EXTRAORDINARY

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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 17th May 2011

No. 4544–Ii/1(B)-86/2001-LE.–In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 4th May 2011 in I. D. Case No. 15 of 2002 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the management of M/s. OSWAL Chemicals & Fertilisers Ltd., Musadia, Paradeep and its Workmen represented through OSWAL Sara Karakhana Shramik Sangh, Paradeep was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE No. 15 OF 2002

The 4th May 2011

Present :

Shri Raghubir Dash, O.S.J.S. (Sr. Branch),
Presiding Officer, Industrial Tribunal,
Bhubaneswar.

Between :

The Management of– . . First-party–Managements
1. M/s. OSWAL Chemicals
& Fertilisers Ltd., Musadia, Paradeep.
2. M/s. Indian Farmers Fertilizers Co-operative
Limited (IFFCO), Paradeep Unit, Paradeep,
Jagatsinghpur.
3. M/s. Balaji Traders,
C/o Management of OSWAL Chemicals &
Fertilisers Ltd., Musadia, Paradeep.

And

Its workmen, represented through OSWAL . . Second-party–Workmen
Sara Karakhana Shramik Sangh,
Paradeep.

Appearances :

Shri B. C. Bastia, Advocate	. .	For the First-party Nos. 1 & 2
None	. .	For the First-party No. 3
Shri Susant Das, Vice-President of the Union.	. .	For the Second-party–Workmen

AWARD

This is a reference under Section 10 of the Industrial Disputes Act, 1947 (for short, 'the I. D. Act') made by the Government of Orissa in the Labour & Employment Department vide their Order No. 8737–Ii/1 (B)-86/2001–LE., dated the 23rd July 2002 for adjudication by this Tribunal. The Schedule of reference runs as follows :–

> "Whether the workmen engaged in M/s. OSWAL Chemicals & Fertilisers Ltd., Musadia, Paradeep through M/s. Balaji Traders (list furnished by the L. & E. Department vide Letter No.9854, dated the 17th August 2002) are entitled to absorption in M/s. OSWAL Chemicals & Fertilisers Ltd., Musadia, Paradeep on expiry of contract on Dt. 31-8-2001 or entitled to absorption/engagement under new contractors establishments entrusted with the execution of the said work ?"

2. Shorn of unnecessary facts stated in the claim statement, the case of the workmen numbering 1,139, represented through OSWAL Sara Karakhana Shramik Sangh (hereinafter referred to as 'the Sangh') may be narrated as follows :

The services of the workmen were hired by the management of OSWAL Chemical & Fertiliser Ltd. (for short, 'OCFL') in 1997 when its Fertiliser Plant at Paradeep was at its commencement stage. The workmen were working under the direct control and supervision of OCFL. At that time there was no existence of any contractor in the name of M/s. Balaji Traders. But, subsequently the OCFL placed the services of the workmen under a fictitious contractor in the name of M/s. Balaji Traders. In fact, no such firm was in existence. It was an unregistered firm. The fictitious contractor was introduced only to deprive the workmen their status as regular workers of OCFL. The management had not obtained any registration under the Contract Labour (Regulation & Abolition) Act, 1970 (for short, 'C.L.R.A. Act'). The work in which the workmen used to be engaged was permanent/perennial in nature and very much essential for the OCFL to carry-out its manufacturing activities. Their job and that of other regular employees of OCFL were identical. Their work was being controlled by the officers of the OCFL. Therefore, the workmen should be treated as the employees of the principal employer.

Upon introduction of the fictitious contractor the Sangh raised stiff objection. To suppress the workmen as well as the trade union activities of the Union, the Management of OCFL in January, 2001 refused employment to 18 of the members of the Sangh. So, the Sangh resorted to strike with effect from 14-2-2001. There was intervention by the labour machinery but the disputes could not be resolved. So, there was another strike with effect from 21-6-2001. Steps taken to bring about a settlement through intervention of the labour machinery failed. Even the labour machinery took the side of the management to frustrate the cause of the workmen. Though there were tripartite meetings held on 16-8-2001, 4-9-2001 and 12-9-2001 neither OCFL nor the fictitious contractor did give any hints that the contract of M/s. Balaji Traders was to expire on 31-8-2001. It was only during the conciliation proceeding held on 19-9-2001 in the absence of the Sangh, representatives of OCFL submitted that since its contract with M/s. Balaji Traders had already expired on 31-8-2001 there was no scope on the part of OCFL to accommodate the workmen in its establishment. Thus, the services of the workmen got terminated with effect from 1-9-2001. There was non-compliance of

the mandatory provisions of the Act. Therefore, the termination of services being illegal the workmen should be absorbed in the establishment of the principal employer.

3. The OCFL in its written statement has taken the stand that for the running of its plant it has given various miscellaneous jobs to different contractors having valid licence to engage contract labourers. Balaji Traders was one such contractors. The workmen are contract labourers engaged through said Balaji Traders. So, there is no master-servant relationship between OCFL on one hand and the workmen on the other. Their disengagement, consequent upon expiry of the term of contract between OCFL & Balaji Traders, does not create any right in the workmen to be absorbed under the principal employer. It is false to say that M/s. Balaji Traders is a fictitious firm. It is a registered contractor and the workmen were employed through the contractor. It is false to say that OCFL had directly employed the workers at the initial stage but later on their services were shown to have been placed under the said contractor.

Admitting that all the contract labourers had gone on a strike with effect from 21-6-2001, it is contended that despite of several approaches and publication in the newspaper asking the contract labourers to report for duty the labourers did not report. So, the contractor M/s. Balaji Traders on expiry of the contract on 31-8-2001 declined to take-up further job on contract from OCFL.

It is denied that the work for which the workmen were engaged is perennial in nature. Its further plea is that even if it is perennial in nature, the engagement of contract labourers in such work is not prohibited under Section 10 of the C.L.R.A. Act. It is also denied that the 1,139 workers had been engaged through the contractor M/s. Balaji Traders.

As regards the absorption of the workmen in the establishment of OCFL, it is contended that since the workmen are contract labourers they cannot be absorbed in the establishment of the principal employer. As regards the absorption of the workmen under any other contractor, it is contended that there is no such provision of law. Further it is contended that Section 25-H of the I.D. Act is not applicable to contract labourers.

On maintainability of the reference it is pleaded that contract labourers being not 'workmen' as defined under Section 2 (s) of the I.D. Act and the Sangh's membership being confined to only contract labourers, no industrial dispute can be raised by the Sangh under the I.D. Act.

4. During pendency of this proceeding the ownership of the Fertiliser plant was transferred to Indian Farmers Fertiliser Co-operative Limited (for short, 'IFFCO'). Therefore, the Sangh made a petition to implead IFFCO as a party which was allowed by this Tribunal. On being noticed the management of IFFCO appeared and filed written statement adopting the written statement of OCFL, besides taking specific contention that as per the terms and conditions specified in the Sale Agreement entered into between IFFCO and OCFL, the former has accepted the liability to absorb only the regular employees of OCFL who were on OCFL's roll as on 30-9-2005 and that it did not undertake the liability of whatsoever nature in respect of employment and non-employment of the contract labourers.

5. On the pleadings of the parties, the following issues have been settled :–

ISSUES

(i) "Whether the workmen engaged in M/s. OSWAL Chemicals and Fertilisers Ltd., Musadia, Paradeep through M/s. Balaji Traders (list enclosed) are entitled to absorption in M/s. OSWAL Chemicals & Fertilisers Ltd., Musadia, Paradeep on expiry of contract on Dt. 31-8-2001 or entitled to absorption/engagement under new contractors establishments entrusted with the execution of the said work.

(ii) Whether the reference is maintainable ?

(iii) Whether the workmen (list enclosed) working in M/s. OCFL were engaged through M/s. Balaji Traders or were engaged directly under Management OCFL and whether the contract is real or mere camouflage ?

(iv) Whether M/s. IFFCO is liable to accept any liabilities to arise out of this I.D. Case ?"

6. In this case the second party has examined two witnesses. W.W. No. 1 is the General Secretary of the Union and W.W. No. 2 is an Executive Committee member of the Sangha. On behalf of the OCFL its Manager (Personnel & H.R.) is examined as M.W. No. 1 and on behalf of IFFCO its Deputy General Manager (H.R.) is examined as M.W. No. 2. Both sides have exhibited documents.

FINDINGS

7. *Issue Nos. (i) (ii) & (iii)*–On the maintainability of the case, OCFL has raised several grounds. First, it is submitted that this Tribunal vide order, Dt. 1-9-2008 having once disposed of this I.D. Case and subsequently there being no prayer from either side for restoration of this case, the Tribunal could not have passed order *suo motu* for revival of the case with further submission that this Tribunal having become *functus officio* after one month of notification of the Award/Order, Dt. 1-9-2008 it was devoid of jurisdiction to restore the case about more than one year after passing of the order of disposal of the I.D. Case.

In this regard, it is to be mentioned that subsequent to the reference which is subject matter of this I.D. Case No. 15 of 2002, the State Government made another reference (registered as I.D. Case No. 2 of 2006) superseding the earlier reference. Thereafter, this Tribunal sought for clarification from the State Government as to which of the two references should be adjudicated upon. Since no clarification was received and in the meanwhile the Hon'ble High Court of Orissa passed order in W.P. (C) No. 5893 of 2008 to dispose of I.D. Case No. 15/2002 expeditiously, preferably within a period of four months, this Tribunal passed order on 1-9-2008 that I.D. Case No. 15/2002 had been rendered infructuous in view of the subsequent reference and further directed that parties should proceed in I.D. Case No. 2/2006. When the matter stood thus, the management of IFFCO filed W.P. (C) No. 3562 of 2009 challenging an order passed in I.D. Case No. 2 of 2006 impleading IFFCO as a party. While finally disposing of the writ petition the Hon'ble High Court vide order, Dt.10-9-2009 directed this Tribunal to take-up the maintainability of the subsequent reference (I.D. Case No. 2 of 2006) as a preliminary issue. Accordingly, this Tribunal after having heard both the sides passed orders on 4-11-2009 on the preliminary issue holding that the subsequent reference registered as I.D. Case No. 2 of 2006 was not maintainable. In I.D. Case No. 2 of 2006 the second party (the Sangha) of I. D. 15/2002 had filed a petition to recall the order Dt. 1-9-2008 which was passed in I.D. Case No. 15 of 2002. This Tribunal while disposing of the preliminary issue in I.D. Case No. 2 of 2006 passed an order allowing the said petition and recalled the order Dt. 1-9-2008. Thereafter, the order Dt. 4-11-2009 passed in I.D. Case No. 2 of 2006 was was challenged in W.P. (C) No. 18559 of 2009 in which the Hon'ble High Court passed the final order on 8-12-2010 refusing to allow the Writ Petition. In addition to that Hon'ble Court made the following observations :–

> "Admittedly, the Tribunal disposed of I.D. Case No. 15 of 2002 on 1-9-2008 holding that it was rendered infructuous because of the 2nd reference. Again while hearing on the maintainability of the 2nd reference the Tribunal held that since it superseded the earlier reference, it could not be maintainable and simultaneously recalled the order Dt. 1-9-2008 passed in I.D. Case No. 2 of 2006 and revived I.D. Case No. 15 of 2002.

> Even if the submission of learned counsel for the petitioners that the Tribunal ought not have recalled the order Dt. 1-9-2008 passed in I.D. Case No. 15 of 2002 while hearing I.D. Case No. 2 of 2006, still then, in view of the Court, it did not lead to miscarriage of justice.

In view of the above quoted observations of the Hon'ble Court the first party should not have raised the above stated ground of objection on the maintainability of the reference. Hon'ble High Court in clear terms have held that the order Dt. 1-9-2008 passed in I.D. Case No. 15 of 2002 while hearing I.D. Case No. 2 of 2006 did not cause miscarriage of justice. This Tribunal is also of the considered view that the order Dt. 1-9-2008 passed in I.D. Case No. 15 of 2002 was passed to correct its own mistake so that the parties should not be forced to enter into further litigations.

8. As to the objection that this Tribunal had become *functus officio* by the time it passed the order to restore this I.D. Case, it is to be stated that the reference was not adjudicated upon by this Tribunal when it passed the order on 1-9-2008 taking the view that I.D. Case No. 15 of 2002 had become infructuous. In order to become an 'Award' as per the definition contained in the I.D. Act, there must be an adjudication of a question or point relating to an industrial dispute which has been specified in the order of reference or is incidental thereto and such adjudication must be one on merits. In M/s. COX & Kings (Agents) Ltd. *Vrs.* Their workmen, AIR 1977 (S.C.) 1666, an order of the Labour Court to the effect that since no demand of the workmen had been served on the employer no industrial dispute had come into existence in accordance with law and as such, the reference was invalid and the Court had no jurisdiction to adjudicate the matter referred to it by the Government, was held to be not an Award in terms of the definition. Similar is the case at hand. Therefore, even if the order Dt. 1-9-2008 has been published by the Government under Section 17(1) of the I.D. Act, the same will not acquire the status of an Award. Consequently, the objection raised by the first party that after one month of the notification of the said order this Tribunal had become *functus officio* is not correct in the eye of law.

9. Another objection is that a dispute pertaining to contract labourers can be raised only under the provisions of the C.L.R.A. Act and that the provisions of the I.D. Act have no application in the matter of contract labourers. In this regard the Judgments of the Hon'ble Supreme Court in B.H.E.L. *Vrs.* Kamal Kar Matar & others, 2001(I) LLJ 1697 (S.C.) of the Orissa High Court in Hira Cement Workers Union *Vrs.* State of Orissa and Others, 2001 (II) LLJ 545 (Orissa) and of High Court of Rajasthan in Delhi Cloth and General Mills Co. Ltd. *Vrs.* State of Rajasthan, 1993 (II) LLJ 1014 (Rajasthan) have been relied on.

In each of the above reported cases the admitted position was that the workers in the respective cases were engaged by labour contractor. But, in the case at hand that position is not admitted. If ultimately it is held that the workmen represented by the Sangh are held to be contract labourers then the principle laid down in these reported cases will be applicable and the matter will be dealt with accordingly. Since the Sangh has taken the stand that the contract between the contractor and the principal employer is not genuine and for that the workmen should be treated as employees of the principal employer, the reference cannot be said to be not maintainable. The following observations made in Gujarat Electricity Board, Ukai, Gujarat *Vrs.* Hind Mazdoor Sabha, AIR 1995 (S.C.) 1893 which is relied on by both the parties will make the position crystal clear :–

> "These decisions in unambiguous terms lay down that after coming into operation of the Act (the C.L.R.A. Act) 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. This conclusion has been arrived at in these decisions on the interpretation of Section 10 of the Act. However, it has to be remembered that the authority to abolish the contract labourer under Section 10 of the Act comes into play only where there exists a genuine contract. In other words, 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 raise 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."

10. Another objection on the ground of maintainability is that a dispute pertaining to contract labourers can be raised only by a Union of the regular employees of the principal employer and therefore, the second party being a Union of contract labourers cannot espouse the cause of the concerned workmen. To support the contention reliance has been placed on the decision in Gujarat Electricity Board, Ukai (*Supra*). In this Judgment it is observed by their Lordships that if the contract is sham or not genuine the workmen of the so-called contractor can raise an industrial dispute for declaring that they were always the employees of the principal employer. If, the contract is genuine then the workmen can raise an industrial dispute provided it is espoused by the direct workmen of the principal employer.

Therefore, if ultimately it is held that the contract between the principal employer M/s. OCFL and the so-called contractor M/s. Balaji Traders is found to be genuine, then the reference will be infructuous inasmuch as the direct workmen of the principal employer have not espoused the dispute. Since it is contended that the contract between the two is sham and the introduction of contractor Balaji Traders a camouflage, the dispute raised before this Tribunal *prima facie* appears to be maintainable.

11. It is further argued on behalf of the first party that the issue as to whether the contract system is genuine or a camouflage and whether the workmen should be treated as the employees of the principal employer being neither the subject matter of reference nor incidental thereto, determination thereon is beyond the scope of the reference. To counter this argument the second party has cited the decisions in M/s. Indian Farmers Fertiliser Co-operative Ltd. *Vrs.* Industrial Tribunal, 1991 Lab. I. C. 1747 (Allahabad High Court) and General Manager, Oil and Natural Gas Commission, Silchar *Vrs.* Oil & Natural Gas Commission Contractual Workers Union, 2008 (12) SCC 275. In Indian Farmers Fertiliser Co-operative Ltd.'s case (*Supra*), the reference was on the legality and justifiability of termination of services of 88 workmen. In the schedule of reference names of the principal employer and the contractor were mentioned as employers of the workmen. The Tribunal, whose award was under challenge before the Hon'ble Allahabad High Court had adjudicated on the employer-employees relationship between the workmen and the principal employer. Therefore, it was argued before the Hon'ble High Court that the question as to whether the workmen were the employees of the principal employer was completely outside the scope of reference. The Hon'ble High Court held that since names of both the employers were there in the reference it was within the scope of the reference and that the Tribunal had jurisdiction to come to a conclusion that the workmen were the employees of the principal employer. The workmen in that case had, throughout the proceedings contended that though they were the employees of the principal employer they were wrongly shown as the employees of the contractor. On the other hand, the principal employer had contended that the workmen were the employees only of the contractor. It is observed by the Hon'ble High Court that since in the aforesaid background the

dispute was referred to the Tribunal, the Tribunal was within its scope to decide the question whether the workmen were the employees of the principal employer.

In General Manager, Oil & Natural Gas Commission's case (*Supra*), the reference under adjudication was as follows :

> "Whether the demand of ONGC Contractual Workers Union, Silchar on the Management of ONGC Kachar Project, Silchar for regularisation of the services of the contractual workers is justified ? If so, what relief are the workmen concerned entitled to ?"

But, the real dispute between the parties was whether the workmen were contract labourers or employees of ONGC. Instead of directly addressing that dispute the aforecited reference was made which gives an impression of a pre-supposition that the workmen were contractual employees and the only dispute was with regard to the regularisation of their services. Under such circumstances, the Hon'ble Supreme Court observed that the reference appears to have been loosely worded, that both the parties were aware of the real issues involved, that the pleadings of the parties would show that the core issue before the Tribunal was as to whether the employees were of the contractor or of the ONGC, and that the Management's argument that the issue was beyond the reference is hyper-technical.

In Delhi Cloth & General Mills Co. Ltd. *Vrs.* Workmen, AIR 1967 (S.C.) 469, the Hon'ble Supreme Court have held that the Tribunal must look to the pleadings of the parties to find-out the exact nature of the dispute, because in most cases the order of reference is so cryptic that it is impossible to cull-out therefrom the various points about which the parties were at variance.

In the case at hand the second party, from the very beginning, has been claiming that the contract system being sham and fictitious, the concerned workmen are the employees of the principal employer. The copy of the conciliation failure report which is received from the State Government along with the order of reference reflects that even during the conciliation the second party Sangh had demanded regularisation of the workers by the management of OCFL on the ground that they had been working under fictitious contractors like M/s. Balaji Traders. The name of M/s. Balaji Traders along with M/s. OSWAL Chemical & Fertiliser Ltd. finds place in the schedule of reference. A bare reading of the schedule of reference gives an inference that the Government while making the reference pre-supposed that the concerned workmen were engaged in the OCFL through the contractor M/s. Balaji Traders. The Sangh, so also, the OCFL have adduced evidence before this Tribunal to support their respective contention on the issue as to who is the real employer of the concerned workmen. With these facts and circumstances and following the observations made in the aforecited case laws, this Tribunal is of the considered view that the issue as to whether the contract is not genuine for which the workmen are to be treated as employees of the principal employer is not beyond the scope of the reference.

12. Before going to analyse the evidence on the second party's claim that the workmen were directly employed by OCFL, that they were directly controlled by the principal employer, i.e. OCFL and that subsequently the workmen were shown to be contract labourers by interposing a fictitious contractor, the principles laid down by the Hon'ble Supreme Court in some of the Judgements may be referred to.

In Ram Singh *Vrs.* Union Territory, Chandigarh, AIR 2004 (S.C.) 969, it is observed that the industrial adjudicator is required to consider the question as to whether the contractor has been

interposed either on the ground of having undertaken to produce any given result for the establishment or for supply of contract labourers for work of the establishment under a genuine contract or is a mere ruse/camouflage to evade compliance with various beneficial legislations so as to deprive the workers of the benefit thereunder. If the contract is found to be not genuine the so-called contract labourers will have to be treated as the employees of the principal employer and they shall be directed to be regularised in the establishment of the principal employer. It is further observed that in determining the relationship of employer and employee, "control" is one of the important tests. However, all other relevant facts and circumstances are required to be considered including the terms and conditions of the contract. It is also observed that "integration test" is one of relevant tests which is applied by examining whether the person was fully integrated into the employer's concern or remained apart from and independent of it. Facts which may be relevant are who has the power to select and dismiss, to pay remuneration, deduct insurance contribution, organise the work, supply tools and materials, and what are the mutual obligations between them. In General Manager (OSD), Bengal-Nagpur Cotton Mills, Rajanandgaon *Vrs.* Bharat Lal, 2011 (128) FLR 560 it is laid down that– two of the well-recognised tests to find out whether the contract labourer 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 International Air Port-Authorities *Vrs.* International Airport Cargo Workers Union, 2009(123) FLR 321(S.C.), it is observed that if the contract is for supply of labour necessarily the labour supplied by the contractor will work under the direction, supervision and control of the principal employer, but that would not make the worker a direct employee of the principal employer, if the salary is paid by the contractor, if the right to regulate employment is with the contractor and the ultimate supervision and control lies with the contractor. It is further observed that the principal employer only controls and directs the work to be done by a contract labourer when such labourer is assigned/allotted/sent to him. But, it is the contractor as employer, who choses whether the worker is to be allotted/assigned to the principal employer or used otherwise. In short, the 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 subject to what conditions. Only when the contractor sends/assigns the workers to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control.

13. Keeping these principles in mind the evidence on record is to be analysed. Much has been argued on the point as to on whom the onus of proof lies. Relying on the decision of the Hon'ble Allahabad High Court in M/s. Indian Farmers Fertilisers Co-operative Ltd.'s Case (*Supra*), it is submitted on behalf of the second party that the onus is on the principal employer to prove by positive evidence that the workmen were on the pay rolls of the contractor or were the contractor's employees. In the said Judgment it is observed that the workmen having stated that they were direct employees of IFFCO and that each of them had continuously worked for 240 days, the onus of proof shifted on IFFCO and it was the IFFCO who should have proved by positive evidence that the workmen were contractor's employees. But, the Hon'ble Supreme Court have observed in General Manager (OSD), Bengal-Nagpur Cotton Mills case (*Supra*) that it is for the employees to aver and prove that he was paid salary directly by the principal employer and not the contractor. In the reported case the genuineness of the contract system was under consideration and the Industrial Tribunal while deciding that the contract was a camouflage had placed the onus upon the principal employer to prove that the workmen was being paid by the contractor. But, their Lordships have observed that the Tribunal placed the onus wrongly upon the appellant. In the same Judgment it is

also observed that the employee did not establish that he was working under the direct control and supervision of the principal employer. Basing on such observations of the Hon'ble Apex Court this Tribunal concludes that the onus lies on the employees to prove that they were working under the direct control and supervision of the principal employer and that they were the principal employer's employees. In view of the aforesaid observations of the Hon'ble Supreme Court, the observation of the Hon'ble Allahabad High Court on onus of proof cannot be applied against the principal employer.

Placing reliance on M/s. Indian Farmers Fertilisers Co-operative Ltd.'s case (*Supra*), it is further argued on behalf of the second party that the principal employer having failed to produce the Statutory Registers required to be maintained under the CLRA Act to prove that the workmen were contract labourers, an adverse inference should be taken against it. But, in view of the observation of the Hon'ble Supreme Court on the burden of proof, it is to be held that the second party should have made a prayer to this Tribunal to direct the OCFL to cause production of any such Registers and/or documents wherefrom the second party could have obtained corroborative evidence to support their claim that they were directly recruited by the principal employer, they used to receive salary from the principal employer, and any other facts that have a bearing on the status of the workmen.

However, it may be noted that both sides having adduced evidence both oral and documentary, this Tribunal is to examine the same and record its findings on the issue.

14. The oral evidence on the point under consideration adduced by the parties may be scrutinied. W.W. No. 1 has stated that the concerned workmen were recruited directly by the OCFL, that they were engaged in permanent and perennial nature of jobs like production, administration, transport, workshop and Mechanical Section of OCFL, that the names of the workers were entered in the Muster Roll of the casual employees working under the OCFL, that the workmen used to receive their salary from the OCFL by signing the Wage Register maintained by the OCFL, that all the workmen were working under the direct control and supervision of the Officers of OCFL, that the workmen were recruited in different years during the period 1997-2000 when the Contractor M/s. Balaji Traders had not yet come to picture, that though one Mastan Singh was shown to be the Proprietor of M/s. Balaji Traders, as a matter of fact, there was no such person in the name of Mastan Singh and that a fictitious contractor was thus planted by the principal employer to deprive the workmen of their legitimate dues including regularisation in service.

Though another witness has been examined by the second party, he has not adduced evidence on any other facts which have not been covered by W.W. No. 1.

On the other hand, M.W. No. 1 examined on behalf of OCFL has stated in his deposition that the attendance of the workmen used to be taken by the contractor and that they used to get their wages from the contractor. In cross-examination he has stated that the workmen had been engaged in different sections of the plant of the first party but, he could not say about the nature of job each of them used to perform.

15. Thus, the oral evidence adduced in this case contains statements which are general and sweeping in nature. It is simply stated that the workmen were engaged in permanent and perennial nature of job but except the evidence that the workmen had been working in the establishment of the OCFL continuously for one to four years there is no other specific evidence as to whether the jobs they used to perform were permanent/perennial in nature. Though it is claimed by W.W. No. 1 that OCFL had recruited the workmen by undertaking mass recruitment drive, there are no supporting materials such as notice of recruitment, interview card and appointment orders showing that they

were directly recruited by the OCFL. Though it is claimed that the names of the workmen were there in the Muster Roll of the OCFL and that the workmen used to receive their salary from the OCFL by putting signatures on the Wage Register, it is not supported by relevant documents/ Register. Even no prayer was made by the second party to direct the first party to produce such documents/Registers which may be supposed to be in the latter's custody. There is no evidence on the points as to who had the power to select and dismiss the workmen, who used to pay remuneration, who used to deduct insurance or other contributions and who used to supply tools and materials to the workers.

16. On behalf of the second party, it is argued that the so-called contractor M/s. Balaji Traders is a fictitious firm and that it was one Mr. B. K. Sukla, the then Manager of the principal employer, who on paper showed the workmen to have been engaged by that fictitious contractor. Lengthy argument has been advance on behalf of the second party to make out a case that the proprietor of the Firm Balaji Traders is a fictitious person and that it was Shri B. K. Sukla, Manager of OCFL, who on paper had shown Balaji Traders as a contractor but as a matter of fact there was no such contractor in existence. In support of such contention it is pointed out as to how the name, address and age of the proprietor of Balaji Traders have been differently described in different places, (Exts. 20,29,30), how the proprietor has never appeared before any authority including this Tribunal, how the application for labour licence (Ext. 20) under the CLRA Act submitted by Balaji Traders was not signed by the proprietor himself as a result of which the licence granted on the basis of that application was subsequently cancelled by the Licensing Authority, (Ext. 24 to 26), how the letters issued to the proprietor of Balaji Traders by the Licensing Authority were returned by the postal agency undelivered (Ext. 27), and how said B.K. Sukla has initialled the over writing part of the application for labour licence (Ext. 20) which should have been initialled by the applicant himself and how said B. K. Sukla had issued work order (Ext. 151) in favour of Balaji Traders though on the date of issue of the work order neither Balaji Traders had the labour licence (Ext. 22) nor Shri B. K. Sukla had the authority to issue the work order (Ext. 55). Basing on above facts it is vehemently argued by the learned counsel for the second party that the person who is shown to be the contractor/ proprietor of the Contractor-Firm is a fictitious person. Simply picking up some anomalies from several documents that have not been subjected to the test of cross-examination, in that the person/ authority who are executants/originators of the documents have not been brought before the Tribunal to explain on the facts contained in the documents and the circumstances under which the anomalies came to being, this Tribunal cannot give a finding as to whether the contractor is a fictitious person/ firm. That apart, merely because there are some variations in someone's name, address and age mentioned in different forms/documents, that some letters addressed to someone have been received back undelivered or someone has not made personal appearance in some proceedings, there cannot be a conclusion that no such person is in existence or that he is a fictitious person. Here, it may be stated that the contractor being a party in I.D. Case No. 8 of 2001 of this Tribunal, was served with notice and he filed written statement (Ext. 29) in that I.D. Case. Even in this I.D. Case he is a party and notice having been sent to him he had appeared, took time but, did not file written statement. Thus, in both the I.D. Cases he has been set *ex parte*. Under such circumstances, it is not possible to say that the contractor is a fictitious person.

This Tribunal is not required to determine whether the "contractor" (as a person or as a Firm) is a fictitious person. What the Tribunal is required to find-out is whether the very contract system introduced by the principal employer is genuine or not. It may so happen that the contract system is found to be genuine but the contractor is found to be an imposter or a fictitious person. In that event,

the workmen claiming the contract to be sham or a camouflage will not get any relief. In this case, the second party is required to prove that the contract is not genuine or it is a camouflage. This is to be determined by the Tribunal by application of different tests such as "control test" and "integration test" as narrated earlier. Apart from that, the factors contained in sub-section (2) of Section 10 of the CLRA Act are to be taken into consideration. Because in Gujarat Electricity Board, Ukai's case (supra) it has been obsered in last sub-para of paragraph 20 of the Judgment that in cases like the one on hand the Tribunal is called upon to record a finding on the factors mentioned in sub-section (2) of Section 10 of the CLRA Act to find-out whether the contract is sham or genuine. The factors contained in Section 10 (2) of the CLRA Act are as follows :–

(a) Whether the process, operation or other work is incidental to, or necessary for, the industry, trade, business, manufacture or occupation that is carried on in the establishment ;

(b) Whether it is of perennial nature, that is to say, it is of sufficient duration having regard to the nature of industry, trade, business, manufacture or occupation carried on in that establishment ;

(c) Whether it is done ordinarily through regular workmen in that establishment or an establishment similar thereto ;

(d) Whether it is sufficient to employ considerable number of whole-time workmen.

17. In order to establish that the principal employer had absolute control over the workmen and that there was complete integration of the workmen with the establishment of the principal employer the second party has exhibited some documents. As already stated, there is no material to show that the principal employer had recruited the workmen and it had the power to take disciplinary action against the workmen including the power to dismiss them. Though a number of Attendance Cards of some of the workmen have been exhibited, there is nothing in the cards as to who used to take the attendance of the workmen concerned. Each and every card is signed by someone designated as "Issuing Authority" but it is not explained as to who was the Issuing Authority and whether he was an Officer of the Principal employer. Though it is claimed that remunaration of the workmen used to be paid by the principal employer, there is no documentary evidence to that effect. On the other hand, Salary Slims of some of the workmen exhibited by the second party seem to have been issued by Balaji Traders and there is nothing on the body of the slips wherefrom it can be said that the principal employer used to pay remunaration to the workmen.

The second party has exhibited Gate Pass issued to the workmem. On examination of the Gate passes it is found that to some of the workmen on gate pass was issued by Balaji Traders and another issued by the Chief Security Officer of the principal employer. It is not in dispute that the Contractor Balaji Traders was introduced in the year 2001 but many of the workmen had been working in the plant site much prior to that. At the top of the gate pass, which has been issued by the Chief Security Officer of the principal employer, it is mentioned "Cont./Contractor & Labour Entry pass, C/o OSWAL Chemicals & Fertilisers Ltd." It is argued that since the workmen were directly employed by the principal employer prior to the introduction of Balaji Traders, the principal employer had issued the gate passes to the workmen. On behalf of the principal employer it is argued that the gate passes signed by the Chief Security Officer were meant for contract labourers and from security point of view the Security Officer used to issue the gate passes. There are few Mess/

Canteen passes marked Exts. 43/1, 43/2, 45/1, 59/2, 65/1 and 73/2. It is submitted by the second party that on the body of these passes OCFL is described as the Contractor of the respective workmen to whom the passes have been issued. But, this submission does not appear to be correct. In the column meant for Company's name "OCFL" is written. No where OCFL is mentioned as the contractor. No doubt OCFL is the issuing authority but that does not mean that the concerned workmen were the direct employees of the OCFL.

It is further pointed out that the gate passes marked Exts. 57/1, 59/1 and 81/1 show the name of the Contractor as "OCFL." Citing these gate passes, it is argued that since the workmen were initially recruited by the OCFL and since they were never engaged by any contractor, the OCFL has shown itself as the contractor of the workmen only to show that they were contract labourers. It is also pointed out that some of the gate passes issued by Balaji Traders, such as Exts. 35, 58, 63/1, 70/1 83/1, 86/1 and 98, are signed by B. K. Sukla, an Officer of the principal employer. Citing istances of these gate passes it is submitted that since there was no contractor in the name of Balaji Traders and since such a contractor was introduced by the OCFL as a camouflage the Management of OCFL itself used to issued gate passes to the workmen, showing as if the gate passes were issued by Balaji Trades. In this regard, it may be observed that the instances cited are very few and in a large establishment where a large number of workmen must have been employed both directly and through contractors to whom gate passes used to be issued, few such instances are not going to establish that the workmen were integrated with the establishment of the principal employer.

18. The second party relies on some direct communications between OCFL and few workmen to show how OCFL had full control over the workmen and their service conditions. It is pointed out that vide Ext. 42/1, the Manager (Logistics) of OCFL had called for an explanation from one A. K. Sahoo (one of the workmen of this case) as to why he absented from duty on a particular date. Exts. 44 and 44/1 reflect that on the application of one of the concerned workmen namely, Arabinda Mohapatra, the Management of OCFL recommended to reimburse medical expenses incurred by the said workmen out of an injury he had met while on duty. Ext. 46 series reflects that an Engineer of OCFL had intimated to the Manager, personnel Department of OCFL that Chandan Kumar Beura, another concerned workman, had not received his salary for the month of September/Octorber, 2000. Exts 128/28 reflects that on the application of one Jagabandhu Sahoo requesting the personnel Officer, OCFL to change his designation on the basis of his educational qualification, some of the officials recommended for his promotion. Exts. 144/8 and 144/9 reflect that one Sukadev Swain who was injured while working inside the plant had applied for medical leave for twenty days as well as reimbursement of cost of medicines and some Officers of OCFL had made recommendations in his favour. It is replied by the first party that as a welfare measure the injured workmen, though contract labourers, used to get benefit on medical grounds arising out of injuries sustained while working inside the plant. It is also submitted that in the matter of payment of salary to the contract labourers, the principal employer is responsible for due payment. The submissions appear to be tenable. That apart, the aforestated few instances cannot be utilised as a piece of evidence to prove that all the 1139 workmen were under the complete administrative control of OCFL or they were integrated with the regular establishment of OCFL.

19. However, the gate passes, Attendance Cards and the salary slips make it clear that each of the workmen was allotted with a code number which remained unchanged throughout the period of their employment. These documents also make it clear that the name of the job and the department in which each of the workmen was deployed remained unchanged throughout the

period of their employment. The workmen's code number, department and name of job having remained unchanged for years together, it is to be held that there was continuity of their employment as well as availability of the same job to individual workmen for years together. W.W. No. 1 has stated in his affidavit evidence that the workmen were recruited in the years 1997, 1998, 1999 and 2000 to work in the establishment of OCFL. But, as there is no data it is not possible to find out when each of the workmen got entry into their respective job. So, the duration of employment of each of the workmen is not ascertainable. However, from the pay slips and attendance cards exhibited in this case it can be concluded that some of the workmen had been continuously engaged for years together.

20. Save and except the oral testimony of W.W. Nos. 1 and 2 making bald statement that the workmen were working under the direct control of OCFL, there are no other material showing the nature of control and supervision the OCFL used to exercise over the workmen. According to OCFL, the workmen were all along engaged through contractors and that prior to Balaji Traders the concerned workmen were engaged through M/s. Chandan Traders. But, the fact remains that each of them was assigned with a particular job and there was never any change in respect of their designation as well as department in which they used to be deployed, besides their code numbers. From all these it can be presumed that at the instance of the principal employer the workmen were being deployed in same job and same department. So, it is found that the principal employer used to exercise control over the workmen with regard to the work they were to be assigned with.

However, having dealt with the evidence germane to 'control test', I am of the considered view that the same is not sufficient to conclude that even by preponderance of probabilities the principal employer had absolute control over the workmen.

21. It is found from the gate passes & some other documents that the workmen used to be engaged in different departments such as Transport, Workshop, Laboratory, Electrical & Mechanical, Administration etc. but the Tribunal is not in a position to ascertain whether the work in which the workmen were engaged was incidental to or necessary for the industry's trade, business, manufacture or occupation carried on in the establishment of OCFL. However, it is found from the evidence of M.W. No. 1 who has stated in his cross-examination that as on 19-1-2000 i.e., the date of his joining in OCFL, Paradip, the Company had not yet started its production. He has expressed his inability to say as to when the construction of the plant commenced. In the absence of any other material there may be a presumption that till the joining of M.W. No. 1 in the establishment the work of construction of the plant had not yet completed. Exts. D and E are the certificates of registration updated from time to time. Ext. G appears to be a part of Ext. D. These documents reflect that OCFL had engaged a number of contractors during the period 1997-2002. It appears, during the construction of the Plant large number of workmen were being engaged through different contractors. It was during the period of construction of the Plant different workmen entered into their respective job in different years from 1997 to 2002. Ext. G reflects that as on 18-9-2000 Balaji Traders was in the list of contractors annexed to the Certificate of Registration marked Ext. D. At that time the total manpower that could be deployed through Balaji Traders was 400 only which seems to have been enhanced subsequently to 1,000 (Ext. 22). According to the second party, it was in September, 2000 all the 1139 workmen involved in this reference were falsely shown by OCFL to have been engaged through Balaji Traders. W.W. No. 1 says that the workmen of this case were recruited in different years between 1997 and 2000. So, the most glaring possibility is that during the construction of the Plant these workmen were employed to work at the Plant site. Since all the workmen were in

employment during the period of construction of the Plant it is quite evident that after completion of the construction work services of most of the workmen would not have been required for the industry that was to be carried on in the establishment of OCFL.

That apart, there is absolutely no evidence on record that the work used to be performed by the workmen is now being done ordinarily through the regular workmen of the first party. Work related to construction of a plant comes to an end the moment construction get complete. So, such work is not integral part of the overall work to be executed by the establishment for production of fertiliser and other ancilliary work.

Thus, it is found that the factors which are enumerated in sub-section (2) of Section 10 of the C.L.R.A. Act are absent. Even the “control test” and “integration test” fail. Consequently, the contract cannot be said to be sham or a mere camouflage. Accordingly, Issue No. 3 is answered against the second party. Once it is held that the contract is not proved to be sham or fictitious the reference becomes not maintainable.

22. *Issue No. (i)*–This issue is the reproduction of the schedule of reference. In view of the findings recorded on Issue No. 3 the workmen who were engaged in the OCFL through Balaji Traders are not entitled to absorption either under the principal employer or under any other contractors.

23. *Issue No. (iv)*–The management of IFFCO denies its liability to extend any relief to the workmen under the Award to be made in this proceeding. In this regard, it may be mentioned that during pendency of this proceeding. OCFL sold its Fertiliser plant at Paradip to M/s. IFFCO. Ext. C is the xerox copy of the Sale Agreement executed by OCFL and IFFCO on 13-3-2006. When the second party/Sangh came to know that the Fertiliser plant was going to be transferred to IFFCO a petition was filed before this Tribunal on 28-9-2005 with a prayer to implead IFFCO as a party. On that petition order has been passed to implead IFFCO as a party. On being noticed, IFFCO appeared and filed objection that it was not a necessary party. However, vide Order dated 8-3-2006 this Tribunal allowed the application and IFFCO was impleaded as first party No. 2. Thereafter, IFFCO filed its written statement. The second party has not amended its Claim Statement to introduce its stand as against IFFCO. Therefore, in the claim statement of the second party there is no averment as to why IFFCO should accept the liability arising out of the Award that may be passed in favour of the second party and against the OCFL. In Shankar Chakravorti *Vrs.* Britannia Biscuit & Co., AIR 1979 (S.C.) 1652 it has been observed as follows :–

> “Obligation to lead evidence to establish an allegation made by a party is on the party making the allegation. The test would be who would fail if no evidence is led. It must seek an opportunity to lead evidence and lead evidence. A contention to substantiate which evidence is necessary has to be pleaded. If there is no pleading raising a contention there is no question of substantiating such a non-existing contention by evidence. It is well settled that allegation which is not pleaded even if there is evidence in support of it, cannot be examined because the other side has no notice of it and of entertained it would tantamount to granting an unfair advantage to the first mentioned party. We are not unmindful of the fact that pleadings before such bodies have not to be read strictly but it is equally true that the pleadings must be such as to give sufficient notice to the other party of the case it is called upon to meet.”

After making the above quoted observation their Lordships have further observed that the aforestated principle is also applicable in the matter of industrial adjudication. So, basing on the principle that if there is no pleading raising a contention there is no question of substantiating a non-existent contention by evidence and even if there is evidence in support of it the same contention cannot be examined, this Tribunal is of the considered view that in the absence of pleadings in the claim statement this issue is not to be decided by this Tribunal.

That apart, Issue Nos. 2 and 3 having been answered against the workmen and since the contract is not proved to be a camouflage and the dispute raised before this Tribunal is not maintainable, this Tribunal is not inclined to thrash out the terms and conditions of the Sale Agreement (Ext. C) to find out whether under the said terms and conditions IFFCO has to accept any liability in respect of the workmen of this Case.

24. In the result, the reference is answered against the second party.

Dictated and corrected by me.

RAGHUBIR DASH	RAGHUBIR DASH
4-5-2011	4-5-2011
Presiding Officer	Presiding Officer
Industrial Tribunal	Industrial Tribunal
Bhubaneswar	Bhubaneswar

By order of the Governor

P. K. PANDA

Under-Secretary to Government

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