporation has filed this petition taking exception to the Award dated 12 January 2017 passed by the Industrial Court, Thane. A Reference was made at the instance of the Municipal Labour Union on behalf of the contract employees of Contractor for a declaration that they are entitled to be absorbed in the services of the Municipal Corporation. By the impugned Award, the Industrial Court has directed absorption of workers included in the list at Annexure-A to the Statement of Claim into service of the Municipal Corporation w.e.f. 3 March 2010. The arrears and consequential benefits are directed to be paid from the date of the Award.

3. Facts of the case are that Petitioner is a Municipal Corporation established under the provisions of the Maharashtra Municipal Corporation Act, 1949 (**MMC Act 1949**). It used to handle the work of solid waste management through its own

employees, vehicles and equipment. In the year 2005, the Municipal Corporation decided to get the work of solid waste management executed by appointing a Contractor. After inviting tenders, the Municipal Corporation appointed M/s. Antony Waste Handling Cell Private Limited (**Anthony Waste**) as the Contractor for performing the work of collection and transportation of municipal solid waste. The contract was for a period of ten years and the Contractor was to be paid at rates specified in the agreement. Accordingly, an Agreement came to be executed between the Petitioner-Municipal Corporation and the Contractor on 22 September 2010.

4. Petitioner claims that in pursuance of the said contract, Anthony Waste engaged various personnel required for execution of the contract. The Contractor accordingly commenced the services of collection and transportation of municipal solid waste in pursuance of the agreement dated 22 September 2010.

5. On 3 March 2010, Municipal Labour Union representing about 125 employees engaged on contract of Solid Waste Management of the Municipal Corporation, raised a demand for absorption of said 125 employees. The proceedings were taken in conciliation before the Conciliation Officer. The conciliation proceedings however failed and on submission of failure report, the Additional Labour Commissioner, Mumbai made a reference to the Industrial Court, Thane by order dated 21 May 2012. The Union

filed Statement of Claim before the Industrial Court. Order dated 21 September 2012 was passed by the Industrial Court on application below Exhibit-U-4 in Reference (I.D.) No. 27/2012, restraining the Municipal Corporation from doing any act in respect of employment of workers of the Union or engaging any fresh hands. That order dated 21 September 2012 became subject matter of challenge in Writ Petition No. 11254/2012 instituted by the Municipal Corporation before this Court. The Writ Petition came to be disposed of on 17 December 2012 directing the Industrial Court to decide the application at Exhibit-U-4 in an expeditious manner.

6. In the meantime, the services of the Contractor were found to be unsatisfactory by the Municipal Corporation and the contract came to be terminated in the year 2012. It is Petitioner's case that on account of termination of its contract, the Contractor instigated its workmen to raise a reference through its Union. The Industrial Court thereafter proceeded to decide the application at Exhibit-U-4 by its order dated 10 January 2013 allowing the application for grant of interim relief. The Municipal Corporation was directed to maintain *status-quo* in respect of the employees included in Annexure-A to the Statement of Claim till final disposal of the main Reference.

7. The Municipal Corporation thereafter filed Written Statement opposing the Statement of Claim *inter-alia* denying any

employer-employee relationship between the Municipal Corporation and the workers of the Contractor.

8. Both the parties led evidence in respect of their respective claims. The Industrial Court delivered Award dated 12 January 2017 answering the reference in affirmative. It is declared that the workmen whose names were included in the list annexed at Annexure-A to the Statement of Claim are entitled to be absorbed on the permanent muster of the Municipal Corporation on their respective posts from the date of demand i.e. 3 March 2010 with appropriate payment in the unskilled category. It is declared that the concerned workmen would be entitled to arrears and consequential benefits from the date of the Award.

9. Petitioner-Municipal Corporation is aggrieved by Award dated 12 January 2017 and has filed the present petition. During pendency of the petition, an amendment was sought for impleadment of Shramik Sanghatana as Respondent No.2.

10. Mr. Talsania the learned senior advocate appearing for the Petitioner-Municipal Corporation would submit that the Industrial Court has erred in directing absorption of the workers of Contractor into municipal service. That the contract workers have admittedly not been engaged by the Municipal Corporation. They were engaged by the Contractor for execution of the contract. That

there has never been any employer-employee relationship between the Petitioner-Municipal Corporation and the concerned workers. That the Industrial Court erred in holding that there is employer-employee relationship by erroneously concentrating only on the aspect of supervision, by ignoring the other tests of payment of wages, exercise of disciplinary powers etc. Even with regard to the test of supervision, he would submit that mere issuance of directions for execution of contract would not *ipso-facto* mean that any employee of the Municipal Corporation was supervising the work of contract workers.

11. Mr. Talsania would place reliance on the judgment of the Apex Court in ***Balwant Rai Saluja V/s. Air India Limited*** (2014) 9 SCC 407 to submit that six tests have been prescribed by the Apex Court for establishing employer-employee relationship in para-65 of the judgment. He would also place reliance on the judgment of the Apex Court in ***Kirloskar Brothers Limited vs. Ramcharan and others*** (2023) 1 SCC 463 where again, the Apex Court has reiterated the tests of payment of salary, power to remove/dismiss or initiating disciplinary action, posting the employees to work at a particular place etc. That none of the tests have been satisfied by the Respondent-Union. That since no employer-employee relationship exists, there is no question of absorption of contract workers into municipal service.

12. Mr. Talsania would further invite my attention to various clauses of the contract executed with the Contractor in support of his contention that the Municipal Corporation had absolutely no connection with the workers engaged by the Contractor. He would submit that the Municipal Corporation agreed to pay to the Contractor on the basis of volume of municipal solid waste handled and transported by it and it was for the Contractor to decide the number of employees needed for execution of the contract. That even vehicles and equipment used for execution of the contract belonged to the contractor.

13. Lastly, Mr. Talsania would submit that even if employer-employee relationship is established between the Municipal Corporation and workers of the Contractor, the Industrial Court could not have granted the relief of absorption in violation of principles enunciated by the Constitution Bench in ***Secretary State of Karnataka Vs. Umadevi*** (2006) 4 SCC 1. That the contract workers are not recruited through any selection process. Their appointments are not against sanctioned posts. They had not completed ten years of service as on the date of raising demand for absorption. That therefore they did not satisfy even a single criterion as on the date of raising of demand for absorption in municipal service.

14. Ms. Jane Cox the learned counsel appearing for Respondent No.2-Union would oppose the petition and support the Award passed by the Industrial Court. She would submit that the contract executed with the Contractor was sham and bogus and that the concerned workmen are actually the employees of the Municipal Corporation. That the Municipal Corporation exercised deep and persuasive control and supervision over the concerned workmen. She would take me through the findings recorded before the Industrial Court to demonstrate to the extent to which supervision was exercised by the employees and officers of the Municipal Corporation over the concerned workmen. That vehicles and equipment for execution of the contract were also provided by the Municipal Corporation. That the employees were deliberately shown as the ones engaged by the Contractor for the purpose of avoiding any claim by such employees for being absorbed in municipal service. Otherwise for all technical purposes, they are the employees of the Municipal Corporation. Ms. Cox would submit that after termination of the contract in the year 2012, the concerned workmen have been serving with the Municipal Corporation as its own employees and executing the work of municipal solid waste management. This would clearly show that the contract was executed merely for the purpose of denying employer-employee relationship by the Municipal Corporation. She would submit that as per the judgment of the Apex Court in *Kirloskar Brothers* (supra),

one of the most important tests is about the authority of the employer to issue directions about the manner in which the work is to be executed. She would submit that it has come in the evidence that the officers and employees of the Municipal Corporation always directed the concerned workmen about the manner in which the work was to be executed. She would rely upon the judgment of this Court in **Municipal Corporation of Greater Mumbai Versus. Kachara Vahtuk Shramik Sangh**, 2017 I CLR 798 in support of her contention that when the work is as basic as cleaning the streets, high level of technical knowledge and expertise is not required and in such circumstances, minuscule supervision on the work of the concerned workmen by the Corporation assumes importance. She would submit that in that case, this Court upheld the claim of absorption of similarly placed workmen. She would submit that the learned single Judge has delivered the said judgment after taking into consideration the judgment of the Apex Court in **International Airport Authority of India Vs. International Air Cargo Workers Union**, (2009) 13 SCC 374, which is in turn been relied by the Apex Court in its judgment in **Balwant Rai Saluja** (supra).

15. Ms. Cox would further submit that the judgment of the Apex Court in **Umadevi** (supra) would not come in the way of a industrial adjudicator in grant of relief of absorption in exercise of statutory powers conferred upon it. In support of her submission,

she would place reliance on the judgment of the Apex Court in **Maharashtra State Road Transport Corporation & Anr. V/s. Casteribe Rajya P. Karmachari Sanghatana** 2009 III CLR 262. She would also rely upon the judgment of the Apex Court in **Hari Nandan Prasad and Another Versus. Employer I/R. to Management of Food Corporation of India and Anr.** (2014) 7SCC 190. She would therefore submit that the Industrial Court is thus vested with power to grant absorption in service irrespective of the judgment of the Apex Court in *Umadevi* (supra). Lastly, she would submit that the concerned workmen are in service of the Municipal Corporation since the years 2005-06 and have by now completed 17 to 18 years of service and that therefore this Court may not interfere with the Award of the Industrial Court which ensures their absorption in municipal service. That such absorption would entitle the workmen by drawing the same wages and benefits which have been paid to their cohorts in regular municipal service especially when both the employees are having the same workmen. She would pray for dismissal of the petition.

16. Rival contentions of the parties now fall for my consideration.

17. Petitioner-Municipal Corporation has questioned the correctness of Industrial Court's decision by contending that there is no employer-employee relationship between the Municipal

Corporation and the workers included in the list to Annexure-A to the Statement of Claim. The list included 27 drivers and 72 labours totaling about 99 workers. Ms. Cox has placed on record a separate compilation, which includes the list of workers which was annexed at Annexure-A to the Statement of Claim. The list would indicate that the concerned personnel were employed at various point of time beginning from the year 2005. Some are employed as late as on 11 January 2012. Thus, when a demand was raised by the Union on 3 March 2010, some of the employees, whose names are included in list at Annexure-A to the Statement of Claim, were yet to be employed. The Industrial Court has directed absorption of all employees included in the list at Annexure-A to the Statement of Claim w.e.f. 3 March 2010. As per the list at Annexure-A placed on record by Ms. Cox, 22 employees have been engaged after 3 March 2010. The List at Annexure-A to Statement of Claim is as under :

DRIVER

Sr.No.	Name	Designation	Date of Appointment
1.	Sunil Narayan Kand	Driver	27/1/2006
2.	Ganesh Narayan Chavan	Driver	16/7/2006
3.	Namdev Haribhau Ubare	Driver	18/12/2005
4.	Madhav Shamrav Sardar	Driver	5/7/2007
5.	Jaidas Chindhu Burse	Driver	25/3/2006
6.	Siddharam Sonba Gaikwad	Driver	19/12/2005
7.	Ashok Laxman Khatkar	Driver	28/8/2006

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8.	Swapnil Madhukar Patil	Driver	15/12/2007
9.	Anil Sahebrao Khandagale	Driver	25/3/2006
10.	Shankar Kisan Sonawane	Driver	4/8/2008
11.	Kailas Laxman Jagtap	Driver	3/12/2007
12.	Ranjit Ashok Sharma	Driver	3/3/2010
13.	Sameer Anant Darekar	Driver	3/5/2011
14.	Kisan Sambhaji Gadgil	Driver	25/3/2006
15.	Raju Narayan Dhaiphule	Driver	15/6/2006
16.	Sunil Yuvraj Khavale	Driver	15/4/2006
17.	Ishwardas Shankar Bagul	Driver	20/7/2006
18.	Sanjay Bhimrao Aher	Driver	3/12/2007
19.	Santosh Muktaaji Javale	Driver	2/6/2006
20.	Prakash Nandu Sabale	Driver	5/11/2011
21.	Ganesh Chandrakant Jadhav	Driver	4/5/2011
22.	Satish Atmaram Salve	Driver	20/3/2007
23.	Gurunath Dattu Jadhav	Driver	16/3/2007
24.	Ram Sarjerao Kamble	Driver	12/3/2006
25.	Lahu Gyanba Jadhav	Driver	4/1/2012
26.	Yuvraj Suresh Kamble	Driver	22/7/2007
27.	Sudhir Parshuram Pashte	Driver	25/5/2006

LABOUR

Sr.No.	Name	Designation	Date of Appointment
1.	Pravin Ananta Ovhal	Labour	15/5/2011
2.	Nivrutti Kashinath Jagtap	Labour	18/8/200

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3.	Dattatray Madhukar Jadhav	Labour	13/9/2006
4.	Sunil Sadashiv Avhad	Labour	28/12/2005
5.	Haridas Kisan Thool	Labour	15/12/2007
6.	Santosh Ramchandra Bhalerao	Labour	28/8/2006
7.	Kamlesh Ravindra Suryavanshi	Labour	8/9/2011
8.	Bhimrao Chindu Jadhav	Labour	3/2/2006
9.	Darshan Ramchandra Bhalerao	Labour	3/2/2007
10.	Arun Dharma Jadhav	Labour	14/4/2011
11.	Lahu Ramchandra Bhalerao	Labour	14/11/2006
12.	Sunil Abaji Chaudhari	Labour	20/5/2011
13.	Kashinath Haribhau Rokade	Labour	7/12/2007
14.	Vikram Rajaram Bhoir	Labour	25/11/2006
15.	Pramod Ashok Londhe	Labour	15/3/2011
16.	Rajesh Balaram Madvi	Labour	20/4/2006
17.	Bapu Anant Ovhal	Labour	11/4/2007
18.	Prakash Hemant Kurosiya	Driver	3/5/2008
19.	Sanjay Shankar Gaikwad	Labour	21/5/2007
20.	Guddu Malik Sonkar	Labour	23/9/2010
21.	Arvind Bhaguram Jadhav	Labour	8/2/2006
22.	Naresh Maruti Ture	Labour	12/6/2007
23.	Malu Kashinath Harad	Labour	20/4/2006
24.	Arun Yashwant Bhoir	Labour	25/12/2007
25.	Rupesh Vaman Jadhav	Labour	5/5/2009
26.	Santosh Namdev Bhalerao	Labour	5/6/2007

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27.	Rajesh Chintaman Dhonde	Labour	20/1/2006
28.	Arvind Vishnu Pagare	Labour	20/2/2009
29.	Kachru Ramchandra Hatangale	Labour	9/5/2007
30.	Dilip Pandurang Pawar	Labour	8/3/2008
31.	Rajesh Harichandra Savardekar	Labour	1/1/2006
32.	Bhausaheb Aananta Bhalerao	Labour	2/8/2006
33.	Vinayak Shankar Harad	Labour	14/11/2006
34.	Naresh Bhagwat Kadam	Labour	10/3/2010
35.	Balu Maruti Sable	Labour	4/1/2012
36.	Ramesh Jagan Bhoir	Labour	18/5/2008
37.	Namdev Vishnu Shelke	Labour	3/2/2006
38.	Balwant Vishnu Chaudhary	Labour	17/4/2007
39.	Mahendra Aananta Ovhal	Labour	25/10/2007
40.	Radhakisan Maruti Panjge	Labour	18/11/2007
41.	Gorakhnath Yashwant Dhodwal	Labour	5/12/2007
42.	Ankush Ramchandra Bhalerao	Labour	1/7/2009
43.	Dashrath Shankar Ghodke	Labour	3/1/2011
44.	Ramesh Dadaram Gaikwad	Labour	12/8/2007
45.	Sunil Ramdas Gudekar	Labour	3/3/2008
46.	Sunil Yashwant Bhoir	Labour	7/11/2007
47.	Gurunath Parshuram Dhule	Labour	28/11/2005
48.	Namdev Gajanan Jadhav	Labour	6/11/2006
49.	Ramesh Mahavir Valmik	Labour	22/7/2006
50.	Gurunath Phoolchand Langde	Labour	11/3/2011
51.	Shantaram Balaram Shelar	Labour	5/4/2011

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52.	Shyam Ravindra Syam	Labour	7/1/2012
53.	Sanjay Manik Ukhande	Labour	27/7/2006
54.	Ramesh Pandit Chavan	Labour	19/5/2010
55.	Ganesh Ramu Kapse	Labour	1/5/2007
56.	Sachin Sundar Kasar	Labour	11/1/2012
57.	Bhausaheb Sahebrao Gagurde	Labour	6/4/2007
58.	Bharat Shankar Sonawane	Labour	16/5/2011
59.	Sandip Wadiya	Labour	1/3/2010
60.	Sashi Dalvi	Labour	15/7/2007
61.	Vishwas Dharma Bhoir	Labour	3/4/2008
62.	Milind Vasant Bhalerao	Labour	12/12/2007
63.	Kaluram Babulal Aadol	Labour	8/2/2006
64.	Bharat Radhakisan Yashwante	Labour	19/7/2008
65.	Shivram Balkrushna Bhagde	Labour	13/5/2007
66.	Ramesh Pandarinath Chaudhary	Labour	3/2/2007
67.	Subhash Panditrao Chavan	Labour	25/8/2007
68.	Yogendra Naresh Shelar	Labour	1/1/2011
69.	Krushna Valku Ratambe	Labour	3/2/2006
70.	Sachin Dattu Gaikwad	Labour	3/5/2007
71.	Manohar Ramu Kapse	Labour	11/11/2006
72.	Sunil Ankush Bhalerao	Labour	30/5/2008

18. Thus, out of total 99 employees included in Annexure-A to the Statement of Claim, 22 came to be employed after 3 March

2010. Ignoring this aspect, the Industrial Court has proceeded to grant them the benefit of absorption even before they were appointed in service. So far as the rest of the employees are concerned, barring very few who were engaged in 2005 or 2006, most of them had put in only couple of years in service as on 3 March 2010. The effect of the order of the Industrial Court is that they would be granted the benefit of permanency in the municipal service on the strength of putting in couple of years of service in respect of the contract executed with the Contractor.

19. The main contest between the parties before the Industrial Court was about existence of employer-employee relationship. Before adverting to the factual position, it would be necessary to examine the legal position settled by various judgments on the issue. In its judgment in *International Airport of India* (supra), the Apex Court has explained the expression 'control and supervision' in the context of contract labour and has held in paras- 38 and 39 as under :

38... if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by a contractor, if the right to regulate the employment is with the contractor, and the ultimate supervision and control lies with the contractor.

39. The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise. In short, worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor. (*International Airport Authority of India case, SCC p. 388, paras 38-39*)"

20. In ***Balwant Rai Saluja*** (supra), the Apex Court considered the judgments in ***Bengal Nagpur Cotton Mills Vs. Bharat Lal*** (2011) 1 SCC 635, ***International Airport Authority of India*** (supra), ***National Aluminium Co. Ltd V. Ananta Kishore Rout*** (2014) 6 SCC 756 and concluded in para-65 of its judgment that following six relevant factors are required to be taken into consideration for establishing employer-employee relationship. The Apex Court held in para-65 as under :

65. Thus, it can be concluded that the relevant factors to be taken into consideration to establish an employer-employee relationship would include, inter alia :

- (i) who appoints the workers;
- (ii) who pays the salary/remuneration;
- (iii) who has the authority to dismiss;
- (iv) who can take disciplinary action;
- (v) whether there is continuity in service; and

(vi) extent of control and supervision i.e. whether there exists complete control and supervision.

As regard extent of control and supervision, we have already taken note of the observations in *Bengal Nagpur Cotton Mills case* (2011) 1 SCC 635, *International Airport Authority of India case* (2009) 13 SCC 374 and *Nalco case* (2014) 6 SCC 756.

21. Thus as per the conclusions deduced by the Apex Court in *Balwant Rai Saluja*, after taking into consideration all the judgments delivered in the past, that the Court must take into consideration the relevant factors of appointment of workers, payment of salary, authority to dismiss or to take disciplinary action, continuity of service and extent of control and supervision. Thus 'control and supervision' cannot be the only test for deciding existence of employer-employee relationship.

22. The Industrial Court has relied upon the judgment of the Apex Court in **Indian Petrochemicals Corporation Ltd. V/s. Shramik Sena & Ors.** 1999 II CLR 634 in which the Apex Court in para-25 has held as under :

25. Though the canteen in the appellant's establishment is being managed by engaging a contractor it is also an admitted fact that the canteen has been in existence from inception of the establishment. It is also an admitted fact that all the employees who were initially employed and those inducted from time to time in the canteen have continued to work in the said canteen uninterruptedly. The employer contends that this continuity of employment of the employees, inspite of there being change of contractors, was due to

an order made by the Industrial Court Thane, on 10th November 1994 wherein the Industrial Court held that these workmen are entitled to continuity of service in the same canteen irrespective of the change in the contractor. Consequently, a direction was issued to the management herein to incorporate appropriate clauses in the contract that may be entered into with any outside Contractor to ensure the continuity of employment of these workmen. The management, therefore, contends that the continuous employment of these workmen is not voluntary. A perusal of the said order of the Industrial Court shows that these workmen had contended before the said Court that the management was indulging in an unfair labour practice and in fact they were employed by the Company. They specifically contended therein that they are entitled to continue in the employment of the Company irrespective of the change in the contractor. The Industrial Court accepted their contention as against the plea put forth by the management herein. The employer did not think it appropriate to challenge this decision of the Industrial Court which has become final. This clearly suggests that the management accepted as a matter of fact the respondent-workmen are permanent employees of the management's canteen. This is a very significant fact to show the true nature of respondents employment. Besides apart, a perusal of the affidavits filed in this Court and the contract entered into between the management and the contractor clearly establishes:

- (a) The canteen has been there since inception of the appellant's factory,
- (b) The workmen have been employed for long years and despite change of contractors the workers have continued to be employed in the canteen.
- (c) The premises, furniture, fixture, fuel, electricity, utensils etc. have been provided for by the appellant,
- (d) The wages of the canteen workers have to be reimbursed by the appellant.

(e) The supervision and control on the canteen is exercised by the appellant through its authorised officer, as can be seen from the various clauses of the contract between the appellant and the contractor.

(f), The contractor is nothing but an agent or a manager of the appellant, who works completely under the supervision, control and directions of the appellant.

(g) The workmen have the protection of continuous employment in the establishment.

23. However, in *Indian Petrochemicals* (supra), the Apex Court was deciding case of employees of statutory canteens established under the Factories Act. The test laid down by the Apex Court for the employees of statutory canteens would not govern other cases for establishing employer-employee relationship. This is because some of the tests such as provision of fuel, electricity, utensils and premises etc. cannot be satisfied in cases of other contract workers. The tests laid down by the Apex Court in *Balwant Rai Saluja*, on the other hand, would determine existence of employer-employee relationship in all other cases.

24. Thus, as per judgment in *Balwant Rai Saluja*, the six tests suggested by the Apex court are required to be satisfied for the purpose of establishment of employer-employee relationship. Let us test the facts of the present case in the context of the said six tests:

(i) Who Appoints The Workers :

In the present case, there is no dispute to the position that the workers, whom Respondent-Union represents, have been appointed by the Contractor, M/s. Antony Waste. The Municipal Corporation had not issued any advertisement or sent any requisition to any recruiting agency for making appointments. No appointment orders are issued by the Municipal Corporation. The workers did not participate in any selection process conducted by the Municipal Corporation. There is nothing on record to indicate that the Municipal Corporation engaged Petitioners directly in their service. Therefore, the first test is not satisfied by the workers.

(ii) Who Pays The Salaries / Remunerations :

In the present case, till currency of the contract with the contractor, the salary was always paid by Contractor alone. There is nothing on record to indicate that the Municipal Corporation paid wages to the workers at any point of time. It is only after the termination of the contract and on account of the interim order initially passed by the Industrial Court, the services of the workers are continued by the Municipal Corporation and since there is no Contractor involved, the wages are also required to be paid by the Municipal Corporation. However, the test is to be applied at the time when the workers were

initially engaged. When the demand was made, the Contractor was executing the contract and paying salary to the workers. The terms of agreement, to which a reference is being made in the paragraphs to follow, also make it clear that the entire responsibility of payment of wages rested on the shoulders of the Contractor. It is sought to be argued by Ms. Cox that the wages were deliberately routed through the Contractor. I am unable to agree. The terms and conditions of the contract are such that the payments were to be made to the Contractor on the volume of solid waste managed and handled and transported and not on the basis of number of workers engaged. This aspect is also being dealt separately in the judgment. Therefore, there is nothing on record to indicate that at the time of raising of demand, the Municipal Corporation paid salary to the workers. Thus, the second test is also not satisfied.

(iii) Who Has The Authority To Dismiss; And

(iv) Who Can Take Disciplinary Action :

Since the workers were engaged by the Contractor, the Contractor alone had power to dismiss or to take disciplinary action. The workers have not placed any material on record to indicate that any employee was directly terminated by the Municipal Corporation or that any disciplinary action was initiated against any workers during currency of the contract by the Municipal Corporation. Thus, the third and fourth test are also not satisfied.

(iv) Whether There Is Continuity Of Service :

This test is to be applied in a fact situation where there are multiple contracts and the contractors engage same workers to execute their respective contracts. In the present case, M/s. Antony Waste was the first Contractor engaged by the Municipal Corporation to handle the work of solid waste management. There was no Contractor before M/s. Antony Waste and there is no contractor after termination of contract with M/s. Antony Waste. Therefore, this test is also not satisfied as there are no multiple Contractors. It may well be argued that the test is satisfied on account of the fact that services of workers are continued even after termination of contract of M/s. Antony Waste. However, such continuation is purely towards deference to the interim orders passed by the Industrial Court. Sans such interim order, the Municipal Corporation would not have continued the services of the Contract workers. In my view, therefore even the fifth test is not satisfied.

(vi) Extent Of Control And Supervision :

29. About this test, there is a detailed discussion by the Industrial Court and a finding is recorded that the Municipal

Corporation used to exercise control and supervision over the work performed by the Contractors. Maintaining cleanliness and handling the solid waste are one of the mandatory functions of the Municipal Corporation under the provisions of Section 63 of the Maharashtra Municipal Corporation Act, 1949. Thus, there is a statutory duty imposed upon the Municipal Corporation to collect, transport and dispose of the solid waste generated within its jurisdiction. Merely because the Municipal Corporation employs a Contractor to collect and transport the solid waste generated within its jurisdiction, the same would not absolve it from performing its statutory duties. It therefore can never happen that after contracting out the function of collection and transportation of municipal solid waste, Municipal Corporation would depend entirely on performance of the work by a Contractor. Though a contract may contain stipulations to punish a Contractor for failure to perform the work properly, but on account of statutory duty enshrined upon the Municipal Corporation, it is bound to supervise the overall work performed by the Contractor. However, supervision of performance of work by a Contractor cannot be mixed with the issue of supervision of work of an individual worker. As per test (vi), 'Control and Supervision' would include determination of the question 'whether there exists complete control and supervision'. In *Kirloskar Brothers*, the sixth test is included to mean 'Who can tell the employee the way in which the work should be done?'. In short, who has direct control over the

employee. In my view, to satisfy this test, it must be proved that the Municipal Corporation directed which worker should work where. To illustrate, the Municipal Corporation should have an authority to direct the Contractor that worker 'X' should not work in Ward 'A' or that worker 'Y' should work in Ward 'B'. The Municipal Corporation should not only be vested with but must have also exercised the power of transferring the workers from Place-A to Place-B. In the present case, the Contractor was being paid the contract value depending on volume of the municipal solid waste handled and transported. It was for the Contractor to decide how many employees would be required to execute the contract. Apparently, he has changed the workers from time to time which is clear from the list annexed at Annexure-A to the Statement of Claim where fresh faces are engaged every year. There is nothing on record to indicate that the Municipal Corporation played any role in replacement of workers. Therefore, merely because the Sanitary Inspector or a Supervisor of Municipal Corporation is deployed at a relevant place to ensure proper performance of the contract, same would not *ipso-facto* give rise to an assumption that the Municipal Corporation exercised full, complete or direct control or supervision over the workers of the Contractor. It must be borne in mind that for performance of statutory duties under Section 63 of the MMC, 1949, it is incumbent for the Municipal Corporation to supervise the

work of the Contractor. This would not mean that it supervises the work of the worker.

30. To my mind, therefore merely because Respondent-Union was able to prove that the some of the employees or Officers of the Municipal Corporation supervised some of the activities such as maintenance of muster roll, issuance of some directions etc. would not satisfy the test of exercise of direct control over the employee.

31. I am therefore of the view that Respondent-Union failed to meet any of the six tests specified by the Apex Court in its judgment in *Balwant Rai Saluja*. Even if some leeway is to be granted to the Respondent-Union by assuming that the sixth test of 'control and supervision' is satisfied in the present case, satisfaction of that test alone would not be sufficient and it is mandatory for it to satisfy tests nos. 1 to 5 as well. Therefore, it is difficult to hold that there was no employer-employee relationship between the Municipal Corporation and the contract workers.

32. For the purpose of determining existence of employer-employee relationship, it would also be apposite to refer to some of the terms and conditions of the contract. Under the contract, the

Municipal Corporation agreed to pay to the Contractor rate of Rs.550/- per ton for collection and transportation of the municipal solid waste. There is a provision for escalation each year under which the rate was to escalate to Rs.763.28/- per tonne in the tenth year. There is nothing to indicate in the contract that the Municipal Corporation directed the Contractor to employ particular number of employees. On the contrary, Clause-5.9(c) made the Contractors alone liable in respect of the work force employed by it. Clause-5.9(c) reads thus :

(c) Make efforts to maintain harmony and good industrial relations among the personnel employed in connection with the performance of its obligations under this Agreement and shall be solely responsible for compliance with all labour laws and solely liable for all possible claims and employment related liabilities of its staff employed in relation with the project and hereby indemnifies the Municipal Corporation against any claims, damages, expenses or losses in this regard and in that case and for shall no purpose shall the Municipal Corporation be treated as employer in this regard.

33. The contract was not for supply of labour but a comprehensive contract on turn key basis for collection and transportation of the municipal solid waste. In addition to engaging labourers for execution of the contract, the Contractor was also required to deploy its own vehicles, equipment, machineries, accessories, materials etc for execution of the contract. This is provided for in Clause-5.3(e) which reads thus :

e) The vehicles, equipment, machines, accessories, materials, implements, operational expenses including fuel and manpower and their facilities and protective gears required for implementing the project/work shall be provided by the Contractor in time bound manner.

34. There is some degree of debate between the parties as to who used to actually supply the vehicles meant for transportation of municipal solid waste. Ms. Cox is at pains to take me through the evidence of the witness examined by the Municipal Corporation-Mr. Vilas Balkrishna Joshi, the then Assistant Health Officer. In his evidence, he has given certain admissions that for removal of solid waste, the Corporation used to bear the expenses of the vehicle. He has also admitted that the Corporation used to supply the necessary equipment for removal of solid waste.

35. On the other hand, the witness of the Respondent-Union in his evidence stated that *'it is correct to say that the Dumpers/Refused Compactor are the heavy vehicles. I do not know whether the Kalyan Dombivali Municipal Corporation had given the Dumper/RC vehicles to M/s. Antony Waste Management for use.'* He did not make a positive statement that the vehicles and equipment were being supplied by the Municipal Corporation or by the Contractor. There is thus divergence in the evidence given by both the sides where the two witnesses appear to have given

admissions in support of case of the opposite side. The question is whether the opinion of the witnesses would prevail over the terms and conditions of the contract. The contract clearly covenanted that equipment, machinery etc. must be provided by the Contractor. The Contractor was to be paid on tonnage basis and it is incomprehensible as to how he could be permitted to use vehicles, machinery or equipment of the Municipal Corporation. It is not known whether he indeed used those machinery, it is not known as to under which arrangement, such use was permitted by the Municipal Corporation. The Contract did not envisage the use of vehicles, machinery and equipment of the Municipal Corporation by the Contractor. In my view, there can be no doubt that the contract was a comprehensive one where the Contractor was to take care of each and every aspect related to collection and transportation of municipal solid waste and he was to be paid on tonnage basis.

36. So far as the aspect of supervision is concerned, the Contract outlined the role of the Municipal Corporation in Clause-4.1 as under :

4.1 General role of the Municipal Corporation :

(a) The Municipal Commissioner shall designate officers for inspection of daily performance and supervision of the contract work on his/her behalf.

(b) Such persons shall have to inspect the work and give guidance, instruction and convey view points within the frame work of stipulated

terms & conditions for better performance or corrective action for the work of Collection, transfer & Transportation of Municipal Solid Waste, carried on by the Contractor with a view to ensure that the work is carried out smoothly and efficiently as stipulated in the contract and without any inconvenience to the citizens.

(c)The Contractor shall, promptly comply with the deficit in requirement conveyed and instructions given by the designated KDMC officers from time to time in this regard.

37. As observed above, supervision over work of Contractor engaged in collection and transportation of municipal solid waste is mandatory to discharge statutory functions by the Municipal Corporation. The Municipal Corporation is bound to inspect the work giving guidance or instructions as well as to take certain policy decisions to ensure smooth collection and transportation of municipal solid waste. Any dereliction in performance of the Contract by the Contractor would result in accumulation of waste at houses, public bins, etc. In a peculiar contract such as collection of solid waste, mere punishing the contractor by imposition of penalties or terminating him does not suffice and the employees and officials of the Municipal Corporation must ensure that the waste is collected and transported in an efficient manner to keep the city clean. In these circumstances, mere supervision of the Contract by the Municipal Corporation in accordance with the terms and conditions of the Agreement would not *ipso-facto* mean that the work of the employees is supervised by the Municipal Corporation. I am

therefore of the view that the conclusion reached by the Industrial Court about existence of employer-employee relationship is perverse and is liable to be set aside.

38. Since the employer-employee relationship is not established, the contract workers become employees of the Contractor. They do not get any right to seek regularisation / absorption / permanency in the municipal service. What is altogether ignored by the Industrial Court is the fact that the Municipal Corporation cannot employ any person in excess of sanctioned staffing pattern. The staffing pattern of each Municipal Corporation is sanctioned by the State Government. If Contractor's employees are directed to be absorbed in municipal service, such absorption would be over and above the sanctioned staffing pattern. This aspect has not at all been taken into consideration by the Industrial Court while directing absorption of Petitioners in service.

39. There is also some amount of debate between Mr. Talsania and Ms. Cox about permissibility of grant of relief of absorption by an industrial adjudicator contrary to the law laid down in *Umadevi*. Ms. Cox has placed strong reliance on the judgment of the Apex Court in *Maharashtra State Road Transport Corporation*. In my view, the contingency of determining right of absorption in

municipal service would have arisen only in the event if employer-employee relationship being proved. Since employer-employee relationship itself is not proved, there is no question of consideration of right of the workers to be absorbed in the municipal service. I am therefore stirring clear the debate between Mr. Talsania and Ms. Cox with regard to the permissibility of grant of relief of absorption by an Industrial adjudicator contrary to the law laid down by the Constitution Bench in *Umadevi*.

40. What is left now is to deal with the judgment of the learned Single Judge of this Court in *Municipal Corporation of Greater Mumbai* (supra). This Court has dealt with the issue of grant of permanency status to volunteers engaged by NGOs and Societies for performing the work of street cleaning in the M.C.G.M. The then Municipal Commissioner of MCGM had introduced the Scheme of engaging local NGOs and Co-operative Societies to ensure cleanliness in the City by following Hyderabad pattern. Under the Scheme, tenders were invited from NGOs and Co-operative Societies, and they were allotted the work on lottery basis to clean the municipal streets. The NGOs and Co-operative Societies in turn engaged volunteers to execute the work of cleaning the municipal streets. This Court held that since minute supervision by employees and Officials of Municipal Corporation was done in respect of unskilled work performed by those volunteers, the test of

supervision and control was satisfied. This Court held that the Contractors existed only for the purpose of collecting money from the Corporation and passing on the same to the concerned workers. In para-34 of the judgment, this Court held as under :

34. There is bound to be some degree of control by the Principal Employer, ultimately it is the assessment of evidence which will pave the way and bring out the actual relationship between the employer and the workers. Where the contract labour is employed in a highly specialized and skilled work area and the principal employer is answerable to the consumers of the system, then the principal employer will naturally have a higher degree of supervision and cannot leave the work of supervision to the contractors alone. However, when the work is as basic as cleaning the streets as done by concerned workers, which does not require a high level of technical knowledge and expertise, then minute supervision on the work of the concerned workers by the Corporation will have to be taken note of. The tender does not specify any particular qualification on behalf of the contractor or an NGO. If the work of cleaning the streets was to be taken purely on a contract basis, then the reporting to the Overseer, similar terms of contract through-out the city, specifying the tools and powders, fining the workers, directing the subsequent contractor to pay the wages of workers of earlier contractors, repeatedly issuing tenders without any gap, would not normally arise. To find out whether the contractors are only introduced as intermediaries to avoid grant of permanent status, these aspects are crucial to be considered. The charge that the contracts are sham and bogus does not necessarily mean that the contractors do not exist, issue is what their status is and whether they are merely interposed. As stated earlier there cannot be a single mathematical formula, but all factors must be considered cumulatively. The evidence which is culled out and discussed, taken cumulatively shows an all pervading role of the Corporation. The decision of the Standing committee, budgetary allocation, virtually no expertise of the contractors, norms in all wards being fixed, even margin of profit is fixed, almost all aspects of the work is determined by the corporation, transferability, that almost anyone can form an NGO and apply and that the Corporation does have any rigorous standards

for applicants, are some of the key factors. This shows that on site there is a clear and direct connection between the Corporation and the concerned workers. The contractors exist only for the purpose of collecting money from the Corporation and passing on the same to the concerned workers. Any contractor or a Co-operative Society or any NGO without any past experience without much credentials can simply submit a tender, collect a specified amount, keep some men present as supervisor, show the specified number of workers working under the said contractors and pass on the money from the Corporation to the workers. They have no other role to play. The entire thrust of the argument of the Corporation is that the contracts have been given and there is no direct payment by the Municipal Corporation. The Union has not disputed this position, however, the basic grievance is that in spite of this being the position on paper in reality, there is no tripartite arrangement but the contractors or NGOs are only placed for the sake of convenience. This grievance is upheld by the Tribunal.

41. It is on the basis of judgment of this Court in Municipal Corporation of Greater Mumbai that Ms. Cox would strenuously argue that the case in hand involves similar contract where the Contractor is engaged only as an intermediary and the entire work of collection and transportation of municipal solid waste is handled by the Municipal Corporation through contract workers. I am unable to agree. Unlike in the case in *Municipal Corporation for Greater Mumbai*, where the Contractors existed for the purpose of collecting money and passing on the same to the concerned workers, the contract in the present case is of comprehensive nature involving not just the labourers but also vehicles, equipment and machinery. The Contractor is a well-established player in the field of handling the

municipal solid waste all over the country. It is therefore difficult to believe that he was engaged merely as an intermediary. Also of relevance is the fact that the judgment of learned Single Judge of this Court was challenged before the Apex Court by the MCGM by filing Civil Appeal No. 4929/2017. The Apex Court in para-8 of its order dated 7 April 2017 directed that the order was to be treated as a precedent. The Apex Court directed as under :

8. This order shall not be treated as a precedent as by and large, it is based on consensus.

42. Therefore, it is difficult to hold that the judgment of this Court in M.C.G.M. would constitute a binding precedent in view of the clarification given by the Apex Court.

43. After considering the entire conspectus of the case, I am of the view that the impugned judgment and order passed by the Industrial Tribunal is unsustainable. The Petitioner failed to satisfy all the six tests laid down by the Apex Court in the case of ***Balwant Rai Saluja*** for the purpose of establishing employer-employee relationship. The workers represented by the Respondent-Union were engaged by the Contractor. They were always paid by the Contractor. They have been replaced frequently by the Contractor without any role by the Municipal Corporation. As per the list

annexed at Annexure-A to the Statement of Claim, some of the workers were engaged for couple of months by the time the demand was made for their permanency. Rest had put in couple of years of service. To grant the benefit of permanency to such workers who are neither engaged by the Municipal Corporation nor have participated in any selection process nor were engaged against sanctioned posts and had worked for couple of months/years would constitute breach of equality clause enshrined under Article 41 of the Constitution of India. The Industrial Tribunal has erred in granting them the benefit of permanency from the date of their appointment i.e. 3 March 2010. In my view, with termination of the contract, the workers ought to have continued in services of the Contractor in respect of another contract. They had no right to claim any right from the Municipal Corporation. Their continuation in service on account of interim orders initially passed by the Industrial Tribunal and later continued by this Court, would not create any right in their favour. In fact, on account of the interim orders, the Municipal Corporation has not been able to engage another Contractor since it has a liability of continuing the contract workers of M/s. Antony Waste even though its contract is long since terminated.

44. I therefore find the impugned Judgment and Order of the Tribunal to be indefensible. Accordingly, the Petition succeeds.

The Judgment and Award dated 12 January 2017 passed by the Industrial Tribunal in Reference (IT) No.27/2012 is set aside.

45. Rule is made absolute in the above terms.

SANDEEP V. MARNE, J.

46. After the Judgment is pronounced, Ms. Cox, the learned Counsel appearing for Respondent No.2 would pray for stay to the Judgment. Mr. Rao would oppose the prayer. Considering the fact that members of the Respondent-Union are in service for considerable period of time, operation of Judgment is stayed for a period of six weeks from today.

SANDEEP V. MARNE, J.