IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
Mr. Justice Iftikhar Muhammad Chaudhry, CJ
Mr. Justice Jawwad S. Khawaja
Mr. Justice Ijaz Ahmed Chaudhry

Civil Appeals Nos. 83 and 84 of 2006.
(Against the judgment dated 16.3.2005 passed by the High Court of Sindh, Karachi in Const. P. D-739 of 1993 and D-754 of 1996)

Fauji Fertilizer Company Ltd. Thr. its Factory Manager
... Appellants

VERSUS

National Industrial Relations Commission thr. Chairman etc.
... Respondents

For the appellants: Mr. Khalid Anwar, Sr. ASC
Raja Abdul Ghafoor, AOR
assisted by Barrister Muhammad Anas Makhdoom Adv.

For the respondents: Mr. Abid Hassan Minto, Sr. ASC
Ch. Akhtar Ali, AOR
Respondent No.2 in CA 83/06)
Respondent No.3-37, 39-40, 42-114 in CA 84/06

Other respondents: Ex-parte.

Date of hearing : 16.5.2013.

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JUDGMENT

Iftikhar Muhammad Chaudhry, CJ. These appeals by the leave of the Court have been filed against the common judgment dated 16.03.2005 passed by the High Court of Sindh at Karachi in Constitution Petitions No. D-739/1993 and D-754/1996.

2. The facts necessary for disposal of the listed appeals are that appellant in the titled appeals, namely, Fauji Fertilizer Company Ltd. (successor of M/s Pak Saudi Fertilizer Company Ltd.) [hereinafter referred to as “the company”], is a company incorporated under the Companies Ordinance, 1984, and is engaged in the manufacturing and marketing of Urea Fertilizer. The company used to enter into contracts with separate independent contractors for the execution of work of bagging urea and connected activities like insertion, filling and stitching of bags as well as their loading. For separate periods M/s Shahbaz & Co.; M/s M.B.K. Jalbani (Pvt) Ltd.; M/s Workman Associates; M/s Mohammad Hussain & Co.; Abdul Majeed & Co. and M/s Technical Associates were engaged by the company. As per terms and conditions of the contracts, the contractors were to engage the workers and provide their services to the company. The workers’ wages were paid by the contractors. However, the contractors were remunerated on the basis of volume of urea handled. During the period from 1984 to 1986, when M/s Shahbaz & Co. was the bagging and loading contractor, the employees of the contractor formed a union under the name and style of ‘Pak Saudi Fertilizers Ltd. Bagging and Loading Contractors *Mazdoor* Union’ [hereinafter referred to as “contractor’s union”], which was also declared a CBA by the Registrar of Trade Unions, Hyderabad. Previously, the union had used the office of ‘Pak Saudi Fertilizer Employees’ Union’ [hereinafter referred to as “employees’ union”] for affecting the settlement with regard to the terms and conditions of services of workmen employed by M/s Shahbaz & Co. After the registration of contractor’s union as CBA, the contractor entered into fresh settlement with it on 09.05.1985. In the

year 1989, the contractor's union served the charter of demand on the management of the company and M/s M.B.K. Jalbani, the then contractor. However, the company approached the National Industrial Relations Commission [NIRC] by means of proceedings under section 22A(8)(g) of the Industrial Relations Ordinance, 1969 [hereinafter referred to as "IRO 1969"] along with an application under regulation 32(2C) of the National Industrial Relations Commission (Procedure & Functions) Regulations, 1973 [hereinafter referred to as "the regulation 1973"]. Thereafter, a settlement was affected between M/s M.B.K. Jalbani and the contractor's union and the grievances of workers were redressed. Later on, M/s Workman Associates, the then contractor, also entered in to a settlement with the contractor's union vide memorandum of settlement dated 07.10.1991. On 08.03.1992, the contract was awarded to M/s Workman & Co., which entered in to a settlement with the contractor's union on 09.03.1992. On 15.03.1992, the contractor's union filed proceedings before NIRC against M/s Workman & Co as well as the company, alleging therein that the company was not justified in awarding the contract to one Muhammad Aslam, the Managing Partner of M/s Workman Associates; that the lock-out affected in relation to 112 workers (Respondents No. 3 to 114 in Constitution Petition No. D-739/1993) employed by the Contractor were illegal; and that settlement dated 9.3.1992, whereby the wages/ benefits of the workers were reduced, was an attempt to circumvent the earlier settlement dated 7.10.1991, and was as such illegal. The learned Member NIRC, Karachi *vide* the order dated 15.03.1992, *inter alia*, directed that the payments of wages continued to be made as per settlements dated 7.10.1991 and to lift the lock-out

of workers, if any. Initially, the said petition was filed against the company and M/s Workman Associates, however, M/s Workman and Company was also impleaded by means of an application under Order 1 Rule 10, CPC. In their reply, the company denied the existence of a relationship of employer and employee between the company and the members of the contractor's union on the ground that the members of the contractor's union were the employee of the contractor and that there was no lock-out. Ultimately the Member NIRC, Karachi *vide* order dated 10.04.1992 concluded that the management of the company was not responsible for making payments of wages to the workers/members of the contractor's union but rather, M/s Workman and Co. were liable to make such payments in accordance with settlement dated 09.03.1992 and that, *prima facie*, there was no proof of coercion in execution of the said settlement. Being aggrieved from the said order, the contractor's union filed an appeal before the full bench of NIRC, Islamabad, wherein the company raised an objection with regards to the *locus standi* of the union to file the appeal, being the CBA in the establishment of M/s Shahbaz and Co.; it also objected that there was no relationship of employer and employee between the members of contractor's union and the company; and that the order appealed against was an interim order. It was further alleged that as per the contract executed between the company and the contractors, the payment to the contractors would be made on the basis of per ton of bagging and loading of the urea and connected activities. However, the workers started resorting to slow down tactics in work due to which the contractor was not in a position to make fixed payments of wages to the workers, who also filed a case under Section 22A(8)(g) of

IRO 1969 before the NIRC Bench, Karachi with a prayer to direct the members of the contractor's union to call off their slowdown in work and restore normalcy to the production process. The Commission, *vide* order dated 30.04.1992, directed the workers to call off their slowdown. Against the said order the contractor's union filed an appeal before the full bench of NIRC, wherein, M/s Workman and Co. claimed that the workers were in fact the employees of the company and not of the contractor. The learned full bench of NIRC, *vide* order dated 03.03.1993, declared that the members of the contractor's union were employees of the company and directed the management of the company to make payments to the workers. The case was, however, remanded to the single bench of NIRC at Karachi for determining the issue pertaining to the alleged lock-out of 112 workers. The company being aggrieved and dissatisfied with the said judgment challenged the same before the High Court of Sindh at Karachi by means of Constitution Petition No. D-739 of 1993 wherein the learned High Court, vide order dated 18.03.1993, passed a *status quo* order.

3. In the mean time, members of the contractor's union (respondents No. 3 to 114) filed separate applications under section 25A of the IRO 1969 before the Labour Court VII, Sukkur, which were registered as applications No. 36/92 to 147/92. The grievance of the applicants/workers was that they were working in the factory premises of the company, involved in the manufacturing of urea and that their job was to clean the machines and perform other manual work, which was of a permanent nature, and that the entire work was done by 362 workers, who were frisked/searched by the *chowkidaars* of the company, as such, for all intents and purposes they were the

employees of the company. It was further alleged by the workers that they were locked-out and that some of the office bearers of the union were kidnapped and their signatures were forcibly obtained on the contract/settlement dated 09.03.1992. The Labour Court, after recording of evidence and hearing the parties, allowed all the grievance applications *vide* its decision dated 24.04.1996. The company being aggrieved of the said order, preferred appeals under section 37(3) of IRO 1969 before the Sindh Labour Appellate Tribunal, Karachi, which were dismissed *in limine* by means of a common order, dated 16.05.1996. The company assailed the said order before the High Court of Sindh, Karachi, by means of Constitution Petition No.D-754/1996. Both the petitions, namely, Constitution Petition No.D-754/1996 and Constitution Petition No.D-739/1993 were heard together by the learned High Court and by means of impugned judgment dated 16.03.2005, the CP No.D-754/1996 was dismissed and accordingly the CP No.D-739/1993 stood dismissed as having become infructuous. The company assailed the said judgment before this Court by means of Civil Petitions for leave to appeal No.2103 and 2104 of 2005 which were converted into Civil Appeals No. 83 and 84 of 2006 as leave was granted on 26.01.2006.

4. Mr. Khalid Anwar, learned Sr. ASC submitted on behalf of M/s Fauji Fertilizer Company Ltd. that the NIRC at the request of respondent union, *vide* interim order dated 14.03.1992, directed the company to continue paying the wages to the workers but the same was vacated on 30.04.1992, on the ground that, *prima facie,* the contractor was liable to make payments and not the company. Being aggrieved from the said order, the contractors' union filed appeal

before the full Bench of NIRC, which decided on 3.3.1993 declaring that the members of the contractors' union were employees of the company, however, the case was remanded to the Single Bench. In the meanwhile, the workers/members of the contractor's union made a switch in strategy and on 19.07.1992, approached the Labour Court through applications under Section 25A of IRO 1969 on the identical facts and the same cause of action. According to him, although the complaints were made by individual workers that all applications were filed through one Abdul Haq, the then Secretary General of contractor's union. Thus, it is obvious that the contractor's union played a key role in the same.

5. The learned counsel further submitted that under section 22A(11) and (12) of IRO 1969, once a matter is pending before the NIRC, the Labour Court has no jurisdiction in the said matter. According to him, the Labour Court in order dated 24.04.1996, pointed out that the workers had approached the NIRC and therefore, it should have refrained from assuming jurisdiction in the matter. There was no evidence to establish that a government owned factory would enter into a sham contract merely to deny workers their legitimate dues under the Labour Laws.

6. Mr. Abid Hassan Minto, Sr. ASC, appearing on behalf of respondents No.3 to 114 submitted that the application under section 22A(8)(g) read with section 15 of IRO 1969 and regulation 32(2C) of the Regulation 1973, was filed for the enforcement of its rights granted under sections 26(1) & (3) and 28 of the IRO 1969, as the company resorted to an illegal lock-out with *mala fide* intention to compel the office bearers of the contractor's union to sign a settlement

for reduction of wages and benefits available to the workers. The contractor's union did not espouse the cause of removal from employment in terms of Standing Order No. 12(3) of the SO Ordinance, 1968. On the other hand, the respondents No. 3 to 114 were removed orally by the company without assigning any reason, as required under the S.O. No.12(3) *ibid*, as such, they approached the Labour Court by means of grievance applications under section 25A of the IRO 1969 for reinstatement with full back benefits. According to the learned counsel, the civil proceedings before the NIRC filed by the contractor's union was for the enforcement of its own rights, whereas, the grievance applications filed by the individual workers were for their reinstatement. Therefore, the Labour Court rightly assumed jurisdiction and the learned High Court confirmed the same.

7. In this regard, it is to be noted that the proceedings filed before the NIRC were initiated by the contractor's union against M/s Workman & Co as well as the company alleging therein that the company was not justified in awarding the contract to one Muhammad Aslam, the Managing Partner of M/s Workman Associates. The illegal lock-out by the company to the effect of 112 workers was also challenged through the same petition before the NIRC. Whereas the grievance applications under section 25A of the IRO 1969 were filed against the company with the following prayer:-

> "It is, therefore, prayed that this Honourable Court may be pleased to direct the respondents to reinstate the applicants with full back benefits with cost of this application."

The argument of learned counsel for the appellant that applications filed before NIRC as well as before the Labour Court are identical, therefore, the Labour Court could have not entertained the petition, does not appeal to mind. Though the facts of both the proceedings were similar due to having arisen from common circumstances but both the proceedings were initiated by separate entities i.e. the contractor's union and the individual workers; and the prayers made in both the proceedings were absolutely different as mentioned above. Thus, it is held that both the proceedings were independent and the Labour Court had rightly assumed the jurisdiction in terms of section 25A of the IRO 1969 to redress the grievance of the workers.

8. Learned counsel for the appellants next submitted that the complaint before the NIRC was filed by members of the contractor's union who were employees of the contractor and not of the company and therefore cannot claim to be employees of the company. The grievance of the workers in the said complaint was regarding the alleged lock-outs of 192 members, who were subsequently reduced to 112. Although vague allegations were made, it was never specifically claimed that they were the employees of the company. Reference in this behalf has been made to the cases of *Muhammad Sharif v. Punjab Labour appellate Tribunal* (Civil Appeal No.39 of 1977), *Souvenir Tobacco Co. Ltd. v. Najammuddin* (PLD 1977 Karachi 250), *Mian Munir Ahmad v. The State* (1985 SCMR 257), *Farid Ahmad v. Pakistan Burmah Shell Ltd.* (1987 SCMR 1463), *Nasir Jamal v. Pak Suzuki Motor Company Ltd.* (2000 PLC 52), *M/s Hinopak Motors Ltd. v. Chairman Labour Appellate Tribunal* (2000 PLC 89) and *Steel Authority Of India Ltd. v. Union of India* (AIR 2001 SC 3527).

9. The learned counsel next submitted that before the Labour Appellate Tribunal, the company specifically raised the objection that under the Labour Laws there can be only one CBA in one establishment. As the company has its own CBA, the CBA of the contractor cannot claim its members to be employees of the company.

10. According to the learned counsel in the definition of employer provided in section 2(viii) of IRO 1969, there are three ingredients: firstly, the employer; secondly, the workman; and thirdly, that there must be a contract of employment. Learned counsel submitted that the phrase 'directly or through a contractor' provided in the definition of worker in section 2(xxviii) means not a contractor's employee but the employees of an employer whether they are directly recruited or recruited through a contractor. Unless this interpretation is given, the definition of employer becomes meaningless. The concept of a contractor is separately established, in terms of which, if the contractor is carrying on work at some factory then those factory premises are also deemed to be his premises. Merely because the contractor's workmen are working in the premises of the company, does not convert them into the workmen of the company as per the definition of "industrial establishment" mentioned in section 2(f)(iv) of the Industrial and Commercial Employment (Standing Orders) Ordinance 1968 [hereinafter referred to as "the SO Ordinance, 1968"].

11. Learned counsel for the respondent-workers submitted that the workers were directly involved with the affairs of the company, as they used to stitching, filling and loading of urea bags, cleanings of machines, insertion of polythene into bags, etc., which are

the jobs connected with the manufacturing process as defined under section 2(g) of the Factories Act, 1934. The land, building, machines, raw materials, finished goods, etc., were the properties owned, managed, controlled by the company through its occupiers/manager. The hire and fire authority including settlement of wages and benefits of the workers rest with the company and the so called contractors were engaged for their personal gain. The work of the respondent workers was supervised, controlled and looked after by the incharge of bagging and loading department and his subordinate staff/supervisors. He further contended that the contractors were changed from time to time but the workers including the respondents No.3-114 continued in the employment of the company. The jobs done by them namely cleaning of machines floor etc. were also connected with the manufacturing process within the premises of the factory. Therefore, the workers were the employees of the company. He relied upon the case of *M/s Euro Ceramics Ltd. v. Registrar of Trade Union* (1996 PLC 45), *M/s Dawood Cotton Mills v. Sindh Labour Appellate Tribunal* (SBLR 2004 Sindh 614), *M/s Basti Sugar Mills v. Ram Ujagar* (AIR 1964 SC 355) and *Hussainbhai Calicut v. Alath Factory* (AIR 1978 SC 1410).

12. In the first instance it would be appropriate to look at the definitions of “employer”, “worker” and “establishment” provided in various statutes. As per the definition in section 2(viii) of IRO 1969, “*employer*” *in relation to an establishment, means any person or body of persons, whether incorporated or not, who or which employs workmen in the establishment under a contract of employment*. This definition of employer has to be read in juxtaposition with the

definition of “worker” provided in section 2(xxviii) which provides that *worker and workman means any person not falling within the definition of employer who is employed in an establishment or industry for hire or reward either directly or through a contractor whether the terms of employment be express or implied*. As per this definition, the phrase ‘directly or through a contractor’ means employees of an employer whether they are directly recruited or recruited through a contractor. The word “establishment” has been defined in section 2(ix) to mean *any office, firm, industrial unit, undertaking, shop or premises in which workmen are employed for the purpose of carrying on any industry*. Reference may also be made to section 2(c) of SO Ordinance, 1968 which provides that ‘employer’ *means the owner of industrial or commercial establishment to which* [the said] *Ordinance applies*. Section 2(f)(iv) ibid, *inter alia,* provides that ‘*industrial establishment’ means the establishment of a contractor who, directly or indirectly, employs workmen in connection with the execution of a contract to which he is a party, and includes, the premises in which, or the site at which, any process connected with such execution is carried on.* The learned High Court in the impugned judgment had also referred to section 2(h) of the Factory Act, 1934, which provides that “*worker” means a person employed directly or through an agency whether for wages or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work whatsoever, incidental to connect with the subject of the manufacturing process.*

13. At this juncture, it would be appropriate to have a glance at the case-law referred to by the learned counsel for the appellant. In

the case of *Souvenir Tobacco Co. Ltd. v. Najammuddin* (PLD 1977 Karachi 250) the employees of Canteen Managing Committee were declared not to be the employees of the company on the ground that according to the Karachi Factories Canteen Rules, 1953 read with the contents of the settlement, the affairs of the canteen of the company were directly under the control and the management of the Canteen Managing Committee and it was held that the application for re-instatement should have been filed against the said Committee and not against the company. In the case of *Mian Munir Ahmad v. The State* (1985 SCMR 257) the company used to run a beverage bottling at their factory and for the manufacturing of its product (Pepsi Cola) employed its own workers, who were on the pay-roll of the Factory. But certain other works were entrusted to contractors who employ their own labour. During the season in question the contract of loading and unloading the material in the Factory was awarded by the company to one Abdul Hamid Contractor, who had employed his own labour for the said work, who had nothing to do with the company, directly or indirectly. The employees of the contractor filed criminal complaints against the Managing Director of the company (appellant therein). The appellant approached the High Court for quashment of proceedings but the petition was dismissed on the ground that the High Court had no jurisdiction to exercise its inherent powers under section 561A, Cr.P.C., to quash proceedings pending before a labour Court as the same was not a Court subordinate to the High Court. The matter came to this court where the question for consideration was that whether the High Court had no jurisdiction under section 561-A, Cr.P.C. in respect of the proceedings pending before the Labour Court,

which was dealing with the case 'in its capacity as a Section 30 Magistrate'. A 3-Member Bench of this Court allowed the appeal and quashed all the criminal complaints. It was further observed that the contractor had employed its own labour they were not on the pay-roll of the Factory. The management of the Factory was not even aware of the number of the workers employed by the contractor or about the terms and conditions of their appointment or service. As such the Factory Management was not required to issue them any attendance tickets under the relevant law, i.e. section 2 of Schedule 2(g) of the W.P. Standing Orders Ordinance. In the case of *Farid Ahmad v. Pakistan Burmah Shell Ltd.* (1987 SCMR 1463) the respondent company owned a number of petrol pumps and stations in Karachi, most of which were run by dealers appointed by the company, whereas, some others were run and managed by contractors. Appellant, the employee of the contractor, was terminated by the then contractor. The said termination order was challenged by the appellant in the Labour Court through a Grievance Petition under section 25A of the IRO, but the same was dismissed on the ground that there was no privy of contract between him and the company. Appeal filed by him before the Labour Court was accepted and he was ordered to be reinstated. The said order, though was complied with by the company, but was challenged before the High Court through a writ petition. The writ petition was allowed observing, *inter alia*, that the appellant was not an employee of the respondent company. In spite of the above judgment the appellant continued to work at the petrol pump. Afterwards, the then contractor, again terminated the services of the appellant. Thereupon, the appellant filed a criminal complaint before

the NIRC against the company and its 3 officers u/s 53(1-A) of the IRO, complaining "unfair labour practice". The matter came up before this Court when leave was granted to consider as to whether or not the appellant was an employee of company and whether it was open to the High Court to have decided this question in exercise of its constitutional jurisdiction as it involved a question of fact. A 5-member Bench of this Court, after relying upon the cases of *Mian Munir Ahmad* (*ibid*) and *D.C. Works Limited v. State of Saurashtra* (AIR 1957 SC 269), on the ground that the contractor was not only the person who had employed the appellant but also the person who had the power of hiring and firing the employees, assigning works to be taken from them, etc., held that the appellant was not employees of the company but that of the contractor. In the case of *Mehmood Hussain v. Presiding Officer, Punjab Labour Court* (2012 SCMR 1539) a 2-member bench of this Court held that the question of relationship between the owners of company and the persons employed by its contractors, had already been decided by this Court in the case of *Mian Munir Ahmad* (supra) wherein it was held that such persons were not the employees of the company but those of the contractor who has hired them, therefore, the claim made by the respondent from the appellant was not tenable in law.

The ratio of the above case-law is that the employees of the contractor shall not be the employees of the company if: -

(a) they are under the control and management of the contractor and not that of the company;

(b) they are not on the pay-roll of the company and the management of the company is not even aware of the number of the workers employed by the

contractor or about the terms and conditions of their appointment or service; and

(c) the contractor has the power of hiring and firing the employees, and assigns works to them and the company has no concern with it.

14. Turning towards the case-law referred to by the learned counsel for the respondents, it is to be noted that in the case of *M/s Euro Ceramics Ltd. v. Registrar of Trade Union* (1996 PLC 45) the Balochistan High Court after considering the cases of *Mian Munir Ahmad* (supra) and *Farid Ahmad* (supra) held that in order to determine the status of the workers it is to be seen that whether the contractor engaged the workers for running of the affairs of the company or through those workers, it was carrying out another independent work which had no concern with the production, etc., of the company. It was further held that contractor had engaged the labour not for doing the job other than which was being carried out in the factory; and inference can also be drawn that a device was adopted to deprive the employees from their legitimate right to form a trade union. In the case of *M/s Dawood Cotton Mills v. Sindh Labour Appellate Tribunal* (SBLR 2004 Sindh 614) a Division Bench of the High Court of Sindh again considered the same question in the light of the law laid down in the cases of *Mian Munir Ahmad* (supra) and *Farid Ahmad* (supra). The Court distinguished the said judgments on the ground that the workers were required to work in the weaving department of the company which constituted one of the principle organs of a textile mill; the machines were belonged to the company and the raw material was also supplied by them; and the said section was controlled by the weaving master. The Court relied upon the case

of *Hussainbhai Calicut v. Alath Factory* (AIR 1978 SC 1410) = (1978 LLJ 397) to hold that the workers employed through contractor were the employees of the company. The said judgment of the High Court was assailed through civil petition for leave to appeal in the case of *M/s Dawood Cotton Mills v. Sindh Labour Appellate Tribunal* (Civil Petition No.309/2004, etc.) but this Court maintained the finding of the High Court. In the case of *Pakistan Telecommunication Company Limited v. Muhammad Zahid* (ICA No.164 of 2002) a Division Bench of the High Court, while dealing with the question as to whether the employees engaged by the PTCL through a contractor (Telecom Foundation) were the employees of PTCL or not, it was held that it is trite law that whether employees are engaged directly or through a contractor, they would be deemed to be the employees of the establishment for whose benefit they perform functions. The said decision was upheld by the Supreme Court in the case of *Pakistan Telecommunication Company Limited v. Muhammad Zahid* (2010 SCMR 253), declaring the employees of Telecom Foundation to be employees of the PTCL.

15. It would also be advantageous to consider cases on the issue in hand from the Indian jurisdiction. In the case of *M/s Basti Sugar Mills v. Ram Ujagar* (AIR 1964 SC 355) the Indian Supreme Court has held that the word 'employed by the factory' are wide enough to include workmen employed by the contractors of the factory. In the case of *Silver Jubilee Tailoring House v. Chief Inspect* (AIR 1974 SC 37) = [(1974) 3 SCC 498] certain employees claim the status of regular workers in a tailoring house "as employed in the establishment" within the meaning of Section 2(14) of the Shops and

Establishments Act. On the question as to whether there existed employer-employee relationship between the workers and the Management, the Court pointed out that the control test, which is normally adopted for considering the said question is not an exclusive test or a decisive test. If the ultimate authority over the performance of the work of the employee rested in the employer so that he is subject to the supervision of the principal employer, would be sufficient. In the case of *Hussainbhai, Calicut v. The Alath Factory Thezhilali Union, Kozhikode* (AIR 1978 SC 1410) = [(1978) 4 SCC 257] the Indian Supreme Court laid the test for determining the workmen employed by the independent contractor to work in employer's factory. The said issue relates to hiring workmen through contractors by an industry manufacturing ropes. The Supreme Court pointed out to the admitted fact that the work done by the contract labour was an integral part of the industry concerned and the workmen were broadly under the control of the Management. The relevant para therefrom reads as under: -

> "5. The true test may, with brevity, be indicated once again. Where a worker or group of workers labours to produce goods or services and these goods or services are for the business of another, that other is, in fact, the employer. He has economic control over the workers' subsistence, skill, and continued employment. If he, for any reason, chokes off, the worker is, virtually, laid off. The presence of intermediate contractors with whom alone the workers have immediate or direct relationship ex contract is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, we discern the naked truth, though draped in different perfect paper arrangement, that the real employer is the Management, not the immediate contractor. Myriad devices, half-hidden in fold after fold of legal form depending on the degree of concealment needed, the type of industry, the local conditions and the like, may be resorted to when labour legislation casts welfare obligations on the real employer, based on Articles 38, 39, 42, 43 and 43-A of the Constitution. The court

> must be astute to avoid mischief and achieve the purpose of the law and not be misled by the maya of legal appearances."

In the case of *Catering Cleaners of Southern Railway v. Union of India* (AIR 1987 SC 777) = [(1987) 1 SCC 700], on the issue of contract labour engaged for cleaning catering establishments and pantry cars in Southern Railway, the Indian Supreme Court pointed out that the work of cleaning catering establishments and pantry cars is necessary and incidental to the industry or the business of the Southern Railway; the employment was of perennial nature and that the work required employment of sufficient number of whole-time workmen. It was directed that those workmen, who were previously employed by the contractor on the same wages and conditions of work as were applicable to those engaged in similar work in Western Railway, be absorbed without waiting for the decision of the Central Government. In the case of *Sankar Mukherjee v. Union of India* (AIR 1990 SC 532) = [(1990) (Supp) SCC 668], the Indian Supreme Court considered the notification by the Government of West Bengal prohibiting the employment of contract labour in various departments including the job of loading and unloading of bricks from the wagons and trucks in Brick Department. The Court pointed out that the bricks handled by the Brick Department were used in furnaces of the company as refractory and incidental to the industry carried on by the company. Even though the petitioners therein were not doing the job of stacking the bricks, there was no denial or any averment or material to show that the job of loading and unloading of bricks was not incidental or alike to the stacking of the bricks; on the other hand, the workers performing those jobs which were of perennial nature, were to be

treated alike. The workers doing the job of loading and unloading from the wagons and trucks in the Brick Department are to be treated on par with those who were doing the job of cleaning and stacking in the said Department. There was no reason as to why others doing the same job should be treated differently. In the case of *Indian Overseas Bank v. I.O.B. Staff Canteen Workers' Union* (AIR 2000 SC 1508) = [(2000) 4 SCC 245] the Court held that no single or substantive test could be confined or concretized as a fixed formula of universal application in all class or category of cases. Although some common standards could be devised, the mere presence of one or more or their absence of the same cannot, by itself, be held to be decisive of the whole issue, since every case has to be decided on the peculiar aspects of a particular case. That being the position, in order to safeguard the welfare of the workmen, the veil may have to be pierced to get at the realities. In the case of *Steel Authority Of India Ltd. V. Union of India* (AIR 2001 SC 3527) the Court held that even in case of contract labour, there can be adjudication as to the regularization of the employment by the Industrial Court/Tribunal. If the contract is found to be not genuine, but a mere camouflage, the so called contract labour will have to be treated as employee of the principal employer, who shall be directed to regularize the services of the contract labour in the establishment concerned. In the case of *Mishra Dhatu Nigam Ltd. v. M.Venkataiah* (AIR 2003 SC 3124) = [(2003) 7 SCC 488] the Indian Supreme Court held that where in discharge of a statutory obligation of maintaining a canteen in an establishment the principal employer availed the services of a contractor, the contract labour would indeed be the employees of the principal employer and that

such cases do not relate to or depend upon the abolition of contract labour. In the case of *Ram Singh v. Union Territory, Chandigarh* (AIR 2004 SC 969) = [(2004) 1 SCC 126] the Court reiterated that in determining the relationship of employer and employee, even though 'control' test is an important test, it is not the sole test. It was further observed that it is necessary to take a multiple pragmatic approach weighing up all the factors for and against the employment instead of going by the sole test of control. An "integration" test is one of the relevant tests. It is applied by examining whether the person was fully integrated into the employer's concern or remained apart from and independent of it. The other factors which may be relevant are, who has the power to select and dismiss, to pay remuneration, deduct insurance contributions, organise the work, supply tools and materials and what are the "mutual obligations" between them. The Court further held that the mere fact of formal employment by an independent contractor will not relieve the master of liability where the servant is, in fact, in his employment. In that event, it may be held that an independent contractor is created or is operating as a subterfuge and the employee will be regarded as the servant of the principal employer. In the case of *Workmen of Nilgiri Coop. Mkt. Society Ltd. V. State of T.N.* (AIR 2004 SC 1639) = [(2004) 3 SCC 514] after referring to the case of *Ram Singh* (supra) the Court reiterated that the test of organization or of control and supervision are the only decisive test and different tests have to be applied in different facts and circumstances; ultimately all relevant facts have to be integrated in considering the said question. Relevant portion therefrom is reproduces hereinbelow: -

"37. The control test and the organisation test, therefore, are not the only factors which can be said to be decisive. With a view to elicit the answer, the court is required to consider several factors which would have a bearing on the result: -

(a) who is the appointing authority;
(b) who is the paymaster;
(c) who can dismiss;
(d) how long alternative service lasts;
(e) the extent of control and supervision;
(f) the nature of the job e.g. whether it is professional or skilled work;
(g) nature of establishment;
(h) the right to reject."

16. The crux of the above case-law is that: -

(a) the word 'employed by the factory' are wide enough to include workmen employed by the contractors of the company;

(b) the employees of the contractor shall be the employees of the company if the contractor engaged the workers for running of the affairs of the company and not for some other independent work which has no concern with the production of the company;

(c) if the employees are working in a department of the company which constituted one of the principle organs of the company, the machines belong to the company, the raw material is supplied by the company and the said department is controlled by the supervisors of the company, the employees of the contractor shall be the employees of the company;

(d) the employees, engaged directly or through a contractor, would be deemed to be the employees of the company for whose benefit they perform functions;

(e) even though ‘control’ test is an important test, it is not the sole test; a multiple pragmatic approach weighing up all the factors for and against the employment has to be adopted, including an “integration” test; and

(f) if the contract is found to be not genuine and a device to deprive the employees from their legitimate rights/benefits, the so called contract employees will have to be treated as employee of the company.

17. Normally, the relationship of employer and employee does not exist between a company and the workers employed by the Contractor; however, in the case where an employer retains or assumes control over the means and method by which the work of a Contractor is to be done, it may be said that the relationship of employer and employee exists between him and the employees of the contractor. Further, an employee who is involved in the running of the affairs of the company; under the direct supervision and control of the company; working within the premises of the company, involved directly or indirectly in the manufacturing process, shall be deemed to be employees of the company.

18. In the instant case, the employees of the contractor were involved in running the affairs of the company such as filling and loading of urea bag as well as cleaning of machines and floors, therefore, for all intents and purposes, they are employees of the company through the contractor.

19. As regards to the lock-out it was submitted by the learned counsel for the petitioner that as per definition of “lock-out” contained

in section 2(xvi) of IRO 1969, the concept of lock-out only applies in relation to the employees of the company and not to the employees of the contractor.

20. Section 2(xvi) ibid provides that 'lock-out' *means the closing of a place of employment or part of such place or the suspension, wholly or partly, of work by an employer, or refusal, absolute or conditional, by an employer to continue to employ any number of workmen employed by him where such closing, suspension or refusal occurs in connection with an industrial dispute or is intended for the purpose of compelling workmen employed to accept certain terms and conditions of or affecting employment*;

21. In light of the above definition, we are in agreement with the learned counsel that the lock-out only applies to the employees of the company. However, as we have already declared that the respondents are employees of the company, therefore, the CBA of contractor's union was rightly aggrieved from the said lock-out. Thus, the learned Labour Appellate Tribunal has rightly redressed the grievance of the respondent employees.

22. The learned counsel further submitted that the Constitution Petition No. D-739/1993 was admitted to regular hearing and a stay was granted. However, the same was dismissed by a two-line order that it had become infructuous merely because the other petition namely CP No. D-754/1996 against the order passed by Labour Appellate Tribunal had been dismissed. He argued that this was a manifest error and the petition should have been decided on merits.

23. It is to be noted that when the constitution petition arising out of the proceedings of Labour Court was dismissed, the main grievance of the employees was redressed as such the other constitution petition had become infructuous.

24. Learned counsel for the appellant has also submitted that the Labour Court directed for reinstatement of respondents in service with full back benefits in terms of agreement/settlement dated 31.01.1991 which was valid up to 27.01.1993, but according to him the said agreement was terminated on 22.02.1992, therefore, they are not entitled for back benefits after the said date. In this behalf it is to be noted that notwithstanding expiry of agreement between employer and employees, their relationship shall be governed under SO Ordinance, 1968, as they have attained status of permanent employees by the efflux of time.

25. These are the reasons of our short order of even date, whereby the listed appeals were dismissed with costs.

Chief Justice

Judge

Judge

Islamabad, the
16th May, 2013
Nisar/*

Approved For Reporting