HIGH COURT OF MADHYA PRADESH : INDORE BENCH

SINGLE BENCH : HON'BLE SHRI JUSTICE VIVEK RUSIA, JUDGE

W.P. No. 2928/2017 (s)

Caparo Engineering India Ltd

Vs.

Pradhanmantri Engineering Shramik Sanghthan

Shri J.P. Cama, learned Sr. counsel along with Shri Girish Patwardhan, counsel for the petitioner.

Shri Ramsingh Gour, learned counsel for the respondent

O R D E R

(Passed on _____/01/2018)

1. The petitioner has filed the present writ petition under Article 227 of the Constitution of India against the award dated 3rd January 2017, passed in case no. 9/ID/Reference/2013 by the Labour Court, Dewas, by which, the members of the respondent / Union have been directed to be classified as permanent employees with further direction to grant similar benefits as are being given to its permanent employees.

2. The petitioner is a Company incorporated under the provisions of The Companies Act, 1956 and is a division of Caparo Engineering India Ltd. The petitioner is engaged in the business of manufacture and sale of precision tubes having its Manufacturing Unit at Steel Tubes Road, Kalukheda, Dewas. The said Unit was earlier owned by the Steel Tubes India Ltd,(in short 'STI') and purchased by the petitioner in an auction proceedings conducted under the provisions of SARFAESI Act, 2002. The sale certificate to the said effect was issued on 10th August 2006.

3. The respondent is a registered Labour Union having its registration no. 4961 representing cause of 39 so called contract labour (herein after referred as 'workmen') working in the unit owned by the petitioner.

4. That on 30th August 2006, the Steel Tubes India Ltd had entered into the settlement / agreement with the then Trade Unions of the workmen *viz* Engineering Shramik Sanghthan, Dewas, Engineering Udyog Mazdoor Union and Engineering Mazdoor Sangh, Dewas. That after execution of the said agreement / settlement all the exiting workmen had submitted their resignation from the services of STI after their full and final settlement. After the aforesaid purchase on 10.8.2006 of the said manufacturing unit, the permanent workers working therein were given employment by the petitioner.

5. According to the petitioner, these 34 workmen were working in canteen run by the STI through one contractor namely M/S Gayatri Catering and Nursery (hereinafter referred as " M/s Gayatri "). Out of the 34 workmen, 29 workmen were deployed at the canteen work and 5 workmen were deployed at the garden for gardening work. M/S Gayatri was the contractor and the STI was the employer with respect to these 34 workmen. After purchase of the said unit, the petitioner becomes a principal employer with respect to those 34 workmen. M/S Gayatri obtained a certificate dated 5th August 2004 under the Contract Labour (Regulation and Abolition) Act, 1970 (herein after referred as "the CLRA Act "). According to the petitioner, all the 34 workmen were being paid salary by M/S Gayatri who used to deduct EPF and ESI contributions. The petitioner being a principal employer filed an application dated 20th Sept. 2006 with the Registration officer under the CLRA Act and the certificate dated 20th November 2006 was issued to the petitioner by the competent authority.

6. On 08th December, 2006, the petitioner / company and the respondent / union entered into a compromise / settlement before the Assistant Labour Commissioner, Dewas (hereinafter referred as " 2006 Settlement") that the

appointment letters in respect of 145 labourers and 28 staffs have been issued and the appointment letters for remaining 288 labourers shall be issued later on and no workers would be retrenched and no workers would be kept on contract basis.

7. According to the petitioner, there was no settlement for these 34 workmen engaged in the canteen through M/s Gayatri, even their names are not there in the list appended with the 2006 Settlement. The list of 429 workers who joined the petitioner from STI along with their date of appointment, provident fund and ESI etc deduction has been filed as annexure-P/9 in the writ petition.

8. These 34 workmen who were previously employed with M/s Gayatri upto December. 2006 were thereafter continued with M/s Shweta Catering and Nursery (hereinafter referred as "M/s Shweta ").

9. The petitioner entered into an agreement dated 26th December, 2006 with M/s Shweta for engaging 34 workmen for the maintenance of garden and nursery and for running the staff canteen for a period of two years. Undisputedly, these 34 workmen were already working with the petitioner through M/s Gayatri. The agreement was extended for the period of two years and so on. According to the petitioner, as per the terms and conditions of the agreement, the contractor will deploy full time supervisor to supervise, discipline, quality and standard of the performance of these 34 workmen. The contractor shall deduct and deposit their provident fund and ESI contribution and on completion of the contract period, he will withdraw all his workers / force from the company site. Necessary instructions in writing were also issued to the contractor by Annexure-A/2 appended to the said agreement and under the said directions, the contractor was required to furnish the list of workmen containing their names, father's name, address and BIMA numbers. The contractor was also required to submit bills on 5th day of every month along with documents like salary slip, attendance slip, service tax photocopy and affidavit.

10. The petitioner had also entered into another agreement dated 25th

December 2006 with M/s Shweta for providing contract of manpower supplied for the purpose of material handling at the company premises on certain terms and conditions.

11. After expiry of the period of the contract, the petitioner issued another letter dated 25th December, 2010 to M/s Shweta for extending the agreement for another two years and same was accepted by Ms. Shweta .That finally an agreement dated 23/12/2013 was executed between the petitioner and M/s Shweta, by which the agreement which came into effect w.e.f 1st January, 2014 has been extended till it is not mutually terminated by the parties to the agreement, meaning thereby, this agreement is still in force. All the 34 workmen are still working with the petitioner not in canteen and garden but in the manufacturing unit.

12. According to the petitioner, another settlement was arrived between the petitioner and the regular / permanent workmen in the year 2007 regarding change in service conditions, in which also, names of 34 workmen were not there. By way of this settlement, it has been agreed that the management of the petitioner shall give canteen on contract basis to any other contractor, but it shall be ensured that there would be no loss of job to any worker, who are presently working in the canteen. The petitioner entered into an agreement with the another contractor M/s Orbit Catering & Services for providing canteen service to its workers and staff in the manufacturing unit.

13. In the year 2011, the petitioner entered into a settlement with the labour Union called Chamunda Engineering Mazdoor Union. At the time of settlement dated 25th February, 2011, a demand was raised in respect of these 34 workmen regarding their status and working conditions. According to the petitioner, till the execution of the settlement of 2011, there was no dispute raised by the respondent / union in respect of those 34 workmen. The petitioner received a letter from the office of the labour officer, Dewas regarding charter of demand of the respondent /

union. The said letter was immediately replied by the petitioner. The respondent / union, vide letter dated 12th July, 2011 made various complaints against the petitioner, which was duly replied by the petitioner by letter dated 18th August, 2011. In order to settle the dispute between the petitioner and the respondent Union, the labour Officer started conciliation proceedings but the dispute could not be settled and the conciliation proceeding ended in failure. That vide order dated 12th March, 2013, the conciliation officer has referred the dispute to the labour Court with the following terms and conditions :

> *क्या श्री सुखदेव पिता रामलाल तथा अन्य 33 श्रमिक (कुल 34 संलग्न सूची अनुसार) ठेका श्रमिक है ? यदि नहीं तो श्रमिकों को सीायी किये जाने की पात्रता आती है ? यदि हां तो इस संबंध में नियोक्ता को क्या निर्देश दिये जाना चाहिये ?*

14. Vide order dated 6th May, 2013, the Labour Court has registered a reference as case no. 09/ID / 2013 and issued notice to the first part i.e. respondent and second party i.e. petitioner for submitting their statement of claim.

15. Both the parties appeared on the next date of hearing and sought time to file the statements of claims. That the respondent being the First Party filed the statement of claim demanding the status of permanent employees an all the benefits which are being given to permanent employees by the petitioner . The petitioner being the Second Party *inter-alia* raised preliminary objections also, challenging the maintainability of the reference. The core and upmost objection raised by the respondent was that these 34 workmen are the contract labours and not their permanent workers . The labour Court vide order dated 28th March, 2014 directed the petitioner to lead evidence first before the respondent leads evidence, meaning thereby, the present petitioner was burdened to prove that the 34 workmen are the contract labours . In compliance of the order dated 28th March, 2014, the petitioner filed an affidavit of Mr. Dinesh Kumar Bansal (Manager Personal) as DW-1in lieu of examination-in-chief. Thereafter, on 22nd May, 2015, the petitioner also filed an affidavit of his second witness namely Mr. Ravi

Girijapurkar, the proprietor of M/s Shweta, Dewas. Both the witnesses were cross-examined in detail by the respondent. Thereafter, the respondent filed an affidavit of Mr. Ajay Goswami (PW-1) in lieu of examination-in-chief and also filed 25 identical affidavits of other witnesses i.e. 25 out of 34 workmen whose names are there in the list of statement of claims. Five workmen have not filed their affidavits as they resigned and settled their claims full and finally with M/s Shweta. According to the petitioner, only 25 workmen contested the case before the Labour Court. All the witnesses were cross-examined by the petitioner. After hearing arguments of both the parties, the learned labour Court pronounced the Award dated 06th February, 2017 by directing the petitioner to classify all the 25 workmen as permanent workers and grant them the benefit of the permanent workers w.e.f 07/05/2011. Being aggrieved by the said award, the petitioner has filed the present writ petition before this Court.

16. The petitioner has assailed the impugned award *inter alia* on the ground that learned labour Court has grossly erred in directing the petitioner (original respondent) to lead evidence first before the respondent's evidence. The burden was on the respondent to prove first that they are permanent workers of the petitioner hence such erroneous procedure cannot be sustained in law hence impugned award is liable to be set aside on this ground alone. The impugned award has also been assailed on the ground these 34 workmen were engaged through M/s Gayatri and thereafter, M/s Shweta, initially for the canteen work and catering services and thereafter, for the purpose of material handling as under the contract for manpower supply. Learned Labour Court has wrongly recorded the finding that there is employer and employee relationship between the petitioner and these workmen. When the contractor in his evidence has clearly admitted that he has appointed them and paying salary to them and also having disciplinary control over them, therefore, the findings are perverse and based on wrong appreciation of evidence and hence the impugned award is liable to be set aside

and matter is liable to remanded back to labour court for adjudication .

17. Mr. J.P. Cama, learned Sr. counsel appearing for the petitioner has drawn attention of this court towards the terms of reference and emphasized that the terms of reference has in fact wrongly been framed by the competent authority. The respondent approached the labour court contending that they are the permanent employees of the petitioner, therefore, terms of reference ought to be, as to whether, they are permanent employees of the petitioner on not? If they discharge their burden, then burden shifts on the petitioner to establish that they are contract labours. Learned labour Court has wrongly directed the petitioner to lead evidence to prove whether the 34 workmen are contract labours.

18. Shri J.P. Kama learned counsel for the petitioner has further drawn attention to the evidence of DW-2 Ravi Girjapurkar, the proprietor of M/s Shweta, who has clearly admitted that the petitioner has engaged him as contractor in the month of April 2007 to let the labours mentioned in the schedule work. He is getting work done from these workmen as per the instructions from the factory administration. Shri J.P. Cama , learned counsel has further drawn attention of this court towards the cross-examination of the labours, who have stated that they have not received any appointment letter, they have not been issued any ID cards, there was no facility of attendance register like regular employees etc. The workers have not filed any documentary evidence to establish that they were given instructions to work on the machines alongwith regular workers, therefore the findings recorded by the labour court are perverse and are liable to be remanded back to the labour Court to decide afresh as per correct appreciation of evidence.

19. In support of his contention, he has placed reliance over the judgment of the Hon'ble Apex Court delivered in the case of ***Workmen of Nilgiri Coop. MKT. Society Ltd Vs. State of T.N and others*** reported in ***2004 (3) SCC 514***, on the issue of burden of proof, in which the Hon'ble Apex Court has held that it is well settled principle of law, that the person who sets up a plea of existence of

relationship of employer and employee, then the burden would be upon him. He has further placed reliance over para 11 of the judgment delivered in the case of ***General Manger, (OSD), Bengal Nagpur Cotton Mills, Vs. Bharat lal and another*** **reported in** ***2011(1) SCC 635.*** Relevant para -11 is reproduced below

> *11 On a careful consideration, we are of the view that the Industrial Court committed a serious error in arriving at those findings. In regard to the first test as to who pays the salary, it placed the onus wrongly upon the appellant. It is for the employee to aver and prove that he was paid salary directly by the principal employer and not the contractor. The first respondent did not discharge this onus. Even in regard to second test, the employee did not establish that he was working under the direct control and supervision of the principal employer. The Industrial Court misconstrued the meaning of the terms 'control and supervision' and held that as the officers of appellant were giving some instructions to the first respondent working as a guard, he was deemed to be working under the control and supervision of the appellant.*

The Hon'ble Supreme Court has laid down two test to decide the issue of employer and employee relationship *viz* (i) whether the principal employer pays the salary instead of the contractor; (ii) whether the principal employer controls and supervises the work of the employee and merely because, the officers of the principle employer gives some instructions to the employee of the contractor, that would not make him employee of the principle employer. He has further placed reliance over the judgment of Hon'ble Apex Court ***Balwant Rai Saluja and another Vs. Air India Limited and others*** reported in ***2014(9) SCC 407 page 289,*** in which, the Hon'ble Apex Court has held that the test of complete administration control i.e. complete effective and absolute control and supervision of the employer over the employee decides the employee and employer relationship between them.

The Court must apply the test of complete administration control.

20. He has further placed reliance over the judgment delivered in the case of ***International Airport Authority of India Vs. International Air Cargo Workers Union and another*** reported in **2009(13) SCC, 374,** in which the Hon'ble Apex Court has held that where there is no notification under section 10 of the CLRA Act and where it is not proved in industrial adjudication that the contract was shame and bogus then the question of directing the principal employer to regularize of contract labours does not arise. He has further placed reliance over the judgment delivered in the case of ***Dena Nath and others Vs. National Fertilizers Ltd and others*** reported in ***(1992) 1 SCC 695.*** Learned counsel for the petitioner has produced a copy of the order dated 16th January , 2015 passed in Writ Petition No. 6491/2010 [Ipca Laboratories Vs Laghu Udyog Mazdoor Union] in which, this Court has remanded the case to the Industrial Court to decide afresh in accordance with law after appreciating evidence on record, because the labour Court has wrongly placed the burden on the employer and incorrectly drawn adverse influence without properly appreciating the position of law settled by the Hon'ble Apex Court.

21. *Per contra* the Learned counsel for the respondents has argued in support of the award passed by the labour Court by submitting that the very case of the respondents before the labour court was that they are regular employees of the petitioner but the petitioner came with the plea that they are contract labourer, therefore, the burden was rightly shifted on them to prove whether these 34 workmen are the contract workers or not? The petitioner has never challenged the order, by which they were directed to begin start the evidence first, therefore, at this stage, they cannot make any complaint or challenge that proper procedure has not been followed. Section 29 of the CLRA Act,1970 casts an obligation on every principle employer and every contractor to maintain register and record giving particulars of contract labour, nature of contract performed by the contract labour,

the rate of wages to the contract labours. As per the Rules 74 to 78 of chapter 7 of the Contract Labour (Regulation and Abolition) Rules, 1971, (hereinafter referred to "the Rules, 1971) every employer is required to maintain register of contract labours in form No. 12. Rule 78 , muster roll, wages register, pension register and over time register etc. The petitioner as well as the contractor both have failed to maintain and produce any such register in respect of those disputed 34 workmen before the Labour Court . A copy of the contract / agreement executed between the petitioner and M/s Shweta / M/s Gayatri has not been signed by the 34 workmen, therefore, these agreements are shame and bogus and not binding on the 34 workmen.

22. In support of his arguments, Mr Gour ld. counsel has placed reliance over the judgments delivered in the case of **Naveen Singh Bhadoriya Vs. State of M.P and others** reported in ***2010 LLR 1291.*** He has also drawn attention of this Court towards the cross-examination and the affidavit of PW-2, in which he has admitted that he has not given the appointment letter to the labours provided from March, 2006 to April 2007 and he came to the Court at the instance of the petitioner without receiving any summons from the Court. He is getting work done from those labours as per the factory administration, these labours have been deputed in the factory to handle the machines and material and they have been paid the wages by the petitioner, therefore, the labour Court has rightly come to the conclusion that they are workers of the petitioner and entitled for classification as permanent employee with all consequential benefits. The present petition is devoid of merit and substance hence liable to be dismissed.

23. That in the year 2006, the petitioner has purchased the manufacturing unit from Steel Tubes India Ltd in auction proceedings conducted under the provisions of SARFAESI Act, 2002. Vide Ex.-D/1 dated 08/12/2006, a compromise was arrived between three trade unions and the management of the petitioner. The office bearer of the Union submitted their demand for pay, HRA, DA, washing allowance

etc vide notice dated 20/12/2006. The management of the petitioner issued a notice to the officer bearer on 16/01/2007 and thereafter, a compromise was arrived under various terms and conditions. The agreement was signed by the President and the Office Bearer of the Engineering Shramik Sanghathan, Dewas and the Director and the Manager of the petitioner / Company.

24. The management of the petitioner has accepted that the existing 145 workmen and the other staffs have been issued appointment letters and for remaining 28 workmen, the appointment orders would be issued by 26/12/2006. The most important feature of the said settlement was that any workmen would not be retrenched and also would not be kept on contract basis. All the workmen would be absorbed after expansion of the factory. Point no. 2 of the said agreement is reproduced below

> **2. बिन्दु क्रमांक 2**
>
> पूर्व में १४५ श्रमिक तथा स्आफ को नियुक्ती पत्र जारी किये गये है शेष २८८ श्रमिकों को दिनांक २६.१२. २००६ तक नियुक्ती पत्र जारी कर दिये जावेंगे। किसी भी श्रमिक की छटनी नहीं की जावेगी ओर न ही किसी श्रमिक को ठेके पर रखा जावेगा। समस्त श्रमिकों को कारखानें का विस्तारीकरण कर समायोजित किया जावेगा।

25. Thereafter, detailed agreement had also been signed between the management and the Union / respondent, which was made applicable from 01/09/2006 to 31/08/2010 i.e.Ex.-P/2. Under condition no. 8, the management shall have a right to give canteen on contract basis and the management would have to ensure that the employee working in the canteen be not put to loss to their employment. Condition no. 8 is reproduced below

> **8- भोजन भत्ता**
>
> भोजन भत्ता (थाली भत्ता) १६ रूपये प्रति कार्य दिवस के लिए उपस्थिति के आधार पर सभी श्रमिकों को देय होगा। तदानुसार श्रमिक यदि चाहेंगे तो १६ रूपये में कैन्टीन से भोजन प्राप्त कर सकेंगे। भोजन भत्ता आकस्मिक

अवकाश लेने पर भी देय होगा।

प्रबन्धन को यह अधिकार होगा कि वह जब चाहे कैन्टीन को ठेके पर दे सकें। इस संबंध में प्रबन्धन को यह सुनिश्चित करना होगा कि वर्तमान में कैन्टीन के कार्यरत कर्मियों को उनके रोजगार की हानि न हो।

26. It is clear from the aforesaid two agreements that all the existing employees would be issued appointment order. There would be no retrenchment of any employee and the employees working in the canteen would not suffer loss of job and the canteen can be given on contract .

27. It is an undisputed fact that these 34 workmen were working in the canteen, which was given on contract basis to M/s Gayatry and thereafter, M/s Shweta. Vide Ex.-P/3, the management of the petitioner has decided to give canteen on contract basis and employees working in the canteen were kept in production unit and status-quo would be maintained in respect of their employment. The relevant part of the agreement is reproduced below :

प्रबन्ध प्रतिनिधियों एवं श्रमिक प्रतिनिधियों के बीच हुए समझौते दिनांक १६.०३.२००७ के खण्ड ख (लाभ) की कंडीका ८ में यह तय किया गया था कि प्रबन्ध को यह अधिकार होगा कि जब चाहे कैन्टीन को ठेके पर दे सकें। इस संबंध में प्रबन्धन को यह सुनिश्चित करना होगा कि वर्तमान में कैन्टीन में कार्यरत कर्मियों को उनके रोजगार की हानि न हो।

इस दिशा में यह निर्णय लिया गया कि दिनांक ०७.०५.२००७ से कैन्टीन को ठेके पर दिया जावेगा और कैन्टीन में लगे सभी कार्यरत कर्मियों को यथावत स्थिति के माध्यम से उत्पादन कार्यकेन्द्रों पर रखा जावेगा तथा उनके रोजगार के संबंध में यथास्थिति बनाई रखी जाएगी। प्रबन्धन ने यह आश्वासन दिया कि इन कर्मियों को मिलने वाले वेतन तथा अन्या सुविधायें जैसे कि घोषित अवकाश, साप्ताहिक अवकाश, वर्ष में १० दिन की छुटटी, मेन लोन, त्यौहार अग्रिम, बोनस इत्यादि में कोई बदलाव नही होगा। यूनिफार्म देने की सुविधा में भी यथास्थिति रखी जावेगी। कैन्टीन ठेके पर देने की तिथी पर निम्नलिखित कर्मचारी

कैन्टीन में कार्यरत थे उनके लिए उपरोक्त निर्णय लागू रहेगा

28. The names of the 29 employees working in the canteen have been mentioned in the said agreement who would be given job in the production unit. After the aforesaid agreement dated 19/08/2007, the 34 workmen are working in the production unit uninterruptedly till today. It is clear from the above scenario the petitioner wants to take services from them, but does not want to give the benefits and status of the permanent employees. Since last 10 years they are working in the production unit along with permanent employees. When these 34 workmen were not given the benefits at par with the other permanent employees who were given the appointment letter by Caparo Company, then they approached the Assistant Labour Commissioner by way of demand. The Assistant Labour Commissioner issued a notice to the petitioner / management and conducted conciliation proceedings. The case of the respondent/s before the Assistant Labour Commissioner was that the management are adopting unfair labour practice and not treating them as permanent employees and paying half salary, whereas the permanent employees are getting Rs.12,000/- per month salary with 20%DA apart from other allowances. The management is wrongly projecting them as contract employee. The management appeared before the Assistant Labour Commissioner and denied that there is employer and employee relationship between them and submitted that the respondents are the contract employee. On the basis of the stand taken by the petitioner, the Assistant Labour Commissioner has framed terms reference whether 34 workmen are the contract labours and if not, whether they are entitled to get the permanent status. Vide order dated 12/03/2013, the dispute was referred to the labour Court for adjudication. Before the labour Court, the respondent being first party filed the statement of claim. They claimed that 34 workmen be declared as permanent employee and consequently, the benefits be given to them. The petitioner being second party before the labour Court raised

preliminary objection about the maintainability of the reference as well as contested on merit. By order dated 28/03/2014, learned labour Court has directed the present petitioner to lead evidence in support of their stand that these 34 workmen are the contract labourer. In compliance of the aforesaid order, the management has given evidence of Shri Dinesh Kumar Bansal, Manager (Personnel) and Shri Ravi Girjapurkar, Contractor of M/s Shweta and got exhibited as Ex.-D/9 to D/129.

29. That there is no provision of appeal or revision against the award / order passed by the Labour Court under Industrial Disputes Act,1947 hence they are being challenged by way of writ petition under art 227 of the Constitution of India. The scope of the writ petition under art 227 is very limited.

In case of *Savita Chemicals (P) Ltd. v. Dyes & Chemical Workers' Union,reported in (1999) 2 SCC 143*, the apex court has held as under

> ***19.*** *So far as this point is concerned, placing reliance on various decisions of this Court, namely, Hari Vishnu Kamath v. Ahmad Ishaque[1], Nagendra Nath Bora v. Commr. of Hills Division & Appeals, Assam[2] and Sadhu Ram v. Delhi Transport Corpn.[3] learned Senior Counsel for the appellant submitted that unless there was a patent error committed by the* 166 *Labour Court, the High Court under Article 227 could not have interfered with the findings of the Labour Court as if it was hearing an appeal. There cannot be any dispute on the said settled legal position. Under Article 227 of the Constitution of India, the High Court could not have set aside any finding reached by the lower authorities where two views were possible and unless those findings were found to be patently bad and suffering from clear errors of law. As we have already discussed earlier while considering Points 1 and 3, the findings reached by the Labour Court on the relevant terms were patently erroneous and dehors the factual and legal position on record. The said patently illegal findings could not have been countenanced under Article 227 of the Constitution of India by the High Court and the High Court would have failed to exercise its jurisdiction if it had not set aside such patently illegal findings of the Labour Court. Consequently, on this point the appellant has no case. Point 4 is, therefore, answered in the negative against the appellant and in favour of the respondent.*

In case of *Sneh Gupta v. Devi Sarup,reported in (2009) 6 SCC 194 Apex court has held as under* :

> ***41.*** *The High Court moreover was exercising its jurisdiction under Article 227 of the Constitution of India. While exercising the said* 212 *jurisdiction, the High Court had a limited role to play. It is not the function of the High Court while exercising its supervisory jurisdiction to enter into the disputed question of fact. It has not been found by the High Court that the findings arrived at by the learned Additional District Judge were perverse and/or in arriving at the said findings, the learned Additional District Judge failed and/or neglected to take into consideration the relevant factors or based its decision on irrelevant factors not germane therefor. It could intervene, if there existed an error apparent on the face of the record or, if any other well-known principle of judicial review was found to be applicable.*

In case of *Atlas Cycle v. Kitab Singh,reported in (2013) 12 SCC 573,*Apex court has further held as under:-

> ***15.*** *We are satisfied that the learned Single Judge thoroughly analysed all the aspects and arrived at a correct conclusion. It is settled law that when the Labour Court arrived at a finding overlooking the materials on record, it would amount to perversity and the writ court would be fully justified in interfering with the said conclusion. We are conscious of the fact that the High Court exercising writ of certiorari jurisdiction would not permit to assume the role of the appellate court, however, the Court is well within its power to interfere if it is shown that in recording the said finding, the Tribunal/Labour Court had erroneously refused to admit the admissible and material evidence, or had erroneously admitted any inadmissible evidence which has influenced the impugned finding, the writ court would be justified in exercising its remedy. In other words, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari.*

30. Shri Cama, learned Sr. counsel appearing for the petitioner emphasized that the learned Labour Court has wrongly shifted the burden on the petitioner / management to establish that the respondents are the contract labours whereas the burden lies on the respondent/s to prove that they are the permanent employees of the petitioner and there is any employee and employer relationship between them. In support of his contention, he has placed reliance over the judgment of Hon'ble Apex Court in the case of **Amar Chakravarty & Ors vs Maruti Suzuki India**

Limited, reported in ***2010 (14) SCC, 471***. With due honor and respect to the above ruling of Apex court the contention of learned senior counsel is liable to be disallowed mainly on the ground that the petitioner has never challenged the order dated 28/03/2014, by which, they were directed to start evidence before the evidence of the respondent. The petitioner could have assailed the terms of reference by which, the burden has been casted upon them to prove that the respondents are the contract labours. After the terms of reference and the order dated 28/03/2014, the petitioner has participated and lost in the entire proceedings before the labour Court, now at this stage, they cannot be permitted to assail the order on the ground that the burden was wrongly shifted on them to prove that the respondents are the contract labours.

31. In the case of **Amar Chakravarty**, (supra) the Hon'ble Apex Court has held that the provisions of the Evidence Act, 1872 *per se* are not applicable in an industrial adjudication, but its general principles do apply in proceedings before the Industrial Tribunal or the Labour Court, as the case may be. The Hon'ble Apex Court in this case gave an example that where an employer asserts misconduct on the part of the workman and dismisses or discharges, it is for the principal employer to prove misconduct by the workman before the Industrial Tribunal or the Labour Court, as the case may be, by leading relevant evidence before it and thereafter, it is open to the workman to adduce evidence *contra*. The workman cannot be asked to prove that he has not committed any misconduct. Since the petitioner came up with the case that the respondents are the contract labours, therefore, the burden has rightly been shifted on them to establish this and therefore, learned labour Court has not committed any error of law while directing the petitioner to lead evidence and prove that the respondents are the contract labours, therefore, the contention raised by learned counsel for the petitioner is hereby rejected.

32. Shri Cama, learned Sr. counsel has further emphasized that there is no

employee and employer relationship between the petitioner and the respondents. He has placed reliance over the judgment delivered in the case of ***International Airport Authroity of India Vs. International Air Cargo Workers*** reported in ***2009(13) SCC 374***, in which the Hon'ble Supreme Court has given a test to be applied to decide the employee and employer relationship. In that case, Hon'ble Apex Court has held that if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by contractor, if the right to regulate employment is with the contractor, and the ultimate supervision and control lies with the contractor.

In this case the apex court has considered that where there is no abolition of contract labour under sec 10 of CLRA Act but the contract labour contended that the contract between employer and contractor is sham and nominal the remedy is under Industrial Disputes Act,1947 and the industrial adjudicator can grant the relief sought if it finds that the contract is sham , camouflage and nominal after applying certain tests. Para 35 to 39 are reproduce below:-

> *35. As noticed above, SAIL did not specifically deal with the legal position as to when a dispute is brought before the industrial adjudicator as to whether the contract labour agreement is a sham, nominal and merely a camouflage, when there is no prohibition notification under Section 10(1) of the CLRA Act.*
>
> *36**. But where there is no abolition of contract labour under Section 10 of the CLRA Act, but the contract labour contend that the contract between the principal employer and the contractor is sham and nominal, the remedy is purely under the ID Act. The principles in Gujarat Electricity Board2 continue to govern the issue. The remedy of the workmen is to approach the industrial adjudicator for an adjudication of their dispute that they are the direct employees of the principal employer and the agreement is sham, nominal and merely a*

camouflage, even when there is no order under Section 10(1) of the CLRA Act.

37 The industrial adjudicator can grant the relief sought if it finds that contract between principal employer and the contractor is sham, nominal and merely a camouflage to deny employment benefits to the employer and that there is in fact a direct employment, by applying tests like: who pays the salary; who has the power to remove/dismiss from service or initiate disciplinary action; who can tell the employee the way in which the work should be done, in short who has direction and control over the employee. But where there is no notification under section 10 of the CLRA Act and where it is not proved in the industrial adjudication that the contract was sham/nominal and camouflage, then the question of directing the principal employer to absorb or regularize the services of the contract labour does not arise.

38 The tests that are applied to find out whether a person is an employee or an independent contractor may not automatically apply in finding out whether the contract labour agreement is a sham, nominal and is a mere camouflage. For example, if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by contractor, if the right to regulate employment is with the contractor, and the ultimate supervision and control lies with the contractor.

39 The principal employer only controls and directs the

work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise. In short worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor.

In view of the above pronouncement by the Apex court the labour court can grant the relief to the contract labour if certain test are passed. Now this court is required to examine the perversity in the impugned award of labour court in a writ petition under art 227 of the constitution of India.

33. He further placed reliance over the judgment delivered by Hon'ble Supreme Court in the case of ***Balwant Rai Saluja & Anr vs Air India Ltd.& Ors*** reported in ***2014(9) SCC 407,*** in which, the Hon'ble Supreme Court has summarized the factors to establish the employer and employee relationship.

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

(i) who appoints the workers;

(ii) who pays the salary/remuneration;

(iii) who has the authority to dismiss;

(iv) who can take disciplinary action;

(v) whether there is continuity of service; and

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

complete control and supervision.

As regards, extent of control and supervision, we have already taken note of the observations in Bengal Nagpur Cotton Mills case (supra), the International Airport Authority of India case (supra) and the NALCO case (supra).

34. He has further placed reliance over the judgment delivered in the case of ***G.M.,(Osd),Bengal Nagpur Cotton ... vs Bharatlal & Anr*** reported in ***2011(1) SCC 635***, in which the Apex Court has given two well recognized tests to decide whether the contract labourer are the direct employers of the principal employer. The principal employer pays the salary instead of the contractor. The principal employer controls and supervises the work of the employee.

35. Learned counsel further submitted that all these 34 contract labours were appointed initially by the contractor M/s Gayatri and thereafter by M/s Shweta to work in the canteen and thereafter, they were directed to work in production unit by the petitioner, but the salary and other benefits are being paid by the contractor, who has admitted this fact in his evidence and got exhibited the Ex.-D/29 to Ex-D/120.

36 Under Contract Labour (Regulation and Abolition) Central Rules, 1971 (in short "the Rules, 1971 "), Chapter-VII deals with the registers and records and collection of statistics. Every principal employer mandatorily shall maintain it in respect of each registered contractors in Form XII. Every contractor shall maintain records in respect of each registered establishment where he employs contract labours. Every contractor shall issue an employment card in form XIV. Every contractor is required to maintain Muster Roll, Wages Register, Deduction Register and Over-time Register, therefore, under section 29 of Chapter – VII of the Act, 1970. Section 29 is reproduced below:-

29. Registers and other records to be maintained.-

(1) Every principal employer and every contractor shall maintain such registers and records giving such particulars of contract labour employed, the nature of work performed by the contract labour, the rates of wages paid to the contract labour and such other particulars in such form as may be prescribed. -(1) Every principal employer and every contractor shall maintain such registers and records giving such particulars of contract labour employed, the nature of work performed by the contract labour, the rates of wages paid to the contract labour and such other particulars in such form as may be prescribed."

(2) Every principal employer and every contractor shall keep exhibited in such manner as may be prescribed within the premises of the establishment where the contract labour is employed, notices in the prescribed form containing particulars about the hours of work, nature of duty and such other information as may be prescribed.

He is required to send half early return in Form XXIV (in duplicate) so as to reach the Licensing Officer concerned not later than 30 days. The Rules 74 to 82 f the CLRA Rules 1971 are reproduced below :

74 Register of contractors.—*Every principal employer shall maintain in respect of each registered establishment a register of contractors in Form XII.*

75 Register of persons employed.—*Every contractor shall maintain in respect of each registered establishment where he employs contract labour a register in Form XIII.*

76 Employment Card.—(*i) Every contractor shall issue an employment card in Form XIV to each worker within three days of the employment of the worker. (ii) The card shall be maintained upto date and any change in the particulars shall be entered therein.*

77. Service Certificate.—*On termination of employment for any reason whatsoever the contractor shall issue to the workman whose services have been terminated a Service Certificate in Form*

XV.

78 Muster Roll, Wages Registers, Deduction Register and Overtime Register.—*1 [(l) (a) Every contractor shall in respect of each work on which he engages contract labour,—*

(i) maintain a Muster Roll and a Register of Wages in Form XVI and Form XVII respectively: Provided that a combined Register of Wage-cum-Muster Roll in Form XVIII shall be maintained by the contractor where the wage period is a Fortnight or less;

(ii) maintain a Register of Deduction for damage or loss, Register of Fines and Register of Advances in Form XX, Form XXI and Form XXII respectively;

(iii) maintain a Register of Overtime in Form XXIII recording therein the number of hours of, and wages paid for, overtime work, if any;

(b) Every contractor shall, where the wage period is one week or more, issue wage slips in Form XIX, to the workmen at least a day prior to the disbursement of wages;

(c) Every contractor shall obtain the signature or thumb impression of the worker concerned against the entries relating to him on the Register of Wages or Muster Roll-cum-Wages Register, as the case may be, and the entries shall be authenticated by the initials of the contractor or his authorised representative and shall also be duly certified by the authorised representative of the principal employer in the manner provided in rule 73.

(d) In respect of establishments which are governed by the Payment of Wages Act, 1936 (4 of 1936) and the rules made thereunder, or Minimum Wages Act, 1948 (11 of 1948) or the rules made thereunder, the following registers and records required to be maintained by a contractor as employer under those Acts and the rules made thereunder shall be deemed to be register and records to be maintained by the contractor under

these rules, namely:— 1. Subs, by G.S.R. 948, dated 12th July, 1978. The Contract Labour (Regulation and Abolition) Central Rules, 1971

(a) Muster Roll;

(b) Register of Wages;

(c) Register of Deductions;

(d) Register of Overtime;

(e) Register of Fines;

(f) Register of Advances;

(g) Wage slip;

(2) Notwithstanding anything contained in these rules, where a combined or alternative form is sought to be used by the contractor to avoid duplication of work for compliance with the provisions of any other Act or the rules framed thereunder for any other laws or regulation or in cases where mechanised pay rolls are introduced for better administration, alternative suitable form or forms in lieu of any of the forms prescribed under these rules, may be used with the previous approval of the 1Regional Labour Commissioner (Central)].

79 Every contractor shall display an abstract of the Act and rules in English and Hindi and in the language spoken by the majority of workers in such form as may be approved by the Chief Labour Commissioner (Central).

80 (1) All registers and other records required to be maintained under the Act and rules, shall be maintained complete and up-to-date, and, unless otherwise provided for, shall be kept at an officer or the nearest convenient building within the precincts of the workplace or at a place within a radius of three kilometres. 2

[(2) Such registers shall be maintained legibly in English and Hindi or in the language understood by the majority of the

persons employed in the establishment.]

(3) All the registers and other records shall be preserved in original for a period of three calendar years from the date of last entry therein.

(4) All the registers, records and notices maintained under the Act or rules shall be produced on demand before the Inspector or any other authority under the Act or any person authorised in that behalf by the Central Government.

(5) Where no deduction or fine has been imposed or no overtime has been worked during any wage period, a 'nil' entry shall be made across the body of the register at the end of the wage period indicating also in precise terms the wage period to which the 'nil' entry relates, in the respective registers maintained in Forms XX, XXI, and XXIII respectively.

81. (1) (i) Notices showing the rates of wages, hours of work, wage period, dates of payment of wages, names and addresses of the Inspectors having jurisdiction, and date of payment of unpaid wages, shall be displayed in English and in Hindi and in the local language understood by the majority of the workman in conspicuous 1. Subs, by G.S.R. 48, dated 31st December, 1987. 2. Subs, by G.S.R. 657, dated llth August, 1987. places at the establishment and the work-site by the principal employer or the contractor, as the case may be.

(ii) The notices shall be correctly maintained in a clean and legible condition.

(2) A copy of the notice shall be sent to the Inspector and whenever any changes occur the same shall be communicated to him forthwith.

[(3) Every principal employer shall, within fifteen days of the commencement or completion of each contract work under each contractor, submit a return to the Inspector, appointed under section 28 of the Act, intimating the actual dates of the

commencement or, as the case may be, completion of such contract work, in Form VI B.]

82. ***Return*** *:- (1) Every contractor shall send half yearly return in Form XXIV (in duplicate) so as to reach the Licensing Officer concerned not later than 30 days from the close of the half year. Note.—Half year for the purpose of this rule means "a period of 6 months commencing from 1st January and 1st July of every year".*

(2) Every principal employer of a registered establishment shall send annually a return in Form XXV (in duplicate) so as to reach the Registering Officer concerned not later than the 15th February following the end of the year to which it relates.

[(3) The returns to be submitted under this rule by contractor/principal employer shall be correct, complete and up-to-date in all respects.]

37. According to Section 29 of the Act, 1970, every principal employer and every contractor shall maintain such registers and records giving such particulars of contract labours employed in the establishment, the nature of work performed by the contract labour, the rates of wages paid to the contract labour but the petitioner did not produce any such records despite court order hence adverse inferences are required to be drawn against the petitioner.

38. The petitioner has produced the copy of agreement executed on 26.12.2006 with M/s Shweta for providing services in respect of maintenance of garden / nursing at the premises of its establishment only for two years. For the said period, one more agreement dated 26/12/2006 was executed between them for running staff mess / canteen . After expiry of the said agreement, a letter dated 25/12/2008 was written by the petitioner to M/s Shweta for providing man-power for the purpose of material handling i.e. Ex.-P/9, which was received and accepted by M/s Shweta. The said letter contains certain direction to the contractor by way of

Annexure-P/2. Under the said terms and conditions, the contractor was required to produce salary slip, attendance register, service tax photocopy and affidavit but no such documents have been exhibited before the court. After expiry of two years, another letter of similar nature was written on 25/12/2010 and finally the agreement dated 23/12/2013 was executed between the petitioner and M/s Shweta (Ex.-P/14) for an indefinite period to provide manpower for the material handling job. The said agreement came into effect w.e.f. 01st January, 2014 and will be valid for the period, unless it is not mutually terminated by the parties and by virtue of the said agreement, the respondents are working with the petitioner, therefore, condition no. 5, as there is continuity of service as laid down by the Hon'ble Supreme Court in the case of ***Balwant Rai Saluja*** **(supra)**. In view of this it can be safely held that all agreements or letters constituting agreements are nothing but sham, nominal and merely camouflage to deny the status of permanent employees and benefits to these 34 workmen.

39. The contractor DW-2 in his cross-examination has admitted that he has not maintained any documents in respect of the payment of salary, nature of job and working hours. He has also admitted that he had agreement with the petitioner from the year 2008 to 2013. He has also admitted that he had never issued appointment orders to the workers and did not produce the attendance register before the court. The most important admission on his part is that he has not got renewed the statutory license renewed under the CLRA Act 1970 from the year 2007 to 2011. He came to the Court at the instance of the petitioner, not through summons issued by the Court. In para 14 of the his cross-examination, he has admitted that the Company decides the schedule about the working of the workmen, therefore, it is clear from the evidence from the contractor. He is not having any record as required under Chapter VII of the Rules, 1971, therefore, he does not fulfill any of the condition, which is required to be fulfilled by the

contractor under the Rules, 1971. The most important aspect is that the petitioner / Company had obtained the license only for one year, i.e. in the year 2007 and thereafter, he has not obtained any licence under the Rules, 1971 to engage labours through contractor.

40. The petitioner has examined Shri Dinesh Kumar Bansal, (DW-2), Manager (personnel), who in his cross-examination has admitted that despite the court order, he has not produced the schedule, production register, attendance and payment register to the Court in respect of the respondent / union. He has stated that he cannot give the exact number of the workers at the time when the petitioner / Company started production. Therefore, in view of the aforesaid material which came on record by way of oral as well as documentary evidence, it is clear that the management has failed to discharge the burden that the workmen were appointed through the contractor. The workmen are continuously working with the petitioner since 2006 since when it took over the manufacture unit and started production. The management has decided not to retrench any workers and further decided to give canteen work to the contractor and the employees working in the canteen would be adjusted in the production unit, therefore, the management had already taken the decision in respect these 34 workers. There are only two agreements executed in the year 2006 and 2014. There is no agreement from 2008 to 2014. There is no compliance of section 29 of the CLRA Act 1970, 1971 by the contractor as well as by petitioner. Neither the company nor the contractor have the licence as required under the CLRA Act and Rules, 1971, therefore, the learned Labour Court did not commit any error while reaching to the conclusion that members of the respondents / Union are not the contract employees and entitled for all the benefits, which are available to the regular employees. The findings are no at all perverse or pertinacious and Even otherwise, the management has not produce any appointment order issued to their permanent employees. The petitioner has produced Ex-D/29 to D/129 to demonstrate that the

salary is being paid by M/s Shweta to the workers. On the payment slip / register, only name of the workers are mentioned , but age , addresses and the name of their father have not been mentioned. Even the name of the Company where there are working has not been mentioned, where they are working. There is no counter signature of the manager or supervisor of the petitioner. The salary sheet has not been submitted before the competent authority as required under the provision of the Chapter-VII, therefore, not only the so-called agreement, but the payment sheets and the registers are shame and bogus and prepared only to defend the claim of the respondents. The petitioner has also not produced any document to show that how much amounts were paid from time to time to the contractor for providing the manpower, therefore, these agreements are the shame and bogus.

41. Hence, in view of above discussion the impugned award dated 3rd January 2017, passed in case no. 9/ID/Reference/2013 by the Labour Court, Dewas is hereby upheld and writ petition is dismissed. No order as to cost.

(VIVEK RUSIA)
JUDGE

amol

AMOL N MAHANAG
2018.01.08 11:43:20
+05'30'