

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP-430-2021 (O&M)
Date of Decision: 03.10.2023

M/S MARK EXHAUST SYSTEM LIMITED

...Petitioner

Versus

STATE OF HARYANA AND OTHERS

...Respondents

CORAM: HON'BLE MR. JUSTICE HARSH BUNGER

Present : Ms. Abha Rathore, Advocate
for the petitioner.

Mr. Praveen Chander Goyal, Addl. A.G., Haryana.

Mr. K.B. Sidhu, Advocate
for respondents No.3 and 4.

Mr. K.S. Sidhu, Advocate
for respondent No.5 along with
Mr. Prabir Bhattacharyya-respondent No.5, in person.

HARSH BUNGER, J.

Petitioner (M/s Mark Exhaust System Limited) has filed the instant writ petition, seeking a writ in the nature of *certiorari* for setting aside Clause-1 of the Reference Order (“whether workers were employed with the management or with contractor”) and to delete the name of the petitioner from the array of the parties in the Reference Order dated 04.03.2020 (Annexure P-14).

A further prayer has been made for staying proceedings before the Industrial Tribunal-cum-Labour Court, Circle-II, Gurugram qua the petitioner.

2. Briefly, the petitioner is stated to be engaged in the manufacture of auto parts and claims that it has approximately 90 regular workmen. It is the case of the petitioner that for dealing with other incidental works like

loading, unloading, security services, drivers, house-keeping, pantry, welding, material handling and movement; the petitioner's company is engaging contract labour by following the requirements of Contract Labour (Regulation and Abolition Act, 1970) (here-in-after referred to as 'the CLRA Act, 1970'). It is the case of the petitioner that it is duly registered for engaging contractor and contract labour. Respondents no.6 to 8 are stated to be the duly licensed contractors, to whom the contracts were given by the petitioner company.

3. As per the petitioner, the workers of the contractors had initially raised a demand notice dated 02.03.2017, claiming enhanced wage allowances, regular increments, appointment letters, leave etc. The said demand notice was replied by the respondent-Management, by pointing out that the contract workers were engaged by the contractors and were being paid wages by the contractors only and there was no master-servant/employer-employee relationship between the petitioner-Company and the contractor's workmen. It is also the case of the petitioner that another demand notice dated 10.10.2017 was also served by the contractor's workers against the petitioner company and its contractors, alleging their illegal termination on 24.04.2017. It is further the case of the petitioner-company that another demand notice dated 07.12.2018 was served by three contractor's workers (respondents No.3 to 5, herein) by claiming themselves to be the General Secretary, Vice President and the President of '*Mark Exhaust Theka Sharmik Sangthan.*'

4. As per the petitioner, the aforesaid demand notice was replied by the petitioner's company as well as the contractors and the contractors had admitted that the workers, mentioned in the demand notice, were

working with them. Petitioner claims that the Government, without applying its mind to the stand taken by the Management and also the stand of the contractors, made reference on 04.03.2020 (Annexure P-14) as under :-

- “(i) Whether workers were employed with management or with Contractor?
- (ii) Whether their termination is justified or not ?
- (iii) Whether workers are entitled to any relief ?”

In the afore-mentioned circumstances, the petitioner-company has filed this writ petition, seeking setting aside of Clause (i) of the Reference Order (Annexure P-14) by submitting that the appropriate government has failed to apply its mind and formulate an opinion on the basis of material on record as to whether there exist a genuine industrial dispute. Petitioner-company claims that the CLRA Act, 1970 does not prohibit use of contract labour and when there is a valid contract system, there is no employee-employer relationship between the contractor's workers and the principal employer. It is the case of the petitioner-Company that the workers were never employed by it and there was no question of their termination. Petitioner states that it has no role as regards the workers inasmuch as that the petitioner-company was engaging contractors for the work of loading-unloading, security services, drivers etc. and the payment was also being made through the contractor. It is also stated that there never existed any employer-employee relationship between the petitioner-company and respondents No.3 to 5 or 264 workmen and there was no authorization by the said 264 workers in favour of respondents No.3 to 5. Petitioner-company places reliance upon the judgment rendered by the Hon'ble Supreme Court in the case of *Steel Authority of India vs National Union Water Front Workers 2001 AIR (Supreme Court) 3527*, to contend

that the principal employer cannot be required to absorb the contract labour working in the establishment concerned. Accordingly, it is submitted that the demand notice and Clause (1) of Reference Order (Annexure P-14) be set aside.

5. On the other hand, learned counsel appearing for respondents No.3 to 5, while referring to Annexure P-9 (demand notice) dated 07.12.2018, submitted that the list of the contesting workmen, duly signed by the workmen, engaged by the management through the contractors along with the relevant personal and service details were attached with the demand notice and all the 264 workmen were being referred as the contesting workmen. By referring to the said demand notice, it is further submitted that the major issues raised therein are as follows :-

“a. Whether the contracts of the management nos.1 and 2 with all its above mentioned contractors regarding the contesting workmen were sham and bogus and the said workmen have been and are employees of the managements since their respective first date of joining (“joining date”) any such contractor or the management, whichever is earlier? And

b. Whether the termination / discharge / retrenchment /change of service conditions of the said contesting workmen effected by the managements from 24.04.2017 in the garb of termination of contract with the three contractors aforesaid are null and void ab initio as those are in blatant violations of all related sections of the Industrial Disputes Act, 1947 and the same further amount to adoption of unfair labour practices by the managements?

c. Whether the said workmen are entitled to salaries and all consequential benefits at par with the equally placed regular employees of the management

from their earliest joining dates stated in the clause (a) above?

d. Whether the said workmen are entitled to all consequential reliefs such as backwages, bonus etc., based on the salaries stated in clause (c)above, and continuity of services from 24.04.2017?

e. In the alternative, if the workmen are held to be not employees of the management, then reliefs such as stated in clause (d) above from the respective contractors effective 24.04.2017 ?”

6. It is submitted that the managements have all along been falsely and fraudulently denying employer-employee relationship between the contract workers (including the contesting workmen) and the managements and that the managements along with the contractors were falsely claiming that the contracts with the contractors had expired in its due course and after the termination of the respective contracts, they are not in a position to engage the said workers. It is submitted that the contracts of the management with the contractors regarding the contesting workmen were *sham* and *bogus* and the workmen have been and are employees of the management since their respective date of joining. It is also submitted that a large number of the contract workers were actually treated by the management as their employees till around 2009 and their salaries along with provident fund and ESIC contributions were paid directly by the managements and around 2009, the management had forced its employees to close their provident fund and ESIC accounts and to join the roles of some contractors under the threat of throwing out the workers unceremoniously. It is the case of the workers that they have been working directly under the control and supervision of the management and the leaves of the workers were also sanctioned by the management. It is stated that the promotions of some workers were also

affected by the managements and their medical treatments were also provided for by the managements itself. It is claimed that the nature of work of the workers is that of regular employees of the management and the jobs are perennial in nature and intrinsically, inseparably and directly connected with the core manufacturing activity of the management. It is submitted that the afore-said facts as well as the issues will be dealt with by the Tribunal, to whom the reference has been made by the appropriate government, where the respective parties would lead their evidence in accordance with law. It is submitted that the petitioner-company is falsely claiming that the reference order dated 04.03.2020 (Annexure P-14) was passed without application of mind. It is submitted that a perusal of the failure report by the authorities would manifest that the contentions of the petitioner-company as well as the contractors were duly considered and only then, an opinion was formed that there exist an industrial dispute on the referred issues. Accordingly, it is submitted that there is no merit in the writ petition and the same may be dismissed.

7. As regards respondents No.6 to 8 are concerned, they have filed their separate written statements wherein, a stand has been taken that the petitioner-company had engaged their contract labour for works like house-keeping, pantry, welding, material handling and movement etc. and the contractor-company was following the requirements of the CLRA Act, 1970. It is also their stand that they have been paying wages to their contract labour every month and the said labour was working under their control and supervision. It is also their stand that the petitioner-company had terminated their contract and the contract labour engaged by them, had left the services on their own.

8. I have heard learned counsel for the respective parties and perused the paper book with their able assistance.

9. It is well settled law that as to whether the contract is a *sham* or camouflage, is not a question of law, which can be arrived at having regard to the provisions of the CLRA Act, 1970 and it is for the industrial adjudicator to decide the said question keeping in view the evidences brought on record.

10. With regard to the afore-said legal position, reference can be made to the judgment rendered by the Hon'ble Supreme Court in the case of ***Workmen of Nilgiri Coop. Marketing Society Limited vs State of Tamil Nadu and others 2004(3) SCC 514***, wherein it has been held as under :-

“68. Whether a contract is a sham or camouflage is not a question of law which can be arrived at having regard to the provisions of Contract Labour (Regulation and Abolition) Act, 1970. It is for the industrial adjudicator to decide the said question keeping in view the evidences brought on records.

69. In Municipal Corporation of Greater Mumbai v. K.V. Sharamik Sangh and Others, 2002(2) S.C.T. 756 ; [(2002)4 SCC 609], non-maintenance of records by the contractors was held to be not conclusive for determination as to whether the workmen were working under the contractor. The Court held that such disputed questions of fact cannot be gone into in a civil proceeding.

70. In Sarva Shramik Sangh v. M/s Indian Smelting & Refining Company Limited & Others, 2002(2) SCT 756 (SC) : [JT 2003(8) SC 243], this Court observed :

“...A jurisdictional fact is one on the existence or otherwise of which depends assumption or refusal to

assume jurisdiction by a court, tribunal or the authority. Said fact has to be established and its existence proved before a Court under the Maharashtra Act can assume jurisdiction of a particular case. If the complaint is made prima facie accepting existence of the contractor in such a case what has to be first established is whether the arrangement or agreement between the complainant and the contractor is sham or bogus. There is an inherence admission in such a situation that patently the arrangement is between the complainant and the contractor and the claim for a new and different relationship itself is a disputed fact. To put it differently, the complainant seeks for a declaration that such arrangement is not a real one but something which is a façade. There is no direct agreement between the complainant and the principal employer and one such is sought to be claimed but not substantiated in accordance with law. The relief in a sense relates to a legal assumption that the hidden agreement or arrangement has to be surfaced...”

71. It was also observed :

“The common thread passing through all these judgments is that the threshold question to be decided is whether the industrial dispute could be raised for abolition of the contractor labour system in view of the provisions of the Maharashtra Act. What happens to an employee engaged by the contractor if the contract made is abolished is not really involved in the dispute. There can be no quarrel with the proposition as contended by the appellants that the jurisdiction to decide a matter would essentially depend upon pleadings in the plaint. But in a case like the present one, where the fundamental fact decides the jurisdiction to entertain the complaint itself the position would be slightly different. In order to entertain a complaint under the Maharashtra Act, it has

to be established that the claimant was an employee of the employer against whom complaint is made, under the I.D. Act. When there is no dispute about such relationship, as noted in paragraph 9 of the CIPLA's case (supra) the Maharashtra Act would have full application. When that basic claim is disputed obviously the issue has to be adjudicated by the forum which is competent to adjudicate..."

*...89. In **Dharangadhara Chemical Works Limited v. State of Saurashtra & Others**, AIR 1957 Supreme Court 264, this Court upon noticing several authorities held :*

*"The principle which emerges from these authorities is that the prima facie test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work, or to borrow the words of Lord Uthwatt at page 23 in **Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Ltd. [1947] 1 A.C. 1, at p. 23.** "The proper test is whether or not the hirer had authority to control the manner of execution of the act in question."*

The nature or extent of control which is requisite to establish the relationship of employer and employee must necessarily vary from business to business and is by its very nature incapable of precise definition. As has been noted above, recent pronouncements of the Court of Appeal in England have been expressed the view that it is not necessary for holding that a person is an employee, that the employer should be proved to have exercised control over his work, that the test of control was not one of universal application and that there were many contracts in which the master could not control the

*manner in which the work was done (Vide observations of Somervell, L.J., in **Cassidy v. Ministry of Health** (supra), and denning, L.J., of Stevenson, Jordan and **Harrison Ltd. V. MacDonald and Evans** (supra).)*

*The correct method of approach, therefore, would be to consider whether having regard to the nature of the work there was due control and supervision by the employer or to use the words of Fletcher Moulton, L.J., at page 549 in **Simmons v. Health Laundry Company**, [1910] 1 K.B. 543 at pp. 549, 550 :-*

“In my opinion it is impossible to lay down any rule of law distinguishing the one from the other. It is a question of fact to be decided by all the circumstances of the case. The greater the amount of direct control exercised over the person rendering the services by the person contracting for them the stronger the grounds for holding it to be a contract of service, and similarly the greater the degree of independence of such control the greater the probability that the services rendered are of the nature of professional services and that the contract is not one of service.”

*...94. There cannot be any doubt whatsoever that where a person is engaged through an intermediary or otherwise for getting a job done, a question may arise as the appointment of an intermediary was merely sham and nominal and rather than camouflage where a definite plea is raised in Industrial Tribunal or the Labour Court, as the case may be, and in that event, it would be entitled to pierce the veil and arrive at a finding that the justification relating to appointment of a contractor is sham or nominal and in effect and substance there exists a direct relationship of employer and employee between the principal employer and the workman. The decision of this Court in **Hussainbhai, Calicut v. The Allath Factory***

Thezhilali Union, Kozhikode and Others, (1978) 4 SCC 257 will fall in that category.”

11. Still further, in a recent judgment rendered by the Hon’ble Apex Court in the case of *Kirloskar Brothers Limited vs Ramcharan and others, 2023(1) SCC 463*, the Hon’ble Supreme Court has referred to a decision in the case of *International Airport Authority of India v. International Air Cargo Workers’ Union 2009(13) SCC 374*, wherein the case of *Steel Authority of India* (supra) was considered and it was observed that where there is no abolition of contract labour under Section 10 of the CLRA Act, 1970 but the contract labour contends that the contract between the principal employer and the contractor is sham and nominal, the remedy is purely under the Industrial Disputes Act. It has further been observed that the industrial adjudicator can grant the relief sought if it finds that the contract between the principal employer and the contractor is sham, nominal and merely a camouflage to deny employment benefits to the employee and that there is in fact a direct employment, by applying tests like: who pays the salary; who has the power to remove/dismiss from service or institute disciplinary action; who can tell the employee the way in which the work should be done, in short, who has direct control over the employee.

12. The relevant extract of the judgment rendered in *Kirloskar Brothers Limited* (supra) reads as under :-

“4.5 Thus, as observed and held by this Court, neither Section 10 of the CLRA Act nor any other provision in the Act, expressly or by necessary implication, provides for automatic absorption of contract labour on issuing a notification by the appropriate Government under sub-section (1) of Section 10, prohibiting employment of contract labour, in any process, operation or any other work in any establishment and consequently, the principal

employer cannot be required to order absorption of the contract labour working in the establishment concerned. It has further been observed and held by this Court in the aforesaid decision that on issuance of prohibition notification under Section 10(1) of the CLRA Act, prohibiting employment of contract labour or otherwise, in case of an industrial dispute brought before it by any contract labour in regard to conditions of service, the industrial adjudicator will have to consider the question whether the contractor has been interposed either on the ground of having undertaken to produce any given result for the establishment or for supply of contract labour for work of the establishment under a genuine contract or is a mere ruse/camouflage to evade compliance with various beneficial legislations so as to deprive the workers of the benefits thereunder.

4.6 xxx xxx xxx

4.7 In the case of **International Airport Authority of India v. International Air Cargo Workers' Union and Anr.** (supra), after considering the decision of this Court in the case of **Steel Authority of India Ltd. and Ors. v. National Union Waterfront Workers and Ors.** (supra), it has been observed and held by this Court that where there is no abolition of contract labour under Section 10 of the CLRA Act, but the contract labour contends that the contract between the principal employer and the contractor is sham and nominal, the remedy is purely under the ID Act. It is further observed that the industrial adjudicator can grant the relief sought if it finds that the contract between the principal employer and the contractor is sham, nominal and merely a camouflage to deny employment benefits to the employee and that there is in fact a direct employment, by applying tests like: who pays the salary; who has the power to remove/dismiss from service or initiate disciplinary action; who can tell the

employee the way in which the work should be done, in short, who has direct control over the employee.”

13. When the respective pleadings of the parties in this case is considered in the legal position as indicated above, it is manifest that on one hand, the petitioner-company is claiming that for various incidental works, it had given out contracts to various contractors (respondents No.6 to 8) and the contract workers were not employed by them and there was no relationship of employer and employee between the petitioner-company and the contractor's workers; whereas, on the other hand, the workers through respondents No.3 to 5 claimed that they are in fact the workers of the petitioner-management, who exercise its direct control over them and the contracts between the petitioner-company and the contractors (respondents No.6 to 8) are sham and bogus. Respondents No.3 to 5, have referred to various instances to claim that the workers are infact the employees of the petitioner-management and the alleged contracts are mere camouflage.

14. In my considered view, since the petitioner-management and the workers and also the contractors have taken a stand which would require evidence to be led by the parties in support of their respective claims, the same would fall within the domain of the industrial adjudicator, to which, the appropriate government has already made a reference vide Reference Order dated 04.03.2020 (Annexure P-14), which reads as under :-

“Therefore, the Governor of Haryana is now exercising the powers conferred by clause (c) of sub-section (1) of section 10 of the Industrial Disputes Act, 1947 and amendments made by him from time to time and section 7-(a) of the said Act. The Industrial Tribunal, Circle-2, constituted under A, referred to Gurgram for the following specific matters, which is either a disputed matter/case between the said management and the workers or a

case/matters relevant to the dispute or related to the judgment and award in 6 months. Let's do –

- (1) Whether the workers were employed with Management or with Contractor?*
- (2) Whether their termination is justified or not?*
- (3) Whether workers are entitled for any relief?*

Vineet Garg
Dated:-04.03.2020 Principal Secretary, Government of Haryana, Labour and Employment Department”

Therefore, it would purely fall within the jurisdiction of the Industrial Adjudicator to consider and decide upon the contesting claims of the respective parties on the basis of evidence/material to be led by them. From the perusal of the file, it cannot be said that the appropriate Government has erred in making the reference of dispute for adjudication.

15. No other argument has been raised.

16. In view of the discussions in the fore-going paras, I do not find any merit in this writ petition and the same is accordingly dismissed.

17. All pending application/s, if any, shall also stand closed.

October 3rd, 2023
gurpreet

(HARSH BUNGER)
JUDGE

Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No