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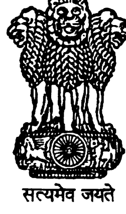

புதுச்சேரி மாநில அரசிதழ்

La Gazette de L' État de Poudouchéry

The Gazette of Puducherry

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GOVERNMENT OF PUDUCHERRY

LABOUR DEPARTMENT

(*G.O. Rt. No. 20/AIL/Lab./T/2021, Puducherry, dated 9th February 2022)*

NOTIFICATION

Whereas, an Award in I.D (L) No.03/2015, dated 29-12-2021 of the Industrial Tribunal-*cum*-Labour Court, Puducherry in respect of the Industrial Dispute between the management of M/s. Hindustan National Glass & Industrial Limited, Puducherry and its workman Tmt. A. Krishnaveny, over non-employment and non-payment of settlement has been received;

Now, therefore, in exercise of the powers conferred by sub-section (1) of section 17 of the Industrial Disputes Act, 1947 (Central Act XIV of 1947), read with the Notification issued in Labour Department's G.O. Ms. No. 20/91/Lab./L, dated 23-05-1991, it is hereby directed by the Secretary to Government (Labour) that the said Award shall be published in the Official Gazette, Puducherry.

(By order)

D. Mohan Kumar,
Under Secretary to Government (Labour).

BEFORE THE INDUSTRIAL TRIBUNAL-*CUM*-LABOUR COURT AT PUDUCHERRY

Present : Thiru R. Bharanidharan, m.l.
Presiding Officer.

Wednesday, the 29th day of December 2021.

I.D. (L) No. 03/2015
in
C.N.R. No. PYPY060000772015

A. Krishnaveni,
Eripakkam New Colony,
Kariyamanickam Post,
Puducherry. . . Petitioner

Versus

1. The Managing Director,
M/s. Hindustan National Glass & Industrial Ltd.,
Thondamanatham Village,
Villianur-Sedarapet Main Road,
Puducherry.

2. M. Manoharan (Contractor),
No. 12, Car Street,
Thondamanatham,
Puducherry. . . Respondents

This Industrial dispute coming on 14-12-2021 before me for final hearing in the presence of Thiruvalargal B. Mohandoss, P. Manivannan, K. Ilango K. Indrajith, Kruthiga Devi, Vijayasanthi, Velmurugan and Sunder Rajan, Advocates for the petitioner and Thiruvalargal L. Sathish, T. Pravin, S. Velmurugan and V. Veeraragavan, Advocates for the 1st respondent, Thiru S. Karthikeyan, Advocate for the 2nd respondent upon hearing both sides, upon perusing the case records, after having stood over for consideration till this day, this Court delivered the following:

AWARD

This Industrial Dispute has been referred by the Government as per the G.O. Rt. No. 6/AIL/Lab./J/2015, dated 02-02-2015 for adjudicating whether the industrial dispute raised by the petitioner Tmt. Krishnaveni, w/o. Anbazhagan, against the management of M/s. Hindustan ational Glass and Industrial Limited, Puducherry, over non-employment and non-payment of settlement benefits is justified and if justified, what relief the petitioner is entitled to?

(b) To compute the relief if any, awarded in terms of money if, it can be so computed?

2. *The case of the petitioner, in brief, are as follows:*

The petitioner joined as house keeper in the 1st respondent management in the year 1994. She was directly appointed by the 1st respondent management and as assigned work in the pantry section. The 1st respondent management engaged in manufacturing glass bottles. At the time of appointment, the petitioner's salary was fixed at ₹ 300 per month by the1st respondent management. Right from the beginning the 1st respondent management has exercised absolute control and supervision over the work of the petitioner. The 1st respondent management has also deducted ESI contribution from the salary of the petitioner. The workers in the 1st respondent management have resorted to strike during January 2006. The petitioner was prevented from egressing out of the administrative block by the workers. At that time from 25-01-2006 to 11-02-2006, the petitioner stayed inside the factory premises and prepared food for the managerial staffs. In the annual statement slips of provident fund the name of the 2nd respondent was mentioned as employer. The petitioner never worked under the 2nd respondent and the 2nd respondent is a total stranger to the petitioner. On the respondent side it was stated that it was a mistake and will be rectified in due course after submitting proper application. The 1st respondent has mistaken the claim of the petitioner

and tried to retrench her from the service by assigning false reasons. There after the petitioner was transferred to ACL Department (printing section on bottles) for sweeping and clearing machines during 2013 since, the ACL Department was kept in locked condition for 6 months. The dust particles has caused allergy and she was suffered from severe cough and sneezing. Hence, the petitioner visited ESI Dispensary for treatment where she was advised to take bed rest for 3 days. After the expire of 3 days ESI leave, the petitioner went to the factory where she was not permitted to enter the factory. It is informed by the security person that it was order of HR and VP. Her last drawn salary is ₹ 3,840 per month. Aggrieved over the action of the 1st respondent, the petitioner has made representation to the Labour Officer (Conciliation) Puducherry on 02-12-2013. The 1st respondent filed his reply statement, dated 28-05-2014 since, there was no amicable settlement, the Labour Officer (Conciliation) has sent a failure report having extracted work from the petitioner for more than 20 years. The respondent was come with a different stand that the petitioner is only a contract workers. The 2nd respondent is in collusion with the 1st respondent to defect the cause of the petitioner. The petitioner prays to direct the respondent to reinstate the petitioner in her original employment with back wages and continuity of service.

3. *The brief averments in the counter filed by the 1st respondent is as follows:*

The petitioner is not a workman under the 1st respondent and there is no employer employee relationship between the petitioner and the 1st respondent. The petitioner was an employee of the 2nd respondent Mr. Manoharan, who is a contractor as such the petitioner is not entitled to raise any Industrial Dispute as against the 1st respondent. The 1st respondent has entrusted the work of pantry and general housing on contract to 1st respondent Mr. Manoharan. The petitioner Krishnaveni was engaged by the 2nd respondent contractor in fulfillment of the contractual obligation with the 1st respondent company. Since, the contractor Mr. Manoharan is not independently covered under the ESI Act, the 1st respondent being the Principal employer has covered the petitioner under the ESI Act. The 2nd respondent who is the licensed contractor of manpower supply has appointed the petitioner under his employment and all along governing the service conditions of the petitioner. It is submitted that the 1st respondent came to know about the dispute raised by the petitioner only after the notice received from the Labour Officer (Conciliation) Puducherry. The 1st respondent deny all other allegations raised by the petitioner and pray for dismissal of the Industrial Dispute.

4. *The brief averments in the counter filed by the 2nd respondent i as follows:*

The 2nd respondent is one of the contractor supplying manpower to the 1st respondent company on contractual obligation with the 1st respondent. The 2nd respondent has engaged the petitioner as contract worker. The petitioner was worked under the 2nd respondent till November 2013. The 2nd respondent has paid wages to the petitioner and remitted her monthly contribution to the Provident Fund Authority. Since, the 2nd respondent was not having separate ESI Code, the petitioner was given ESI coverage under the ESI Code of the 1st respondent. The 1st respondent management does not have any legal relationship in respect of the petitioner who was engaged by the 2nd respondent contractor after 12-11-2013 the petitioner did not report the duty. Only during Conciliation Proceedings before Labour Officer (Conciliation), the 2nd respondent came to know about the Industrial Dispute raised by the petitioner. The 2nd respondent has totally denied the allegations raised by the petitioner before the Labour Officer (Conciliation), Puducherry. The petitioner discontinued her employment with 1st respondent on her own and has not reported to duty till date. The 2nd respondent submitted that the petitioner cannot make any claim against the 1st respondent and she is not entitled to any compensation or any interest as claimed in the petitioner and pray for dismissal of the petition.

5. *The points for consideration are:*

Whether the dispute raised by the petitioner Tmt. Krishnaveni against the 1st respondent management over non-employment and over non-payment of settlement benefits is justified?

6. On the petitioner side, the petitioner Tmt. Krishnaveni, was examined as PW.1 and her chief affidavit was filed through her Ex.P1 to P7 were marked. In the evidence of PW.1, she has deposed that he was joined in the 1st respondent which was previously known as OBL during the year 1994. Ever since, the date of appointment the petitioner was assigned work in the Administration Section of the 1st respondent company where she used to provide Coffee to the staff members and other Managerial Persons. At the time of appointment the petitioner salary was fixed at₹ 300 per month. The 1st respondent management has not given any leave or weekly off to the petitioner. From the beginning,

the 1st respondent management has exercised absolute control and supervision over the works of the petitioner. The 1st respondent management has also deducted ESI contribution from her salary. In January 2006, when the workers have resorted to strike the petitioner was stayed inside the 1st respondent factory and did all house keeping works like preparing breakfast, lunch and dinner to the managerial staffs. The petitioner was given festival bonus and other allowances periodically on par with permanent workers by the 1st respondent management. The petitioner was sought to see the name of the 2nd respondent as employer in the Annual Statement, the petitioner never worked with the 2nd respondent and the 2nd respondent is the total stranger to the petitioner since, the petitioner has requested the 1st respondent to correct the name of the employer. The 1st respondent management was annoyed and transfer her to ACL Department which was kept in a locked condition for more than six months. Since, the petitioner was engaged in cleaning process she was suffered from severe cough and sneezing for which she was under treatment in the ESI hospital. The petitioner properly informed about leave to the respondent management. After treatment when the petitioner returned to work she was not permitted by the security persons to enter inside the factory premises. The request of the petitioner was not considered by the respondent management. Finally, the petitioner has made representation, dated 02-12-2013 to the Labour Officer (Conciliation), Puducherry, for amicable settlement of issue. The 2nd respondent in collusion with the 1st respondent management is supporting the case of the 1st respondent. The petitioner claim for damages for non-employment at ₹ 2,00,000.

7. RW.1 Thiru Srinivasan, Deputy Manager, H.R. and Administration in the Respondent company M/s. HNGL. On the respondent management side Ex.R1 to R23 were marked. In the evidence of RW.1 he has deposed that the petitioner is not a workman under the 1st respondent management and there does not exist any employer employee relationship between the 1st respondent and the petitioner. The petitioner was employer of the 2nd respondent Thiru M. Manoharan. The petitioner has no *locus standi* to raise any conciliation or Industrial Dispute against the 1st respondent management. The petitioner was not appointed by the 1st respondent and her name was not available in the rolls of the respondent management of the 1st respondent and the 1st respondent management has not permitted the services of the petitioner. The 1st respondent management has entrusted the work of pantry and general housing to one Mr. Manoharan who is the contractor the petitioner was engaged in the 2nd respondent Mr. Manoharan, in fulfillment of his contractual obligation with the 1st respondent management. The wages and other conditions of the services are fixed by the 2nd respondent Mr. Manoharan, who is the employer of the petitioner. Since, the 2nd respondent is not independently covered under the ESI Act. The 1st respondent who is the principal employer in view of the obligations has covered the petitioner under the ESI Code of the 1st respondent management from 13-11-2013 onwards the petitioner was not present for any work with the 1st respondent management and the reasons were not informed to the 1st respondent management. The 1st respondent management denied that the petitioner joined in the services of the OBL Company during the year 1994 and the RW.1 denied all other evidence of the PW.1 is baseless and false. The 1st respondent has no necessity to retrench the petitioner and the 1st respondent has never informed the petitioner that her services are not required any more.

8. In the evidence of RW2 Thiru Padmanaban Iyer, he has deposed he was working a Secretary to Vice-President of the 1st respondent management, he has deposed that the 2nd respondent is the authorised contractor of our erstwhile company M/s. ACE Glass Containers Limited for supply of manpower for loading and unloading. The supply of manpower resources for loading and unloading and other allied activities were periodically renewed by the 1st respondent management. The petitioner was not directly employed by the 1st respondent and she was employed by the 2nd respondent. The 1st respondent has nothing to do with employment or non-employment of the petitioner. The petitioner has to workout her remedies with the 2nd respondent and her employment is nothing to do with the 1st respondent management. RW.1 and RW.2 prayed for the dismissal of the petition.

9. The learned Counsel for the petitioner stoutly argued that the petitioner was employed in the year 1994 in the respondent management which was previously known as OBL Company. The petitioner was assigned work in the pantry section where the petitioner used to provide Tea and Coffee to the staff and managerial persons. The respondent management has exercised absolute control and supervision over the works of the petitioner. The petitioner having studied only up to 6th standard she is not well versed with Labour legislation and rules and regulations of the Act. The 1st respondent management has given her festival allowance and other allowance periodically on par with permanent employees. The 1st respondent management has also deducted PF contribution from the salary of the petitioner. The petitioner never worked under the 2nd respondent and the 2nd respondent is a total

stranger to the petitioner. Since, the petitioner has raised her voice as to the incorporation of 2nd respondent name in the PF slip as employer the management has decided to retrench her from the services of the company. After the petitioner given an oral representation that she will not further question about the employer she was transfered to ACL Department by the 1st respondent. The petitioner have worked for full days in the ACL Department which was kept in a locked condition for several months. The petitioner was infected with severe cough and sneezing and the petitioner got treatment at ESI hospital where she was advised to take rest for three days. The petitioner has also submitted her ESI leave service to the management. However, when she returned to duty after her ESI leave she was prevented by the security person from entering into the company. Aggrieved by the act of the 1st respondent, the petitioner has given representation, dated 02-12-2013 to the Labour Officer (Conciliation), Puducherry for which the 1st respondent has filed his counter on 28-05-2014. In the said counter, the 1st respondent denied employer employee relationship between the 1st respondent and the petitioner, it was further contended by the 1st respondent that the petitioner is an employee of the 2nd respondent contractor.

10. The learned Counsel for the petitioner stoutly argued that ever since, 1994, the petitioner was served in the company of the 1st respondent and the 1st respondent is her appointing authority. The monthly salary was periodically disbursed by the 1st respondent to the petitioner, the 1st respondent deducted her ESI and PF contributions and therefore, the 1st respondent cannot denied the fact that the petitioner was directly appointed by the 2nd respondent.

11. The learned Counsel for the petitioner has invited the attention of this Court to the evidence of RW.1 wherein, RW.1 has deposed that he has not inspected the records maintained by the erstwhile management of OBL in the 1994. Moreover, the 1st respondent completely suppressed the agreement entered in between 1st respondent and 2nd respondent in the year 2005. RW.1 further deposed that there are previous agreement prior to 2005, but, the same were not filed before this Court. Moreover, the 1st respondent failed to produce the list of 220 contract labours who worked under the 1st respondent. The learned Counsel for the petitioner further submitted that the 1st respondent has not produced material documents which are essential for the just decision of case and hence, the petitioner pray for adverse inference to be taken by the Court in this regard. The learned Counsel for the petitioner has invited this attention of this Court to the cross-examination of RW.1 where he deposed that they have not filed any documents to show that the Contractor Manohar was engaged by the 1st respondent to do works apart from loading and unloading work. In Ex.R21 list the name of the 2nd respondent found place. In Ex.R22 Rule 4 contemplates the nature of duties performed by the employees which is clearly stated in Rule 3. Even in rule 3 the nature of duties of the contract labourers was not clearly defined and ear marked in Ex.R23. The nature of work is defined as loading of finished goods and unloading of raw materials. Moreover, the 1st respondent has not stated that he was permitted by the Inspector of Factories for supply of manpower for house keeping and pantry section.

12. The learned Counsel for the petitioner further submit that in the event of any transfer of management the purchaser company will get the list of contractors and the list of contract employees. Further, the 1st respondent has not filed the list of contractors details and the list of contract worker. The learned Counsel for the petitioner submit that in Ex.R22, the party of the 1st part appoints the party of the 1st part for the services provided in Clause (3) for the term in return for the payment agreed upon this agreement. As per Ex.R21 and R22 the supply of labour by the 2nd respondent was only for loading and unloading operations. The licence granted to the 2nd respondent do not give blanket permission to the petitioner for engagement of workers in the house keeping and pantry section which are beyond the purview of loading and unloading. The petitioner submit that Ex.R21 to R23 cannot be relied upon since, they were creator for the purpose of defrauding the interest of the petitioner. The learned Counsel for the petitioner further submit that the 1st respondent in order to avoid legal claim has manipulated the records and fictitiously created R2 as the contractor of the 1st respondent as if, there exists employer and employee relationship between the petitioner and the 2nd respondent. The 1st respondent has effective control over the work done by the petitioner and pray for grant of relief as prayed in the claim petition.

13. The learned Counsel for the 1st respondent submit that the petitioner was not directly appointed by the 1st respondent management and she was not assigned work in pantry section of the respondent management. It is the 2nd respondent who is the registered contractor under the 1st respondent has engaged the services of the petitioner. In the Conciliation proceedings before the Labour Officer (Conciliation), Puducherry, the petitioner has not seek for reinstatement, but, the claim is for settlement of her dues, the same was indicated in the failure report, dated 14-11-2014 submitted by the Labour Officer

(Conciliation), Puducherry. The petitioner has also filed an application before the gratuity authority for settlement of her gratuity. The conduct of the petitioner clearly established that she was never interested for seeking-reemployment, but, only the due entitled for her.

14. The learned Counsel for the 1st respondent submit that out of Ex.P1 to P7 nothing related to her appointment with the 1st respondent. The petitioner claim her employment with 1st respondent only on the basis of ESI contribution deposited by the 1st respondent. The learned Counsel for the 1st respondent further submit that the petitioner has to establish by cogent evidence that she was appointed by the 1st respondent directly. In this respect, the learned Counsel for the 1st respondent has invited this Court attention to the judgment of our Hon'ble Supreme Court of India in General Manager (OSD), Bengal Nagpur Cotton Mills Rajnandgaon *Vs.* Bharat Lal & Another reported in CDJ 2010 SC 1161 held that "Two of the well-recognized tests to find out whether the contract labour are the direct employees of the principal employer are, (i) whether the principal employer pays the salary instead of the contractor and (ii) whether the principal employer controls and supervise the work of the employee. In this case, the Industrial Court answered both questions in the affirmative and as a consequence held that first respondent is a direct employee of the appellant.

> On a careful consideration, we are of the view that the Industrial Court committed a serious error in arraiving at those findings. In regard to the first test as to who pays the salary, it placed the onus wrongly upon the appellant, it is for the employee to aver and prove that he was paid salary directly by the principal employer and not the contractor. The first respondent did not discharge this onus. Even in regard to second test, the employee did not establish that he was working under the direct control and supervision of the principal employer".

15. The learned Counsel for the 1st respondent further submit that the claim of the petitioner regarding her employment status only on the basis of ESI payment by the 1st respondent is not at all tenable. Payment of ESI contribution does not confer the status of direct employment on a contract worker. In fact the 1st respondent has paid the ESI contribution in respect of the petitioner is due to the statutory obligation imposed on the 1st respondent by the ESI Act. Section 2(9) of ESI Act 1948: "Employee means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and;

> (i) who is directly employed by the principal employer, on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or
>
> (ii) who is employed by or through an immediate employer, on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment". Section 38 of ESI Act "subject to the provision of this Act all employees in factories or establishment to which this act applies established insured the manner provided by this Act".

16. Since, the second respondent does not have any separate ESI Code as per section 40 and 41 of the ESI Act it is the responsibility of the principal employer to pay the ESI contribution to all the employees. In section 40 of the ESI Act it cast the primary responsibility of the being all ESI contribution for all employees whether employed directly or through immediate employer upon the principal employer. Section 41 of the ESI Act mandates that the principal employer to recover contribution paid for the contract employees from the immediate employer. The learned Counsel for the 1 st respondent has invited this Court attention to the judgment of Hon'ble Bombay High Court in Bhartiya Kamgar Sena *Vs.* Udhe India Ltd. reported in CDJ 2007 BHC 2170 held that "the entire payment of salary was made by the contractor. The workmen have agreed that salary slips were never issued by the Company. From 1992, the provident fund contribution is paid by the Contractor. It is no doubt true that up to year 1992, the company was paying the contribution. However, as rightly pointed out by Mr. Cama, the learned Senior Counsel appearing on behalf of the Company that primary responsibility and liability of making this contribution is on the registered employer under the provisions of section 40 of the ESI Act and regulation 30 of the P.F. Scheme, 1952. Therefore, the emphasis which was led by Mr. Bhat, the learned Counsel appearing on behalf of the Union, on payment of these contribution by the Company up to 1992 does not change the relationship between the Contractor and the workmen. Mr. Bhat had strenuously urged that the firm was registered with the P.F. Authorities only in 1992. That does not, in my view, change the fact that the

liability, in any case, till the registration of the firm by the Contractor was on the Company. This being a statutory liability, it was not open for the Company to shirk from this statutory responsibility and, therefore, it had no other alternative, but, to make the said payment. This factor, in my view, therefore, could not be a circumstance which could be taken against the company".

17. The learned Counsel for the 1st respondent submit that there exists a legally valid agreement between the 1st respondent and the 2nd respondent for supply of manpower which is evident from Ex.R22. Ex.R2 and R20 are letters of addition to the earlier agreement, dated 26-06-2001 for providing pantry assistant, *etc*. The 1st respondent has got Certificate of Registration given to the erstwhile respondent management for engaging contract workers. The learned Counsel for the 1st respondent further submit that Ex.R5 is the muster roll maintained by the 2nd respondent for the month of April 2013 to November 2013 where we can find the name of the petitioner Krishnaveni. In Ex.R6 wage register maintained by the 2nd respondent for the period from April 2013 to November 2013 the workers including the petitioner were signed in the wage register maintained by the 2nd respondent. Ex.R7, R8 and R9 related to the allocation of separate EPF code for the employees of the 2nd respondent and the Ex.R8 is the Challan for the payment of EPF contribution to his workers. Ex.R9 is the statement of accounts for the deposit of EPF contribution by the 2nd respondent to the credit of the petitioner. The learned Counsel for the 1st respondent submit that Ex.R7 to R9 categorically established that the 2nd respondent who is the registered contractor has subsequently got separate EPF code. Moreover, the 2nd respondent who has participated in the Conciliation proceedings has clinching by admitted that the petitioner is his employee. The learned Counsel for the 1st respondent further submit that the there is no plea in the claim petition that the contract between the 1st and 2nd respondent is sham and nominal which are credit with a view to defraud the interest of the petitioner. In this respect, the learned Counsel for the respondent has invited this Court attention to the judgment of the Hon'ble Apex Court in Steel Authority of India Limited *vs*. Union of India and others reported in CDJ 2006 SC 797 held that "it is not disputed before us that the matter relating to abolition of contract labour being governed by the provisions of the 1970 Act, the Industrial Court will have no jurisdiction in relation thereto. It is also not in dispute that the decision of the Constitution Bench of this Court in Steel Authority of India Ltd. (supra) governs the field".

18. The Hon'ble Apex Court in Bharat Heavy Electricals Ltd. *Vs*. Mahendra Prasad Jakhmola and others reported in CDJ 2019 SC 697 held that "therefore, this Hon'ble Court's power to decide as to whether the contract for supply of manpower between the management and contractor is sham or not is unquestionable. However, for such an exercise to be carried out, the worker must first accept this he was engaged through a contractor, but, such contract is sham, when the plea of the worker is that he is direct employment of management, there is no scope for the Industrial Tribunal to decide upon the question of genuineness of the Contract".

19. The evidence of RW.1 would go to show that the contract between the 1st respondent and 2nd respondent is genuine one. Ex.R22 the agreement for supply of manpower and Ex.R2 the letter understood to the 2nd respondent by the 1st respondent for supply of pantry as is stant will clearly establish that the contract between 1st respondent and 2nd respondent for the supply of manpower not only for loading and unloading but, also pantry and allied activities. The learned Counsel for the 1st respondent invited this Court attention of that the 1st respondent has exercised confirm of supervision over the work of the petitioner is the real test for conforming whether the petitioner is the worker under the 1st respondent management in Bharath Heavy Electricals Limited *vs*. Mahendra Prasad Jakhmola and Others reported in CDJ 2019 SC 697 held that "we, now, come to some of the judgments cited by Shri Sudhir Chandra and Ms. Asha Jain. In General Manager, (OSD), Bengal Nagpur Cotton Mills, Rajnandgaon *vs*. Bharat Lala and Another' [2011 (2) S.C.T. 198: 2011 (1) SCC 635], it was held that the well recognised tests to find out whether contract labourers are direct employees are as follows: 1. It is now well settled that if, the industrial adjudicator finds that the contract between the principal employer and the contractor to be a sham, nominal or merely a camouflage to deny employment benefits to the employee and that there was in fact a direct employment, it can grant relief to the employee by holding that the workman is the direct employee of the principal employer. Two of the well-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. In this case, the Industrial Court answered both questions in the affirmative and as a consequence held that the first respondent is a direct employee of the appellant.

The expression 'control and supervision' were further explained with reference to an earlier judgment of this Court as follows:

The expression 'control and supervision' in the context of contract labour was explained by this Court in International Airport Authority of India *vs.* International Air Cargo Workers' Union thus: (SCCP. 388, paras 38-39) "38 ... if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but, that would not make the worker a direct employee of the principal employer, if, the salary is paid by a contractor, if the right to regulate the employment is with the contractor and the ultimate supervision and control lies with the contractor".

20. The Hon'ble Punjab and Haryana High Court in Cement Corporation of India *vs.* Presiding Officer reported in 2010 LLR 704 held that "In this case, the Labour Court had assumed the character of the contract agreement with respondent No. 2 and 3 as a sham one too lightly without actually examining whether the management had an oblique motive or a deliberate intent to create a fraud on the statute or the obligations created under any of the provisions of the Industrial Disputes Act. A sham transaction is indeed a specie of fraud. Such fraudulent intent cannot be inferred only by the fact that the management retained some degree of control over the workmen under the contract basis. After all, the contract labour had not been working outside the factory. They were within the factory and inevitably there has to be some manner of control and hamogenous approach of the management at least, in so far as extending minor privileges like health and hygiene. If, the management had provided shoes or uniform or if, they had provided medical facilities, it should be rather seen as appropriate acts of the management without making needless distinctions even for benefits that ought to have been extended on a humane principle between workmen directly employed and workmen employed through contractors. In this case, acts of munificence and graceful acts of the management have been wrongly characterized as instances of sham and fraudulent behaviour. In National Thermal Power corporation & others *vs.* Badri Singh Thakur & others (2008) 9 SCC 377, the Hon'ble Supreme Court was considering the claim of workmen seeking absorption in NTPC, when the corporation had been registered under section 7 of the Contract Labour (Regulation and Abolition) Act and the contractor had also been licensed under the Act. The Court held the CLRA Act governed the field in view of the supremacy of the Central Act over MP Industrial Relations Act and held so long as there was no prohibition under section 10 of the Act for engaging contract labour, there was no question of regularising the services of the labour directly under the management. The issue is akin to considering whether the contract labour could be seen as directly engaged by the management. The Labour Courts's Award, in so far as it finds that the contract was ham and finding that all the workmen were to be treated as directly engaged by the management is erroneous and accordingly set aside".

21. The learned Counsel for the 1st respondent further submit that in respect of employer and employee relationship the Courts have been taken consistent view. The learned Counsel for the 1st respondent has invited this Court attention to the judgment of the Hon'ble High Court of Bombay in Smt. Chandrakala, w/o. Lalaji Misal and Others *vs.* Marathwada Medical Research and Rural Development Institution Ltd. reported in CDJ 2015 BHC 2336 held that "For the sake of clarity, it needs to be noted that the CLRA Act, 1970 and the Rules thereunder are aimed at regulating the deployment of contract labourers. If, the contract labourers are performing work similar to the work performed by the regular employees, their wage structure has to be similar. The contractor has to pay wages directly to the contract labourer, but, in the presence of a representative of the Principal Employer. The contractor has to raise a bill for service charges and the wages of the labourers are paid from such payments made by the Principal Employer to the contractor. If, the contractor does not deposit the PF contibutions, the Principal Employer is mandatet to pay the same issuance of identity cards/admit cards would not mean that a direct relationship is established between the labourers and the Principal Employer. Abolition of contract labour system by the competent authority does not lead to the automatic absorption of the contract labourers in the service of the Principal Employer.

As such, merely because there was supervision by the representative of the Principal Employer on the work activities of the contract labourers would not tantamount to the laborers being the employees of the Principal Employer".

22. The learned Counsel for the 1st respondent further submit that the contract between the 1st respondent and 2nd respondent for house keeping and pantry service is quite legal and the Registration Certificate granted to the 1st respondent for engagement of 2nd respondent as a contractor does not specifies

house keeping and the pantry services is one of the areas whether contractor can be supply by the 2nd respondent. It would not entitle the petitioner from claiming direct employment status under the 1st respondent.

23. In this respect, the learned Counsel for the 1st respondent has invited the Court attention to the judgment of Hon'ble Apex Court in Municipal Corporation of Greater Mumbai *vs.* K.V. Shramik Sangh and Others reported in CDJ 2002 SC 309 held that" it appears to us that the High Court proceeded to conclude that the labour contract was not genuine and the workers of the Union were employees of the Corporation because the Corporation and the contractors did not comply with the provisions of the CLRA Act. Conclusion that the contract was sham or it was only camouflage cannot be arrived at as a matter of law for non-compliance of the provisions of the CLRA Act, but, a finding must be recorded based on evidence particularly when disputed by an Industrial Adjudicator as laid down in various decisions of this Court including the Constitution Bench judgment in SAIL.

> The material referred to relates to the complaints of the Union, recommendations of the Labour Commissioner, Labour Minister and the Labour Contract Advisory Board in regard to abolition of contract labour under Section 10 of CLRA Act, but, that material could not be a foundation or basis to say that the labour contract was sham, camouflage or a devised to deny the statutory benefits to the workers".

24. The learned Counsel for the 1st respondent has also invited this Court attention to the Judgment of Hon'ble Punjab and Haryana Court in Food Corporation of India *vs.* Presiding Officer reported in CDJ 2007 PHC 499 held that "Section 10 of the CLRA Act, then employment of the contract labour through the contractor is not prohibited. If, by engaging the contract labour and by prohibiting the services of the contract labour by the contractor to the principal employer, the provisions of Section 7 and 12 of the CLRA Act have been violated, the only consequences of those violations will be as envisaged under sections 23 and 25 of the CLRA Act and the contract labour engaged in violation of the provisions of Sections 7 and 12 of the CLRA Act cannot be deemed to be the employees of the principal employer 923. In view of the said legal position, there is no force in the contention of learned Counsel for the workmen that in view of the fact that the management Corporation was not having certificate of Registration under Section 7 of the CLRA Act and the labour contractor was not having any licence under Section 12 of the CLRA Act on the date when the workmen were employed, the workmen should be deemed to be the direct employees of the Management Corporation". The learned Counsel for the 1st respondent further submit that the petitioner having failed to establish the employer and employee relationship between the 1st respondent and the petitioner and having failed in proving the fact that the petitioner was directly employed by the 1st respondent, she is not entitled for any relief and pray for dismissal of the petition.

25. This Court has carefully considered the rival submission made by both side learned Counsel and the exhibits filed in respect of their contentions and also the written argument filed by both sides. The claim of the petitioner is that she was directly employed by the 1st respondent in the 1994 when the management of the 1st respondent company was run by erstwhile OBL company. The petitioner has also contended that she was assigned work in the administration section and also worked in the pantry section. In order to prove that she was directly appointed by the 1st respondent the petitioner has filed Ex.P1 ESI Certificate wherein the name of employer is mentioned as M/s. HNG India Limited, Villianur, wherein, the date of appointment of the petitioner is mentioned as 18-09-2004. In Ex.P2 which is the application for the acceptance of medical treatment the 1st respondent name is mentioned as name of the employer. The petitioner has also submitted Identity Card issued by the ESI Department on 09-12-2014 the petitioner has sought for certain information by way of RTI (Right to Information Act) to the ESI Department. Ex.P5, dated 06-01-2015 is the reply given by the ESI Corporation wherein, the ESI Corporation has given information that the 1st respondent has paid contribution from 10/2008 to 11/2013 to the petitioner. On the contrary the respondent stoutly denied that the petitioner was a direct employee under the 1st respondent and stoutly denied the employer employee relationship between the 1st respondent and the petitioner. Our Hon'ble Apex Court in CDJ 2010 SC 1161 held to well recognized test to find out whether contract labours are the direct employees of the principal employer, the first test is whether the principal employer pays the salary in respect of the contractor and the second test is whether the principal employer controls and supervised the work of the employee. In so far the first test is concerned the petitioner has not filed any appointment order given by the 1st respondent at the time of joining the company. Even though the petitioner has claim that she is working from 1994 with the 1st respondent management she has not filed any monthly salary slip issued by the 1st respondent.

But, on the respondent side they have filed Ex.R5 which is register of muster roll for April 2013 which was maintained by contractor and counter signed by the 1st respondent in which the name of the petitioner is found place. Ex.R6 is the register of wages maintained by Thiru Manohar the 2nd respondent for the period April 2013 in which the petitioner has signed for the receipt of wages. Ex.R6 categorically established that the petitioner has received salary only from the 2nd respondent. In respect of the second test the petitioner has not flied any documents that she was working under the direct control of supervision of the 1st respondent. Even though the petitioner has not examined any additional witness to prove the said fact.

26. It is well established principles of evidence that the burden of proving the fact lies on the party who asserts the same. In this case, it is the petitioner who plead that she was directly appointed by the 1st respondent and she is receiving the salary from the 1st respondent and her works are under the direct supervision of the 1st respondent. Hon'ble Alahabad High Court in Subodh Kumar *vs.* Presiding Officer Labour Court-II Meerut and another reported in CDJ 2012 ALL HC 071 held that "there cannot be any dispute to the well settled principle of law that in any proceedings the burden to prove a fact lies on the party which pleads the same and not on the party who denies it".

27. Our Hon'ble Apex Court in Kanpur Electricity Supply Company Ltd. *vs.* Shamim Mirza reported in (2009) 1 SCC 20 held "It is trite that the burden to prove that a claimant was in the employment of a particular management, primarily lies on the person who claims to be so but, the degree of proof, so required, varies from case to case. It is neither feasible nor advisable to lay down an abstract rule to determine the employer-employee relationship,. It is essentially a question of fact to be determined by having regard to the cumulative effect of the entire material placed before the adjudicatory forum by the claimant and the management".

The ratio of judgments laid down in the said judgment is of no benefit to the petitioner in the present case, as the burden of proving the fact of employment, *i.e.,* master-servant relationship lies upon him as he asserts the same in affirmation while the employer denied it..". The above precedents of our Hon'ble Apex Court and Alahabad High Court made it clear the burden of proving the relationship of master and servant relies upon the present who assert it particularly when the same was denied by the employer.

28. The learned Counsel for the petitioner in his vibrant argument submit that the 1st respondent has paid ESI contribution and EPF contribution to the petitioner. Without master and servant relationship the 1st respondent could not have deposit contribution of ESI and EPF in respect of the petitioner. In this respect, the attention of the Court is invited to section 2(9) of ESI Act and also section 40 and 41 of the ESI Act wherein the ESI mandate that the principal employer shall pay in respect of every employee whether timely employed by him or through immediate employer. Section 41 of the ESI Act empowers the principal employer to recover the contribution paid for contract employees from the immediate employer.

29. Since, the 2nd respondent does not have a separate code under ESI Act. The 1st respondent management has paid the same and recovered from the 2nd respondent since the ESI Act is a beneficial legislation. It direct the principal employer to pay the contribution in respect of the employee working under the management whether timely or through the contractor. Ex.R7 to R9 makes it clear that the 2nd respondent has alloted separate code for EPF for the employees under him. Ex.P9 is the statement of account for deposit of EPF contribution by the 2nd respondent in respect of the petitioner. Time and action Our Hon'ble Apex Court and our Hon'ble High Court repeatedly held in Catena of decision that payment of ESI and EPF contribution are the statutory liabilities of the principal employer and the payment of EPF and ESI contribution alone does not make a workmen to be directly employed by the principal employer.

30. The learned Counsel for the petitioner contended that Ex.R22 the agreement entered between the 1st respondent and the 2nd respondent, dated 01-10-2011 is created for the purpose of defrauding the legitimate interest of the contract workers. The learned Counsel for the petitioner further submit that what are all the duties allocated to the contract labourers was stated in Ex.R22. On the perusal of Ex.R22 there is no such terms and conditions enlisted. In orders Ex.R23 is concerned the contract labours are engaged in loading of finished goods and unloading of raw materials. In the evidence of RW.1 he has clearly admitted that they have not intimated the factory inspected that the 2nd respondent was engaged for supply of manpower for house keeping and pantry section also. Moreover, during transfer of management the 1st respondent has got the list of contractors and list of contract workers, but, the same was not filed before this Court for the reason well known to the 1st respondent for which adverse inference has to be taken against the 1st respondent. On the

respondent side, they have marked Ex.R2 and Ex.R20 which are the letter of addition of contract agreement, dated 26-06-2001 for Pantry Assistant, Guest House made and Guest House Assistant. On the side of the 1st respondent it was contended that the petitioner having failed to plead that the contract between the 1st and 2nd respondent were sham and nominal cannot question the validity of the agreements letter. In this respect, Hon'ble Punjab and Haryana High Court in CDJ (2007) PHC 499 held "In my opinion, the aforesaid observations do not advance the case of the workmen. If, an industrial establishment is permitted to employ contract labourer through a contractor, engaging of such contract labour must be *bona fide*. Incase, it is found that engaging of contract labour was not *bona fide* and it was a mere camouflage then in those cases, the contract labour employed by the principal employer is to be treated as employee of the principal employer, who can be directed to regularise service of the contract labour in the concerned establishment. This is not the case of the workmen here. It is not the case of the workmen either in the pleading or during the course of arguments that their engagement through contract labour was not *bona fide* and it was a mere camouflage. Rather their case is that they were directly employed by the Management Corporation. Therefore, no benefit can be given to the workmen on the basis of the aforesaid observations made by the Supreme Court.."

It is thus clear that unless the petitioner admits that he was engaged through a contractor, which was sham and bogus, there cannot be an adjudication on the genuineness and *bona fides* of the said contract".

31. The learned Counsel for the 1st respondent contended that since, the 2nd respondent did not have necessary license for house keeping and supply of manpower to pantry section. The petitioner must be deemed to be a direct employee of the 1st respondent is not all tenable. As per Ex.R21 the 2nd respondent is authorised to provide contract labourers only for loading and unloading at the initial stage, but, the same was subsequently modified under Ex.R3 as loading of finished goods and unloading of raw materials. The engagement of the service of the contract who does not have Registration Certificate for house keeping and pantry service is only a violation of section 23 of the Contract Labour Regulation and Abolition Act and it does not confer any right upon of the petitioner to claim direct employee status.

32. From the aforestated analysis, this Court is of the considered opinion that the petitioner was employed in the 1st respondent management in pantry section. The petitioner has not concretely established the employer employee relationship between the 1st respondent and the petitioner. The payment of EPF and ESI contribution were made by the 1st respondent, but, the same would not confer any status on the petitioner that she was directly employed under the 1st respondent. The 2nd respondent who is the contractor has admitted in his counter that due the contractual obligation with the 1st respondent, the 2nd respondent has engaged the petitioner as contract worker. The 2nd respondent further submitted that the petitioner Krishnaveni was worked under the respondent till November 2013. The 2nd respondent has paid the wages to the petitioner and also remitted her monthly PF contribution till her last working day. The 2nd respondent further submit that the petitioner was engaged by the 2nd respondent and her service conditions were under the control of the 2nd respondent only. From the averments made in the counter, the 2nd respondent completely admitted that the petitioner was engaged by him in order to fulfill the contractual obligation with the 1st respondent. From the above, it is clear that the petitioner was all along worked in the 1st respondent company and she was engaged as a contract labour by the 2nd respondent.

33. Our Hon'ble Apex Court has considered the Appalling and exploitative nature of the contract labours in Vacuum Refinery Company *vs.* Their workman (1959) II LLJ 435 Bombay workmen observed that the contract labour should not be employed where:

"(a) the work is perennial and must go on from day to day,

(b) the work is incidentally to and necessary for the work of the factory,

(c) the work is sufficient to employee considerable number of whole time workmen.

(d) the work is being done in must concerns through regular workmen". From the evidence of PW.1 it came to light that she was employed during the year 1994 with erstwhile management of OBL and continued to be a worker even after the management was taken over by the respondent company. The petitioner has not proved the employer and employee relationship between the 1st respondent, but, one cannot denied that the 1st respondent is the principal employer for all practicable purposes. The contract labour system ensure that the workmen were paid much lower wages than that of what they are entitled and direct employment. From the system of contract Labour ultimately leads to the exploitation of the labour clause. On considering the nature of work appointed by the petitioner it is perennial in nature

and the long period of the petitioner would throw light that the requirement for employment of the petitioner was continued for several years. However, without employing her as a permanent employee all along kept her as contract labour is certainly not in accordance with established principles of law.

34. The petitioner was not allowed entry into the respondent management in which she has worked for several years is really a pitiable state of affairs and always there exists lack of job security to the contract workers. It is the Judiciary to uphold the concept of social justice and right to live with dignity as enshrined under Article 21 of the Constitution. It is submitted by the petitioner side that she was a widow and suffering for her livelihood and lives in penury.

35. The 1st respondent being a principal employer having utilized the hard labour of the petitioner through 2nd respondent for several years cannot simply stated that the 1st respondent is nothing to do with non-employment of the petitioner. Being the principal employer the 1st respondent is duty bound to verify whether the contract employees are properly paid salary and the conditions of the services are properly maintained by the contractor. The petitioner is without any employment from the year 2013. The 1st respondent having engaged the petitioner through 2nd respondent, the 1st respondent is equally liable to redress the wrong committed by the contractor who is the agent of the 1st respondent for the purpose of engaging the labourers. This Court feels that the petitioner would have uffered a lot due to her sudden non employment for which she has to be provided with just compensation. At the distance of time from 2013, this Court is not inclined to pass any orders in respect of her further employment. It is sufficient to provide her with compensation. There is no straight jacket formulate in awarding just compensation. This Court considering the overall circumstances and the present day living conditions and cost of living is inclined to fix quantum of compensation at ₹ 2,00,000 only. Out of ₹ 2,00,000 compensation amount the 1st respondent being the principal employer is directed to pay a sum of ₹ 1,00,000 and the 2nd respondent being the contractor who has engaged the services of the petitioner is required to pay a sum of ₹ 1,00,000 as compensation. The petitioner is not entitled for any other reliefs.

36. In the result, the petition is partly allowed. The petitioner is entitled for compensation of ₹ 2,00,000 (Rupees two lakhs only). The 1st respondent and 2nd respondent are directed to pay sum of ₹ 1,00,000 (Rupees one lakh only) each to the petitioner as compensation within a period of eight weeks from the date of this award. No costs.

Dictated to Stenographer, transcribed by him, corrected and pronounced by me in the open Court on this the 29th day of December 2021.

R. Bharanidharan,
Presiding Officer,
Industrial Tribunal-*cum*-
Labour Court, Puducherry.

List of petitioner's witness:

PW.1	—	20-06-2017	Krishnaveni

List of petitioner's exhibits:

Ex.P1	—		Temporary Identity Certificate issued by the Employees State Insurance Corporation showing the petitioner as Employee of the 1st Respondent Company.
Ex.P2	—	08-03-2013	Certificate of re-employment issued by the Employees State Insurance Corporation and counter signed.
Ex.P3	—		Identity Card of the petitioner issued by the Employees State Insurance Corporation.
Ex.P4	—	09-12-2014	Application for seeking information under RTI Act, 2005 submitted by the petitioner to the Employees State Insurance Corporation.
Ex.P5	—	06/09-01-2015	Reply issued by Employees State Insurance Corporation to the petitioner.
Ex.P6	—	28-05-2014	Reply submitted by the 1st respondent to the Labour Officer (Conciliation).
Ex.P7	—	14-11-2014	Failure Report submitted by the Labour Officer (Conciliation) to the Secretary to Government (Labour), Puducherry.

List of respondent's witnesses:

RW.1	—	05-12-2017	P. Srinivasan
RW.2	—	09-08-2019	S. Padmanabhan Iyer

List of respondent's exhibits:

Ex.Rl	—	02-12-2013	Photocopy of the letter with documents submitted by the petitioner to the Labour Commissioner, Labour Department, Puducherry.
Ex.R2	—	07-04-2005	Photocopy of letter by 1st respondent to 2nd respondent regarding amendment to agreement.
Ex.R3	—	27-11-2006	Photocopy of Inter Office memo of 1st respondent.
Ex.R4	—	07-07-2008	Photocopy of License issued by Inspector of Factories Government of Puducherry to 2nd respondent.
Ex.R5	—	April 2013 to November 2013	Photocopy of Muster Roll of 2nd respondent.
Ex.R6	—	April 2013 to November 2013	Photocopy of Wage Register of 2nd respondent.
Ex.R7	—	14-02-2006	Photocopy of Letter by Assistant Provident Fund Commissioner to 2nd respondent.
Ex.R8	—	02-07-2013	Extract of Electronic Challan-*cum*-Return of 2nd Respondent for the wage month of June 2013.
Ex.R9	—	21-04-2014	Photocopy of Statement of Accounts of Petitioner issued by EPF Organization.
Ex.R10	—	21-01-2014	Photocopy of Letter by Inspector of Factories to 1st respondent with Annexure of petition.
Ex.R11	—	24-01-2014	Photocopy of reply by 1st respondent to Inspector of Factories.
Ex.R12	—	03-01-2014	Photocopy of reply by 1st respondent to Labour Officer (Conciliation).
Ex.R13	—	11-06-2014	Photocopy of Letter by 1st respondent to Labour Officer (Conciliation).
Ex.R14	—	11-06-2014	Photocopy of reply by 2nd respondent to Labour Officer (Conciliation).
Ex.R15	—	14-02-2014	Photocopy of Notice issued to 1st respondent by the Controlling Authority under the Payments of Gratuity Act.
Ex.R16	—	14-11-2014	Photocopy of report of Failure issued by the Conciliation Officer.
Ex.R17	—	02-02-2015	Photocopy of Notification issued by the Labour Department, Puducherry.
Ex.R18	—	15-09-2006	Photocopy of 12(3) Settlement between 1st respondent and its Permanent Workmen.
Ex.R19	—	16-06-2011	Photocopy of 12(3) Settlement between 1st respondent and its Permanent Workmen.
Ex.R20	—	10-11-2006	Copy of letter sent by the 1st respondent office to the Labour Inspector, Puducherry.
Ex.R21	—	31-08-2007	Copy of the letter along with application for amendment and annexure submitted by 1st respondent before the Registering Authority under the Contract Labour (R&A) Act 1970.
Ex.R22	—	01-10-2011	Copy of Agreement between the 1st respondent and 2nd respondent for supply of contract workers.
Ex.R23	—	24-09-2012	Copy of amendment carried out in Registration Certificate *vide* No. 3/90/CL/Registration, dated 26-03-1990 with respect to increase and decrease of number of contract workers in 1st respondent company.

R. Bharanidharan,
Presiding Officer,
Industrial Tribunal-*cum*-
Labour Court, Puducherry.