CASE NO.:
Appeal (civil) 4573 of 2005

PETITIONER:
Electronics Corporation of India Ltd.

RESPONDENT:
Electronics Corporation of India Service Engineers Union

DATE OF JUDGMENT: 21/08/2006

BENCH:
ARIJIT PASASYAT & LOKESHWAR SINGH PANTA

JUDGMENT:
J U D G M E N T

ARIJIT PASAYAT, J.

Challenge in this appeal is to the order passed by a learned Single Judge of the Bombay High Court allowing a Writ Petition filed by the respondent.

The respondent filed a Writ Petition before the High Court challenging the award dated 18th August, 1995 passed by the Industrial Tribunal, Bombay (in short the 'Tribunal') rejecting the reference made to it by the Government of Maharashtra under the Industrial Disputes Act, 1947 (in short the 'Act') on the ground that the respondent-Union was not able to establish master and servant relationship between the alleged workmen represented by the Union and the present appellant (hereinafter referred to as the 'Company'). The entire dispute arose on account of the services of the alleged workmen represented by the Union, being terminated.

Stand of the Union in a nutshell is as follows:

The Reference was in respect of about 30 workmen involved in the dispute. The Union represents the employees who are called "Retainers" by the Company. These employees sought permanent absorption and other reliefs from the Company. The Company is engaged in the business of manufacturing, selling and servicing of electronic items, mainly Televisions. Between the years 1972 and 1978, the Company engaged these 30 persons as Technicians initially on a contract basis for a period of four years. Some of these Technicians were then made permanent as either Tradesmen or Scientific Assistants or Assistant Technical Officers. These 30 employees obtained employment after responding to an advertisement issued by the Company for engaging Service Engineers on retainer basis. The employees were selected pursuant to a written test and oral interview. After selection, they were required to undergo practical training which was imparted by the Company for a period of three months. After the training period was completed, contracts were entered into between the Company and each of these 30 employees. According to them, the contract which labels each of them as "Retainer" was nothing but a paper arrangement between themselves and the Company who did not want to implement certain labour laws. Although the service contracts were treated as individual contracts, the Union has averred that the workmen were under the supervision of the Company and no

independent decision could be taken by these employees. The employees raised a demand for permanent absorption in employment and for all other service conditions which were applicable to other employees. As this was not granted by the Company, the Union approached the High Court under Article 226 of the Constitution of India, 1950 (in short the 'Constitution') by filing Writ Petition No.2689 of 1983. This petition was dismissed as the petitioner had an alternate remedy by approaching the machinery provided under the Act. Accordingly, the Union raised a dispute against the Company which was referred for adjudication by the Tribunal. The dispute pertained to the claim of regularization as well as certain other demands including wage revision made by the Union on behalf of the employees.

The Union filed their Statement of Claim justifying the demands made by them for regularization of the employees and absorption and permanency, wage rise, etc. The Union demonstrated that in fact these employees were always the workmen of the company and had wrongly been treated as retainers. It was emphasized in the Statement of Claim that the Company had direct control and supervision over these employees who were not able to take any independent decisions in respect of their work. The Company in its Written Statement contended that there was no contract of service between them and the retainers claiming to be employees since they were independent persons with whom the Company had entered into a contract for servicing of Television sets sold by them to the customers. It was contended that the industrial dispute referred was not maintainable as there could be no dispute between the Company and the Retainers. Evidence of one of the employee was led on behalf of all the 30 employees before the Tribunal. No evidence, oral or documentary, was led by the Company. On a consideration of the documents as well as oral evidence, the Tribunal by an Award rejected the Reference as not maintainable. It decided as a preliminary issue as to whether employee-employer relationship was established. The Tribunal came to the conclusion that the Retainers had individually entered into contracts with the Company for service of repairing the Television sets sold by the Company and that there was no master and servant relationship between the company and the 30 persons who claimed to be employees. According to the Tribunal, the evidence clearly indicated that these 30 persons were merely contractors and there was no direct nexus of master and servant relationship between them. The Tribunal's decision was assailed before the High Court by a writ petition filed by the Union. The primary stand of the Union-writ petitioner was that the evidence adduced clearly established that a paper arrangement was erroneously accepted by the Tribunal as the reality. Master and servant relationship was clearly established.

Per contra, the Company supported the reasonings given by the Tribunal.

Considering the rival submissions, High Court by the impugned judgment held that it was for the appellant to establish that there was no master and servant relationship between the parties and the members of the Union were not workmen within the meaning of the expression "workman" under Section 2(s) of the Act. The High Court was of the further view that the Company had not established either that the members of the Union were not workmen or that the employer employee relationship does not exist. Accordingly,

the writ petition was allowed and the parties were directed to appear before the Tribunal for further hearing of the reference.

In support of the appeal, it was inter alia submitted as follows:

The Corporation was entering into individual contracts with the Service Engineers/Licencees and, there was no compulsion of whatsoever nature on them to enter into the contracts year after year. Some of the workmen also opted for working with the Company in terms of those individual contracts, as they found the same to be such more lucrative and paying rather then being regular employees of the Company.

There are no regular posts like Service Engineers or the Licencees or Retainers in the company and such contracts are entered into by the Company to attend the additional work as and when required in accordance with terms and conditions of the contracts. The regular employees are governed by the Service condition as applicable to the Company, whereas the Service Engineers/Licencees are governed by the individual contracts signed by them with the Company. It is quite evident that service conditions under which the regular employees of the Company function are totally different and incomparable and, therefore, there cannot be similar wages for different kind of work under different conditions applicable to different categories of persons. So the demand of regularization of the employment of the Service Engineers is not maintainable. They were only required to attend the complaints received in respect of T.V. sets allotted to them and they were not doing any other work in connection with the said sets, whereas the regular employees of the company are required to do other work in addition to the servicing of the T.V. sets manufactured by the Company. The terms of the employment of the regular employees of the company are governed by the standing orders of the Company under the Industrial Employment (Standing Orders) Act as well as the provisions of the Act whereas the terms of the employment of the Service Engineers/Licencees are governed in terms of individual contracts entered into by the Company with them. Assuming without admitting that the Service Engineers are required to be absorbed by the Company, then the same also is practically impossible for the Company to implement, as the Company is the Central Government Undertaking, and it is governed by the directions of the Government. Regular employees are required to work for fixed and regular hours. The Service Engineers/Licensees were not required to adhere to follow any specific schedule or routine. The Service Engineers cannot claim any regularization or absorption in the Company and, hence they are not entitled to parity of wage scales and other benefits which are provided to the regular employees of the Company. The Service Engineers are required to work as per their convenience without any interference of whatsoever nature from the Company. It is quite evident that the nature of duties performed by the regular employees of the Company and Service Engineers are quite different and distinct and, the same cannot be compared. It is submitted that regular employees were totally at the disposal of the Company during their duty hours and they were under its direct supervision, control and management, whereas the Service Engineers/Licencees were not under any such supervision, control or management and, so also they were required to work as per their convenience and, their services were not available to the Company during any fixed or

particular hours or as per its convenience.

In response, learned counsel for the respondent submitted that the High Court's view was correct. It took note of the relevant factors. Hence, no interference is called for.

We find that the High Court accepted that the onus was on the persons claiming to be workmen to prove that they are workmen as defined in the Act. It came to a peculiar conclusion that since preliminary issue was raised by the employer the onus shifts to it.

It is not in dispute that the claimants were retained for a very long period of time by the appellant on the basis of a contract entered into between them and the company. Dispute was raised in respect of permanency, absorption, regularization and pay scale only in 1992 and, therefore, appeared to be an afterthought and a highly belated claim. No reason was set out as to why such belated demand was raised. That itself was indicative of the fact that the concerned persons were of the view that they were retainers and did not have any master and servant relationship with the company. The agreements indicate that they were entered into for a period of few months. A minimum 250 sets in a year was allotted to each retainer. The agreement to appoint as Service Engineers/Licensees as retainer contains some clauses which throw considerable light.

"1. \005\005\005\005.On successful completion of the training, the retainer will be allotted ECTV sets to be maintained by him. This agreement expires 12 months from the date of allotment of TV sets.

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5\005..the Licensor shall pay to the Retainer at Rs.90/- per set year for ECTV sets allotted to him out of those covered by warranty and Annual Service Contract with ECTV\005\005However the allotment will be so arranged that any point of time, a minimum of 250 ECTV sets will be maintained by the retainer.

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9. The retainer should nominate alternative retainer authority by ECIL to attend complaints pertaining to the TV sets allotted to him and inform the ECIL office in writing of such an arrangement before absenting himself from work. In the absence of such arrangement, the Licensor will arrange to attend such pending complaints and charge the Retainer at Rs.10/- per complaint plus the value of spares used.

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15\005..During the subsistence of this contract in regard to the construction or interpretation of the terms and provisions hereof or otherwise howsoever in relation thereto or in any way touching on this agreement, such dispute or

difference shall be referred to the decision of two arbitrators one each to be named by either party and thereupon all the provisions of the Indian Arbitration Act (Act X of 1940) or any other statutory modification thereof for the time being in force shall be applicable."

It is to be noted that this Court had occasion to deal with a similar issue. By order dated 16.8.1989 in SLP (Civil) 5169/1989, it was observed as follows:

"After hearing the learned counsel for both the parties and on a consideration of the facts and the circumstances of this case we direct that the contracts which have been terminated already should be renewed on the same terms and the petitioners will be permitted to work on the basis of this contract. As regards other whose contracts are yet to and their contracts will be renewed as soon as the present terms ends and they will also be permitted to work on the basis of the same terms of the contract. We do not find any basis for the contention that the Agreement-in-question are contracts of service.

If there is any shortage of work then the available work will be equally distributed amongst the service engineers. Fresh appointments may be considered if the quantum of work justifies.

The writ petition pending before the High Court are disposed off.

The special leave petition is disposed of accordingly."

Though clarification was later on sought for and this Court clarified that where the contracts are different and contain clauses which exclude the application of the decision in the earlier batch, they should not be held to be bound by the original decision. It is accepted that against the decision in writ petitions filed by almost similarly situated persons before the Delhi High Court, which dismissed the claim by order dated 15.3.1989 in C.W.No.2855/88 this Court was moved and order dated 16.8.1989 was passed. Though the High Court in the present judgment referred to a decision of the learned Single Judge of the Calcutta High Court to hold that employer employee relationship existed, the Division Bench of the said High Court set aside the order of the learned Single Judge by its order dated 26.4.2004 in M.A.T.No.1427 of 1998. It is fairly accepted by learned counsel for the respondent that there has been no further challenge to the orders passed by the Division Bench of the Calcutta High Court. The Tribunal rightly noted the relevant features and observed after making a comparison of the duties of claimants and the regular employees that employer employee relationship did not exist.

A very important conclusion of the Tribunal was that there are no regular posts like Service Engineers or Licencees or retainer in the company and such contracts are entered

into by the Company to attend to additional work as and when required. It was further noted that there is a definite procedure for appointment of personnel of the appellant-Company. It was pointed out that the question of designating the claimants as Tradesmen or Technical Officer on permanent basis in the Company does not arise as they have neither requisite qualifications for holding any of the above posts nor were they employees of the Company and they have not been employed after following the procedure required for appointment of the personnel of the Company. Further, technical officers cannot claim to be workmen under the Act as they did mainly supervisory duties and drew wages exceeding Rs.1600/-p.m. The Company was entering into individual contracts with its retainers and there was no compulsion whatsoever to enter into the contract year after year. As a matter of fact, it was note that some of the workmen of the Corporation opted for working in terms of those individual contracts as they found the same to be more lucrative and paying rather than being regular employees. There is no denial of this position by learned counsel for the respondent

With reference to the evidence of the witness examined by the claimants it is clear that even he (Mr. Kasbekar) agreed that the service engineers and the licencees were independent contractors. The agreement signed by them makes the position clear. He accepted that no appointment letter was ever given by the company. They have not enrolled their names with the Employment Exchange. The first agreement was signed in 1978. He joined the company along with others in view of the advertisement regarding retainership. He also accepted that seven persons as noted above were previously working in the company, but left the service and joined as retainers. They were aware at the time of signing the agreement about the service conditions, salary, benefits given to regular workers.

It was fairly accepted and admitted that taking into consideration that retainership was more beneficial than the regular service employees, all the seven employees left the service of the company and accepted the retainership. It was also accepted that there were several retainers who were working in several places like Delhi, Calcutta, Lucknow. One significant admission was that complaints of T.V. sets were made by the customers to the appellant company. The retainers used to visit the company for collecting complaints, collecting components, for receiving payments and for repairing the calledback sets. Except for these reasons, they were not required to go to the company.

A further significant admission was that there were several types of employees working in the company whose work cannot be compared with that of the retainers. Whenever the retainers went on leave they used to provide a substitute to the company. The Tribunal also noted that the witness has admitted that the scheme was for retainership and there was no question of his asking for absorption as regular employees. Till 1989-90 they were getting more income than the regular employees and, therefore, had not sought for regularization. But since 1989-90 they found the regular employees were getting more salary than their income, and, therefore, they claimed regularization. Further 2.24% deduction towards Income tax was made from the bills of the retainers in view of the contract and that was not applicable to the case of salaries of the regular employees. He accepted that he did not know about the nature of work and working hours of the regular

employees. Factually, it was found that the retainers were getting Rs.90/- per set. The agreement was on job contract basis. In Clause 15 of the agreement, there was a provision for arbitration under the Indian Arbitration Act, 1940.

In view of what has been stated, the Tribunal was right in its view that no employer employee relationship existed. Observations of the High Court to the contrary are clearly untenable because the findings and the reasons given by the Tribunal have not been discussed. No reason has been given by the High Court as to how these conclusions were erroneous and perverse. The inevitable conclusion is that the impugned judgment of the High Court deserves to be set aside and that of the Tribunal to be restored and we direct accordingly.

The appeal is allowed. No costs.
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