
(2014) 07 DEL CK 0249
In the Delhi High Court
Case No : W.P. (C) 6657/2012

Vinay Sharma

APPELLANT

Vs

Indraprastha Gas Ltd.

RESPONDENT

Date of Decision : 28-07-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Contract Labour (Regulation and Abolition) Act, 1970 — Section 10(1)
Evidence Act, 1872 — Section 114(3)(g)
Industrial Disputes Act, 1947 — Section 10, 10(4), 2(k)
Trade Unions Act, 1926 — Section 4(1)

Citation : (2014) 4 LLJ 135 : (2014) 3 LLN 680

Hon'ble Judges : V. Kameswar Rao, J

Bench : Single Bench

Advocate : Arjun Krishnan, Advocate for the Appellant; K.K. Rai, Sr. Advocate, Anil Bhat, Raavi Birbal and S.K. Pandey, Advocate for the Respondent

Final Decision : Dismissed

Judgement

V. Kameswar Rao, J.—The challenge in this writ petition is to the award dated December 20, 2011 passed by the Industrial Tribunal, Karkardooma Courts, Delhi in I.D. No. 99/2003 whereby the Industrial Tribunal has answered the reference by holding that the petitioners-workmen are not the employees of the management M/s. Indraprastha Gas Limited (respondent No. 1 herein) and denied the relief of regularization to them.

2. It may be noted here that the Industrial Dispute was espoused by a Union called "Vyapar Thatha Udyog Karamchari Sangh" with respect to 216 claimants/workmen. The present writ petition has been filed by 15 claimants/workmen out of the 216 claimants/workmen represented through Union.

3. The impugned order has been passed on a reference made by the appropriate government on the following terms:

Whether the workmen performing the duties of D.S.M. and Technician are

entitled to be regularized with the management in corresponding pay-scale and posts, if so, what directions are necessary in this respect?

4. It was the claim of the workmen before the Industrial Tribunal that they have been working with the management as "Technicians" and "Driver Sales Men" (DSM) and are entitled to be regularized with the management at the corresponding pay scales and posts. It was their case that they have been working at 120 pump stations of the respondent No. 1-management since the date of their appointment. According to them, the management has given the pump stations to the commission agents for supervision for the last few months preceding the date of reference. According to them, the management was not providing any legal facilities to them like weekly off, festival off, national holidays, medical leaves, annual increments etc. on the basis of equal pay for equal work. Their work has been satisfactory. They also pleaded that the demand notice was sent, but, was not replied to. Pursuant to the failure of the conciliation proceedings, the claim has been filed.

5. On the other hand, the respondent No. 1-management, has, in its stand before the Industrial Tribunal challenged locus standi of the Union to represent the 216 claimants/workmen. According to the respondent No. 1, the claim has been signed by the Secretary of the Union and the power to sign the claim cannot be delegated. The Respondent No. 1 has also taken a stand that the claimants have never been in their employment but in the employment of various contractors. The management would rely upon the contract between it and various contractors. It had also pleaded that it is the Principal employer having Registration Certificate under the Contract Labour (Regulation and Abolition) Act, 1970 and the contractors had the licence to engage the contract labour. The PF and ESI have been deducted and deposited by the contractors. There is no Master-Servant relationship between the claimants and the respondent No. 1-management.

6. The Industrial Tribunal framed the following issues:

1. Whether the cause of workmen has been duly espoused? OPW?
2. Whether the claimants are employees of management?
3. Whether the workmen are entitled for regularization with the management in the corresponding pay scale?
4. In terms of reference.
7. The claimants/workmen have examined three witnesses namely Ram Lakhan Yadav, General Secretary of the Union as WW1, Shokeen Pal and Nihal Singh as WW2 & WW3 respectively, wherein, they have reiterated the contents of the claim.
8. The management, on the other hand, examined Mr. Ashim Batra, General Manager (Marketing) as MW1. That apart, it had also examined various

contractors from MW2 to MW18.

9. The Industrial Tribunal, on issue No. 1, has held that the Industrial Dispute has been properly espoused.

10. On the issue No. 2, the Industrial Tribunal was of the view, relying upon the agreements between the respondent No. 1-management and the various contractors, that the workmen were in the employment of contractors and not in the employment of the respondent No. 1-management. Based on the findings of issue No. 2, the Industrial Tribunal held that the claimants/petitioners, are not entitled to the regularization.

11. Mr. Arjun Krishnan, learned counsel appearing for the petitioners would submit that the petitioners herein were in the actual employment of the respondent No. 1-management prior to 2003 inasmuch during that period the respondent No. 1-management had started appointing commission agents and thereby shifting employment of the petitioners under the commission agents. According to him, this is clear from Exh. WW1/1 which is a Salary Sheet of October 2001; Exh. WW1/4, which is a Shift Rota for Technicians for the month of March 2002; Exh. WW1/7-Daily Shift/DSM-wise sales for May, July, 2002; grant of Diwali gift for the month of October 2002 to DSM/Technicians which included the names of the petitioners herein. He would also rely upon the Attendance Register for the month of October 2001; Identity Card issued to the petitioners on December 26, 2001 and log book entries. He would also state that the petitioners are really aggrieved by the findings of the Industrial Tribunal, wherein, the Industrial Tribunal has held that the petitioners are not the employees of the respondent No. 1-management but the contractors. He would further state that the contracts of the respondent No. 1-management with the commission agents were sham contracts and the petitioners were real employees of the M/s. Indraprastha Gas Limited. According to him, all the operating agreements were identical. He would rely upon certain clauses of the contract like Clause 9, wherein, the contractor was paid entire manpower cost + 15% as commission; Clause 5(b), wherein, the IGL has power to remove persons it considers incompetent or unsuitable; Clause 4, wherein, overall control and supervision was with the IGL, who appoints the Executive Incharge of the Station; Clause 6(g), wherein, the Operator can appoint his personnel on fixed terms which was coterminous with the operating agreement with IGL. He would state that there was no operating contract prior to end of 2002 with any contractor. He would state that the respondent No. 1 had failed to produce the relevant records of the past two years from the date of claim. It would have been the best evidence to prove their case. He would state that the contracts are merely on paper as for all purposes, the real and effective control and supervision remains with the respondent No. 1-management. The employer could not have been changed without following the due process under the Industrial Disputes Act, 1947. He would support the reference made by the appropriate government inasmuch the issue, whether the petitioners were

employed by IGL or whether operating agreements were sham and nominal, are two sides of the same coin. It has been their consistent stand that they are the employees of the IGL and not of the contractors. He would state that in the claim statement, the petitioners had made out a case of contract being sham, nominal and camouflage. He would also state that the claim has to be seen in substance rather than the usage of nomenclature like "sham" and "camouflage". According to him, it is a settled law that the Industrial Tribunal can adjudicate the real dispute between the parties, even if the reference presupposes certain facts. According to him, the real grievance in the writ petition is with regard to the finding on issue No. 2. He would state, Industrial Tribunal has not given a finding on the operating agreements being sham. He would state, it is not necessary, all the claimants must come in the witness box to prove his/her case. According to him, since the Industrial Dispute was espoused by the Union in a representative capacity, there was no need for all the workmen to depose. He would state that WW1 has deposed generally and not about any individual workman. He states that WW1 has proved the exhibited 13 documents i.e. Exh. WW1 to WW1/13, which show that the petitioners were employees of IGL from 1998 onwards. He would further state that WW2 has deposed that throughout, the work was being got done by the respondent No. 1 and not by the commission agents. In other words, it was the respondent No. 1-management, which was supervising the work and the contractors were nowhere on the ground and it was only a paper arrangement. Similarly, WW3 had also deposed, not about himself but about the other Technicians. He would state that MW1 has admitted that the work done by the petitioners was of a permanent and perennial nature and the same workman was employed, through more than one contractor. He would state that the petitioners were working for IGL in 2001-02 and non-production of documents of period prior to 2003 ought to result in adverse inference against the respondent No. 1-management. He would rely upon the following judgments in support of his case:

1. Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc. etc.,
2. G.M. ONGC, Shilchar Vs. ONGC Contractual Workers Union,
3. Indian Farmers Fertilizer Cooperative Ltd. Vs. Industrial Tribunal I, Allahabad and Others,
4. International Airport Authority of India Vs. International Air Cargo Workers" Union and Another,
5. Bharat Heavy Electrical Limited Vs. State of U.P. and Others,

12. On the other hand, Mr. K.K. Rai, learned Senior Counsel appearing for the respondent No. 1 would submit that the present petition filed by 15 claimants/workmen is not maintainable inasmuch as neither the petitioners herein have filed their affidavit(s) nor they have appeared in the witness box to depose the case in their favour. He would submit that the espousal being through the Union,

it is the Union which could have filed the present writ petition and not anyone else. He would also state that the espousal before the Industrial Tribunal has not been done as per law. According to him, either it should be by the Union belonging to the establishment or Union of another establishment belonging to the same industry. In this regard, he would rely upon the judgment of the Supreme Court in the case reported as J.H. Jadhav Vs. Forbes Gokak Ltd., and also on Section 4(1) of the Trade Union Act, 1926. He would also state that the reference to the extent that the claimants/petitioners are entitled to the regularization, is itself bad as reference presupposes the existence of an employer-employee relationship between the claimants-petitioners and the respondent No. 1-management, which otherwise it not. According to him, the reference should have been whether there exists a relationship of employer-employee between the claimants-petitioners and the respondent No. 1-management. In the absence of such a reference, the reference which has been answered by the Industrial Tribunal should have been rejected at the outset. He would further state, even the reference does not contain a case of the contract being sham and camouflage, which is further apparent from the statement of claim; issues framed; examination-in-chief and cross examination of the witnesses, where, even the existence of a contract has been denied. According to him, there has to be a case of existence of contract to claim it sham and camouflage. He would also state that the contract being sham and camouflage, even though not pleaded, even otherwise, cannot be adjudicated as an ancillary issue and it has to be a primary issue based on the reference having been made which has not been done in the present case. It is his case that no foundation was laid in the pleadings that the contract is sham and camouflage. It was not open to the claimants/petitioners to argue before this Court that the contract was a sham and camouflage. Even otherwise according to him to hold a contract, sham, it is necessary to determine that the workman engaged through a contractor is really a workman of the principal employer. To hold such, the tests are (i) who pays the salary; (ii) who has power to remove/dismiss from service or initiate disciplinary action against the workman concerned; (iii) who has discretion and control over the employees. He would state that if the contract is for supply of labour, the labour supplied by the contractor works under the direction, 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 the contractor, the right to recall the employment is with the contractor and the entire supervision and control lies with the contractor. In this regard he relied upon the judgments of the Supreme Court in the case reported as International Airport Authority of India Vs. International Air Cargo Workers' Union and Another, ; General Manager (OSD), Bengal Nagpur Cotton Mills, Rajnandgaon Vs. Bharat Lal and Another, . It is also his case that the claimants/petitioners being a contract labour could not have raised industrial dispute. In this regard he relied upon the judgment of the Supreme Court reported as Gujarat Electricity Board, Thermal Power Station, Ukai Vs. Hind Mazdoor Sabha and Others, .

13. That apart it is his submission that the Tribunal has rightly rejected the reference. He would further state that the following pertinent aspects would still be necessary as a mode of proof for the petitioners to establish their case inasmuch as the petitioners must enter the witness box to prove their case regarding employment; mere non-production of documents per-se would not draw an adverse inference against the management; mere pleadings does not substitute the evidence so also a self serving affidavit would not be a proof in support of the case; to get the benefit of Section 114(3)(g) of the Evidence Act, one must place some evidence in support of his case. In this regard he relied upon the following judgments:

- (a) Municipal Corporation, Faridabad Vs. Siri Niwas,
- (b) The Range Forest Officer Vs. S.T. Hadimani,
- (c) Manager, R.B.I., Bangalore Vs. S. Mani and Others,
- (d) R.M. Yellatti Vs. The Assistant Executive Engineer,

14. That apart on the issue of summoning of documents of the period before contractors were engaged it is the submission of Mr. Rai that such an application was never pressed by the claimants/petitioners and therefore no case for summoning of the documents was made out. He would also state, the application for summoning of the documents was made after filing of the evidence by the respondent No. 1. He would also take support from the Rule 14(5) of Delhi Shops & Establishment Rules, 1954 to contend that the record was maintained by the respondent No. 1 only for a period of two years and therefore the application for summoning the records having been moved in the year 2005 the respondent No. 1 could not have produced the same and even the subsequent application filed in the year 2006 demanded entirely different documents which would also show that the workmen did not press their earlier application. He would further state that mere ex-gratia payment of Diwali would have no bearing on the employer-employee relationship. It is a document which has been denied by the management. In any case he states that the ex-gratia payment is not part of wages and rely upon the judgment of the Supreme Court reported as 1985(5) SCC 460 Regional Director, Employees' State Insurance Corporation & Anr.; Ghaziabad Zila Sahkari Bank Ltd. Vs. Addl. Labour Commissioner and Others, . In the last it is his case that regularization presupposes the existence of vacancy, a selection process, before appointment is made as per rules. He states that the respondent No. 1 in its affidavit has specifically stated that procedure for recruitment of regular employee involves advertising vacancy, calling applications, screening, calling eligible candidates, interview/test, merit list and appointment of the candidates. On these aspects no cross examination was effected by the claimants/petitioners. He would state that the respondent No. 1 is duly registered under the Contract Labour (Regulation & Abolition) Act, 1970. He rely upon the judgment of the Supreme Court reported as Secretary, State of Karnataka and Others Vs. Umadevi and Others, . He also take support of the

judgment of the Supreme Court in the case reported as Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc. etc., to contend that mere engagement of contract labour, the relationship of master and servant is not established. Even if the contract is found to be not genuine, absorption would not follow automatically. In the last it is his case that this Court in exercise of jurisdiction under Article 226 of the Constitution of India would not interfere with the findings of fact unless the same is perverse or is a case of no evidence. He take support of the judgments of the Supreme Court reported as Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, ; R.M. Yellatti Vs. The Assistant Executive Engineer, .

15. Having considered the rival submissions made by the counsel for the parties, the first and foremost issue which need to be decided is whether the 15 petitioners herein, who even though claimants before the Tribunal and had not filed affidavits in support of their claim nor entered the witness box, could have filed the present writ petition challenging the impugned award. I note, the Union has been arrayed in the memo of parties as respondent No. 2. In any case, the espousal by Union would be relevant for the purpose of Industrial Dispute. To contend that it is the Union which can challenge the award in a writ petition may not be correct in as much as; (i) the industrial dispute stood decided by the Tribunal answering the reference; (ii) the writ petition before this Court under Article 226 of the Constitution would not be continuance of the reference but a remedy available to the claimants under the Constitution; (iii) it may so happen, a Union or a claimant, before an Industrial Adjudicator has accepted the award of the Industrial Adjudicator and is not interested in pursuing the remedy further, but, that would not preclude a claimant or petitioner willing to seek further remedy invoking the provisions of the Constitution from challenging the award. If the contention as advanced by Mr. Rai, learned Senior Counsel is accepted, that would make such a claimant remedy-less or to say the least, at the mercy of the Union/uninterested claimant. The plea urged by learned Senior Counsel for the respondent No. 1 cannot be a ground to non-suit the petitioners. Further, I find that the Industrial Dispute having been espoused by Union on behalf of 216 claimants/workmen, in a representative capacity, the Secretary of the Union has entered the witness box and has deposed on behalf of all the claimants/petitioners. He has got exhibited the documents as Exh. WW1/1 to WW1/13 which included the salary sheets in respect of all the claimants. Even, his deposition was general in nature with regard to all the claimants. In an Industrial Dispute, the deposition of the person representing similarly placed persons would suffice. Even otherwise, merely because the petitioners have not entered the witness box before the Tribunal would not affect the maintainability of the writ petition. It would be a different submission to make that on the testimony of the representative, the petitioners are not entitled to the relief. Further, if the contention of the learned Senior Counsel for the respondent No. 1 is accepted, then, every claimant, i.e. 216 claimants, need to have entered the witness box, which would be contrary to the intent of espousal required under the Act.

16. On the issue of espousal by "Vyapar Thatha Udyog Karamchari Sangh", the Supreme Court in the case of J.H. Jadhav (supra) while, interpreting the word "Industrial Dispute" as defined in Section 2(k) of the Act has held the phrase "Union" indicates the Union to which the employee belongs even though it may be a Union of the minority and includes the Union of another establishment belonging to the same Industry. The said Union would also be competent to take up the cause of the workman. The said submission need to be rejected for two reasons; (i) no such contention was either raised/urged before the Tribunal; (ii) such an issue is a mixed question of law and fact and in the absence of any material to show that the Union which espoused the cause of the petitioners herein belonged to the establishment or another establishment of the same industry, it may not be possible for this Court to give a finding on the same.

17. Insofar as the submission of Mr. Rai that the contract labour could not have raised an Industrial Dispute against the respondent No. 1, is concerned, suffice to state, with regard to the judgment relied upon by him in Gujarat Electricity Board, Thermal Power Station, Ukal Gujarat (supra), wherein, a two judges' Bench of the Supreme Court has held that if there is a genuine labour contract between the principal employer and the contractor, the authority to abolish the contract labour vests in the appropriate government and not in any court including Industrial Adjudicator. If the appropriate govt. abolishes the contract labour system in respect of an establishment, the Industrial Adjudicator, would after giving opportunity to the parties to place material before it, decide whether the workman be absorbed by the principal employer, if so, how many of them and on what terms, but, if the appropriate government declines to abolish the contract labour, the Industrial Adjudicator has to reject the reference. If however, the so called contract is not genuine, but, is a sham and camouflage to hide the reality, Section 10 would not apply and workman can raise an Industrial Dispute for relief that they should be deemed to be employees of the principal employer. The Court or the Industrial Adjudicator would have jurisdiction to entertain such a dispute and grant necessary relief.

18. Further, the issue has also been put to rest by the Supreme Court in Steel Authority of India Ltd.'s case (supra), wherein the Supreme Court, in para 125(5), has held as under:

125.....

(5) On issuance of prohibition notification u/s 10(1) of the CLRA Act prohibiting employment of contract labour or otherwise, in an industrial dispute brought before it by any contract labour in regard to conditions of service, the industrial adjudicator will have to consider the question whether the contractor has been interposed either on the ground of having undertaken to produce any given result for the establishment or for supply of contract labour for work of the establishment under a genuine contract or is a mere ruse/camouflage to evade compliance of various beneficial legislations so as to deprive the workers of the benefit thereunder. If the contract is found to be not genuine but a mere

camouflage, the so-called contract labour will have to be treated as employees of the principal employer who shall be directed to regularise the services of the contract labour in the concerned establishment subject to the conditions as may be specified by it for that purpose in the light of para 6 hereunder.

The aforesaid being conclusive, it is clear that a contract labour can raise an Industrial Dispute for seeking declaration that the contract is genuine or not. If it is not genuine, the contract labour need to be treated as the employee of the principal employer.

19. Insofar as the submission of Mr. Rai that the reference made by the appropriate Government was bad as the reference presupposes the existence of a employer-employee relationship between the petitioners and the respondent No. 1, is concerned, I note that the respondent No. 1 has disputed the relationship on the ground that the claimants have been engaged through a contractor. In view of this averment, an issue No. 2 was framed by the Industrial Tribunal "whether the claimants are the employees of the management". The Industrial Tribunal has answered this issue in the negative. I note, the parties proceeded before the Industrial Tribunal on an understanding that there exists a dispute on relationship. The respondent No. 1 had not opposed the framing of such an issue. The issue on employer-employee relationship is an incidental issue. Section 10(4) of the Industrial Disputes Act, 1947 permits the Industrial Adjudicator to confine its adjudication to the terms of reference and to those points and matter incidental thereto. The Supreme Court in G.M. ONGC, Shilchar's case (supra) and IFFCO's case (supra) has justified the decision of the Industrial Adjudicator for deciding the issue of relationship between the claimants and the management i.e. ONGC and IFFCO in those cases, even though, the reference in both the cases was for seeking regularization and against termination. In the facts of this case, even if it is said that reference presupposes the existence of relationship of employer-employees between the respondent No. 1 and the petitioners, the said relationship could have been determined in view of the above position of law, and in any case, the defect has been cured by framing issue No. 2 which has been answered by the Tribunal against the petitioners. Insofar as the judgments relied upon by the learned counsel for the respondent No. 1, in Tata Iron and Steel Co. Ltd.'s case (supra), the Supreme Court was dealing with a defective reference, as the real issue, that the transfer of the workmen, to M/s. Lafarge India Ltd. was justified, was not referred for adjudication. Rather, the reference was, whether, not to take back the workmen by TISCO after their transfer is justified. Further, the TISCO has challenged the reference itself, whereas in this case, the respondent No. 1 has filed its reply to the claim petition, allowed framing of issue No. 2 and also a decision on the reference. The objection taken by Mr. Rai is not sustainable in the facts of this case. The judgments in BSNL's cases (supra) were primarily related to an issue whether contract being sham and camouflage need to be referred by the appropriate government, the Single Judge and the Division Bench, referred and concurred with the earlier judgment of the Single Judge of this Court in

Ashok Kumar and Ors. Vs. The State and Anr. in WPC 9438-42/2004 decided on 20-12-2006, wherein the learned Single Judge has held as under:

It is now settled law that where the workmen claim that the contract between principle employer and contractor was sham and camouflage, they have to raise an industrial dispute to that effect and it is industrial adjudicator who, after going through the evidence and the terms and conditions of the contract and other circumstances has to decide whether the contract between principal employer and the contractor was sham and camouflage.

20. I agree with the learned counsel for the respondent No. 1 that the issue of sham and camouflage need to have been referred by the appropriate Government. For this reason, and for the reason that the petitioners have not even averred/pleaded that the contract between the respondent No. 1 and the contractor is sham, nominal and camouflage, suffice to state, that reference could not have been answered in favour of the petitioners. Even on the merits of the conclusion of the Industrial Tribunal, to prove such a relationship, the petitioners were necessary required to plead and prove that the contract between the respondent No. 1 and the contractor is a sham, nominal and camouflage as in reality, they are the employees of the principal employer. The pleadings must match the test required to prove such a relationship. In the pleadings, the petitioners have though referred to commission agents, it was their case that they are working with the respondent No. 1 as Technicians/DSMs and are entitled to be regularized with the respondent No. 1 at the corresponding posts and pay scales. It was also their case that they have been working with the respondent No. 1 since their appointment, which is not providing any legal facilities to them like weekly off, festival off, national holidays, medical leave, annual increments etc. Meaningfully, read, it was the case of the petitioners that they are the direct employees of the respondent No. 1 and their working is regulated by it. It was never their case that their services have been transferred under the contractor. They have never accepted/admitted the contract between the respondent No. 1 and the contractor. So, there was no pleading that the contract being sham, nominal and camouflage. Given the case set up by the petitioners in their claim petition, it was difficult to establish that they are the direct employees of the respondent No. 1, for which, it is necessary to prove (1) salary is being paid by the respondent No. 1; (2) disciplinary powers are with the respondent No. 1; (3) the employees-petitioners are working under the supervision and control of the respondent No. 1. Further, in his deposition, WW1 has denied the fact that the petrol pumps were being operated through the contractors. He has denied the suggestion that the work is being done through commission agents of the management. He has also denied the suggestion that the claimants were not appointed by the management. He has denied the suggestion that the petitioners were not being paid salaries by the management. Further, he has denied the suggestion that the respondent No. 1 has no control or supervision over the petitioners. WW2, in his deposition, has even though denied that the respondent No. 1 is getting the work done through the

commission agents, he has admitted that one V.K. Chandra was working as a Supervisor and he is being paid salary by him. There is nothing on record to show salary was being paid by the respondent No. 1. Further, it is not their case that subsequent to the operating agreements, the disciplinary powers, were being exercised by the respondent No. 1. The reliance placed by Mr. Krishnan on Exh. WW1/1, WW1/4, WW1/7, Attendance Register for the month of October, 2001, Identity Cards issued to the petitioners on December 26, 2001 are for a period prior to December, 2002 as thereafter, the contractors were appointed. I note, the case that the contract is sham, nominal and camouflage has been set up by the petitioners for the first time in this Court, which is clear from the reading of the writ petition. Reference made by Mr. Krishnan to some of the clauses of the contract, suffice to state, the clauses in no way demonstrate that the three test necessary to prove the relationship have been fulfilled. The aspect of supervision and control to the extent, ensuring the work, for which, operating agreements have been executed is being carried out properly would always exist with the principal employer. It is the cumulative effect of all the three tests which would determine the relationship and prove the contract as sham, nominal and camouflage. In the given facts, I note, neither the reference was made about the relationship, or the contract being sham, nominal and camouflage nor the petitioners have pleaded/proved that the contract was sham, nominal and camouflage. In this regard, I reproduce the following observations of the Supreme Court in the case of General Manager (OSD), Bengal Nagpur Cotton Mills Rajnandgaon's case (supra), wherein the Supreme Court has referred to its earlier judgment in International Airport Authority of India's case (supra):

10. It is now well-settled that if the industrial adjudicator finds that contract between the principal employer and contractor to be sham, nominal or merely a camouflage to deny employment benefits to the employee and that there was in fact a direct employment, it can grant relief to the employee by holding that the workman is the direct employee of the principal employer. Two of the well-recognized tests to find out whether the contract labour are the direct employees of the principal employer are (i) whether the principal employer pays the salary instead of the contractor; and (ii) whether the principal employer controls and supervises the work of the employee. In this case, the Industrial Court answered both questions in the affirmative and as a consequence held that first respondent is a direct employee of the appellant.

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 expression "control and supervision" in the context of contract labour was explained by this court in *International Airport Authority of India Vs. International Air Cargo Workers' Union and Another*, thus:

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

13. Therefore we are of the view that the Industrial Court ought to have held that first respondent was not a direct employee of the appellant, and rejected the application of the first respondent.

21. Insofar as the submission of Mr. Krishnan, learned counsel for the petitioners that failure on the part of the respondent No. 1 to produce record pertaining to pre-2003 period to demonstrate that they have been engaged by the management is concerned, the non-production is inconsequential inasmuch as pursuant to the operating agreements, the change effected has not been challenged by the claimants at any point of time. As stated above, the petitioners should have challenged their transfer or their engagements through the contractors and the same should have been a subject matter of reference for adjudication. In the absence of any challenge, it must be presumed that their status was of a contract labour having been engaged through contractors. The reliance placed by Mr. Krishnan on the judgment of the Supreme Court in *Bharat Heavy Electricals Ltd.'s case (supra)* would not be applicable to the facts of this case. The petitioners could not able to establish the tests prescribed, for the Court to hold that they are the employees of the respondent No. 1. Having said that, it is also necessary to get the relief of regularization, the petitioners were required to prove that their exists posts commensurating their qualifications, vacancies with the respondent No. 1 and that they have been engaged through the process followed by the respondent No. 1 for making regular appointments. Mr. Rai is correct inasmuch as to get the relief of regularization, the aforesaid

pertinent aspects need to be pleaded and established by the petitioners. In any case, in terms of the judgment of the Supreme Court in Uma Devi's case (supra), the Court/Tribunal could not have given a direction to regularize the petitioners. The consideration has to be through a process of open selection in terms of the Recruitment Rules. I find that for the reasons stated by the Tribunal and in view of the aforesaid reasons, more particularly, in para 28, the Tribunal has rightly answered the reference denying the claim of regularization of the petitioners. Insofar as the submission of Mr. Rai with regard to the scope of judicial review, more particularly, on the findings of fact, I need not go into that issue keeping in view my conclusion above.

22. The writ petition is accordingly dismissed with no order as to costs.