* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of order: 28th March, 2024**

\+ W.P.(C) 6193/2008

KANCHANJUNGA BUILDING EMPLOYEES UNION

..... Petitioner

Through: Mr. Manoj Joshi, Advocate

versus

KANCHANJUNGA FLAT OWNER'S SOCIETY & ANR

..... Respondents

Through: Mr. Harvinder Singh, Advocate for R-1 (Through VC)

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The instant petition under Article 226 of the Constitution of India has been filed on behalf of the petitioner seeking the following reliefs:

> *"a. issue a writ in the nature of certiorari for quashing the award dated 29.5.2008 passed by the Presiding Officer, Industrial Tribunal No. 1, Karkardooma Courts in I. D. No. 61/2002;*
> *b. the Petitioners services may be regularized.*
> *c. issue such other writ, order and direction, as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."*

2. The relevant facts leading to the filing of the instant petition are as

under:

a. The building, namely Kanchanjunga was constructed in the year 1972 by its promoters M/s Kailash Nath & Associates which had engaged some persons to look after the security of the building maintenance and cleaning of the common area of the building and lift etc.

b. After some time, M/s Kailash Nath & Associates stopped the above said engagement and requested the flat owners to look after the same. Accordingly, in February, 1978, the flat owners formed an association known as Kanchanjanga Flat Owners Association (hereinafter "Association"), i.e., the respondent no. 1, to look after the security, maintenance and cleanliness of the common area of the building. Pursuant to the same, some personnel, i.e., the workmen represented through Kanchanjanga Building Employees Union herein were employed during the period of 1988-1996 as security guards and lift operators. Subsequently, in March, 1998 the above said association entered into an agreement with M/s Goliath Securities Pvt. Ltd., i.e., the respondent no. 2, to look after and provide necessary services on account of the security guards and lift operators, and the workmen were transferred through intermediary Contractors.

c. On 24th October, 2002, the workmen verbally requested the society management to regularize their services since they

had been working for very long time under their control and the same was denied. Thereafter, the workmen raised an industrial dispute against the Association which was referred for adjudication to the Industrial Tribunal by the appropriate government vide reference dated 24th July, 2002. The workmen then filed a claim through their Union in Industrial Dispute bearing ID No. 61/2002, thereby, seeking regularization of their services in the direct management of the Association.

d. In the above said dispute, the learned Industrial Tribunal passed an award dated 29th May, 2008 (hereinafter "impugned award") against the workmen and held that the petitioners are not entitled for any relief.

e. Being aggrieved by the above said impugned award, the workmen have approached this Court seeking setting aside of the same.

3. Learned Counsel appearing on behalf of the workmen Union submitted that the impugned award has been passed erroneously and without taking into consideration the entire facts and circumstances of the case.

4. It is submitted that the learned Industrial Tribunal erred in not granting regularization to the workmen and the same is contrary to the settled position of law.

5. It is submitted that learned Industrial Tribunal erred in not considering that non-submission of sanctioned leave application, chargesheet or memo

during the employment are not relevant factors to consider employee-employer relationship.

6. It is submitted that the workmen were initially engaged by the respondent no. 1 and subsequently converted into contractual labour which amounts to ruse/camouflage employment to evade compliance with various beneficial legislations in order to deprive the workmen of the benefit thereunder.

7. It is submitted that the learned Tribunal erred in not considering that the respondent no. 2 was merely a broker or an agent of respondent no. 1. It is also submitted that nothing was brought on record by the respondents to indicate that the society at the relevant time was registered as a principal employer under the Contract Labour (Regulation and Abolition) Act, 1970 (hereinafter "the Act").

8. It is further submitted that the respondent no. 1 society was not a licensee contractor under the Act and thus, the so called contract/agreement between the respondents was a mere camouflage, smoke screen and disguised in a transparent veil which could easily be pierced by the real contractual relationship between the respondent no. 1 and the workmen.

9. It is submitted that the learned Tribunal failed to appreciate the fact that as a principal employer, the respondent no. 1 always remained in control over the workmen.

10. It is submitted that the workmen have been working with the respondent no. 1 since the year 1985 and in support of this contention, various documents were placed before the learned Tribunal which were not

appreciated in accordance with the law.

11. Therefore, in view of the foregoing submissions, it is submitted that the impugned award may be set aside and the petition may be allowed.

12. *Per Contra*, the learned counsel appearing on behalf of the respondent no. 1 vehemently opposed the instant petition submitting to the effect that the same being devoid of any merit is liable to be dismissed.

13. It is submitted that the learned Tribunal has correctly passed the impugned award and therefore the instant petition is not maintainable since this Court may not re-appraise the evidence and substitute one possible finding with another and the extraordinary writ jurisdiction may not be exercised only to correct a mere error of facts or even law.

14. It is submitted that the petitioner-Union, not being a registered one, is not entitled to file any writ petition before this Court and thus, the same is not maintainable.

15. It is submitted the impugned award is bad in law to the extent that it has held the respondent Association to be an industry under Section 2 (j) of the Act.

16. It is further submitted that the learned Tribunal wrongly attributed Section 2 (j) of the Act to the respondent Association since it is not carrying out any activities as defined under the above stated provision.

17. It is submitted that the workmen were not selected and employed by the respondent no. 1 from year 1988 onwards as alleged by them. Further, it has been rightly held by the learned Tribunal that the workmen were not able to satisfactorily discharge their onus regarding their claim of having been

employed with the respondent Association.

18. It is submitted that the petitioner may not be permitted to rely upon the document which were not proved before the learned Industrial Tribunal. It is further submitted that none of the documents produced by the workmen before the learned Tribunal conclusively proved any relationship of master and servant between the workmen and the respondent no. 1.

19. It is submitted that the wages of the workmen used to be paid by their employer, i.e., independent contractor, which alone used to supervise and control their work and also had the power of exercising disciplinary control over them.

20. It is submitted that the respondent no. 1 never sanctioned leave, issued chargesheet or memo to any of the workmen initially engaged by them and subsequently converted into contract labour, as alleged by the workmen, therefore, the question of the contract for service amounting to ruse/camouflage does not arise.

21. It is submitted that the question of the services of the workmen being continued by the respondent no. 1 does not arise as they had never been employed by the respondent no. 1 and it was entirely upon the new contractor as to whether to continue to engage the contract labour, employed by the previous contractor.

22. Therefore, in view of the foregoing submissions, it is submitted that the learned Tribunal has rightly passed the impugned award and in view of the same the instant petition may be dismissed.

23. Heard the learned counsel for the parties and perused the record.

24. The workmen's case is that their services are entitled to be regularized and the learned Tribunal has wrongly rejected their claim by not appreciating that the workmen's services were converted into contractual labour in order to deprive them the benefit and the same is merely a camouflage.

25. In rival submissions, the respondent Association has refuted the same and submitted that the onus to prove the claim was on the workmen to which they failed and in view of the same, the learned Tribunal rightly adjudicated against the workmen. Furthermore, it is contended that the workmen are trying to substantiate their case on the basis of certain documents which were not proved before the learned Industrial Tribunal, therefore, this Court may not re-appraise the evidence under the writ jurisdiction.

26. In view of the above stated submissions, the issue before this Court is to decide as to whether the learned Tribunal rightly decided the claim of the workmen which is regularization of their service. In order to do the same, it is imperative to peruse the impugned award, relevant extracts of which are as under:

> "*..5. The workmen examined Sh. Mahesh Pandey as WW1, who tendered his affidavit Ex. WW1/A and relied upon the documents Ex.WW1/1 to WW1/20. On the other hand, the management has examined Sh. Rajesh Kapoor as MW1, who tendered his affidavit Ex. MW1/A and relied upon the documents Ex.MW1/1 to MW1/8 and Sh. J. C. Saundal, who tendered his affidavit Ex. MW2/A and relied upon the document Ex.MW2/1.*
> *6. Ld. Counsel of the workmen Sh. Prabhakar Pandey has stated at the workmen arc the direct employees of the*

management no.1 since 1998 Onwards and working under the direct supervision of management no.1. Management no.1 used to pay the salary and attendance of the workmen used to be marked under the direct control of management no.1. The management no.1 deliberately and intentionally failed to provide the basic facilities and minimum wages as provided under the law, to the workmen. The workmen, during January to March 1998, were forced to sign some forms, which were in the name of Goliath Detectives Private Limited i.e. management no.2 and thereafter only, the Goliath Detectives Private Limited was formally and illegally inducted as an intermediary contractor. The Goliath Detectives Private Limited i.e. management no.2 is not the employer of the workmen. Any agreement between the management no.1 and Goliath Detectives Private Limited, if any, is sham and bogus as the workmen are the direct employees of the management no.1 and the work in the aforesaid building is perennial in nature. Therefore, the workmen are entitled to be regularized/absorbed in the direct employment of the management no.1 with all statutory rights and protections and the benefits of the services rendered so far by them.

7. On the other hand, Ld. AR of the management no.1 Sh. B. 8. Mahajan has submitted that there is no relationship of employer and employee between the workmen und the management no. 1. The workmen are the employees of management no.2. therefore, the workmen cannot be regularized with the management no. 1. The management no.1 is not an industry and relied upon the following judgments:…

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13. ***ISSUE N0.2, 4 & 5***

Issue no. 2, 4 & 5 are taken together as they are interconnected. Management no.1 in its Written Statement has stated that there is no relationship of employer and employee between the "management no. 1 and workman and there is no dispute between management no.1 and workmen. The

management no.2 in its Written Statement has specifically stated that the workmen are the employees of management no.2 and management no.2 is a Contractor, which is working under the management no.1 on the basis of contract agreement and management no. 2 is making payment, maintaining records of workmen and supervising the work of security and cleanliness as per terms of agreement and relied upon the documents i.e. agreement Ex.MW2/1 dated 31.01.98 and wages paid to workmen vide Salary/Wages Sheet Ex.MW/7. The agreement ExMW2/1 and Salary/Wages Sheet Ex.MW/7 show that payment is done by the Goliath Detectives Private Limited. Therefore, I am of the opinion that the workmen arc the employees of management no.2 and not the employees of management no.1. Therefore, no industrial dispute between management no.1 and workmen. As such, issue no.2 is decided accordingly. Issue no.4 is decided against the workmen and in favour of management no.1. The workmen also failed to prove on record that demand notice was served upon management no.1. Therefore, issue no.5 is also decided against the workmen and in favour of management.

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20. The management no.2 in its Written Statement has specifically stated that management no.2 is a Contractor and working under the management no.1 on the basis of contract agreement Ex.MW2/1 and as per said agreement, the management no. 2 is also making payment, maintaining records of workmen and supervising the work of security and cleanliness. The workmen have not claimed any relief against the management no.2. WW1 Mahesh Pandey, during the cross examination, has admitted that they do not have any document to show that management no.1 has sanctioned the leave during their employment with management no.1 and management no.1 has issued any charge-sheet or memo during their employment with the management no.1, which otherwise means that management no.1 has not got direct control over the workmen

during their employment at Kanchanjungna Flat Owners Society. There is no document on record to show that the management no. 1 is controlling the affair of the security and cleanliness in which, the workmen are alleged to be employed. The agreement dated 31.01.98 Ex.MW2/1 and Salary/Wages Sheet show that the workmen are the employees or management no.2. Therefore, there is no relationship of employer and employee between the management no.1 and workmen. As such, the workmen are not entitled to be regularized with the management no 1 and this issue is decided against the workmen and in favour of management.

21. Keeping in view the facts and circumstances and discussions made above, the workmen arc not entitled to any relief from the management no.1. However, no relief is claimed against the management no.2. The claim of the workmen fails. The reference is answered against the workmen. The award is passed, accordingly…"

27. Perusal of the impugned award states that the primary issue for adjudication before the learned Tribunal was whether the workmen are entitled to be regularized or not. In pursuance to the same, learned Tribunal proceeded to decide as to whether there exist an employer-employee relationship between the Association and the workmen.

28. Vide their claim, the workmen, argued that they were working with the Association since the year 1991 and thereafter, their services were engaged through the respondent no. 2 herein, i.e., M/s Goliath Detectives Pvt. Ltd by forming a sham and bogus agreement. The workmen had argued that the Association had illegally tried to show that they were not employed by them rather the contractor and that the same was merely an attempt to avoid their liability towards them, and to escape through the scope of

employer-employee relationship. The workmen had vehemently argued before the learned Tribunal and before this Court as well that they are entitled to be regularized as they were under the direct supervision and control of the Association since they regularly used to sign attendance register, were provided with identity cards etc.

29. The Association on the other hand denied the existence of any employer-employee relationship between itself and the workmen. It contended that initially M/s Kaliash Nath & Associates was entrusted for providing the services of security and maintenance and when it became difficult for it to do so, the flat owners formed Kanchanjanga Flat Owners Association with the sole purpose to look after the security and cleanliness of the common areas of the building and thereafter, the said task was handed over to one M/s Fidelifacts Pvt. Ltd. and subsequently to M/s Goliath which is a sister concern of M/s Fidelifacts Pvt. Ltd. In view of the same, the respondent denied to the existence of any relationship as has been alleged by the workmen.

30. The respondent no. 2 had argued before the learned Tribunal that they had deployed the workmen at the above said society for the purpose of security and they have been paying the wages to the workmen as well as the workmen are directly under their supervision and control.

31. In view of the above facts and examination of witness, the learned Tribunal decided that the workmen's claim did not hold any merit since they had failed to produce any evidence to substantiate their claim and hence, it dismissed the claim holding that the workmen were not entitled for

regularization of their services with the Association as they could not prove their relationship of being an employee with the respondent no. 1.

32. Since the petitioner-workmen are seeking regularization of their services with the respondent no. 1, they need to prove that they had direct employer-employee relationship with the Association.

33. The settled position of law with respect to the burden of proof of establishing an employer-employee relationship has been discussed in the judgment of the Hon'ble Supreme Court in ***Workmen of Nilgiri Coop. Mkt. Society Ltd. v. State of T.N.,*** **(2004) 3 SCC 514**, wherein, it has been held that the onus and degree of proof of employment primarily lies on person who claims to be a workman. The relevant paragraphs of the said judgment are as under:

> "..***Burden of proof***
>
> ***47.*** *It is a well-settled principle of law that the person who sets up a plea of existence of relationship of employer and employee, the burden would be upon him.*
>
> ***48.*** *In N.C. John v. Secy., Thodupuzha Taluk Shop and Commercial Establishment Workers' Union [1973 Lab IC 398 : (1973) 1 LLJ 366 (Ker)] the Kerala High Court held : (LAB IC p. 402, para 9)*
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> > *The burden of proof being on the workmen to establish the employer-employee relationship an adverse inference cannot be drawn against the employer that if he were to produce books of accounts they would have proved employer-employee relationship.*

> ***49.*** *In Swapan Das Gupta v. First Labour Court of W.B. [1976 Lab IC 202 (Cal)] it has been held : (LAB IC para 10)*
> *Where a person asserts that he was a workman of the company and it is denied by the company, it is for him to prove the fact. It is not for the company to prove that he was not an employee of the company but of some other person.*
>
> ***50.*** *The question whether the relationship between the parties is one of employer and employee is a pure question of fact and ordinarily the High Court while exercising its power of judicial review shall not interfere therewith unless the finding is manifestly or obviously erroneous or perverse…*"

34. This Court has perused the record of the learned Tribunal. The WW1, i.e., Mr. Mahesh Pandey in his cross examination admitted that respondent no. 2 was looking after the security of the building and the salary of the workmen is being paid by the said respondent. Moreover, in his cross examination, the said witness also admitted that the Association never issued any charge sheet or memo to any of the workmen. WW1 had further admitted that the workmen did not have any documentary evidence to show any sanctioned leave as alleged by the workmen in their claim petition. Further perusal of the record reveals that the respondent no. 2 had admitted the fact that it had direct control and supervision upon the workmen and their salary was also being paid by the respondent no. 2 management. As far as the documentary evidence is concerned, the Lower Court Record also reveals that the contractor had produced an agreement dated 31st January, 1998 as Ex. MW2/1 and salary/wages sheet to show that the workmen are its

employees.

35. Taking into consideration the above stated observation and the deposition of the workmen witnesses as well as the respondent no. 2, it is inferred that admittedly the workmen were directly employed by the respondent no. 2 and their salary was also being paid by the said contractor. Nowhere does the record states or even hint towards the fact that the workmen are in direct employment of the Association. Although, it has been contended on behalf of the workmen that they used to sign attendance register with the Association, however, the workmen have failed to bring on record any documentary or oral evidence to suggest otherwise.

36. The settled position of law states that the onus to prove whether the workers are employees of the principal employer or of the contractor, lies on the party setting up plea regarding existence of such a relationship. The plea of existence of employer-employee relationship between the parties is a pure question of fact and ordinarily cannot be interfered with by a High Court, while exercising its power of judicial review unless the finding of the Court below is manifestly erroneous or perverse.

37. In view of the above facts as well as the settled position of law, it cannot be said that the workmen had any employee-employer relationship with the respondent no. 1 Association rather the said relationship can be established between the workmen and the respondent no. 2. Due to non-existence of employer – employee relationship with respect to the respondent no. 1, the workmen in the present case cannot be held to be entitled to be regularized with the Association. The contention of the

petitioner workmen is that the contract entered into by the respondent no. 1 and respondent no. 2 is sham and camouflage. The said contention does not hold any water since it cannot be concluded that the respondent no. 1 is a principal employer rather the respondent no. 2 is the employer as per the record such as agreement dated 31st January, 1998 marked as Ex. MW2/1 and salary/wages sheet etc.

38. At this juncture, this Court finds it appropriate to delve into another contention raised by the respondent no. 1 wherein it has been argued that the learned Tribunal erred in holding the respondent Association to be an industry under Section 2 (j) of the Act.

39. In the impugned award, the learned Tribunal had framed Issue No. 5 which was 'whether the society management is an industry under Section 2(j) of the Act'. The learned Tribunal observed that as per the deposition of MW1, none of the flats in Kanchanjanga Society is being used for residence and that the workmen are being employed for security and maintenance of the common area of the society. Taking the same into consideration, it held that the society is carrying out activities as defined under Section 2 (j) of the Act and therefore, the same is an 'industry' thereunder.

40. The law pertaining to the adjudication of whether a society or association of flat owners who employ persons for rendering personal services is an 'industry' or not has been settled in a catena of judgments by the Hon'ble Supreme Court as well as this Court.

41. Section 2 (j) of the Act defines 'industry' as any business, trade, undertaking, manufacture or calling of employers and includes any calling,

service, employment, handicraft or industrial occupation or avocation of workmen. In ***Bangalore Water Supply & Sewerage Board v. A. Rajappa,* (1978) 2 SCC 213,** the Hon'ble Supreme Court held that when there are multiple activities carried on by an establishment, its dominant function is to be considered. If the predominant function of an undertaking/establishment is not commercial, the employees working there shall not be entitled to benefits of a workman of an industry under the Act.

42. Furthermore, as per the judgment of the Hon'ble Supreme Court in ***Som Vihar Apartment Owners' Housing Maintenance Society Ltd. v. Workmen,* (2002) 9 SCC 652**, it has been held that in cases where an association or a society of apartment owners have employed persons for rendering personal services to its members, in that case, such employees would not be workmen under the Act and the said association would not fall under the definition of an 'industry' within Section 2 (j). The relevant paragraphs of ***Som Vihar Apartment Owners' Housing Maintenance Society Ltd. (Supra)*** are as under:

> "*...**6.** It is no doubt true that the decision in T.K. Ramesan case [1995 Lab IC 813 (Ker)] was rendered by the Kerala High Court in the context of interpretation of the provisions of the Kerala Shops and Commercial Establishments Act. However, the nature of the activities carried on by a group of persons such as owners of flats in a building complex was considered setting out true tests in a case of this nature. We need not examine these facts either.*
> ***7.** Indeed this Court in Rajappa case [(1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207] noticed the distinction between such classes of workmen as domestic servants who*

render personal service to their masters from those covered by the definition in Section 2(j) of the Industrial Disputes Act. It is made clear that if literally interpreted these words are of very wide amplitude and it cannot be suggested that in their sweep it is intended to include service however rendered in whatsoever capacity and for whatsoever reason. In that context it was said that it should not be understood that all services and callings would come within the purview of the definition; services rendered by a domestic servant purely in a personal or domestic matter or even in a casual way would fall outside the definition. That is how this Court dealt with this aspect of the matter. The whole purpose of the Industrial Disputes Act is to focus on resolution of industrial disputes and the regulation will not meddle with every little carpenter or a blacksmith, a cobbler or a cycle repairer who comes outside the idea of industry and industrial dispute. This rationale, which applies all along the line to small professions like that of domestic servants would apply to those who are engaged by a group of flat-owners for rendering personal services even if that group is not amorphous but crystallised into an association or a society. The decision in Rajappa case [(1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207] if correctly understood is not an authority for the proposition that domestic servants are also to be treated to be workmen even when they carry on work in respect of one or many masters. It is clear when personal services are rendered to the members of a society and that society is constituted only for the purposes of those members to engage the services of such employees, we do not think its activity should be treated as an industry nor are they workmen. In this view of the matter so far as the appellant is concerned it must be held not to be an "industry". Therefore, the award made by the Tribunal cannot be sustained. The same shall stand set aside…"

43. Considering the law stated above and without interfering with the

finding of the learned Tribunal with regard to the non-entitlement of regularization of workmen's services, this Court is of the considered view that the respondent no. 1 is not an industry as per the definition of Section 2 (j) of the Act since its dominant function does not include providing or conducting commercial activities rather the workmen deployed in the respondent society is merely to provide personal services through the respondent no. 2 contractor. Therefore, the finding of the learned Tribunal under Issue no. 5, in holding the respondent no. 1 to be an industry is held to be erroneous and contrary to the settled law as discussed herein above and the same is set aside.

44. At this stage, this Court deems it imperative to set out the law with regard to Article 226 of the Constitution of India under which the instant petition has been filed. It is a settled position of law that in order to invoke the writ jurisdiction of this Court, it has to be proved that the Court below has exceeded or usurped its jurisdiction, or acted illegally; or in contravention to any law, or there is an error on the face of the record.

45. With regard to the facts of the present matter, this Court is of the considered view that the petitioner-workmen have failed to make out any illegality or perversity on the face of the impugned award and therefore, the decision of the learned Tribunal does not suffer from any infirmity with respect to the finding *qua* issue of regularization. There is nothing on record before this Court to imply that the learned Industrial Tribunal has acted in contravention to any law. Hence, the instant petition is liable to be dismissed.

46. In light of the above discussions of facts and law, the impugned award dated 29th May, 2008, passed by the learned Presiding Officer, Industrial Tribunal No. I, Karkardooma Courts, Delhi, in ID no. 61/2002 is upheld to the extent of issue of regularization of workmen with the respondent no. 1.

47. Accordingly, the instant petition stands dismissed. Pending applications, if any, also stands dismissed.

48. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

MARCH 28, 2024
gs/ryp/av

Click here to check corrigendum, if any