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IN THE INDUSTRIAL TRIBUNAL, AT PUNE
BEFORE SHRI. K.N. GAUTAM, PRESIDING OFFICER

Reference (IT) No. 8 of 2009

Pimpri Chinchwad Mahanagar Palika,
Pimpri, Pune 411 018.

... **First Party.**

VERSUS

Rashtriya Sharmik Aghadi,
212/1604, Sant Tukaram Nagar,
Pimpri, Pune 411 0 18.

... **Second Party.**

CORAM :- SHRI. K.N. GAUTAM, PRESIDING OFFICER,
INDUSTRIAL TRIBUNAL, PUNE.

APPEARANCES :- > Shri. S.B. Malegaonkar, Ld. Advocate for the
First Party.
> Second Party in person.

AWARD
(Dated : 07.01.2023)

This is a reference made by Government of Maharashtra vide order dated 14.05.2009 in exercise of power under Section 39(B) read with Section 12(5) of the Industrial Disputes Act, 1947 in respect of reinstatement of Smt. Muktabai Gajanan Patil and

other 571 workmen shown in Annexure A to the reference with continuity of service along with full back wages together with all other consequential benefits.

Facts of the Second Party :

2. The Second Party is a trade union registered under The Trade Unions Act, 1926 and the First Party is a corporation created under Bombay Provincial Municipal Corporation Act, 1959. Previously, the Second Party filed Writ Petition No. 2193 of 2001 before Hon'ble Bombay High Court inter-alia praying that employees/workmen whose names mentioned in Annexure A to the reference order may be made permanent. However, the Hon'ble Bombay High Court vide order dated 24.09.2003 held that the members of the Second Party were working through contractors should not be terminated even though the contractors are removed by the First Party corporation. The Second Party contended that the First Party entered into contracts with the contractors viz. Sulabh International, Vishal Civil Contractor Enterprises and M.P. Enterprises for the purpose of cleaning and maintenance of latrines and urinals in about 78 wards. However, those contractors were paper contractors and having no role except making payment to the workmen engaged through those contractors. The workmen i.e. members of the Second Party were paid meager salary, which was not at par with the employees of First Party corporation. The Hon'ble Bombay High Court gave liberty to the Second Party to file separate application under Rule 25 of Contract Labour (Regulation & Abolition) Act, 1970 for claiming wages at par with the employees of the First Party

corporation. Accordingly, the application was filed and it was allowed by the Labour Commissioner, Pune – Mr. B.K. Patil. Being aggrieved by said order of the Labour Commissioner, the First Party filed Writ Petition before Hon'ble Bombay High Court which was dismissed by the Hon'ble High Court. Being aggrieved by the Judgment and Order of Hon'ble Bombay High Court, the First Party filed Special Leave Petition before Hon'ble Supreme Court, which was disposed of. Similarly, the First Party has filed Special Leave Petition No. 20102 of 2004 before Hon'ble Supreme Court against the order passed in Writ Petition No. 2193 of 2001 by the Hon'ble Bombay High Court, which order was initially stayed by the Hon'ble Supreme Court. However, subsequently said Special Leave Petition was withdrawn by the First Party.

3. The Second Party contended that after obtaining stay from the Hon'ble Supreme Court in Special Leave Petition No. 20102 of 2004, the First Party terminated the services of the members of the Second Party with effect from 01.10.2004. Since, the Special Leave Petition was pending before Hon'ble Supreme Court, the Second Party started pursuing the case of reinstatement of workmen i.e. its members after withdrawal of Special Leave Petition by the First Party and accordingly sent letter dated 08.09.2005 to the First Party contending that the workmen should be reinstated. Thereafter, the Second Party filed Contempt Petition on 03.08.2007, which was dismissed on 08.01.2008, because the Second Party union has to approach appropriate forum for claiming reinstatement. Thereafter, letter dated 02.09.2008 was served on First Party corporation contending that all the workmen

may be reinstated with continuity of service and with full back wages as they have been terminated illegally. All said workmen have completed a continuous service of more than 240 days. It is contended that the members of the Second Party are the employees of the First Party and contractors are sham and bogus, who are paper contractors created only with a view to dodge the claim of permanency to the members of the Second party. The Second Party prayed for declaration that workmen whose names are mentioned in Annexure A to the reference order are the employees of the First Party corporation and the contractors viz. Sulabh International, Vishal Civil Contractor Enterprises, and M.P. Enterprises are sham and bogus contractors and they are paper contractors. It is also prayed that the members of the Second Party whose names are mentioned in Annexure A to the reference be reinstated with continuity of service and full back wages together with other consequential reliefs.

Facts of the First Party :

4. The First Party specifically contended that the Second party is not a registered trade union and it is not functioning through elected representatives. Similarly, the alleged members are no longer remained members of the Second Party. The reference is not initiated by authorized competent person by following due process of law, hence reference itself is not maintainable. It is also contended that similar issue raised by the Second Party is pending before Hon'ble Supreme Court in Special Leave Petition No. 10197 of 2007, wherein both the parties appeared and contesting the issue. Therefore, unless and until said

Special Leave Petition is finally disposed of, it is not proper to pursue the present reference. The First Party contended that the Second Party initiated proceeding against it requesting the Board constituted under Contract Labour (Regulation and Abolition) Act, to abolish the contract labour system in First Party corporation. The appropriate Government on the basis of recommendation of Board decided not to abolish contract labour system and said decision was intimated to First Party vide its communication dated 25.08.2005. The First Party contended that in view of said factual position, the Second Party has accepted that the workmen involved in present reference are employed by various contractors and said contract labour system was not abolished, hence there is no question of illegal termination of services of members of Second Party by the First Party for whom present reference is initiated. Therefore, reference is not maintainable on this ground also.

5. The First Party contended that it has never employed members of Second Party, hence no employer-employee relationship created between the members of the Second party and First Party. According to First Party, it has never employed members of Second party by following due process of law as per rules of recruitment applicable to the First Party. The members of the Second Party were recruited by various agencies including Sulabh International, Vishal Civil Contractor Enterprises and M.P. Enterprises. Those agencies have responsibility as per the terms of understanding with the First Party to maintain toilets and urinals and to operate them by deploying manpower. There were no contracts for employment between the contractors and the First

Party. The relationship was consisting of principal to principal basis and not as principal and contractor basis between the contractors and the First Party. The said agencies have recruited the members of Second Party on their own by following their rules of employment. However, the Second Party falsely claiming that its members were employed by the First Party. It is contended that the Second Party cannot claim the relief through back door entry as there is no employer-employee relationship between the members of Second Party and First Party. Lastly, it is contended that the reference is not maintainable and Second Party is not entitled for the reliefs claimed. It is contended that the reference may be rejected by imposing exemplary cost of Rs. 10 Lacs in favour of the First Party.

6. In view of the rival pleadings of both the parties, the following issues were framed by my learned predecessor vide Exh. O-4. The said issues are reproduced herein below with my findings thereon for reasons to follow :

<u>ISSUES</u>	<u>FINDINGS</u>
1)Whether the Second Party is registered trade union? If yes, whether it has locus-standi to prosecute the matter?	In the affirmative.
2)Whether the First Party Corporation proves that the reference is not maintainable in view of Special Leave Petition as alleged?	In the negative.
3)Whether the concerned persons i.e. members of the Second Party were employed by the First Party corporation?	In the affirmative.

4)Whether the concerned persons i.e. members of the Second Party are entitled to be reinstated with continuity of service and back wages?	In the affirmative.
5)What order?	As per final Order.

REASONS

7. In the instant case, the First Party examined only one witness i.e. its Executive Engineer – Mr. Sanjay Janardhan Bhosale at Exh. C-25. The Second Party has examined its members which includes Sitabai Bansode (Exh.U-72A), Parshuram Shinge (Exh.U-73), Rameshwar Jagtap (Exh.U-33A), Kaushalya Dongre (Exh.U-318), Surekha Khilare (Exh.U-314), Sangeeta Bhumkar (Exh.U-239A), Shobha Bhalerao (Exh.U-20A), Lata Hanwate (Exh.U-137A), Malan Waghmare (Exh.U-248) and Geeta Gaikwad (Exh.U-58). The Second Party has also examined its office bearers, which includes its Vice President – Mr. Javed Ibrahim Pathan (Exh. U-322), its treasurer Mr. Ahmed Baktiyaruddin Khan (Exh.U-329) and its President Mr. Yashwant Bhosle (Exh. U-6). Both the parties have also relied upon documentary evidence.

As to Issue No. 1 :

8. It is the contention of the First Party that the Second Party is not the registered trade union. It is also contended that the Second Party union is functioning without appropriately elected representative and the workmen for whom the Second Party union contesting the reference are not its members. However, the sole witness Mr. Sanjay Bhosle examined by the First

Party at Exh. C-25 nowhere deposed that the Second Party union is not registered and it is functioning without appropriate elected representatives. On the contrary, the President of Second Party union i.e. Mr. Yashwant Bhosle examined at Exh.U-6 specifically deposed that the Second Party union is a registered union and all the workers to whom the Second Party representing are its members. The copy of registration certificate of the Second Party union is filed on record with list at Exh. C-348 clearly shows that the Second Party union was registered on 30.06.1999 and it is a registered union. Moreover, the First Party has made the President Mr. Yashwant Bhosle of Second Party union as party in Writ Petition No. 3954 of 2019 filed by it before Hon'ble Bombay High Court challenging the order dated 28.02.2019 passed by Additional Commissioner of Labour, Pune directing the First Party to pay difference of wages amounting to Rs. 16,09,79,646/- with interest @ 9% to the workers i.e. members of the Second Party union. The contents of order of Hon'ble Bombay High Court dated 24.01.2020 passed in Writ Petition No. 3954 of 2019 filed with list at Exh. U-356 clearly shows that the First Party is itself considering and treating Mr. Yashwant Bhosale as the President of the Second Party union and representing the workmen who are the members of Second Party union against the First Party. At the same time, during cross examination of some of the workmen i.e. members of the Second Party union which includes Sitabai Bansode (Exh. U-72A), Shobha Bhalerao (Exh.U-20), Rameshwar Jagtap (Exh.U-33A), Kaushalya Dongre (Exh.U-318) and Malan Waghmare (Exh.U-248), it is brought on record that Second Party union filed cases on their behalf before Hon'ble High Court and Hon'ble

Supreme Court, which shows that the First Party admitting the fact that the workers to whom the Second Party union representing in the present reference are its members. Hence, there is no substance in the plea of First Party that Second Party union is not registered union and having no locus standi to prosecute the present reference.

9. Even otherwise in **Bharat Sanchar Nigam Limited Vs. Industrial Tribunal & Ors., 2008 III CLR 141** cited by the Second Party, it is held by the Hon'ble Kerala High Court that, *“There is nothing in the Industrial Disputes Act, which requires that a dispute to be an industrial dispute, should be raised by a recognized union or a majority union. It would suffice if there is a controversy between the employer on one side and the workmen union on the other. It is not even necessary that a registered body should raise the dispute. Once it is shown that a body of workmen either acting through their union or otherwise has sponsored the dispute, it becomes an industrial dispute. It is not necessary that the sponsoring union should be a registered union or a recognized trade union for the dispute becoming a valid industrial dispute”*. The Hon'ble Kerala High Court relied upon **Newspapers Ltd., Allahabad Vs. U.P. State Industrial Tribunal & Ors., AIR 1960 SC 1328**, in its judgment wherein it is held by the Hon'ble Apex Court that, *“It is not even necessary that a registered body should raise a dispute. Once it is shown that a body of workmen either acting through their union or otherwise has sponsored the dispute, it becomes an industrial dispute”*. The Hon'ble Kerala High Court has also referred the Judgment of **Associated Cement Companies Vs.**

Their workmen & Ors., AIR 1960 SC 777 wherein the Hon'ble Supreme Court held that, "*An industrial dispute may be raised by a group of workmen who may not represent all or even the majority of the workmen and the award in such a dispute would be binding on all workmen, present and future in the decision of workmen*".

10. Therefore, in view of the aforesaid discussions, it is abundantly become clear that even unregistered union or group of workers may represent the majority of workmen. It is also clear that the Second Party union is a registered union and the workmen to whom it representing are its members and even treated so by the First Party. Hence, it cannot be said that the Second Party is having no locus standi to prosecute the instant reference. I, therefore, answered Issue No.1 accordingly in the affirmative.

As to Issue No. 2 :

11. It is the contention of the First Party that the issue raised by the Second Party in the present reference is also raised by it before Hon'ble Supreme Court in Special Leave Petition No. 10197 of 2007, hence, unless and until the petition before the Hon'ble Supreme Court is finally disposed of, it is not legal and correct to pursue the present reference on the part of Second Party. It is contended by the First Party that therefore; the instant reference is not maintainable.

12. However, vide order dated 12.01.2016 passed by the Hon'ble Supreme Court in Special Leave Petition No. 10197 of 2007 filed on record with list at Exh. U-343 at Serial No. 5, the

said SLP No. 10197 of 2007 was dismissed and the pending interlocutory applications, if any, are disposed of. Vide order dated 12.01.2016, the Hon'ble Supreme Court held that there is no reason to interfere with the order of Hon'ble High Court passed in Writ Petition No. 5214 of 2005 dated 02.03.2007 filed on record with list at Exh. U-243 at Serial No. 4. Therefore, when the Special Leave Petition No. 10197 of 2007 was dismissed by the Hon'ble Supreme Court then certainly the present reference is maintainable, particularly when the issue raised in present reference is not decided by the Hon'ble Supreme Court in Special Leave Petition No.10197 of 2007. Even the First Party has not raised the said issue during its argument about maintainability of present reference. The First Party has not even come with the case that the issue raised in the present reference was already decided by the Hon'ble Supreme Court as contended by it. Therefore, the present reference is perfectly maintainable. I, therefore, answered Issue No. 2 in the negative.

As to Issue Nos. 3 and 4 :

13. It is the contention of the Second Party that the First Party entered into contracts with the contractors viz. Sulabh International, Vishal Civil Contractors Enterprises and M.P. Enterprises for the purpose of maintenance of latrines and urinals. The Second Party specifically contended that these contractors are paper contractors and having no role to play except making payments to the workers engaged through said contractors. It is contended that the alleged contracts between the First Party and the contractors are sham and bogus and said contracts were

created only to avoid giving of permanency to the workmen by the First Party.

14. On the other hand, the First Party contended that the members of the Second Party were never in its employment and there is no settled and valid employer-employee relationship ever created between the members of the Second Party and First Party. It is contended that the members of the Second Party were never employed by the First Party by following rules of recruitment and they were recruited by the respective agency with whom they accepted the employment. It is specifically contended that for want of employer-employee relationship and the fact that none of the members of the Second Party were ever recruited by the First Party, the question of their reinstatement by the First Party does not arise.

15. It is the contention of the First Party that it has never recruited the members of the Second Party, whereas the Second Party contended that its members were recruited by the First Party through contractors, who are bogus and fake contractors and in reality, its members are the employees of the First Party. In the instant case, it has come on record that the members of the Second Party were recruited through contractors by the First Party. According to the Second Party, the alleged contract between the First Party and the contractors were sham and bogus. In order to decide said fact, it is necessary that said contracts allegedly took place between the contractors and the First Party are required to be brought before this Tribunal. The First Party contended that it

is the Second Party claiming declaration that contracts with the contractors were bogus and sham, hence onus is on the Second Party to produce those contracts on record. However, the contracts were between the First Party and contractors, hence the custody of said contract documents is most likely to be with the First Party. The contractors are the contractor of the First Party. Hence, it is the duty of the First Party to produce the contracts executed between it and the contractors on record, to show that those contracts are not bogus and sham but legal and valid. Certainly, the Second Party is not having the custody of alleged contracts, hence unable to produce the same. In fact, Sanjay Bhosle the witness of the First Party at Exh. C-25 deposed that these establishments i.e. Sulabh International, M.P. Enterprises and Vishal Civil Contractors Enterprises i.e. contractors, have undertaken assignment from the First Party via written arrangements and copies of those agreements bearing signatures of Mr. Konde, the then Deputy Commissioner of the First Party are produced on record. However, actually those agreements were not filed by the First Party on record and hence, not got proved by said witness. However, the version of said witness clearly shows that those agreements/contracts are in custody of the First Party. So, in such circumstances, the adverse inference must be drawn against the First Party that had it produced the alleged contracts on record, the same would have established the case of Second Party and disprove the contention of the First Party. In support of my view, I relied upon **T.S. Murugesam Pillai Vs. M.D. Gnana Sambandhya Pandara Sannadhi & Ors., AIR 1917 Privy Council 6**, referred by the Hon'ble Bombay High Court in Writ Petition No.

5214 of 2005 filed by the First Party against the Second Party and Others. In said authority, the Hon'ble Privy Council held as under :

"A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing accordingly to furnish to the Courts the best material for its decision. Wwith regard to third parties, this may be right enough : they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordship's opinion, and inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition."

16. Moreover, the First Party has not examined anybody representing contractors to prove that contracts/agreements took place between them and the First Party are not sham and bogus, but legal contract and to prove that the workmen i.e. members of the Second Party were not recruited by them on behalf of the First Party, but for themselves. As already discussed, the alleged contracts were executed between the First Party and contractors. So, the law presumes that either the First Party or the contractor have knowledge of all the facts constituting the alleged contracts. The contractors are not party to the present reference. So, certainly it is for the First Party, who is party to the present reference to file the alleged contracts on record and to prove the same. Because, it is the fact especially within the knowledge of the First Party. Hence, as per the provisions of Section 106 of the

Evidence Act, burden of proving said fact especially within the knowledge of the First Party lies upon it. The principle underlying Section 106 of the Evidence Act, which is an exception to the general rule governing burden of proof, applies only to such matters which are supposed to be especially within the knowledge of one particular party to the dispute. Hence, in such circumstances the non-production of alleged agreements/contracts with the contractors by the First Party and not proving the same on record certainly discredits the truth of the case of the First Party.

17. Therefore, from the aforesaid discussions, it is apparent that due to non-production of alleged contracts/agreements took place between the First Party and the contractors, the presumption arise that those contracts were sham and bogus and the contractors with whom the alleged contracts taken place are mere paper contractors.

18. So far as the contention of the First Party that the President of the Second Party i.e. Yashwant Bhosle has admitted in his cross examination (Exh. U-6) that it is not the corporation who has appointed its members is concerned, said witness nowhere admitted in his cross examination that corporation i.e. First Party has not appointed its members. In fact, he deposed that as per his opinion, the members of the Second Party were recruited by the First Party through Sulabh International and other establishments. It shows that First Party itself brought on record during cross examination of Mr. Yashwant Bhosle (Exh. U-6) that it has recruited the members of Second Party through contractors.

19. In fact, during cross examination of Mr. Yashwant Bhosle (Exh. U-6) and other witnesses examined by the Second Party, it is nowhere brought on record that payment of salaries/wages of the members of the Second Party were used to be made by the contractors and not by the officials of the First Party. Actually, some of the witnesses which includes Kaushalya Dongre (Exh. U-318) and Lata Hanwate (Exh. U-137A) deposed that one Mr. Dhoble *Mukadam* (Foreman) was making payment of salary to them. The said fact was not disputed during their cross examination. Moreover, the First Party has not examined said Mr. Dhoble to disprove the evidence of aforesaid witnesses. Even the First Party has not come with the case that Mr. Dhoble was having no concern with it and he is not working as *Mukadam* with it.

20. Similarly, most of the witnesses examined by the Second Party which includes Kaushalya Dongre (Exh. U-318), Sitabai Bansode (Exh. U-72A), Shobha Bhalerao (Exh. U-20A), Sangeeta Bhumkar (Exh. U-289A), Rameshwar Jagtap (Exh. U-33A), Surekha Khilare (Exh. U-314), Lata Hanwate (Exh. U-137A), Parshuram Shinge (Exh. U-73A) and Malan Waghmare (Exh. U-248) deposed that Headmaster of Magar School Mr. Shinde, Sanitary Inspector Mr. Naik, Sister Angre, Sister Adhav, Sister Meera Kadam, Medical Officer Dr. Iyer, Mr. Dilip Kanoje, Mr. Jagdale, Mr. Gaikwad, *Mukadam* Mr. Rokde, Sister Bansode, Sister More, Mr. Sonawane, Ward Incharge Mr. Kshirsagar and others, who are the officials of the First Party were having control over them and these persons/officials were supervising and controlling

their work. The said facts are not disputed during the cross examination of aforesaid witnesses. Similarly, it is nowhere suggested to said witnesses during their cross examination that they were working under supervision and control of the contractors.

21. The only fact that was suggested to said witnesses during their cross examination is that they are having no documentary evidence to show that they were appointed by the First Party and they were paid salary by the First Party. However, as already discussed that the members of the Second Party were not directly appointed by the First Party, but through contractors, who are proved as paper contractors. So far as documentary evidence regarding payment of salary is concerned, it is not possible for the workmen to produce such documentary evidence, unless salary receipt or pay slip in this regard issued to them. In fact, in the order passed by the Hon'ble Bombay High Court in Writ Petition No. 5214 of 2005 filed with list at Exh. C-21 the contractors were directed to furnish information about names of the cleaners, their designation and wages, hours of work, wages paid to them and other amenities given to them, but the contractors failed to produce the same. The Hon'ble High Court held that contractors are the contractor of the First Party. It is also held that it is not the case of the First Party that there was any animosity between the petitioner i.e. First Party and contractors and hence, the First Party could always call upon the contractors to produce the documents. So, in the present reference also it was possible for the First Party to produce the documents, if any of the

contractors to show that contractors and not the First Party through its officials were paying the salary of the members of the Second Party. However, no such documents filed on record by the First Party.

22. Actually, the sole witness examined by the First Party i.e. Mr. Sanjay Bhosle (Exh. C-25) serving as Executive Engineer with the First Party deposed that he was serving as Engineer in drainage department. He deposed that he was concerned with the civil department of the First Party and the members of the Second Party were concerned with the health department of the First Party. He specifically deposed that he is not directly concerned with the day-to-day work of the members of the Second Party. All these admissions of said witness clearly shows that he was not directly concern with the work of members of the Second Party. Hence, he is not likely to know the nature of work the members of the Second Party were performing, who was controlling and supervising them while they were performing their duties and who was actually making payment of salaries/wages to them. Hence, his evidence is of no use to prove the contention of the First Party.

23. One of the pleas raised by the First Party is that the Second party has not made the contractors as party to the reference, though it claimed that the contracts between the contractors and the First Party are sham and bogus. It is contended that due to non-joinder of contract as party, their say did not come on record. It is further contended that had the contractors been parties, they would have accepted the fact that

Second Party members are their employees. However, the reference is made by Additional Commissioner of Labour, Pune vide order dated 14.05.2009 at Exh. O-1, wherein only the First Party and Second Party are made parties. Moreover, the Second Party is not claiming any relief against the contractors. Even the First Party in its reply to the statement of claim of the Second party not raised the plea of non-joinder of contractors as party. As already discussed, to prove that the alleged contracts between the First Party and contractors were sham and bogus, the presence of contractors as party is not necessary. Similarly, to prove that members of the Second Party were employees of the contractors, it is not necessary to join them as party. The said fact can very well would have been proved by examining the contractors as witness by the First Party, which is not done. In fact, the Second Party is not claiming any relief against the contractors. So, the question of joining the contractors as party to the present reference does not arise.

24. It is the contention of the learned counsel for the First Party that application for abolition of contract labour system in First Party corporation was made and the State Government has decided not to abolish contract labour system in First Party corporation vide order dated 25.08.2005 and the engagement of contract labour in the First Party Corporation is allowed even today. The learned counsel for the First Party contended that in view of said factual position, the Second Party has adopted that the person involved in this reference are employed by the various contractors as their employees and said contract labour system was

not abolished by the Board constituted under Section 10 of the Contract Labour (Regulation & Abolition) Act. He pleaded that there is no automatic absorption of the workmen even in the event of prohibition of contract labour as per the Judgment he cited and in this matter no prohibition of contract labour is made. To support his contention, he cited the Judgment of **Executive Engineer, Environmental Engineering Division Vs. Gokarnaprasad Damodhar Dubey & Ors., 2004(4) Mh.L.J. 596**. In this case, the Hon'ble Bombay High Court held that, *“Unless the respondent No. 1 and another original complainants establish that there was employer and employee relationship between the petitioner and the complainants by approaching the appropriate forum, the complainants were not entitled to maintain a complaint under Section 28 of the MRTU & PULP Act, 1971”*. In said authority the Hon'ble Bombay High Court referred the authority of **Cipla Limited Vs. Maharashtra General Kamgar Union & Ors., 2001 (1) CLR 754** wherein the Hon'ble Apex Court held that, *“But one thing is clear – if the employees are working under a contract covered by the Contract Labour (Regulation & Abolition) Act, then it is clear that the Labour Court or the industrial adjudicating authorities cannot have any jurisdiction to deal with the matter as it falls within the province of an appropriate Government to abolish the same. If the case put forth by the workmen is that they have been directly employed by the appellant company, but the contract itself is a camouflage and therefore, needs to be adjudicated is a matter which can be gone into by appropriate Industrial Tribunal or Labour Court. The respondent union came to the Labour Court with the complaint that the workmen are engaged by the appellant through the*

contractor and though that is ostensible relationship the true relationship is one of master and servant between the appellant and the workmen in question. By this process, workmen repudiate their relationship with the contractor under whom they are employed but claim relationship of an employee under the appellant. That exercise of repudiation of the contract with one and establishment of a legal relationship with another can be done only in a regular Industrial Tribunal/Court under the Industrial Disputes Act”.

25. Moreover, in **Gujarat Electricity Board, Thermal Power Station Ukai Vs. Hind Mazdoor Sabha & Ors., AIR 1995 SC 1893**, cited by the Second Party, the Hon'ble Apex Court held that, “*After the coming into operation of Contract Labour (Regulation & Abolition) Act, 1970, the authority to abolish the contract labour is vested exclusively in the appropriate Government which has to take its decision in the matter in accordance with the provisions of Section 10 of the Act. The decision of the Government is final, subject of course to the judicial review on the usual grounds. However, the authority to abolish the contract labour under Section 10 of the Act comes into play only where there exists a genuine contract. If there is no genuine contract and the so-called contract is sham or a camouflage to hide the reality, the said provisions are inapplicable. When, in such circumstances, the concerned workmen raised an industrial dispute for relief that they should be deemed to be the employees of the principal employer, the Court or the industrial adjudicator will have jurisdiction to entertain the dispute and grant the necessary relief. The question whether the contract is genuine, or not can be examined and adjudicated upon by the Court*

or the industrial adjudicator, as the case may be. Hence, in such cases, the workmen can make a grievance that there is no genuine contract and that they are in fact the employees of the principal employer". The Hon'ble Apex Court also held that, "An industrial dispute for absorption of the workmen of the ex-contractor by the principal employer can be raised in the following contingencies -(i) if the contract is not genuine, the workmen of the contractor themselves can raise such dispute, since in raising such dispute the workmen concern would be proceeding on the basis that they are in fact the workmen of the principal employer and not of the contractor. Hence, the dispute would squarely fall within the definition of industrial dispute under Section 2(k) of the Industrial Disputes Act being a dispute between the employer and the employees. In that case, the dispute would not be for abolition of the contract labour, but for securing the appropriate service conditions from the principal employer on the footing that the workmen concerned were always the employees of the principal employer and they were denied their dues. In such dispute, the workmen are required to establish that the so called labour contract was sham and was only a camouflage to deny them their legitimate dues". The Hon'ble Apex Court further held that, "If the contract is sham or not genuine, the workman of the so called contractor can raise an industrial dispute for declaring that they were always the employees of the principal employer and for claiming the appropriate service conditions. When such dispute is raised, it is not a dispute for abolition of the labour contract, and hence the provisions of Section 10 of the Act will not bar either the raising or the adjudication of the dispute. When such dispute is raised, the industrial adjudicator has to decide whether the contract

is sham or genuine. It is only if the adjudicator comes to the conclusion that the contract is sham, that he will have jurisdiction to adjudicate the dispute."

26. In the instant case, as already discussed and decided that the alleged contracts between the First Party and the contractors were sham and bogus and hence, it is proved that the members of the Second Party are the employees of the First Party and thus, they are entitled for the legitimate dues from the First Party. So, it cannot be said that as the contract labour system was not abolished in the First Party Corporation, it means that the members of the Second Party are the employees of the contractors.

27. The learned counsel for the First Party in order to prove his contention placed reliance on **Mangalaben Ramchandra Shaluka Vs. State of Gujarat & Ors., Special Civil Application No. 8300 of 2013 decided on 10.08.2015**. However, in this case the facts were that the petitioner was appointed as part time sweeper on purely temporary basis as a stop gap arrangement in the Court of Principal Civil Judge and J.M.F.C. Jambusar and she seek order to regularize her service on the post of sweeper with effect from her initial date of appointment. However, the facts of present case are totally different and related to contract workers. Hence, said cited authority having totally different facts and issue is not helpful for First Party to prove its contention.

28. The learned counsel for the First Party further relied upon **Sanjeev Kumar Pandey Vs. State of U.P. & Ors.,**

MANU/UP/1747/2016. In the said case, the facts were that the workman was terminated, who was engaged on daily wage basis. The workman was failed to prove that he was appointed against vacant post after following procedure for appointment. The engagement of petitioner/workman was purely on temporary basis and he was paid for the period during which he was engaged. The Hon'ble Allahabad High Court held that, *“Reinstatement of petitioner is not proper, when there exists no post and procedure of appointment was not followed”*. However, fixed compensation of Rs. 1,50,000/- was granted to the petitioner. But again, the facts of the said cited case and the facts of case in hand are totally different.

The case in hand is a case of contract labours, who claimed that alleged contract between the contractors and First Party were sham and bogus and in fact able to prove said fact, whereas the above cited case is about daily wagers, whose appointment was made in totally different circumstances. Hence, the said cited authority which differ on facts is not helpful to the First Party to prove its contention in the present case.

29. The learned counsel for the First Party also relied upon **Oil & Natural Gas Corporation Vs. Krishan Gopal & Ors., 2020 SCC Online 150 (MANU/SC/0141/2020)** wherein the Hon'ble Apex Court has considered various authorities in respect of regularization and has observed that the following proposition would emerge upon analyzing the various decisions :

(i) Wide as they are, the powers of the Labour Court and the Industrial Court cannot extend to a direction to order

regularization, where such a direction would in the context of public employment offend the provisions contained in Article 14 of the constitution;

(ii) The statutory powers of the Labour Court or Industrial Court to grant relief to workmen including the status of permanency continues to exist in circumstances where the employer has indulged in an unfair labour practice by not filling up permanent posts even though such posts are available and by continuing to employ workmen as temporary or daily wage employee despite their performing the same work as a regular workman on lower wages;

(iii) The power to create permanent or sanctioned posts lies outside the judicial domain and where no posts are available, a direction to grant regularization would be impermissible merely on the basis of the number of years of service;

(iv) Where an employer has regularized similarly situated workmen either in a scheme or otherwise, it would be open to workmen who have been deprived of the same benefits at par with the workmen who have been regularized to make a complaint before a Labour or Industrial Court, since the deprivation of the benefit would amount to a violation of Article 14; and

(v) In order to constitute an unfair labour practice under Section 2(ra) read with item 10 of the Vth Schedule of the ID Act, the employer should be engaging workmen as badlis, temporaries or casuals, and continuing them for years, with the object of depriving them of the benefits payable to permanent workmen.

30. However, in said authority the case of contract workers when the contract on the basis of which they were allegedly employed were proved to be sham and bogus is not considered. In the present case as it is already discussed and proved that alleged contracts between the contractors and First Party were sham and bogus and the members of the Second Party were recruited by the First Party. Moreover, the workmen i.e. members of the Second Party are not claiming permanency or regularization in service, but reinstatement/absorption. In aforesaid authority the case of Gujarat Electricity Board (Supra.) is not considered, wherein it is held that if the contract is sham or not genuine, the workmen of so called contractor can raise an industrial dispute for declaring that they were always the employees of the principal employer and for claiming the appropriate service conditions. Thus, the aforesaid authority is also not helpful to the First Party to prove its contention.

31. The learned counsel for the First Party contended that in case the prayer of the Second Party union is allowed, then members of the Second Party can only be reinstated on the post they were holding when terminated and not anywhere else. It is contended that they were working with the contractor and thus the reinstatement can be only on the roll of the contractor and there is no question of reinstatement in the First Party corporation. To support this contention, the learned counsel for the First Party relied upon **Smt. Saroj Agarwal Vs. Union of India & Ors., W.P.A. No. 14592 of 2014 decided on 25.01.2021**, wherein

Hon'ble Calcutta High Court held that, "*reinstatement means and implies that employee will be put in the same position in which he would have been but for the illegal action taken by the employer*". However, in the present case as already discussed and proved that the alleged contracts between the contractor and First Party were sham and bogus and contractors were paper contractors. So, obviously as per the principal held in aforesaid authority, the members of the Second Party will be reinstated in the roll of First Party and not that of contractors.

32. The learned counsel for the First Party further placed reliance on **Indian Airlines Limited Vs. Gujarat Mazdoor Panchayat, SCA/290/ 200352/54 Judgment**. However, in said authority it is observed by Hon'ble Gujarat High Court that, "*Government Company is under obligation to carry out the instructions and directives issued by the Government of India from time to time and again for its smooth functioning and wellbeing. The Government of India has issued ban on recruitment and recommendations of Kelkar Committee indicated that there was dire need for accepting stringent economic measure that was including the freezing of new recruitments at various stages if possible. In fact, appointments made in violation of recruitment rules cannot be termed as mere irregularity capable of being cured*". However, the said authority is in respect of Government company whereas, the First Party in the present reference is the Municipal Corporation. Hence, certainly the directions issued by the Government of India in respect of Government Company is not applicable in this case. Thus, the aforesaid authority based on different facts in respect of

regularization of employee in Government company is not helpful to the First Party in said case which is Municipal Corporation and having different facts.

33. The learned counsel for the First Party cited the authority of Hon'ble Apex Court i.e. **The Directors, Steel Authority of India Limited Vs. Ispat Khadan Janata Mazdoor Union, Civil Appeal No. (s) 8084 of 2011 decided on 05.07.2019** to put forth his point that contract labour is not prohibited in its establishment by the appropriate Government and even if it would have been prohibited, there would have been no automatic absorption of the members of the Second Party. In said authority, the Hon'ble Apex Court held that, *“There was no automatic absorption of contract labour on issuing the Notification prohibiting the employment of contract labours”*. However, in said cited case, the Hon'ble Apex Court further held that, *“Tribunal in its award rightly arrived to the conclusion that contract was not sham and bogus and there shall be no automatic absorption of contract labour on issuance of a prohibition notification under the CLRA Act”*. However, in the present case as already discussed that contracts between the contractors and the First Party were sham and bogus and therefore, the members of the Second Party are entitled for their absorption in the service of the First Party who is principal employer. So, again said cited authority does not come to the rescue of the First Party to prove its case.

34. The learned counsel for the First Party with the help of authority i.e. **Bharat Heavy Electricals Ltd. Vs. Mahendra Prasad**

Jakhmola & Ors., Civil Appeal Nos. 1799-1800 of 2019 (Arising out of SLP (C) Nos. 33747-33748 of 2014) decided on 20.02.2019 contended that there are two tests laid down in said authority to find out whether the contract labour are the direct employees of the principal employer. In said authority, the Hon'ble Apex Court laid down the following two tests :

- (1) Whether the principal employer pays the salary instead of the contractor;
- (2) Whether the principal employer controls and supervises the work of the employee;

However, in the present case as already discussed and proved that the contracts between the contractors and First Party through which the members of the Second Party were recruited by the First Party are sham and bogus. In Bharat Heavy Electricals case (Supra.) cited by the First Party itself, the Hon'ble Apex Court considered the Judgment of **General Manager, (OSD) Bengal Nagpur Cotton Mills, Rajnandgaon Vs. Bharat Lala & Anr., 2011 (1) SCC 635**, wherein it is held that, *“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 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 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”*.

However, in the instant reference case, it is already discussed and proved that the First Party was paying salaries/wages to the members of the Second Party through its Mukadams (Foremen) and the officials of the First Party were controlling and supervising the members of the Second Party. Thus, the tests prescribed in Bharat Heavy Electricals case (Supra) are fulfilled in the instant case.

35. Similarly in **Food Corporation of India Vs. General Secretary, Food Corporation of India Employees, 2018 III CLR 827**, cited by the Second Party, it is held by the Hon'ble Apex Court that, *“it is evident that the Tribunal, on appreciating the evidence in its original jurisdiction, rightly concluded that firstly, the agreement with the contract labourer for doing the work had come to an end in 1991 and thereafter it was not renewed. Secondly, all the 955 workers were being paid wages directly by the FCI. Thirdly, the nature of work, which these workers were performing was of perennial nature in the set up of the FCI. Fourthly, all 955 workmen were performing their duties as permanent workers, and lastly, no evidence was adduced by the FCI in rebuttal to prove their case against the workers' union”*.

36. In the present case also, it is proved that the agreements/contracts between the contractors and First Party regarding recruitment of members of the Second Party were sham and bogus and the contractors were paper contractors. It is also proved that wages of the members of the Second Party i.e. workmen were paid by the First Party through its officials i.e.

Mukadam (Foremen). It is also proved and in fact held by the Hon'ble High Court in Contempt Petition No. 58 of 2017 decided on 17.07.2018 filed by Second Party against the First Party that the report of Deputy Commissioner of Labour, Pune states that the workmen of contractors i.e. members of Second Party were performing work mainly as sweeper and scavengers, which was the same as the work performed by the employees of the First Party Corporation, which shows that the work which the members of the Second Party were performing was of a perennial nature. Similarly, as discussed above the evidence led by the First Party by examining the sole witness having no connection with the department of the First Party where the members of the Second Party were working and even said witness of the First Party has admitted in his evidence that he was not directly concerned with day-to-day work of the members of the Second Party. Thus, the evidence led by the First Party to rebut the evidence of the Second Party is not in fact able to rebut the evidence led by Second Party. Moreover, the Hon'ble High Court in said Contempt Petition held that it is the primary responsibility of the corporation i.e. First Party to pay the remuneration of the members of the Second Party. Thus, the points raised in the case of Food Corporation of India (Supra) are fulfilled in the present case also.

37. During cross examination of the President of Second Party union Mr. Yashwant Bhosle (Exh. U-6), it was suggested on behalf of the First Party that concerned employees i.e. members of the First Party were not in service of the First Party corporation from 01.10.2004. It means that the members of the Second Party

were terminated by the First Party from service on 01.10.2004. Even in Schedule of the order of reference at Exh. O-1, it is clearly mentioned that workmen i.e. members of Second Party were terminated from work on 01.10.2004. So, it is apparent that the members of Second Party were terminated from their work by the First Party with effect from 01.10.2004.

38. In **Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya, (2013) 10 SCC 324**, it is held that, *“the injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi-judicial body or Court that the action taken by the employer is ultra-virus. The relevant statutory provisions on the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. The denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the employee concerned and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments”*. However, in the instant case, no evidence led by the employer i.e. First Party to show that the members of the Second Party were gainfully employed elsewhere since their termination. The sole witness i.e. Sanjay Bhosle (Exh. C-25) examined by the First Party has not

uttered a single word in this regard. On the contrary, as per the order of Hon'ble Bombay High Court, the First Party paid difference of wages to the members of the First Party. So, it cannot be said that the members of the Second Party were gainfully employed after their termination.

39. Therefore, in view of the aforesaid discussion it is duly proved that the contracts between the contractors and the First Party were sham and bogus and in fact, camouflage and hence, the members of the Second Party are the employees of the First Party, employed through contractors, who are paper contractors. Thus, there was employer-employee relationship between the members of the Second Party and the First Party corporation. It is also proved that the members of the Second Party were performing the work mainly as sweepers and scavengers, which was the same as the work performed by the employees of the First Party corporation. It is further proved that the First Party corporation was paying salary/wages of the members of the Second Party through its officials and the officials of the First Party were controlling, managing and supervising the work of the members of the Second Party. It is specifically proved that the work of the members of the Second Party was perennial/permanent in nature. Therefore, in such circumstances it is duly proved that the members of the Second Party were employed by the First Party corporation and they are entitled for reinstatement with continuity of service and back wages. I, Therefore, answered the issue Nos. 3 and 4 in the affirmative.

As to Issue No. 5 :

40. In view of the aforesaid discussions and particularly, the facts brought on record, it is duly proved that the members of the Second Party were terminated from their work from 01.10.2004. In the instant case, as per Annexure A to the reference order there are 572 workmen/members of the Second Party were the employees of the First Party. However, there are many issues raised while hearing Contempt Petition No. 58 of 2017 by both First Party and Second Party regarding number of workers to whom the payment is to be made, quantum of amount which is payable etc. and the Hon'ble High Court vide order dated 17.07.2018 directed Additional Labour Commissioner to adjudicate said issue. Accordingly, the Additional Labour Commissioner gave notices to the parties, who appeared before the Labour Commissioner. After giving opportunity to the parties and verifying record, the Additional Labour Commissioner, Pune vide order dated 28.02.2019 held that out of 572 workers, only 469 workers were eligible and their names tallied as per the list and concluded that these 469 workers are entitled to get their dues. So, obviously in the present reference also only said 469 workers i.e. members of the Second Party are entitled for the reliefs claimed.

41. In the result, I pass following order :

AWARD

1. The reference is answered in the affirmative.
2. It is hereby declared that only 469 employees who are

identified by the Additional Labour Commissioner, Pune vide his order dated 28.02.2019 out of 572 employees shown in Annexure A to the reference are the employees of the First Party Corporation.

3. The said 469 employees who are identified by the Additional Labour Commissioner, Pune vide his order dated 28.02.2019 to receive difference of wages and acted upon by the Hon'ble High Court vide orders dated 15.12.2020 and 22.12.2020 in Contempt Petition (St.) No. 92227 of 2020 filed by the Second Party against the First Party, as well as, vide order dated 24.01.2020 in Writ Petition No. 3954 of 2019 filed by the First Party against the Second Party are only entitled for reinstatement in their service which they were doing for the First Party with continuity of service and back wages which are applicable to the employees of the First Party doing similar work since the date of termination i.e. from 01.10.2004.
4. While calculating and paying back wages to the 469 employees i.e. members of the Second Party identified by the Additional Labour Commissioner, Pune vide order dated 28.02.2019, the amount of Rs. 16,09,79,646/- paid to said 469 workers by virtue of order of Hon'ble High Court towards difference of wages be adjusted/deducted.
5. Two months time after publication of Award is given to the First Party Corporation for implementation of Award.

6. The copy of award be sent to appropriate Government for publication.
7. No order as to the costs.

Place : Pune

Date : 07.01.2023

(K.N. Gautam)
Presiding Officer,
Industrial Tribunal, Pune

Secretary
Industrial Tribunal, Pune