(2011) 1 Supreme Court Cases 635

(BEFORE R.V. RAVEENDRAN AND A.K. PATNAIK, JJ.)

GENERAL MANAGER, (OSD), BENGAL NAGPUR COTTON MILLS, RAJNANDGAON . . Appellant;

Versus

BHARAT LAL AND ANOTHER . . Respondents.

Civil Appeal No. 10605 of 2010†, decided on December 14, 2010

A. **Labour Law — Contract labour — Employer-employee relationship — Onus of proof — Absorption — Entitlement to — "Control and supervision" — What is — Service agreement between appellant principal employer and second respondent contractor whether a sham — First respondent deployed as guard at appellant's Mill by second respondent — First respondent was discharged from service by second respondent in 1982 — He challenged his termination in 1987 — Labour Court directing appellant to reinstate first respondent and also holding that he was entitled to back wages — Industrial Court held that agreement between appellant and second respondent was sham and directed appellant to treat first respondent as its direct employee — Validity of — Held, it was for employee to aver and prove that he was paid salary directly by principal employer and not by contractor — First respondent did not discharge this onus and did not establish that he was working under direct control and supervision of principal employer — Merely because officers of principal employer gave some instructions to employee of contractor, that would not make him employee of principal employer — Hence, Industrial Court ought not to have held that first respondent was direct employee of appellant — Contract Labour (Regulation and Abolition) Act, 1970 — Ss. 2(1)(b) and 10 — M.P. Industrial Relations Act, 1960 (27 of 1960) — Ss. 31(3) and 65(3) — Words and Phrases — "Control and supervision" — What is**

(Paras 10 to 13)

International Airport Authority of India v. *International Air Cargo Workers' Union*, (2009) 13 SCC 374 : (2010) 1 SCC (L&S) 257, *relied on*

NTPC v. *Badri Singh Thakur*, (2008) 9 SCC 377 : (2008) 2 SCC (L&S) 903; *Municipal Corpn. of Greater Mumbai* v. *K.V. Shramik Sangh*, (2002) 4 SCC 609 : 2002 SCC (L&S) 584, *cited*

B. **Labour Law — Contract labour — Whether contract labourer is direct employee of principal employer — Determination of — Held, two well-recognised tests are whether: (i) principal employer pays salary instead of contractor, and (ii) principal employer controls and supervises work of employee — Merely because officers of principal employer gave some instructions to employee of contractor, that would not make him employee of principal employer** **(Para 10)**

† Arising out of SLP (C) No. 14080 of 2006. From the Judgment and Order dated 12-1-2006 of the High Court of Judicature of Chhattisgarh at Bilaspur in WP No. 336 of 2002

C. **Labour Law — Relief — Entitlement to — Misrepresentation — First respondent terminated from employment with contractor of appellant in 1982 and then he got employment in another organisation in 1985 — In 1987 he challenged his termination of 1982 — Nowhere in the proceedings did he state that he was in employment in another organisation since 1985 — Held, first respondent was careful enough to not disclose his address — In his applications he asserted that he was unemployed — Appellant submitting employment certificate of first respondent from his present employer — That certificate not being denied by first respondent — He continued to be employed during pendency of appeal — Hence held, first respondent not entitled to relief due to deliberate suppression and misrepresentation — Labour Law — Reinstatement/Back wages/Arrears — Generally — Relief — Denial of — When warranted — Suppression of factum of alternative employment — Constitution of India — Art. 136 — M.P. Industrial Relations Act, 1960 (27 of 1960) — S. 65(3) — Equity — Practice and Procedure — Relief — False representation — Effect**
(Paras 14 to 16)

Appeal allowed G-D/47090/CL

Advocates who appeared in this case :
Sanjoy Ghose and Ms Anitha Shenoy, Advocates, for the Appellant;
Shiv Sagar Tiwari, Advocate, for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (2009) 13 SCC 374 : (2010) 1 SCC (L&S) 257, *International Airport Authority of India* v. *International Air Cargo Workers' Union* 638*g*
2. (2008) 9 SCC 377 : (2008) 2 SCC (L&S) 903, *NTPC* v. *Badri Singh Thakur* 638*a*
3. (2002) 4 SCC 609 : 2002 SCC (L&S) 584, *Municipal Corpn. of Greater Mumbai* v. *K.V. Shramik Sangh* 638*a*

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J.— Leave granted. IA No. 5 of 2007 for bringing on record an additional document (certificate relating to employment of the first respondent with another employer from 1985) is allowed. Heard.

2. The appellant entered into a security service agreement dated 2-12-1975 with the second respondent, for its Mills premises, governed by the provisions of the Contract Labour (Regulation and Abolition) Act, 1970 ("the CLRA Act", for short). The first respondent was one of the persons appointed by the second respondent, and he was deployed for guard duties at the appellant's Mill on 15-12-1980. The second respondent discharged the first respondent from service on 27-7-1982/28-7-1982. The appellant terminated the security service agreement with the second respondent on 16-8-1982.

3. Five years after his termination, in the year 1987, the first respondent filed an application under Section 31(3) of the Madhya Pradesh Industrial Relations Act, 1960 (for short "the MPIR Act") for a declaration that his termination from service was illegal. He also sought a consequential direction to the appellant and the second respondent to extend all the benefits

which the employees of the appellant were being extended, from the date of termination, alleging that he was unemployed and without income. The appellant contested the claim and the second respondent remained ex parte.

4. The Labour Court by order dated 28-10-1991 allowed the application in part and directed the appellant to reinstate the first respondent in his previous post and pay him all arrears. Feeling aggrieved, the appellant filed an appeal before the Industrial Court against the said award of the Labour Court. While admitting the appeal, the Industrial Court directed the appellant to comply with Section 65(3) of the MPIR Act which required the employer to pay to the employee the full wages last drawn by him, during the pendency of the appeal.

5. The appellant issued a letter dated 25-2-1992 offering reinstatement from 30-12-1991 on a salary of ₹1000 per month, though he was getting only a salary of ₹200 from the second respondent at the time of his disengagement. Shortly thereafter the appellant's Mills were closed on 31-10-1992 and it was declared to be a sick industry by the Board for Industrial and Financial Reconstruction on 6-5-1993.

6. The Industrial Court heard and dismissed the appellant's appeal by judgment dated 19-5-2001. The Industrial Court held that after the CLRA Act came into force, it would not be possible to rely upon the definition of "employee" under Section 2(13) of the MPIR Act to contend that a workman employed by the contractor was a workman of the principal employer. The Industrial Court also held that the first respondent was appointed by the second respondent. However, it held that the agreement between the appellant and the second respondent was sham/nominal and the first respondent should be treated as a direct employee of the appellant for the following reasons:

(*i*) the appellant failed to establish by adducing necessary evidence that the salary of the first respondent was not directly paid by it and that it was being paid by the second respondent and therefore it should be deemed that the appellant was directly paying wages to the first respondent; and

(*ii*) the officers of the appellant were assigning duties directly to the first respondent and therefore it should be deemed that he was working under the direct control and supervision of the appellant.

7. The appellant challenged the order of the Industrial Court by filing a writ petition in the High Court. The High Court by judgment dated 12-1-2006 dismissed the writ petition without examining the contentions of the appellant on merits, merely on the ground that the appellant did not comply with Section 65(3) of the MPIR Act and the scope of interference under Articles 226/227 was very limited. The said order is challenged in this appeal by special leave.

8. The appellant relied upon the decisions of this Court in *NTPC* v. *Badri Singh Thakur*[1] where this Court held that the provisions of the CLRA Act would override the provisions of the MPIR Act and in *Municipal Corpn. of Greater Mumbai* v. *K.V. Shramik Sangh*[2] where this Court observed that merely because the principal employer and contractor have not complied with the provisions of the CLRA Act in regard to registration, the system of carrying out work through contract labour could not be termed as sham.

9. In this case, the industrial adjudicator has granted relief to the first respondent in view of its finding that he should be deemed to be a direct employee of the appellant. The question for consideration is whether the said finding was justified.

10. It is now well settled that if the industrial adjudicator finds that the contract between the principal employer and the contractor to be a 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-recognised tests to find out whether the contract labourers 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 the 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 the 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 the 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.

12. The expression "control and supervision" in the context of contract labour was explained by this Court in *International Airport Authority of India* v. *International Air Cargo Workers' Union*[3] thus: (SCC p. 388, paras 38-39)

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

1 (2008) 9 SCC 377 : (2008) 2 SCC (L&S) 903
2 (2002) 4 SCC 609 : 2002 SCC (L&S) 584
3 (2009) 13 SCC 374 : (2010) 1 SCC (L&S) 257

contractor, if the right to regulate the employment is with the contractor, and the ultimate supervision and control lies with the contractor.

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

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

14. There is a yet another reason why the first respondent should be denied any relief as there is sufficient material to infer that he deliberately suppressed and misrepresented facts. The first respondent was careful enough not to disclose his address (either his residence or place of work) at any stage of the proceedings before the Labour Court or the Industrial Court or the High Court or this Court. He all along gave his address as care of his counsel Shri Harish Chandra Rishi, Advocate, Rajnandgaon, Chhattisgarh. In the application before the Labour Court as also before the Industrial Court and the High Court, he asserted that he was unemployed. Even in the counter-affidavit dated 29-4-2008 filed in this Court, he stated that he is "suffering from unemployment and mental agony since 1987", thereby giving an impression that he has been continuously unemployed.

15. The appellant has produced before us an employment certificate issued by the current employer of the first respondent. The appellant has stated that it could not earlier ascertain whether the first respondent was otherwise employed as it did not have his particulars as he was not its employee and his whereabouts were not known; and that only after the filing of the special leave petition, it could trace the place of employment of the first respondent and secure the particulars. The certificate produced is a communication dated 17-1-2007/18-1-2007 from Western Coalfields Ltd., a Government of India Undertaking, Nagpur, addressed to the appellant, stating that the first respondent took up employment under Western Coalfields Ltd. on 5-6-1985 and that in January 2007 he was working in Wani area in WCL in Maharashtra and was being paid a gross salary of ₹12,435. This has not been denied or controverted by the first respondent.

16. The proviso to Section 65(3) of the MPIR Act makes it clear that if the employee had been otherwise employed and receiving adequate remuneration during the pendency of the appeal or subsequent periods, the

court shall order that no wages shall be payable under Section 65(3). As noticed above, the first respondent approached the Labour Court only in the year 1987, five years after his disengagement by the second respondent. After he was disengaged in July 1982, the first respondent took up employment with Western Coalfields Ltd. on 5-6-1985 and has been earning a far larger amount than what he was earning earlier. Two years thereafter he approached the Labour Court. He continues to be employed with Western Coalfields Ltd. during the pendency of this appeal. That is an additional ground to deny any back wages or direction to pay wages during the pendency of the litigation. It is also a ground to reject the claim on account of the deliberate suppression and misrepresentation.

17. In view of the foregoing, we allow this appeal and set aside the orders of the Labour Court, the Industrial Court and the High Court. Consequently the application of the first respondent filed before the Labour Court, Rajnandgaon under Section 31(3) of the MPIR Act stands dismissed.

(2011) 1 Supreme Court Cases 640

(BEFORE MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.)

BAJAJ HINDUSTAN LIMITED .. Appellant;

Versus

SIR SHADI LAL ENTERPRISES LIMITED AND ANOTHER .. Respondents.

Civil Appeal No. 5856 of 2005† with SLP (C) No. 1398 of 2006 and Civil Appeals Nos. 5857-58 of 2005, decided on November 29, 2010

A. **Constitution of India — Arts. 14, 73 and 162 — Scope of judicial review — Decisions requiring technical, commercial or expert knowledge — Economic and fiscal regulatory measures — Delicensing of sugar industry — Held, granting licences is a matter of executive or legislative policy considering diverse factors for formulating policy in larger interest of economy of the country — Hence, in areas of economics and commerce, far greater latitude available to executive than in other matters — Courts, not being experts in said fields, cannot interfere with wisdom of policy framed by legislature or executive — Executive Wing of State — Policy/Policy decision/Policy matter — Industry, Trade and Development — Liberalisation/Delicensing — Administrative Law — Judicial Review — Exclusion of (Paras 21 and 35 to 39)**

B. **Administrative Law — Judicial Review — Exclusion of — Policy/Policy decision/Policy matter — Interference by court — When permissible — Held, courts can interfere only when there is clear violation of statute or constitutional provision, or arbitrariness (Para 39)**

† From the Judgment and Order dated 24-8-2005 of the High Court of Judicature at Allahabad in Civil Misc. WP No. 36685 of 2004