



2023:DHC:8882



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Pronounced on: 12th December, 2023**

+ W.P.(C) 2085/2008, CM APPL No. 3975/2008 & 20845/2022

THE DG DELHI DOORDARSHAN KENDRA Petitioner
Through: Ms. Shruti Sharma and Mr. Pranav
Giri, Advocates.
versus

MOHD. SHAHBAZ KHAN Respondent
Through: Mr. Sanjoy Ghose, Sr. Advocate
with Mr. Prakhar Bhatnagar, Mr.
Rohan Mandal and Ms. Sweekriti
Yadav, Advocates.

+ W.P.(C) 2086/2008 & CM APPL No. 20616/2022

THE DG DELHI DOORDARSHAN KENDRA Petitioner
Through: Ms. Shruti Sharma and Mr. Pranav
Giri, Advocates.
versus

DANVIR Respondent
Through: Mr. Sanjoy Ghose, Sr. Advocate
with Mr. Prakhar Bhatnagar, Mr.
Rohan Mandal and Ms. Sweekriti
Yadav, Advocates.

+ W.P.(C) 2087/2008 & CM APPL. 20639/2022

THE DG DELHI DOORDARSHAN KENDRA Petitioner
Through: Ms. Shruti Sharma and Mr. Pranav
Giri, Advocates.
versus

HANS RAJ Respondent
Through: Mr. Sanjoy Ghose, Sr. Advocate



2023:DHC:8882



with Mr. Prakhar Bhatnagar, Mr.
Rohan Mandal and Ms. Sweekriti
Yadav, Advocates.

+ W.P.(C) 2088/2008 & CM APPL. 20736/2022

THE DG DELHI DOORDARSHAN KENDRA Petitioner

Through: Ms. Shruti Sharma and Mr. Pranav
Giri, Advocates.

versus

TEJ PAL

..... Respondent

Through: Mr. Sanjoy Ghose, Sr. Advocate
with Mr. Prakhar Bhatnagar, Mr.
Rohan Mandal and Ms. Sweekriti
Yadav, Advocates.

+ W.P.(C) 2089/2008 & CM APPL. 20638/2022

THE DG DELHI DOORDARSHAN KENDRA Petitioner

Through: Ms. Shruti Sharma and Mr. Pranav
Giri, Advocates.

versus

MANOHAR PASWAN

..... Respondent

Through: Mr. Sanjoy Ghose, Sr. Advocate
with Mr. Prakhar Bhatnagar, Mr.
Rohan Mandal and Ms. Sweekriti
Yadav, Advocates.

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.



FACTUAL MATRIX

1. The petitioner is a Government entity governed by statutory rules & regulations for the appointment of its employees. The respondents are casual laborers who earlier worked with the petitioner.
2. In the year 1998, the petitioner had entered into a contract with an agency named M/s Navnidh Carriers for Transport, loading & Unloading Contraction service on Commission basis for the petitioner as and when required.
3. In the year 1999, the respondents filed an Original Application bearing no. 2637/1999 under Section 19 of the Administrative Tribunal Act, 1985 before the Central Administrative Tribunal ('CAT' hereinafter) seeking directions to the petitioner for pay parity and grant of temporary status from the date on which they completed the requisite number of days at work as per the scheme notified by the petitioner on 17th March, 1994, however, the said application was dismissed *ex parte* on the grounds that there exists no employee employer relationship between the petitioner and the respondents and therefore, the Tribunal does not have jurisdiction to adjudicate the case.
4. Thereafter, the respondents filed for conciliation, however, due to failure of the same, the matter was referred to the Industrial Tribunal by the Central Government.
5. In the year 2001, the respondents' services were terminated leading to the filing of a dispute under Industrial Disputes Act, 1947 ('ID Act' hereinafter). After hearing the parties at length, the learned Industrial Tribunal passed a common impugned award dated 15th October, 2007 in



favor of the respondents and directed the petitioner to reinstate the respondents along with 25% back wages.

6. Aggrieved by the same, the petitioner has preferred the present petition against the impugned award.

SUBMISSIONS

(On behalf of the petitioner)

7. The learned counsel appearing on behalf of the petitioner in all the writ petitions submitted that the learned Tribunal failed to correctly acknowledge the fact that the petitioner, as the Principal Employer, had no authority or oversight over matters such as hiring, firing, promotions, wage determination, workplace assignment, transfers, or other employment conditions of the workers employed by the contractor.

8. It is submitted that there is no employer-employee relationship between the parties, and therefore, no industrial dispute, as defined in Section 2(k) of the ID Act could have arisen in the absence of such an employment relationship among the parties.

9. It is submitted that even if M/s Navnidh Carriers, the contractor, did not possess a license under the Contract Labour (Regulation & Abolition) Act, 1970 ('the Act' hereinafter) for the supply of casual labourers, it should, at most, be considered a violation of Sections 7 and 12 of the Act. Any such violations, if present, would trigger the consequences outlined in Sections 14 and 23 of the Act, however, the conclusion reached by the learned Tribunal, which states that the Respondent-workers were the employees of the petitioner (Principal



Employer) solely because M/s Navnidh Carriers lacked the required license under the Act is legally incorrect and unsustainable.

10. It is submitted that the learned Tribunal failed to appreciate the fact that the entry/gate pass was issued to the workman after a request was made by the contractor- M/s Navnidh Carriers for supply of laborers in terms of the work order between the petitioner and M/s Navnidh Carriers.

11. It is submitted that the learned Industrial Tribunal erred in not appreciating that the petitioner was not paying any wages to the respondent, rather the contractor was responsible for payment of the wages and other demands of the workman engaged by him for carrying out the work assigned to it.

12. It is submitted that M/s. Navnidh Carriers is a necessary party to the present dispute and therefore the proceedings before the learned Tribunal were bad for non-joinder of the necessary parties.

13. It is submitted that the directions passed by the Learned Industrial Tribunal are contrary to the law laid down by the Hon'ble Supreme Court with regard to the casual employees engaged on daily wage basis.

14. It is submitted that the directions by the learned Industrial Tribunal are erroneous for the reason that the onus was on the workman to prove that he had completed 240 days of service in a year immediately preceding the date of his alleged termination. It is submitted that there was no cogent evidence before the learned Industrial Tribunal, whereby, it could have come to the conclusion that the respondent workmen had completed 240 days of service in a year immediately preceding the date of the alleged termination.



15. Hence, in view of the forgoing submissions, it is prayed by the petitioner that the present petition be allowed and reliefs may be granted, as prayed.

(On behalf of the respondents)

16. *Per Contra*, the learned counsel appearing on behalf of the respondent-workmen vehemently opposed the submissions made by the learned counsel for petitioner and submitted that the petitioner is patently wrong in claiming that the workmen were engaged by the petitioner through the contractor M/s Navnidh Carriers as they were directly employed by the petitioner as a casual labour and the respondents worked with the petitioner under the direct control and supervision, and the petitioner has paid the wages from 2nd August, 1998 till 1st February, 2001.

17. It is submitted that no documentary evidence has been adduced by the petitioner to show that the workmen had been hired through any contractor as the petitioner has failed to attest any document which would prove that the contract for work was given to M/s Navinidh Carriers. Therefore, the ground that the respondent was working under the contract of said contractor does not stand in the eye of law.

18. It is submitted that as per the record filed by the petitioner in the writ petition it is mentioned that the nature of work performed by M/s Navnidh Carriers is for transporters, loading and unloading contraction services on a commission basis for all over India. Hence, it is clear that M/s Navinidh Carrier specialises in a different area of service. Thus, they could not have possibly supplied the respondent-workmen to the petitioner under any contract, as they had no experience in the said field.



19. It is submitted that the respondent workmen have been employed by the petitioner for a period of more than five years without any break in the services and without any complaints. They were therefore entitled to be regularised in service with all the consequential benefits. It is submitted that when the workmen demanded regularisation, the petitioner terminated their services arbitrarily on 1st February, 2001.

20. It is submitted that it was already admitted by the witness of the petitioner during the cross examination before the learned Tribunal that the document pertains to the experience certificate issued by the official of the petitioner. Hence, after admitting the validity of the said document, the petitioner cannot take the plea regarding the contract labour. It is submitted that the petitioner has not filed any document regarding the contract labour as mandated by the Act and neither has obtained the license which is required under the Act to provide laborers to an entity.

21. It is submitted that the petitioner had neither given any show cause notice followed by charge sheet, nor conducted any domestic enquiry against the respondent-workmen, as required under the principles of natural justice.

22. Hence, in view of the forgoing submissions, it is submitted on behalf of the respondent that the present petition is devoid of any merits and is therefore liable to be dismissed.

ANALYSIS & FINDINGS

23. Heard the learned counsel for the parties and perused the record. This Court has given its thoughtful consideration to the submissions made by the parties. Since the grievance of the petitioner arise out of a common



impugned order dated 15th October, 2007 as passed by the learned Tribunal. By way of this judgement, this Court shall adjudicate all the connected matters.

24. The petitioner has filed the present petition against the impugned common award passed by the learned Tribunal directing the petitioner to reinstate the respondents with 25% back wages. Therefore, this Court needs to adjudicate the present petition to decide whether the learned Tribunal adjudicated the dispute in accordance with the law or not.

25. For proper adjudication of this writ, this Court deems it necessary to look into two issues, *firstly* the question of non-adherence to the provisions of the Act, which provides for mandatory registration of the Contractor, and *secondly* whether there are other factors which would lead to the establishment of employer employee relationship between the petitioner and respondent-workmen.

26. Before delving into the first issue at hand, it is important for this Court to discuss the relevance of the Act and the intent of the legislature for such an enactment.

27. As mentioned earlier, the Act was established with an aim to fulfill two-fold objectives, i.e. the regulation of employment of contract laborers and the abolition of contract labour under certain circumstances. The legislation was enacted with the aim of preventing the misuse of contract labour and improving working conditions. It addresses the regulation and elimination of contract labour, with a primary objective to eliminate it whenever feasible. In cases where complete abolition is not possible, the Act emphasises the need to regulate working conditions to ensure fair wages and the provision of essential amenities for contract labour.



28. The above said objectives have also been affirmed by the Hon'ble Supreme Court in various cases related to the rights of the wage earners. Therefore, it is fair to say that the enactment of the Act aimed to oversee the supply of the workforce and to safeguard laborers from exploitation, which includes provisions to protect the rights of a contract labour, assigning responsibility to both the labour contractor and the principal employer.

29. Now coming to the relevant provisions of the Act, Sections 7 and 12 provides for the registration of organisations and licensing of contractors respectively. The said provisions read as under:

“7. Registration of certain establishment.-

(1) Every principal employer of an establishment to which this Act applies shall, within such period as the appropriate Government may, by notification in the Official Gazette, fix in this behalf with respect to establishments generally or with respect to any class of them, make an application to the registering office: in the prescribed manner for registration of the establishment:

Provided that the registering officer may entertain any such application for registration after expiry of the period fixed in this behalf, if the registering officer is satisfied that the applicant was prevented by sufficient cause from making the application in time.

(2) If the application for registration is complete in all respects, the registering officer shall register the establishment and issue to the principal employer of the establishment a certificate of registration containing such particulars as may be prescribed.



12. Licensing of contractors.-

(1) With effect from such date as the appropriate Government may, by notification in the Official Gazette, appoint, no contractor to whom this Act applies, shall undertake or execute any work through contract labour except under and accordance with a licence issued in that behalf by the licensing officer.

(2) Subject to the provisions of this Act, a licence under sub-section (1) may contain such conditions including, in particular, conditions as to hours or work, fixation of wages and other essential amenities in respect of contract labour as the appropriate Government may deem fit to impose in accordance with the rules, if any, made under Section 35 and shall be issued on payment of such fees and on the deposit of such sum, If any, as security for the due performance of the conditions as may be prescribed.”

30. As evident, Section 7 provides for registration of the establishment with the Appropriate Government and imposes a duty on the principal employer to obtain the certificate for the said registration. Section 12 of the Act, provides for licensing of the contractors as notified by the Appropriate Government.

31. The perusal of both the provisions clarifies that the conditions as provided therein are of a mandatory nature, failing which the contractor and the principal employer shall be held liable.

32. In the pleadings, the petitioner has submitted that the learned Tribunal has solely relied upon the violation of the said provision and has therefore, concluded the establishment of an employer-employee relationship between the parties on the basis of the said violation. The petitioner has contended that the said reasoning is unsound in law and violation of the same does not anyhow establish a direct employer-



employee relationship between the parties. Therefore, this Court needs to look into the settled principle regarding the said situation.

33. In *Dena Nath v. National Fertilisers Ltd.*, (1992) 1 SCC 695, the Hon'ble Supreme Court clarified the position regarding the said issue and held as under:

“16. The decision of the Madras High Court in Workmen v. Best & Crompton Engineering Ltd., Madras [(1985) 1 LLJ 492 (Mad)] really arose out of an award given by the Labour Court in an industrial dispute. The industrial dispute had been raised by the workmen of the principal employer. They challenged the termination of service of workmen by the management as the management did not requisition the service of 75 workmen after October 16, 1978 on the ground that they were employed by the licensed contractor. This led to an industrial dispute and on a reference made of the said industrial dispute, the Labour Court rejected the contention of the management and held that the so-called contractor was a mere name-lender and did not hold licence under the Act and directed the reinstatement of the workmen with back wages and other benefits. This award of the Labour Court was challenged before the High Court by the management by a writ petition. The learned Single Judge of the Madras High Court took the view that the conclusion of the Labour Court that the labour contractor was not really a labour contractor, but he was merely acting as a tool in the hands of the management is not supported either by the pleadings of the parties or by the evidence. According to the learned Single Judge there was absolutely nothing to displace the weighty documentary evidence in favour of the management and therefore, he characterised the finding entered by the Labour Court to the contrary as being perverse and vitiated. The Division Bench in letters patent appeal reversed this finding of the learned Single Judge.



17. The High Court observed at page 497:

“In order to enable the Management to have the benefit of the contract labour, the Act has now legalised the employment of such contract labour, provided the intermediary contractor holds a valid licence and provided the Management also holds a valid licence as principal employer. This is subject to the prohibition contemplated under Section 10. There is no need for us to examine the content of Section 10 in this case. In order to regulate the employment of contract labour and to provide for abolition in certain circumstances, the said Act came to be passed. According to Section 7:

‘(1) Every principal employer of an establishment to which this Act applies shall, within such period as the appropriate Government may, by notification in the Official Gazette, fix in this behalf with respect to establishments generally or with respect to any class of them, make an application to the registering officer in the prescribed manner for registration of the establishment:

Provided that the registering officer may entertain any such application for registration after expiry of the period fixed in this behalf, if the registering officer is satisfied that the applicant was prevented by sufficient cause from making the application in time.

(2) If the application for registration is complete in all respects, the registering officer shall register the establishment and issue to the principal employer of the establishment a certificate of registration containing such particulars as may be prescribed.’

Under Section 12 of the Act, no contractor to whom this Act applies, shall undertake or execute any work through contract labour except under and in accordance with a licence issued in that behalf by the licensing officer. Sub-section (2) of Section 12 provides:



‘Subject to the provisions of this Act, a licence under sub-section (1) may contain such conditions including in particular conditions as to hours of work, fixation of wages and other essential amenities in respect of contract labour as the appropriate Government may deem fit to impose in accordance with the rules, if any, made under Section 35 and shall be issued on payment of such fees and on the deposit of such sum, if any, as security for the due performance of the conditions as may be prescribed.’

The combined effect of these two provisions in our view makes it clear that for a valid employment of contract labour, two conditions should be satisfied, viz., not only the principal employer but also the contractor should possess the requisite licence. In other words, the holding of licence by one alone will not enable the management to treat the workmen as contract labour.”

18. *The High Court of Kerala in the case of P. Karunakaran v. Chief Commercial Superintendent [1988 Lab IC 1346 : (1988) 72 FJR 248 : (1988) 1 Ker LJ 570] took the same view as was taken by the Punjab and Haryana High Court in the judgment under appeal. A similar view was expressed by the Delhi High Court in the case of New Delhi General Mazdoor Union v. Standing Conference of Public Enterprises (SCOPE) [(1991) 2 Delhi Lawyer 189]*

19. *The reference to the Labour Court/Industrial Tribunal could be as to whether it is necessary for the management to employ contract labour directly or indirectly; a question can as well be referred whether the engagement of contract labour was bona fide or it was a camouflage. In appropriate cases in industrial adjudication appropriate directions can be given to the principal employer in this behalf. This has been the subject-matter of decisions by the Tribunals/Labour Courts and by this Court also. The case of Standard Vacuum Refining Co. of India Ltd. v. Workmen [(1960) 2 LLJ 233 : AIR 1960 SC 948 : (1960) 3 SCR 466] is a case on this point. It was a case where the workmen employed by an oil refinery demanded that the*



contract system of labour adopted by the company for cleaning maintenance of the refinery belonging to the company should be abolished and the said demand was referred for adjudication. It was found that the work for which the contract was given is incidental to the manufacturing process and is necessary for it and of a perennial nature which must be done everyday and in these circumstances the Industrial Tribunal directed the company to abolish the contract system of labour with effect from a particular date and to have the said work done through workmen engaged by itself. This direction was given in view of the fact that the work was of a permanent nature and the labour employed through contractor was receiving much less wages than the unskilled workmen of the company and they were not having any other benefits and amenities like provident fund, gratuity, bonus, privilege leave etc. On the award of the Industrial Tribunal the Supreme Court gave the finding that it was an industrial dispute as defined under Section 2(k) of the Industrial Disputes Act. In dealing with the question whether the Tribunal was justified in giving the directions for abolishing the contract system the Supreme Court noted that industrial adjudication generally does not encourage employment of contract labour in modern times and it would be necessary to examine the merits of the dispute apart from general consideration that contract labour should not be encouraged; and that in any case the decision should rest not merely on theoretical or abstract objections to contract labour but also on the terms and conditions of the contract labour and the grievance made by the workmen thereof. On facts the Supreme Court observed: (SCR p. 475)

“It may be accepted that the contractor in the present case is an independent person and the system is genuine and there is no question of the company carrying on this work itself and camouflaging it as if it was done through contractors in order to pay less to the workmen. But the fact that the contract in this case is a bona fide contract would not necessarily mean that it should not be touched by the industrial tribunals. If the contract had been mala fide and a cloak for suppressing the fact that the



workmen were really the workmen of the company, the tribunal would have been justified in ordering the company to take over the entire body of workmen and treat it as its own workmen. But because the contract in this case was bona fide, the tribunal has not ordered the company to take over the entire body of workmen. It has left to it to decide for itself how many workmen it should employ and on what terms and has merely directed that when selection is being made preference should be given to the workmen employed by the present contractor. ”

The Supreme Court also noticed that the industrial dispute was confined to the cleaning maintenance of the plant; the work was incidental to manufacturing process and the work is necessary for it and was of a perennial nature which must be done every day and such work is generally done by workmen in the regular employment of the employer and there would be no difficulty in having regular workmen for this kind of work. It noted that the matter would be different if the work done was of an intermittent or temporary nature or was so little that it would not be possible to employ full-time workmen for the purpose.

20. It would be noticed that after the aforesaid observations of the Supreme Court in the case of Standard Vacuum Refining Company [(1960) 2 LLJ 233 : AIR 1960 SC 948 : (1960) 3 SCR 466] the Parliament while giving power to the appropriate government to prohibit employment of contract labour in any process or operation or other work in any establishment gave the guidelines in clauses (a), (b), (c) and (d) of sub-section (2) of Section 10, as noticed earlier, and guidelines are practically based on the guidelines given to the Tribunals in the aforesaid case of Standard Vacuum Refining Company [(1960) 2 LLJ 233 : AIR 1960 SC 948 : (1960) 3 SCR 466] by this Court. The Act as can be seen from the scheme of the Act merely regulates the employment of contract labour in certain establishments and provides for its abolition in certain circumstances. The Act does not provide for total abolition of contract labour but it provides for abolition by the appropriate government in appropriate cases under Section 10 of the Act. ”



34. Upon perusal of the aforesaid judicial dictum, it is evident that the non-adherence to the mandate of Section 7 and 12 of the Act does not directly establish an employer-employee relationship between the parties; rather the same can only attract the consequences as provided under Section 14 and 23 of the Act.

35. The aforesaid judgment had overruled the contrary position taken by the various High Courts and settled the law regarding the interpretation of both the provisions.

36. Therefore, this Court is of the view that the mere violation of the said provisions by the petitioner does not amount to the establishment of the employer-employee relationship between the parties and mere violation of the said provision cannot directly convert the relationship to that of an employer-employee.

37. Having dealt with the first aspect, it is imperative for this Court to now analyze whether there are other factors which establish an employer-employee relationship between the parties.

38. The employer-employee relationship is a *sine qua non* for the workers to avail the benefits under the ID Act, and therefore holds an important place for the workers to prove such a relationship.

39. In similar cases, the Hon'ble Supreme Court and various High Courts have dealt with the said issue and prescribed the metric to be met for the establishment of such a relationship between the parties. First among such matrices is the control test as applied by the Hon'ble Supreme Court for the first time in *Shivnandan Sharma v. Punjab National Bank Ltd.*, 1955 SCC OnLine SC 1, whereby the Hon'ble Court referred to the principles enunciated in the common law



jurisdiction and applied the same to the issues before it. The relevant paragraphs of the said judgment are reproduced herein:

“10. It is not always easy to determine whether the relation between two parties, in the present case of the Treasurers vis-a-vis the Bank, is that of servants to a master or of independent contractors who have undertaken to do a particular job for their employer. The question has generally arisen in connection with the determination of vicarious liability of an employer in respect of acts done by his agent (using a neutral word which includes an independent contractor as also a servant). The distinction between a servant and an independent contractor has been the subject-matter of a large volume of case-law from which the textbook writers on torts have attempted to lay down some general tests. For example, in Pollock's Law on Torts [PP. 62 & 63 Pouock on Torts, 15th Edn.] the distinction has thus been brought out:

“A master is one who not only prescribes to the workman the end of his work, but directs or at any moment may direct the means also, or, as it has been put, ‘retains the power of controlling the work’, a servant is a person subject to the command of his master as to the manner in which he shall do his work

An independent contractor is one who undertakes to produce a given result but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand....”

Clerk & Lindsell on Torts (11th Edn.) at p. 135 have adopted the description of an independent contractor given by Pollock as quoted above.

11. In the 11th Edn. of Salmond's Treatise on the Law of Torts, the same distinction has been clearly indicated in the following passage at p. 98.



“What then, is the test of this distinction between a servant and an independent contractor? The test is the existence of a right of control over the agent in respect of the manner in which his work is to be done. A servant is an agent who works under the supervision and direction of his employer; an independent contractor is one who is his own master. A servant is a person engaged to obey his employer's orders from time to time; an independent contractor is a person engaged to do certain work, but to exercise his own discretion as to the mode and time of doing it — he is bound by his contract, but not by his employer's orders.”

Those learned authors have discussed in great detail cases illustrative of those distinctions, indicating the circumstances in which the general rule has been applied to individual cases with such modifications as the facts and circumstances of a particular case required. We are here not concerned with those nice distinctions which have been drawn in connection with the rule of vicarious liability in torts. We are here concerned only with the question how far the test laid down by the standard authors as quoted above can be applied to determine the present controversy whether the Treasurers of the Bank were its servants as contended on behalf of the appellant or independent contractors as claimed on behalf of the respondent Bank. The agreement between the parties, as summarised above, is a composite transaction constituting the Treasurers agents of the Bank, the former agreeing to indemnify the latter against any loss occasioned to the Bank due to the lack of fidelity and efficiency of the ministerial staff entrusted with the charge of the Bank's cash and valuable documents. The Treasurers have been charged with the duty of nominating their assistants who are to be responsible in their day to day work to the Bank which all the time has full control over them in the matter of their leave of absence, as to how they shall keep the cash and other valuables and as to how they shall be under the general direction of the Bank's Manager or some other functionary who may be nominated by the Bank to supervise the work of the Cash Department. The Bank makes itself answerable to the



employees thus appointed by the Treasurers with the concurrence of the Bank for their bonus, provident fund and travelling allowance. For those purposes these assistants are to be on the same footing as the other employees of the Bank.

12. It was contended on behalf of the respondent Bank that its agreement with the Treasurers shows that the latter had the fullest responsibility for the appointment and dismissal and payment of salary of the employees in charge of the Cash Department of the Bank and that therefore the Treasurers could not but be independent contractors. It has already been noticed that the appointment of such assistants as are entrusted with the work of the Cash Department is not under the absolute power of the Treasurers. The appointment has to be approved by the Bank and the Treasurers cannot continue to employ those workmen in whose fidelity and efficiency the Bank has no confidence. Hence both in the matter of appointment and dismissal of the employees the Bank reserves to itself the power to give direction to the Treasurers. Similarly in the matter of the payment of salary the money comes out of the coffers of the Bank, though it may be paid by the hand of the Treasurers. In this connection it was contended on behalf of the appellant that payment of salary of the employees in the Cash Department is made through the Bank itself but we have no tangible evidence in this case beyond the bare assertion at the Bar. But, in our opinion, the situation in respect of the appointment, dismissal and payment of salary of the employees of the Cash Department is analogous to that of the employees of a particular department of the Government, in which appointment and dismissal of ministerial staff may rest with an authority so empowered by the head of the department. Payment of salary may also be made by the appointing authority but the money comes out of the Government treasury. In those circumstances, can it be rightly asserted that those employees are not the servants of Government? The analogy may not be perfect, because, in the present case, the appointment and dismissal of the employees of the Cash Department is the joint responsibility of the Bank and its Treasurers. It has got to be so because the



Treasurers are the guarantors of the fidelity and efficiency of the employees and the Bank has to exercise complete control over the day to day discharge of their functions because it is the Bank which is vitally and immediately concerned with the efficient and honest discharge of the duties of the assistants in the Cash Department, the efficient running of which is the most important of a bank's functions.

13. It will further be noticed with reference to the terms of the agreement set out above that whereas the Treasurers and their nominees have to take their orders from the Bank Manager or other such functionary, there is no specific provision that those nominees shall discharge their day to day functions under the direct control of the Treasurers or that they will be subject to the immediate control of the Treasurers in the discharge of their daily duties and in the matter of the grant of leave of absence. There could not be such a provision, as a dual control of that kind in the daily work of the employees would lead to a great deal of confusion and lack of discipline amongst the ministerial staff. The employees of the Cash Department have of necessity to be under the direct control of the Bank Manager or of some other functionary appointed by the Bank. It is the Bank which has undertaken the responsibility in the matter of their pay and prospects in the service and naturally therefore, such employees, even as other employees of the Bank, have to take their orders from the Bank. It must therefore be held that the Treasurers are the servants of the Bank and that their nominees must equally be so.

14. The Appellate Tribunal held that on a reading as a whole of the clauses of the agreement aforesaid the appellant was an employee of the Treasurers and not of the Bank, It did not address itself pointedly to the question as to what was the exact relation between the Bank and the Treasurers. It did not also consider the question as to what would be the position of the employees of the Cash Department vis-a-vis the Bank if it were held that the Treasurers themselves were the servants of the Bank and not independent contractors. Before the Appellate Tribunal both parties appear to have concentrated their



*attention on the question as to whether the employees of the Cash Department were servants of the Bank or of the Treasurers. In our opinion, that was not a correct approach to the determination of the controversy between the parties. If the Treasurers' relation to the Bank was that of servants to a master, simply because the servants were authorized to appoint and dismiss the ministerial staff of the Cash Department would not make the employees in the Cash Department independent of the Bank. In that situation the ultimate employer would be the Bank through the agency of the Treasurers. It was argued on behalf of the respondent that even if it were held that the Treasurers were the servants of the Bank and not independent contractors, the legal position of the employees of the Cash Department vis-a-vis the Bank would be the same, namely, that they will be in law the servants of the Treasurers. In our opinion, there is no substance in that contention. If a master employs a servant and authorizes him to employ a number of persons to do a particular job and to guarantee their fidelity and efficiency for a cash consideration, the employees thus appointed by the servant would be equally with the employer, servants of the master. It is not always correct to say that persons appointed and liable to be dismissed by an independent contractor can in no circumstances be the employees of the third party. This would be clear from the following observations of Lord Esher, M.R., in the case of *Donovan v. Laing, Wharton & Down Construction Syndicate* [(1893) 1 QBD 629 at 632] :*

“It is true that the defendants selected the man and paid his wages, and these are circumstances which, if nothing else intervened, would be strong to show that he was the servant of the defendants. So, indeed, he was as to a great many things but as to the working of the crane he was no longer their servant, but bound to work under the orders of Jones & Co., and, if they saw the man misconducting himself in working the crane or disobeying their orders, they would have a right to discharge him from that employment.”



Those observations have been approved in the latest decision of the House of Lords in the case of Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool) Ltd. [1947 AC 1] The House of Lords distinguished that ruling on facts but did not depart from the general rule laid down in the earlier decision that the determinative factor is as to which party had control over the workers as to how they would do their job from day to day. Lord Macmillan in his speech at p. 14 has observed as follows:

“Many reported cases were cited to Your Lordships but where, as all agree, the question in each case turns on its own circumstances, decisions in other cases are rather illustrative than determinative. So far as attempts have been made to formulate a criterion of general application, it cannot be said that these attempts have been very successful.”

15. *It would thus appear that the question as to whose employee a particular person was has to be determined with reference to the facts and circumstances of each individual case. Lord Porter in the course of his speech in the reported case (supra) at p. 17 has observed as follows:*

“Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed, have all to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject-matter under discussion but amongst the many tests suggested I think that the most satisfactory, by which to ascertain who is the employer at any particular time is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged.”

16. *As indicated above, in the present case the direction and control of the appellant and of the ministerial staff in charge of the Cash Department of the Bank was entirely vested in the Bank through its Manager or other superior officer. We have*



therefore no hesitation in differing from the conclusion arrived at by the Appellate Tribunal and in holding that the appellant was an employee of the Bank. That being so, the Tribunal had the jurisdiction to make the directions it did in respect of the appellant. The respondent did not at any stage of the proceedings challenge the orders of the Tribunal on its merits. That conclusion being reached, there is no difficulty in upholding the orders of the Tribunal in respect of the appellant. It is therefore not necessary to pronounce upon the other points raised by the parties. The appeal is accordingly allowed with costs throughout.”

40. In ***Sushilaben Indravadan Gandhi v. New India Assurance Co. Ltd., (2021) 7 SCC 151***, the Hon’ble Supreme Court reiterated the settled position and also traced the changes in the terms of acceptability of the control test by the Courts. While doing so, the Hon’ble Court referred to a number of judgments to understand the chronological evolution of the said test and held as under:

“13. This Court has in a series of judgment indicated the tests to be followed in order to determine, in the context of the Industrial Disputes Act and the Factories Act, as to whether different kinds of persons who supply goods or services could be said to be “in the employ” of the employer. Thus, in Dharangadhra [Dharangadhra Chemical Works Ltd. v. State of Saurashtra, 1957 SCR 152 : AIR 1957 SC 264] , the question posed before the Court was whether the salt manufactured by a class of professional laborers, known as agarias, from rain water that got mixed with saline matter in the soil, could be said to be in pursuance of contracts of service with the appellant, as a result of which they would then be entitled to be treated as workmen under the Industrial Disputes Act. After setting out the definition of “workman” under Section 2(s) of the said Act, this Court referred to the earliest test laid down to distinguish between a contract of service and a contract for



service, namely, that whereas in the latter case, the master can order or require what is to be done, in the former case, he can not only order or require what is to be done, but also how it shall be done.

14. After referring to a number of English judgments, the Court then held, giving the example of a ship's master, a chauffeur, and a reporter on the staff of a newspaper as against a ship's pilot, a taxi man and a newspaper contributor, that the test would be whether work is done as an integral part of the business of the employer, in which case it would be a contract of service, or whether it was done as an accessory to such business, in which case it would be a contract for service. Other tests that were laid down were as to whether the master had the power to select the servant, whether he paid wages or other remuneration, whether the master had the right to control the method of doing the work, and whether the master had the right to suspend or dismiss the employee. Ultimately, the true test, according to the judgment, was held to be as follows : (Dharangadhra case [Dharangadhra Chemical Works Ltd. v. State of Saurashtra, 1957 SCR 152 : AIR 1957 SC 264] , SCR p. 160)

“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 p. 23 in Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool) Ltd. [Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool) Ltd., 1947 AC 1 (HL)] , AC 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”.



14. *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 even 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 [Cassidy v. Ministry of Health, (1951) 2 KB 343 : (1951) 1 All ER 574 (CA)] , and Denning, L.J. in Stevenson, Jordan & Harrison Ltd. v. MacDonald & Evans [Stevenson, Jordan & Harrison Ltd. v. MacDonald & Evans, (1952) 1 TLR 101 (CA)]).”*

15. *Ultimately, the Court in Dharangadhra [Dharangadhra Chemical Works Ltd. v. State of Saurashtra, 1957 SCR 152 : AIR 1957 SC 264] held that it would be a question of fact to be decided by all the circumstances of the case. It was further held that the mere fact that the agarias did piece-rated labour, the work being seasonal, and the fact that they can engage others to do the work for them, would not detract from the fact that they are professional labourers who have been hired by the employer. Finally, the Court refused to exercise its discretion to interfere with the Industrial Tribunal's finding that on the facts of the case these agarias would have to be considered as workmen under the Industrial Disputes Act.*

16. *In Chintaman Rao v. State of M.P. [Chintaman Rao v. State of M.P., 1958 SCR 1340 : AIR 1958 SC 388 : 1958 Cri LJ 803] , this Court held that Sattedars and their coolies were not workers within the meaning of Section 2(1) of the Factories Act. In so holding, the Court referred to the judgment of Dharangadhra [Dharangadhra Chemical Works Ltd. v. State of Saurashtra, 1957 SCR 152 : AIR 1957 SC 264] and held that the fact that bidi rolling was done outside the factory premises, and that such rolling can be done at any time that the Sattedar*



chooses clinched the issue in favour of the fact that Sattedars and their coolies were independent contractors. The Court then hedged its decision by stating that it was not intended to lay down that under no circumstances can a Sattedar be considered to be a worker within the meaning of the Factories Act. Ultimately, everything depends on the terms of the contract entered into between such person and the employer.

17. In Birdhichand Sharma v. Civil Judge [Birdhichand Sharma v. Civil Judge, (1961) 3 SCR 161 : AIR 1961 SC 644] , this Court found on facts that the persons employed in a bidi factory, who could work at the time they chose, on a piece-rated basis, the caveat being that if they came after mid-day they were not allowed to work, even though the factory closed at 7 p.m., that such persons were workers under the Factories Act. The earlier two judgments [Dharangadhra Chemical Works Ltd. v. State of Saurashtra, 1957 SCR 152 : AIR 1957 SC 264] , [Chintaman Rao v. State of M.P., 1958 SCR 1340 : AIR 1958 SC 388 : 1958 Cri LJ 803] of this Court were discussed and emphasis was laid on the fact that the persons who were employed had to work within the factory premises and had to report to work before mid-day. Further, the “right of control” was extended to mean that so long as there is some amount of supervision by the management, inasmuch as the management has the right to reject the bidis prepared if they do not come up to the proper standard, would indicate that such persons would be workers.

18. In Shankar Balaji Waje v. State of Maharashtra [Shankar Balaji Waje v. State of Maharashtra, 1962 Supp (1) SCR 249 : AIR 1962 SC 517 : (1962) 1 Cri LJ 497] , this Court set out the established facts between one Pandurang, who was employed by the owner of a factory manufacturing bidis, and the employer, as follows : (SCR pp. 253-54 : AIR pp. 519-20, para 8)

“8. The first contention is based on the established facts of the case which, it is submitted, do not make out the relationship of master and servant between the appellant



and Pandurang, inasmuch as they indicate that the appellant had no supervision and control over the details of the work Pandurang did in the factory. The following are the established facts:

(1) There was no agreement or contract of service between the appellant and Pandurang.

(2) Pandurang was not bound to attend the factory for the work of rolling bidis for any fixed hours of work or for any fixed period. He was free to go to the factory at any time he liked and was equally free to leave the factory whenever he liked. Of course, he could be in the factory during the hours of working of the factory.

(3) Pandurang could be absent from work on any day he liked. He could be absent up to ten days without even informing the appellant. If he was to be absent for more than ten days he had to inform the appellant, not for the purpose of taking his permission or leave, but for the purpose of assuring the appellant that he had no intention to give up work at the factory.

(4) There was no actual supervision of the work Pandurang did in the factory.

(5) Pandurang was paid at fixed rates on the quantity of bidis turned out. There was however no stipulation that he had to turn out any minimum quantity of bidis in a day.

(6) Leaves used to be supplied to Pandurang for being taken home and cut there. Tobacco to fill the bidis used to be supplied at the factory. Pandurang was not bound to roll the bidis at the factory. He could do so at his place, on taking permission from the appellant for taking tobacco home. The permission was necessary in view of Excise Rules and not on account of any condition of alleged service.



(7) At the close of the day, the bidis used to be delivered to the appellant and bidis not up to the standard, used to be rejected.”

19. *On these facts, the judgment in Birdhichand [Birdhichand Sharma v. Civil Judge, (1961) 3 SCR 161 : AIR 1961 SC 644] was distinguished and that of Chintaman Rao [Chintaman Rao v. State of M.P., 1958 SCR 1340 : AIR 1958 SC 388 : 1958 Cri LJ 803] applied. The Court held : (Shankar Balaji Waje case [Shankar Balaji Waje v. State of Maharashtra, 1962 Supp (1) SCR 249 : AIR 1962 SC 517 : (1962) 1 Cri LJ 497] , SCR pp. 257 & 259-60 : AIR pp. 521-22, paras 15 & 18-19)*

“15. Further, the facts of the case indicate that the appellant had no control and supervision over the details of Pandurang's work. He could not control his hours of work. He could not control his days of work. Pandurang was free to absent himself and was free to go to the factory at any time and to leave it at any time according to his will. The appellant could not insist on any particular minimum quantity of bidis to be turned out per day. He could not control the time spent by Pandurang on the rolling of a bidi or a number of bidis. The work of rolling bidis may be a simple work and may require no particular supervision and direction during the process of manufacture. But there is nothing on record to show that any such direction could be given.

18. *It is true, as contended for the State, that persons engaged to roll bidis on job work basis could be workers, but only such persons would be workers who work regularly at the factory and are paid for the work turned out during their regular employment on the basis of the work done. Piece-rate workers can be workers within the definition of “worker” in the Act, but they must be regular workers and not workers who come and work according to their sweet will. It is also true, as urged for the State, that a worker, within the definition of that expression*



in the Act, need not be a whole-time worker. But, even then, the worker must have, under his contract of service, an obligation to work either for a fixed period or between fixed hours. The whole conception of service does not fit in well with a servant who has full liberty to attend to his work according to his pleasure and not according to the orders of his master.

19. We may say that this opinion further finds support from what we hold on the second contention. If Pandurang was a worker, the provisions about leave and leave wages should apply to him. We are of opinion that they do not and what we say in that connection reinforces our view that Pandurang was not a worker as the three criteria and conditions laid down in Chintaman Rao case [Chintaman Rao v. State of M.P., 1958 SCR 1340 : AIR 1958 SC 388 : 1958 Cri LJ 803] for constituting him as such are not fulfilled in the present case.”

20. In D.C. Dewan Mohideen Sahib & Sons v. United Beedi Workers' Union [D.C. Dewan Mohideen Sahib & Sons v. United Beedi Workers' Union, (1964) 7 SCR 646 : AIR 1966 SC 370] , the Court set out a sample agreement which disclosed the facts of the case before it, as follows : (AIR p. 373, para 4)

“4. ... It seems that a sample agreement was produced before the High Court, which provided inter alia for the following terms:

(1) that the proprietor should supply the tobacco and the bidi leaves;

(2) that the intermediary should engage premises of his own and obtain the requisite licence to carry on the work of having the bidis rolled there;

(3) that at no time should more than nine bidi rollers work in the premises of that intermediary;

(4) that the intermediary should meet all the incidental charges for rolling the bidis including the cost of thread and the remuneration paid to the bidi rollers;



(5) that for every unit of 1000 bidis rolled and delivered by the intermediary to the proprietor, the latter should pay the stipulated amount, after deducting the cost of the tobacco and the bidi leaves supplied by the proprietor;

(6) that the intermediary should not enter into similar engagement with any other industrial concern;

(7) that the price of the raw materials and price to be paid for every unit of 1000 bidis rolled and delivered were to be fixed at the discretion of the proprietor.

Besides these conditions, the contract also provided that it was liable to termination on breach of any of the conditions, and that the proprietors had no connection with and that they assumed no responsibility for the bidi workers who had to look to the intermediary for what was payable to them for rolling the bidis.”

21. The earlier judgments of this Court were referred to in Dewan Mohideen Sahib [D.C. Dewan Mohideen Sahib & Sons v. United Beedi Workers' Union, (1964) 7 SCR 646 : AIR 1966 SC 370] . After applying the tests laid down in the said judgments, this Court found : (AIR p. 375, para 12)

“12. ... There is in our opinion little doubt that this system has been evolved to avoid regulations under the Factories Act. Further there is also no doubt from whatever terms of agreement are available on the record that the so-called independent contractors have really no independence at all. As the appeal court has pointed out they are impecunious persons who could hardly afford to have factories of their own. Some of them are even ex-employees of the appellants. The contract is practically one-sided in that the proprietor can at his choice supply the raw materials or refuse to do so, the so-called contractor having no right to insist upon the supply of raw materials to him. The so-called independent contractor is even bound not to employ more than nine persons in his so-called factory. The sale of raw



materials to the so-called independent contractor and resale by him of the manufactured bidis is also a mere camouflage, the nature of which is apparent from the fact that the so-called contractor never paid for the materials. All that happens is that when the manufactured bidis are delivered by him to the appellants, amounts due for the so-called sale of raw materials is deducted from the so-called price fixed for the bidis. In effect all that happened is that the so-called independent contractor is supplied with tobacco and leaves and is paid certain amounts for the wages of the workers employed and for his own trouble. We can therefore, see no difficulty in holding that the so-called contractor is merely an employee or an agent of the appellants as held by the appeal court and as such employee or agent he employs workers to roll bidis on behalf of the appellants. The work is distributed between a number of so-called independent contractors who are told not to employ more than nine persons at one place to avoid regulations under the Factories Act. We are not, however, concerned with that aspect of the matter in the present appeals. But there can be no doubt that the workers employed by the so-called contractors are really the workmen of the appellants who are employed through their agents or servants whom they choose to call independent contractors.”

22. The next case in chronological order is of seminal importance in deciding which side of the line a particular set of facts would lead to a conclusion that a contract is one for service or of service. Thus, in Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments [Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments, (1974) 3 SCC 498 : 1974 SCC (L&S) 31] , this Court had to determine whether there is a relationship of employer and an employee between a tailoring shop and persons employed by the owner of the shop for stitching purposes under Section 2(14) of the Andhra Pradesh (Telangana Area) Shops and Establishments Act, 1951. Section 2(14) of the said Act defined



a “person employed” as meaning, in the case of a shop, a person wholly or principally employed therein in connection with the business of the shop. The facts were set out in para 7 of the said judgment as follows : (SCC p. 501)

“7. The following facts appear from the finding of the learned Single Judge [*Silver Jubilee Tailoring House v. Hyderabad Tailoring Workers Union*, 1968 SCC OnLine AP 300 : 1970 Lab IC 223] . All the workers are paid on piece-rate basis. The workers generally attend the shops every day if there is work. The rate of wages paid to the workers is not uniform. The rate depends upon the skill of the worker and the nature of the work. When cloth is given for stitching to a worker after it has been cut, the worker is told how he should stitch it. If he does not stitch it according to the instruction, the employer rejects the work and he generally asks the worker to restitch the same. When the work is not done by a worker according to the instructions, generally no further work would be given to him. If a worker does not want to go for work to the shop on a day, he does not make any application for leave, nor is there any obligation on his part to inform the employer that he will not attend for work on that day. If there is no work, the employee is free to leave the shop before the shop closes. Almost all the workers work in the shop. Some workers are allowed to take cloth for stitching to their homes on certain days. But this is done always with the permission of the proprietor of the shop. The machines installed in the shop belong to the proprietor of the shop and the premises and the shop in which the work is carried on also belong to him.”

23. After referring to several judgments of this Court, the Court in *Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments*, (1974) 3 SCC 498 : 1974 SCC (L&S) 31] then referred to judgments of the English and American courts as follows : (SCC pp. 505-508, paras 19-23 & 25-29)



“19. In Cassidy v. Ministry of Health [Cassidy v. Ministry of Health, (1951) 2 KB 343 : (1951) 1 All ER 574 (CA)] , All ER at p. 579 Lord Justice Sommerwell pointed out that the test of control of the manner of work is not universally correct, that there are many contracts of service where the master cannot control the manner in which the work is to be done as in the case of a Captain of a ship.

20. In many skilled employments, to apply the test of control over the manner of work for deciding the question whether the relationship of master and servant exists would be unrealistic.

21. In Montreal v. Montreal Locomotive Works Ltd. [Montreal v. Montreal Locomotive Works Ltd., (1947) 1 DLR 161 (Can SC)] , DLR at p. 169 Lord Wright said that a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior and that in the more complex conditions of modern industry, more complicated tests have often to be applied. He said that it would be more appropriate to apply a complex test involving : (i) control; (ii) ownership of the tools; (iii) chance of profit; (iv) risk of loss, and that control in itself is not always conclusive. He further said that in many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties.

22. In Bank Voor Handel En Scheepvaart N.V. v. Slatford [Bank Voor Handel En Scheepvaart N.V. v. Slatford, (1953) 1 QB 248 : (1952) 2 All ER 956 (CA)] , All ER at p. 971 Denning, L.J., said : (QB p. 295)

‘... the test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation....’

23. In United States v. Silk [United States v. Silk, 1947 SCC OnLine US SC 97 : 91 L Ed 1757 : 331 US 704 (1947)] the



question was whether men working for the plaintiffs, Silk and Greyvan, were “employees” within the meaning of that word in the Social Security Act, 1935. The Judges of the Supreme Court of USA, agreed upon the test to be applied, though not in every instance upon its application to the facts. They said that the test was not “the common law test,” viz. ‘power of control, whether exercised or not, over the manner of performing service to the undertaking’, but whether the men were employees “as a matter of economic reality”. Important factors were said to be ‘the degrees of control, opportunities of profit or loss, investment in facilities, permanency of relations and skill required in the claimed independent operation’.

25. In Market Investigations Ltd. v. Minister of Social Security [Market Investigations Ltd. v. Minister of Social Security, (1969) 2 QB 173 : (1969) 2 WLR 1] the Court said : (QB p. 183)

‘I think it is fair to say that there was at one time a school of thought according to which the extent and degree of the control which B was entitled to exercise over A in the performance of the work would be a decisive factor. However, it has for long been apparent that an analysis of the extent and degree of such control is not in itself decisive.’

26. It is in its application to skilled and particularly professional work that control test in its traditional form has really broken down. It has been said that in interpreting “control” as meaning the power to direct how the servant should do his work, the Court has been applying a concept suited to a past age.

‘This distinction (viz. between telling a servant what to do and telling him how to do it) was based upon the social conditions of an earlier age; it assumed that the employer of labour was able to direct and instruct the labourer as to the



technical methods he should use in performing his work. In a mainly agricultural society and even in the earlier stages of the Industrial Revolution the master could be expected to be superior to the servant in the knowledge, skill and experience which had to be brought to bear upon the choice and handling of the tools. The control test was well suited to govern relationships like those between a farmer and an agricultural labourer (prior to agricultural mechanisation) a craftsman and a journeyman, a householder and a domestic servant, and even a factory owner and an unskilled “hand”. It reflects a state of society in which the ownership of the means of production coincided with the profession of technical knowledge and skill in which that knowledge and skill was largely acquired by being handed down from one generation to the next by oral tradition and not by being systematically imparted in institutions of learning from universities down to technical schools. The control test postulates a combination of managerial and technical functions in the person of the employer i.e. what to modern eyes appears as an imperfect division of labour [See Prof. Kahn-Freund in (1951) 14 Modern Law Review at p. 505.] .’

27. It is, therefore, not surprising that in recent years the control test as traditionally formulated has not been treated as an exclusive test.

28. It is exceedingly doubtful today whether the search for a formula in the nature of a single test to tell a contract of service from a contract for service will serve any useful purpose. The most that profitably can be done is to examine all the factors that have been referred to in the cases on the topic. Clearly, not all of these factors would be relevant in all these cases or have the same weight in all cases. It is equally clear that no magic formula can be propounded, which factors should in any case be treated as determining ones. The plain fact is that in a large number of cases, the Court can only perform a balancing operation weighing up the factors which point in one direction and balancing them against those pointing in the opposite



direction [See Atiyah, PS, “Vicarious Liability in the Law of Torts”, pp. 37-38.] .

29. During the last two decades the emphasis in the field has shifted and no longer rests so strongly upon the question of control. Control is obviously an important factor and in many cases it may still be the decisive factor. But it is wrong to say that in every case it is decisive. It is now no more than a factor, although an important one [See *Argent v. Minister of Social Security*, (1968) 1 WLR 1749 at p. 1759.] .”

24. Ultimately, the Court in *Silver Jubilee Tailoring House* [*Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments*, (1974) 3 SCC 498 : 1974 SCC (L&S) 31] found that two important considerations clinched the issue in favour of deciding that the persons employed were employed wholly or principally in connection with the business of the shop. First and foremost, machines on which sewing took place were supplied by the proprietor of the shop. And, secondly, supervision and control in tailoring business terms would include the right to reject sub-standard work. These factors were held to outweigh the fact that such persons did not have to work exclusively for the owner of the shop as also that they are not obliged to work for the full day.

25. In *Hussainbhai v. Alath Factory Thezhilali Union* [*Hussainbhai v. Alath Factory Thezhilali Union*, (1978) 4 SCC 257 : 1978 SCC (L&S) 506] , this Court was confronted with persons who are engaged to make ropes from within a factory which manufactured ropes. What was argued before the Court was that the workmen were not the employer's workmen but only the contractor's workmen. The question that came up for consideration was whether they are “workmen” within the meaning of Section 2(s) of the Industrial Disputes Act. The test applied by this judgment to find out whether such persons are “workmen” was as follows : (SCC p. 259, para 5)

“5. The true test may, with brevity, be indicated once again. Where a worker or group of workers labours to produce



goods or services and these goods or services are for the business of another, that other is, in fact, the employer. He has economic control over the workers' subsistence, skill, and continued employment. If he, for any reason, chokes off, the worker is, virtually, laid off. The presence of intermediate contractors with whom alone the workers have immediate or direct relationship ex contractu is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, we discern the naked truth, though draped in different perfect paper arrangement, that the real employer is the Management, not the immediate contractor. Myriad devices, half-hidden in fold after fold of legal form depending on the degree of concealment needed, the type of industry, the local conditions and the like may be resorted to when labour legislation casts welfare obligations on the real employer, based on Articles 38, 39, 42, 43 and 43-A of the Constitution. The court must be astute to avoid the mischief and achieve the purpose of the law and not be misled by the maya of legal appearances.”

Applying this test, the economic reality of control of the employer over the workman's subsistence, skill and continued employment pointed to such persons being direct employees of the owner.”

41. Therefore, the perusal of the above-cited cases clearly establishes the conditions mandatory for applicability of the control test where the control of the employer is tested on the basis of various factors.

42. The aforesaid judicial dictum establishes the ingredients of the test necessary for establishment of the employee-employer relationship between the parties. The cited judgments also summarized the conditions under which a workman can be termed as a direct employee of the employer. The said conditions can be categorized in two manner, *firstly*



being the control over the nature of work performed and *secondly*, the manner in which the work is done.

43. The above-cited judgments also expounded certain other factors such as payment of salary, control over the work done, appointment of the workers etc. Therefore, the said factors also become important for the Courts to determine the relationship between the parties and this Court needs to analyse the present case on the touchstone of both the tests.

44. Before delving into the same, it is also imperative for this Court to reiterate that the Writ Courts cannot act as a fact-finding agency, rather can merely rely upon the material on record, i.e. the impugned order, and the documents attached by the petitioner and the respondents.

45. The nature and scope of powers conferred upon the Writ Courts has been explained by the Hon'ble Supreme Court and this Court time and again and therefore, the position of law as reiterated in the preceding paragraph is clear. Hence, the only limited question left before this Court is whether there is employer-employee relationship between the parties or not and if the impugned order passed by the learned Tribunal suffers from any illegality.

46. The relevant part of the impugned order reads as under:

“ISSUE NO.1.

It was submitted from the side of the workmen that they have been working as casual labours since 1996, 1997 & 1998 with management no.1. They worked under the sole control of the management. Their work was satisfactory. They were not paid minimum wages. The termination of their services is illegal & arbitrary.



It was submitted from the side of the management that the workmen may have worked as ex-casual labours of the respondent. They were employed by M/s. Navnidh Carriers. The services of the workmen were terminated by the contractor. The contractor has not been made a party.

It was further submitted that the workmen had earlier filed OA No.2367 of 1999 in the CAT, New Delhi raising all the points & CAT rejected their claim as there was no employer-employee relationship,

It transpires from perusal of the documents that the workmen have been issued gate passes. The workmen Sh. Manohar, Sh. Dhanvir & Sh. Hans Raj have been issued gate passes from 1996 to 1997. All the workmen have been issued gate passes least from the year 1998. Paper No. B 31 is a photocopy document. It has been marked as exhibit WW1/1. This document indicates that the Caretaker has mentioned these workmen as casual labour.

Paper No.WW1/3 is also a photocopy. It contains seal of the Asstt. STN Director. Paper No. B-45 is also a photocopy document, it has been admitted by the management & the workmen have been shown as daily wages casual workers. The management has issued a certificate to Sh. Shahbaz that he was casual worker.

It was submitted from the side of the management that all these workmen are contractor's workmen. They have been engaged by M/s. Navnidh Carriers. Navnidh Carriers is not a contractor. From perusal of the documents of M/s. Navnidh Carriers it transpires that he has been given work order for supply of casual labours from 31.07.1998 & this work order has been extended to 31.01.2000. The gate passes issued to the workmen have been issued as visitors and not as workmen of M/s. Navnidh Carriers.

For engagement of contract labour, the management has to follow the procedure laid down in CLRA Act, 1970. It is



admitted to the management that these. workmen have worked in their organization as workers of M/s. Navnidh Carriers. M/s. Navnidh Carriers have not got themselves registered under CLRA Act, 1970. for supply of casual labours. They have no licence for supply of a particular workman, so there appears to be no substance in the argument that the workmen are contractor's men. There is no contract agreement. M/s. Navnidh. Carriers has undertaken to supply workmen on work order pasis from 31.07.1998 whereas the workmen Sh. Manohar- & Sh.. Dhanvir, have been working from 1996 & 1997 as is evident from the gate passes. It appears that the workmen were engaged directly by the management but later on they were placed under M/s. Navnidh Carriers & the work order was given to M/s. Navnidh Carriers for supply of workmen. There is no provision for supply of workmen on the basis of work order. The work order. under the circumstances is sham & ruse. The so- called contractor is only name lender. There is no contract or agreement infact.

It was further submitted that the case of these. workmen have been decided in OA by order dated 01.07.2001. The CAT has not found employer- employee relationship between the management & the workmen.

The management is obviously an industry. The CAT has no jurisdiction to decide the case of industrial workmen. However, it becomes quite evident from perusal of the judgment of the CAT that none was present from the side of the workmen. The order is ex- parte & ex-parte order does not have force of resjudicata.

It also transpires from perusal of the documents that the management has given work order to M/s. Surabhi Transport Agency & thereafter M/s. Fleet Owner & Transport Carriers. The work is discharged on the basis of work order given to M/s. Surabhi Transport Agency & thereafter M/s. Fleet Owner & Transport Carriers. These Transport Carriers have no licence for supply of workers. They are transport agencies. In the



circumstances the management has introduced their names to conceal the engagement of the workmen as daily wagers.

In case contract becomes sham & ruse there is the employer employee relationship between management and the workmen. The workmen have been issued gate passes by the management directly. The workman Sh. Manohar has worked from 27.03.1996 till 01.02.2001. The workmen Sh. Dhanvir has worked from 06.11.1996 to 2001, Sh. Tej Pal has worked from 02.08.1998 to 2001 & Sh. Shahbaz has worked from 01.12.1998 to 02.01.2001. All these workmen have discharged more than 240 days work during the tenure of their engagement. They are direct casual daily wagers of the management and they are entitled to retrenchment compensation in view of section 25 F of the ID Act, 1947 and the documents of the aforesaid three carriers have been created to conceal the real fact of their engagement as casual labours. The management has issued letters treating them as casual labours. Thus, it is established by cogent documentary evidence as well as oral evidence that Sh. Manohar worked from 27.03.1996 till the date of his retrenchment, Sh. Dhanvir worked from 06.11.1996 till his retrenchment, Sh. Hans Raj worked from 1997 & Sh. Shahbaz & Tej Pal worked from 1998. All these workmen have worked continuously and they have completed 240 days in every year.

It has been held in 2005 IX AD (S.C) 261 AS UNDER: -

Daily waged earners are not regular employees. They are not given letters of appointments. They are not given letters of termination. They are not given any written documents which they could produce as proof of receipt of wages. Their muster rolls are maintained in loose sheets. Even in cases, where registers are maintained by the government departments, the officers/clerks making entries do not put their signatures. Even where signatures of clerks appear, the entries are not countersigned or certified by the appointing authorities.

In case of daily wagers, the management takes every effort to conceal the documents regarding the engagement. The



workmen are constrained to file photocopies which they have obtained somehow or the other.

In the instant case the workmen have filed photocopies gate passes which have not been denied by the management. These gate passes relate to 1996, 1997 & 1999. The workmen can at best file photocopies of gate passes as the management takes gate passes. while issuing the other gate passes. There is no explanation as to how the gate passes have been issued to these workmen in 1996 & 1997 whereas M/s Navnidh Carriers was given work order from 31.07.1998. Ex. WW1/24, Paper No. B-52 is a document of the management, it has been signed by Asstt. Station Director. The workmen have been shown as casual daily wagers. The workmen have been issued Identity Cards signed by Security Officer. These documents are no doubt photocopies but the originals cannot be said to be in the possession of the workmen & the management will always say that the originals are not available. The gate passes bear numbers & the photocopies have not been denied. These photocopies under the circumstances are admissible in evidence.

The workmen have been working as daily wagers prior to their engagement through M/s. Navnidh Carriers. The management has not been able to explain as to why gate passes have been issued to these workmen in 1996 1997 & prior to 31.07.1998. It appears that M/s. Navnidh Carriers was introduced to conceal the engagement of these daily wagers. Engagement of the workmen through Carriers is also illegal, so in the facts & circumstances of the case there is employer - employee relationship between the management & the workmen.

The management has engaged the other carriers just as M/s. Surabhi Transport Agency & thereafter M/s. Fleet Owner & Transport Carriers for supply of workmen on work order basis after removal of these workmen. The work is still going on. The work is of continuous and regular nature. In the circumstances it was necessary for the management to maintain muster roll register of daily wages employees. The workmen are the daily



wagers of the management and they have performed more than 240 days work during the years of their engagement.”

47. upon perusal of the relevant parts, it is made out that the learned Tribunal had appreciated the material evidence on record and therefore, held that the respondents were directly employed by the petitioner and not through the services rendered by the Contractor i.e. M/s Navnidh Carriers Ltd.

48. The impugned order clearly shows that the workers had photocopies of the gate passes issued to them prior to the engagement of the Contractor. Furthermore, the appreciation letter as issued to some of the workers also suggest that the respondent workers were in direct control of the petitioner itself and not the contractor and that the work done by the said workers was therefore appreciated by the officials of the petitioner.

49. In their pleadings, the petitioner has contended that the learned Tribunal solely relied upon the violation of Sections 7 and 12 of the Act and therefore concluded the establishment of an employer-employee relationship, however, the perusal of the said order clearly depicts a contrary position with regards to the same.

50. The first few paragraphs of the above said order nowhere suggests that the learned Tribunal erred in doing so, rather it has merely referred to the said provisions to establish that there existed no contract for supply of the said laborers as the petitioner and the contractor failed to get themselves registered under the relevant provisions of the Act, a condition mandatory for the supply of labour.



51. As per the material on record, the employment of the respondent workers started at different times, but even before the petitioner entered into a contract with M/s Navnidh Carriers i.e. the year 1998, hence, this Court is satisfied that there existed a relationship between the parties even before M/s Navnidh Carriers entered into the scenario.

52. Furthermore, the issuance of gate passes might not always result in establishment of employee-employer relationship, however, the other material evidence such as the appreciation letter issued directly by the petitioner is a compelling piece of evidence regarding existence of such a relationship.

53. In any case, the termination of the respondent workmen directly by the petitioner establishes that the petitioner had direct control over the respondent-workmen, thereby, meeting the conditions enshrined to satisfy the ingredients of the control test.

54. Therefore, it cannot be said that the learned Tribunal has termed the relationship between the parties that of an employee-employer solely on the basis of non-adherence to the relevant provisions of the Act, rather the said decision has been supplemented by other material evidence such as the issuance of gate passes from 1996 onwards, whereas the contract for service was first entered into only in July, 1998.

55. At last, the petitioner has vehemently contended that the onus of proving the employee-employer relationship was on the respondent workmen, which they failed to do this. The said contention needs to be outrightly rejected mainly for two reasons, *firstly*, the workmen belonging to the poor strata of society are uneducated and cannot be expected to maintain all the records of their employment, and *secondly*, the settled



position of law clearly states that the referral of a dispute to an Industrial Tribunal would directly lead to the assumption of the existence of employee-employer relationship.

56. The said assumption is an exception to the general rule where the onus is said to be on the employee to prove the existence of such a relationship, however, the relevant provision of the ID Act, i.e. Section 10 provides for the said exception. The said provision is reproduced herein:

“10. Reference of disputes to Boards, Courts or Tribunals.—

(1) 1 [Where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it may at any time], by order in writing,— (a) refer the dispute to a Board for promoting a settlement thereof; or (b) refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry; or 2 [(c) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, if it relates to any matter specified in the Second Schedule, to a Labour Court for adjudication; or (d) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, whether it relates to any matter specified in the Second Schedule or the Third Schedule, to a Tribunal for adjudication: Provided that where the dispute relates to any matter specified in the Third Schedule and is not likely to affect more than one hundred workmen, the appropriate Government may, if it so thinks fit, make the reference to a Labour Court under clause (c):] 3 [Provided further that] where the dispute relates to a public utility service and a notice under section 22 has been given, the appropriate Government shall, unless it considers that the notice has been frivolously or vexatiously given or that it would be inexpedient so to do, make a reference under this sub-section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced: 4 [Provided also that where the dispute in relation to which the Central Government is the appropriate Government, it shall be competent for that Government to refer the dispute to a Labour



Court or an Industrial Tribunal, as the case may be, constituted by the State Government.] 5 [(1A) Where the Central Government is of opinion that any industrial dispute exists or is apprehended and the dispute involves any question of national importance or is of such a nature that industrial establishments situated in more than one State are likely to be interested in, or affected by, such dispute and that the dispute should be adjudicated by a National Tribunal, then, the Central Government may, whether or not it is the appropriate Government in relation to that dispute, at any time, by order in writing, refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, whether it relates to any matter specified in the Second Schedule or the Third Schedule, to a National Tribunal for adjudication.] (2) Where the parties to an industrial dispute apply in the prescribed manner, whether jointly or separately, for a reference of the dispute to a Board, Court, 6 [Labour Court, Tribunal or National Tribunal], the appropriate Government, if satisfied that the persons applying represent the majority of each party, shall make the reference accordingly. 7 [(2A) An order referring an industrial dispute to a Labour Court, Tribunal or National Tribunal under this section shall specify the period within which such Labour Court, Tribunal or National Tribunal shall submit its award on such dispute to the appropriate Government: Provided that where such industrial dispute is connected with an individual workman, no such period shall exceed three months: Provided further that where the parties to an industrial dispute apply in the prescribed manner, whether jointly or separately, to the Labour Court, Tribunal or National Tribunal for extension of such period or for any other reason, and the presiding officer of such Labour Court, Tribunal or National Tribunal considers it necessary or expedient to extend such period, he may for reasons to be recorded in writing, extend such period by such further period as he may think fit: Provided also that in computing any period specified in this sub-section, the period, if any, for which the proceedings before the Labour Court, Tribunal or National Tribunal had been



stayed by any injunction or order of a Civil Court shall be excluded:

Provided also that no proceedings before a Labour Court, Tribunal or National Tribunal shall lapse merely on the ground that any period specified under this sub-section had expired without such proceedings being completed.] (3) Where an industrial dispute has been referred to a Board, 1 [Labour Court, Tribunal or National Tribunal] under this section, the appropriate Government may by order prohibit the continuance of any strike or lock-out in connection with such dispute which may be in existence on the date of the reference. 1 [(4) Where in an order referring an industrial dispute to 2 [a Labour Court, Tribunal or National Tribunal] under this section or in a subsequent order, the appropriate Government has specified the points of dispute for adjudication, 3 [the Labour Court or the Tribunal or the National Tribunal, as the case may be], shall confine its adjudication to those points and matters incidental thereto. (5) Where a dispute concerning any establishment or establishments has been, or is to be, referred to a 4 [Labour Court, Tribunal or National Tribunal] under this section and the appropriate Government is of opinion, whether on an application made to it in this behalf or otherwise, that the dispute is of such a nature that any other establishment, group or class of establishments of a similar nature is likely to be interested in, or affected by, such dispute, the appropriate Government may, at the time of making the reference or at any time thereafter but before the submission of the award, include in that reference such establishment, group or class of establishments, whether or not at the time of such inclusion any dispute exists or is apprehended in that establishment, group or class of establishments.] 5 [(6) Where any reference has been made under sub-section (1A) to a National Tribunal, then notwithstanding anything contained in this Act, no Labour Court or Tribunal shall have jurisdiction to adjudicate upon any matter which is under adjudication before the National Tribunal, and accordingly,— (a) if the matter under adjudication before the National Tribunal is pending a





proceeding before a Labour Court or Tribunal, the proceeding before the Labour Court or the Tribunal, as the case may be, in so far as it relates to such matter, shall be deemed to have been quashed on such reference to the National Tribunal; and (b) it shall not be lawful for the appropriate Government to refer the matter under adjudication before the National Tribunal to any Labour Court or Tribunal for adjudication during the pendency of the proceeding in relation to such matter before the National Tribunal. 6 [Explanation.—In this sub-section, “Labour Court” or “Tribunal” includes any Court or Tribunal or other authority constituted under any law relating to investigation and settlement of industrial disputes in force in any State.] (7) Where any industrial dispute, in relation to which the Central Government is not the appropriate Government, is referred to a National Tribunal, then notwithstanding anything contained in this Act, any reference in section 15, section 17, section 19, section 33A, section 33B and section 36A to the appropriate Government in relation to such dispute shall be construed as a reference to the Central Government but, save as aforesaid and as otherwise expressly provided in this Act, any reference in any other provision of this Act to the appropriate Government in relation to that dispute shall mean a reference to the State Government.] 7 [(8) No proceedings before a Labour Court, Tribunal or National Tribunal in relation to an industrial dispute shall lapse merely by reason of the death of any of the parties to the dispute being a workman, and such Labour Court, Tribunal or National Tribunal shall complete such proceedings and submit its award to the appropriate Government.]”

57. The abovesaid provision of the ID Act clarifies that the disputes referred to the Industrial Tribunal would be considered as Industrial Dispute. Consequently, for a dispute to be referred to the Tribunal, the presence of an employer-employee relationship is assumed and the onus is on the employer to demonstrate the absence of such a relationship. Unless the employer provides substantial evidence refuting the fulfilment



of the same, the presumption of an employee-employer relationship remains in place.

58. In the present case, the engagement of the respondent workmen prior to the year of engagement of the contractor, issuance of gate passes to the workmen by the petitioner and issuance of the appreciation letter are relevant for determining the existence of an employee-employer relationship between the parties. Therefore, this Court does not find any infirmity with the findings of the learned Tribunal as the circumstantial evidence is sufficient to establish the direct relationship of an employee-employer between the parties.

59. In light of the foregoing discussions, this Court is of the view that the petitioner has failed to highlight any infirmity and illegality with the findings of the learned Tribunal. The factual matrix and the circumstantial evidence, as relied upon by the learned Tribunal do establish a relationship of such a nature where the petitioner was solely in control of the functioning of the respondent workmen and thereby directly terminated their employment.

CONCLUSION

60. It is a well established fact that the labour force in our country mainly consists of the marginalised and economically backward people. Oftentimes, there is huge disparity in the bargaining power of the said labor force and the principal employers and therefore, the workers are forced to live at the whims and fancies of their employers.

61. The present case satisfies the ingredients of an industrial dispute, where the workers had completed the minimum threshold of number of



2023:DHC:8882



days and therefore, it was a fit case for the learned Tribunal to rule in favour of the workers. The settled position of law empowers the adjudicating bodies to direct the principal employers to compensate for the illegalities committed by them.

62. Therefore, this Court is of the view that the impugned order as passed by the learned Industrial Tribunal is legally sound and does not suffer from any illegality.

63. In light of the same, the impugned common order dated 15th October, 2007 passed by the learned Tribunal is upheld and accordingly, the present petitions, being devoid of any merit are dismissed.

64. Pending applications, if any, also stand dismissed

65. The order be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

December 12, 2023
SV/AV