A BHARAT HEAVY ELECTRICALS LTD.

v.

MAHENDRA PRASAD JAKHMOLA & ORS.

(Civil Appeal No. 1799-1800 of 2019)

B FEBRUARY 20, 2019

[R. F. NARIMAN AND VINEET SARAN, JJ.]

Contract Labour (Regulation and Abolition) Act, 1970: Notification dated 24.4.1990 issued under the Act, 1970 – Exemption C *from its applicability to BHEL – Held: BHEL, insofar as their UP operations are concerned, in Haridwar, in particular, are exempted from the applicability of the Notification – Labour laws.*

Contract Labour (Regulation and Abolition) Act, 1970: Termination of worker – Award of reinstatement by Labour Court – D *Labour Court based its finding on direct relationship between the parties on the gate passes issued by the appellant, and on a concession made by the appellant's representative – Held: Evidence showed that the gate passes were issued only at the request of the contractor for the sake of security and safety and also from administrative point of view – This evidence was missed by Labour* E *Court when it arrived at a conclusion that a direct relationship ought to be inferred from this fact – Moreover there was nothing to show that the work performed by the contract labour was ordinarily part of the industry of appellant – Labour Court's award is perverse and is set aside in exercise of jurisdiction under Art.226 –* F *Constitution of India – Art.226 – Uttar Pradesh Industrial Disputes Act, 1947.*

Contract Labour (Regulation and Abolition) Act, 1970: Whether employed labourers were direct or contractual employees – Held: Principal employer cannot be said to control and supervise G *the work of the employee merely because he directs the workers of the contractor 'what to do' after the contractor assigns/ allots the employee to the principal employer – In the instant case, evidence led on behalf of appellant showed that no wages were ever been paid to workers by appellant – Workers themselves admitted that there was no appointment letter, provident fund number or wage* H *slip from appellant insofar as they were concerned – Further, it was*

also specifically pointed out that the names of 29 workers were on the basis of a list provided by the contractor in a bid that was made consequent to a tender notice by appellant – Therefore, there was nothing on facts to show that the contract labour that was engaged, even de hors a prohibition notification, was in the facts of the instant case 'sham' – Thus, Labour court erred in holding that the alleged contract with the contractor was "sham".

Concession: Where a question is a mixed question of fact and law, a concession made by a lawyer or his authorised representative at the stage of arguments, cannot preclude the party for whom such person appears from re-agitating the point in appeal – Concession on mixed questions of fact and law cannot decide cases as the evidence as a whole has to be weighed and inferences drawn therefrom.

Words and phrases: Expression 'control and supervision – Meaning of, in the context of contract labour – Labour laws.

Allowing the appeals, the Court

HELD: 1.1 The Award of the Labour Court sets down notification dated 24.04.1990 that was issued under the 1970 Act. A reading of the said notification makes it clear that the appellant, insofar as their UP operations are concerned, in Haridwar, in particular, are exempted from the said notification. Despite this, however, the Labour Court went on to apply the said notification, which would clearly be perverse. The Labour Court based its finding on direct relationship between the parties only on the gate passes being issued by the appellant, and on a concession made by the appellant's representative. The said gate passes were issued, as has been stated by the appellant's witness, only at the request of the contractor for the sake of safety and also from the administrative point of view. The idea was security, as otherwise any person could enter the precincts of the factory. This evidence was missed by the Labour Court when it arrived at a conclusion that a direct relationship ought to be inferred from this fact alone. [Paras 10-11][513-B-F]

1.2 Where a question is a mixed question of fact and law, a concession made by a lawyer or his authorised representative at the stage of arguments cannot preclude the party for whom such

person appears from re-agitating the point in appeal. It would be perverse to decide based only on a concession, without more, that a direct relationship exists between the employer and the workmen. Equally perverse is finding that the extended definition of 'employer' contained in the Act would automatically apply. The extended definition is contained in section 2(i)(iv) of the Uttar Pradesh Industrial Disputes Act. In order that section 2(i)(iv) apply, evidence must be led to show that the work performed by contract labour is a work which is ordinarily part of the industry of BHEL. On the facts of the instant case, that no such evidence was, in fact, led. Consequently, this finding is also a finding directly applying a provision of law without any factual foundation for the same. [Paras 13-15][514-F, G; 515-B, E, F]

2. In the instant case, the contractor pays the workmen their wages. Secondly, the principal employer cannot be said to control and supervise the work of the employee merely because he directs the workmen of the contractor 'what to do' after the contractor assigns/ allots the employee to the principal employer. The Labour Court's Award being perverse ought to have been set aside in exercise of jurisdiction under Article 226. The workmen have themselves admitted that there is no appointment letter, provident fund number or wage slip from BHEL insofar as they are concerned. Apart from this, it is also clear from the evidence led on behalf of BHEL, that no wages were ever been paid to them by BHEL as they were in the service of the contractor. Further, it was also specifically pointed out that the names of 29 workers were on the basis of a List provided by the contractor in a bid that was made consequent to a tender notice by BHEL. There is nothing on facts to show that the contract labour that is engaged, even *de hors* a prohibition notification, is in the facts of this case 'sham'. [Paras 20, 23, 25, 26][520-A, D-F]

Basti Sugar Mills Ltd. v. Ram Ujagar and Ors. **[1964] 9 SCR 838**; *Steel Authority of India Ltd. And Ors. v. National Union Waterfront Workers and Ors.* **(2000) 7 SCC 1 : [2001] 2 Suppl. SCR 343**; *Swami Krishnanand Govindanand v. Managing Director, Oswal Hosiery (Regd.)* **(2002) 3 SCC 39 : [2002] 2 SCR 1**; *C.M. Arumugam v. S. Rajgopal* **(1976) 1 SCC 863 : [1976] 3**

SCR 82; *General Manager, (OSD), Bengal Nagpur Cotton Mills, Rajnandgaon v. Bharat Lala and Another* **2011 (1) SCC 635**; *Balwant Rai Saluja and Another v. Air India Limited and Others* **(2014) 9 SCC 407 – relied on.**

Calcutta Port Shramik Union v. Calcutta River Transport Association and Others **(1988) Supp SCC 768 : [1988] Suppl. SCR 1034**; *Pepsico India Holding Private Limited v. Grocery Market and shops Board and Others* **(2016) 4 SCC 493 : [2016] 2 SCR 305**; *Harjinder Singh v. Punjab State Warehousing Corporation* **(2010) 3 SCC 192 : [2010] 1 SCR 591**; *Steel Authority of India Ltd. And Others* **(2001) 7 SCC 1 : [2001] 2 Suppl. SCR 343 – held inapplicable.**

Case Law Reference

[1964] 9 SCR 838	**relied on**	**Para 9**
[2001] 2 Suppl. SCR 343	**relied on**	**Para 9**
[2002] 2 SCR 1	**relied on**	**Para 12**
[1976] 3 SCR 82	**relied on**	**Para 13**
[1964] 2 SCR 838	**relied on**	**Para 15**
(2011) 1 SCC 635	**relied on**	**Para 18**
(2014) 9 SCC 407	**relied on**	**Para 21**
[1988] Suppl. SCR 1034	**held inapplicable**	**Para 23**
[2016] 2 SCR 305	**held inapplicable**	**Para 23**
[2010] 1 SCR 591	**held inapplicable**	**Para 23**
[2001] 2 Suppl. SCR 343	**held inapplicable**	**Para 26**

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 1799-1800 of 2019

From the Judgment and Order dated 24.04.2014 of the High Court of Uttarakhand at Nainital in Writ Petition No. 1021 of 2011 (M/S) and order dated 11.09.2014 in Review Application No. 644 of 2014 in Writ Petition No. 1021 of 2011 (M/S)]

A With

Civil Appeal Nos.1837-38, 1915-16, 1919-20, 1885-86, 1883-84, 1887-88, 1913-14, 1917-18, 1921-22, 1893-94, 1865-66, 1897-98, 1899-1900, 1867-68, 1909-10, 1803-04, 1805-06, 1807-08, 1809-10, 1907-08, 1887-88, 1871-72, 1873-74, 1905-06, 1877-78, 1817-18, 1819-20, 1903-
B 04, 1821-22, 1879-80, 1891-92, 1895-96, 1825-26, 1901-02, 1843-44, 1841-42, 1845-46, 1875-76, 1815-16, 1813-14, 1847-48, 1811-12, 1849-50, 1851-52, 1801-02, 1911-12, 1839-40, 1863-64, 1861-62, 1859-60, 1857-58, 1835-36, 1855-56, 1881-82, 1853-54, 1827-28, 1833-34, 1829-30, 1889-90, 1831-32, 1823-24 of 2019.

C Sudhir Chandra, Sr. Adv., Parijat Sinha, Ms. Reshmi Rea Sinha, Gaurav Ghosh, Rudra Dutta, Devesh Mishra, Anil Kumar Mishra, Ms. Asha Jain Madan, Mukesh Jain, Ms. Madhu Talwar, Rahul Verma, Mrs. D. Bharathi Reddy, Ms. Rachna Gandhi, Advs. for the appearing parties.

The Judgment of the Court was delivered by

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R. F. NARIMAN, J. 1. The present appeals arise out of a judgment dated 24.04.2014 and a review dismissal from the aforesaid judgment dated 11.09.2014, by which the High Court of Uttarakhand has dismissed a writ petition against a Labour Court's Award.

E 2. The brief facts necessary to decide these appeals are as follows:

3. By Reference Order dated 09.11.2004 under Section 4(k) of the Uttar Pradesh Industrial Disputes Act, 1947, the following dispute was referred to the Labour Court:

> "Whether termination of services of workman Shri Mahendra
F Prasad Jakhmola, s/o Late Shri Vachaspati Jakhmola, Helper by the employer, w.e.f. 13.11.2001, is justified and/or as per law? If not, what benefit/relief the concerned workman is entitled for and with what other details?"

4. Similar Reference Orders were made in 63 other cases.

G 5. Pleadings were filed before the Labour Court at Haridwar and evidence was led on behalf of the appellant as well as by the workmen. By an Award dated 01.11.2009, the Labour Court held, referring to a notification, which is, notification dated 24.04.1990 under the Contract Labour (Regulation and Abolition) Act, 1970 (hereinafter referred to as
H '1970 Act'), that the said notification, on application to the appellant,

would show that the workmen were not deployed to do the work mentioned in the notification. It was further held that based on documentary evidence in the form of gate passes, the workmen, who were otherwise employed by a contractor, were directly employed by the appellant. It was also held to have been fairly conceded by the employer's representative that supervision, superintendence and administrative control of all these workmen were with the appellant. It was also held that under the extended definition of "employer" in the Uttar Pradesh Industrial Disputes Act, 1947, even if the workmen are regarded as workmen of a contractor, they would yet be workmen of the appellant as the appellant was within the extended definition of "employer" under the Act. This being the case, it was held that all such workers, being 64 in number, were entitled to be reinstated with immediate effect but without backwages. From this Labour Award, a review petition was filed by the appellant, in which it was clearly stated that no such concession, as recorded by the Labour Court, was made before it. Further, notification dated 24.04.1990 had no application as Bharat Heavy Electricals Ltd. (BHEL) was exempted therefrom and, therefore, to apply this notification to the facts of this case was also wrong. On 18.05.2011, this review was dismissed by the Labour Court holding:

> "Considering the above noted discussion, as made in award dated 01.11.2009, I find force in the argument of opposite part-2 that as far as notification dated 24.04.1990 is concerned, this court has already considered and has given its verdict on this notification and now on review application no contrary inference can be drawn by this court as prayed by the applicant. As far as Notification dated 23.07.2010 (supra) is concerned, this notification was not issued by Government when award was passed. As such, this notification cannot be said applicable at that time and no benefit of later issued notification dated 23.07.2010 can be given to applicant. Moreover, if applicant was exempted vide notification on dated 24.04.1990, in such a case what was the necessity to issue the second notification dated 23.07.2010 (supra) for exemption of contract labour.
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> On perusal of all the documents and legal preposition of law laid down by Apex Court in Uttar Pradesh State Roadway Transport Corporation versus Imtiaz Hussain (supra). I am in agreement with the Opposite Party-2 that except arithmetical or clerical errors, the order which was passed by the court on merit,

cannot be changed, amended or altered. As far as case in hand is concerned no clerical or arithmetical mistake is involved. As such, application A-2 is liable to be rejected."

6. A writ petition was filed, being W.P. No. 1021/2011, against the aforesaid orders. This writ petition was dismissed by the first impugned order dated 24.04.2014 in which the High Court recorded that "undisputedly" all petitioners, i.e., workmen, were performing the duties which were identical with those of regular employees. Therefore, it can be said that they were under the command, control, management of the BHEL and, concomitantly, the contractor has absolutely no control over the workmen in performing such duties. It was, therefore, held that the alleged contract with the contractor was "sham" and, consequently, the Labour Court Award was correct in law and was upheld. Against this order, a special leave petition was filed which was disposed of as follows: -

"…….

In the impugned order the High Court records, *"Undisputedly, all the petitioners, herein, were performing the skilled/unskilled duties with the regularly appionted staff of BHEL in BHEL Factory Premises and were reporting on duties along with regular employees to perform identical duties and had been working for fixed hours along with regular employees of BHEL.*"

Mr. Sudhir Chandra, learned senior counsel for the petitioner submits that the above position was seriously disputed and the High Court has wrongly recorded "*Undisputedly*".

If that be so, the course open to the petitioner is to approach the High Court seeking review of the impugned order. The submission cannot be entertained for the first time by this Court having regard to the statement of fact recorded in the impugned order.

We observe that if review applications are filed within two weeks, the same will not be dismissed on the ground of delay.

Since special leave petitions are not being entertained on the above ground, liberty is granted to the petitioner to challenge the impugned order, in case, review applications are dismissed by the High Court.

Special leave petitions are disposed of."

7. The appellant, then filed a review petition before the High Court, which disposed of the review stating:

> "BHEL has submitted written statement before the learned Labour Court. Paragraph 3 thereof reads as under:
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> "3.The workman concerned in the dispute Sri Mahendra Prasad Jakhmola was never engaged by BHEL Haridwar and he was not their employee and they were not his employers. It appears that he might have been engaged and employed by the contractor Sri Madan Lal who also has been made party as employer in the Industrial Dispute under reference."
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> Plain reading of paragraph 3 of the written statement would go to suggest that even BHEL is not sure as to whether workmen were supplied by the contractor or were engaged by the BHEL. That being so, even if there was any Contract Labour Agreement between the BHEL and Madan Lal, alleged contractor, same seems to be sham transaction and camouflage.
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> Not only this, the BHEL/employer-I has not placed on record any material to demonstrate that under the alleged Labour Contract Agreement payment was ever made in favour of Madan Lal/alleged contractor for supplying labourers/workmen in question; no material is available on the record to say what was the period of supplying the labourers under the contract.
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> In view of the above discussion, I do not find any good or valid reason to review the judgment under review. Consequently, all the review applications fail and are hereby dismissed."

8. Shri Sudhir Chandra, learned senior counsel appearing on behalf of the appellant, has argued before us that the Labour Court Award was perverse. Accordingly to him, it could not have applied the notification dated 24.04.1990 as his client was excluded from such notification, and being excluded from such notification, there was, consequently, no prohibition on employment of contract labour. Further, if the evidence is to be read as a whole, it is clear that the representative of BHEL made it clear that, in point of fact, there were agreements with contractors and that it is workers of such contractors, who were paid by them, that are involved in the present dispute. He also added that no concession was made before the Labour Court, as was pointed out in the review petition, but, unfortunately, this plea was also turned down by the Labour

A Court, dismissing the review petition. Merely to state that because gate passes were given, does not lead to inference that there was any direct relationship between the appellant and the respondent-workmen. He also argued that the High Court, in the first round, not only missed the fact that the Labour Court Award was perverse, but committed the same error by stating that the admitted position before the High Court was B also that the labour was directly employed by the appellant. This is why, according to him, the Supreme Court sent his client back in review, but the review order, after setting down a paragraph of the written statement filed by the so-called employer, then arrived at an opposite conclusion from what is stated therein. For all these reasons, therefore, according C to him, the judgments of the High Court and the Labour Court Award ought to be set aside. He also cited certain judgments before us to buttress his argument that there was no manner of direct employment between his client and the workmen.

9. Ms.Asha Jain, on the other hand, has pointed out to us that we D should not exercise our discretionary jurisdiction under Article 136 of the Constitution, inasmuch as the Labour Court Award is a fair Award, as only reinstatement was ordered without backwages. She also argued that, at no stage, had BHEL, which is a Government Company, reinstated her clients despite the fact that there is no stay granted in their favour. She went on to add that the concession that was made was rightly made E before the Labour Court, and that the review petition did not contain any statement by any authorised representative, who made such concession, that he had not done so. She countered the argument that gate passes were not the only basis of the Labour Court, concluding that a direct relationship exists between the appellant and her clients. She argued F that despite the change of contractors four times over, the same workers continued showing, therefore, that there was a direct relationship between these workmen and the employer. She also pointed out from certain documents that the contractor got a 10 per cent profit and otherwise he had nothing to do with the labour that was provided by him. She then relied upon certain judgments which state that the power of judicial review G of the High Court ought to be exercised with circumspection, and that mere errors of law or fact cannot be interfered with. She also strongly relied upon the judgment in '*Basti Sugar Mills Ltd.* v. *Ram Ujagar* and Ors.' [(1964) (2) SCR 838) to state that, in any event, even if these employees were employees of the contractor, yet by the extended H definition of 'employer' in the Uttar Pradesh Industrial Disputes Act, a

relationship of employer and workmen would exist under the said Act. She went on to cite certain passages in the '*Steel Authority of India Ltd. And Ors.* v. *National Union Waterfront Workers and Ors.'* [(2001) 7 SCC 1] to buttress her contention that even if there were agreements with the contractor, they were only 'sham' or nominal on the facts of this case.

10. Having heard learned counsel for both the sides, it is important, first, to advert to the Award of the Labour Court. The said Award sets down the notification dated 24.04.1990 that was issued under the 1970 Act. A reading of the aforesaid notification makes it clear that the appellant, insofar as their UP operations are concerned, in Haridwar, in particular, are exempted from the aforesaid notification. Despite this, however, the Labour Court went on to apply the said notification, which would clearly be perverse. In addition, though Ms. Jain stated that documentary evidence was filed, yet the Labour Court based its finding on direct relationship between the parties only on the gate passes being issued by the appellant, and on a concession made by the appellant's representative.

11. What is clear from the evidence that was led by the parties is that the aforesaid gate passes were issued, as has been stated by the appellant's witness, only at the request of the contractor for the sake of safety and also from the administrative point of view. The idea was security, as otherwise any person could enter the precincts of the factory. This evidence was missed by the Labour Court when it arrived at a conclusion that a direct relationship ought to be inferred from this fact alone. Further, as has been correctly pointed out by Shri Sudhir Chandra, the appellant has, not only in the first review, but also in the writ petition filed, taken the plea that no such concession was ever made. Moreover, quite apart from this plea and the counter plea of Ms. Jain that the person who has made such concession should have stated that he did not do so, concessions on mixed questions of fact and law cannot decide cases as the evidence as a whole has to be weighed and inferences drawn therefrom.

12. Even a concession on facts disputed by a respondent in its written statement cannot bind the respondent. Thus, in *Swami Krishnanand Govindananad* v. *Managing Director, Oswal Hosiery (Regd.)* [(2002) 3 SCC 39, this Court held:

A "2. ……. It appears that when the case was posted for trial, the learned counsel appearing for the respondent conceded the facts disputed by the respondent in his written statement before the Court. That statement of the advocate was recorded by the Additional Rent Controller thus: "The respondent's learned counsel has admitted the ground of eviction and also the fact that the applicant is a public charitable institution and for that purpose it required the premises." …….

3. ……. Whether the appellant is an institution within the meaning of Section 22 of the Act and whether it required bona fide the premises for furtherance of its activities, are questions touching the jurisdiction of the Additional Rent Controller. He can record his satisfaction only when he holds on these questions in favour of the appellant. For so holding there must be material on record to support his satisfaction otherwise the satisfaction not based on any material or based on irrelevant material, would be vitiated and any order passed on such a satisfaction will be without jurisdiction. There can be no doubt that admission of a party is a relevant material. But can the statement made by the learned counsel of a party across the Bar be treated as admission of the party? Having regard to the requirements of Section 18 of the Evidence Act, on the facts of this case, in our view, the aforementioned statement of the counsel for the respondent cannot be accepted as an admission so as to bind the respondent. Excluding that statement from consideration, there was thus no material before the Additional Rent Controller to record his satisfaction within the meaning of clause (d) of Section 22 of the Act. It follows that the order of eviction was without jurisdiction."

13. Equally, where a question is a mixed question of fact and law, a concession made by a lawyer or his authorised representative at the stage of arguments cannot preclude the party for whom such person appears from re-agitating the point in appeal. In '*C.M. Arumugam* v. *S. Rajgopal'* [(1976) 1 SCC 863], this Court held:

"8. ……. That question is a mixed question of law and fact and we do not think that a concession made by the first respondent on such a question at the stage of argument before the High Court, can preclude him from reagitating it in the appeal before this Court, when it formed the subject-matter of an issue before the High

Court and full and complete evidence in regard to such issue was led by both parties……." A

14. It would be perverse to decide based only on a concession, without more, that a direct relationship exists between the employer and the workmen. Equally perverse is finding that the extended definition of 'employer' contained in the Act would automatically apply. The extended definition contained in section 2(i)(iv) of the Uttar Pradesh Industrial Disputes Act reads as follows: B

"2. Definitions.

…… C

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(i)'*Employer'* includes-

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…… D

(iv) where the owner of any industry in the course of or for the purpose of conducting the industry contracts with any person for the execution by or under such person of the whole or any part of any work which is ordinarily part of the industry, the owner of such industry;" E

15. A look at this provision together with the judgment in '*Basti Sugar Mills Ltd.* v. *Ram Ujagar* and Ors.' [(1964) (2) SCR 838) relied upon by Ms. Jain, would show that in order that section 2(i)(iv) apply, evidence must be led to show that the work performed by contract labour is a work which is ordinarily part of the industry of BHEL. We find, on the facts of the present case, that no such evidence has, in fact, been led. Consequently, this finding is also a finding directly applying a provision of law without any factual foundation for the same. F

16. This being the case, it is clear that the Labour Court has arrived at a conclusion which no reasonable person could possibly arrive at and ought, therefore, to have been set aside. Apart from the Labour Court dismissing a review from its own order, we find that the High Court, in the first impugned judgment dated 24.04.2014, has also arrived at findings which are contrary to the evidence taken on record. First and foremost, it could not have said that "undisputedly", the labour that was employed through contractors were performing identical duties as regular employees G H

A and that, therefore, without any evidence, it can be said that they were under the control, management and guidance of BHEL. Secondly, when it said that alleged contracts that were awarded in favour of contractors and how many labourers, in what type of work etc. were asked for, were not furnished, is also directly contrary to the evidence led on behalf of the BHEL, in which such documents were specifically provided. Thus, Shri Naveen Luniyal, in his evidence-in-chief, had pointed out:

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> .....
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> Thus, we entered into contract of workers with the contractors which are document No. 8 and 9 of the above list and the same are marked Exhibit E-6 and E-7 respectively. The period of contract used to be extended for the completion of assignment in case the work was not completing in time or the same was being extended. The concerned workman filed writs before Hon'ble Delhi High Court seeking their regularization while impleading BHEL as a party and it was ordered by the court that you may prefer your suit for regularization before C.G.I.T.
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> .....
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> .....
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> There is no master employer and servant relationship of the workers with BHEL and BHEL was also not making any payment of salary to them as the workers were in the service of the contractor. Thus, there does not arise any question of giving them employment.
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> The workers were being issued gate passes at the request of the contractor, for the sake of safety and also from administrative point of view, it was specifically bearing the mention that they are the workers of the contractors. Any worker cannot enter in the workplace if such gate passes are not issued. CISF takes care of the safety in our organisation."

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G 17. Equally, the review judgment apart from being cryptic, draws an unsustainable conclusion after setting out paragraph 3 of the written statement of BHEL in the Labour Court. What was stated by BHEL in paragraph 3 was that the workmen were only engaged by the contractor and were not their employees. The written statement then goes on to be speculative in stating that it appears that a workman might have been

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engaged as an employee by a particular contractor. A plain reading of this written statement would certainly not suggest that BHEL is not sure as to whether workmen were or were not supplied by a contractor, or engaged by BHEL. What is clear from the written statement is that BHEL has denied that the workmen were engaged by BHEL or that the workmen were BHEL's workmen. From this to conclude that the transaction seems to be 'sham', is again wholly incorrect. Apart from this, it is also incorrect to state that BHEL has not placed on record any material to demonstrate that under the alleged labour contract, payment was ever made in favour of Madan Lal, the alleged contractor. It has been correctly pointed out by learned counsel appearing on behalf of BHEL that in the very first sentence of the cross examination of the workmen, before the labour court, the workmen admitted that payments of their wages were made by four contractors including Shri Madan Lal. Also, the fact that Madan Lal was paid under the agreement with BHEL was never disputed. Indeed, Ms. Jain's argument that Madan Lal only derived a 10 per cent profit from the agreement with him presupposes payment to Madan Lal by BHEL under the agreement with him. This finding again is wholly incorrect.

18. 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* v. *Bharat Lala and Another'* [2011 (1) SCC 635], it was held that the well recognised tests to find out whether contract labourers are direct employees are as follows:

> "10. 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"

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

> "12. The expression "control and supervision" in the context of contract labour was explained by this Court in *International Airport Authority of India* v. *International Air Cargo Workers' Union* thus: (SCC p.388, paras 38-39)
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> > "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.
> >
> > 39. The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/ allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise. In short, worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor."

20. From this judgment, it is clear that test No. 1 is not met on the facts of this case as the contractor pays the workmen their wages. Secondly, the principal employer cannot be said to control and supervise the work of the employee merely because he directs the workmen of the contractor 'what to do' after the contractor assigns/ allots the employee to the principal employer. This is precisely what paragraph 12 explains as being supervision and control of the principal employer that is secondary in nature, as such control is exercised only after such workman has been assigned to the principal employer to do a particular work.

21. We may hasten to add that this view of the law has been reiterated in '*Balwant Rai Saluja and Another* v. *Air India Limited and Others'* [2014(9) SCC 407], as follows:

> "65. Thus, it can be concluded that the relevant factors to be taken into consideration to establish an employer-employee relationship would include, inter alia:
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> (i) who appoints the workers;
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> (ii) who pays the salary/remuneration;
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> (iii) who has the authority to dismiss;
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> (iv) who can take disciplinary action;
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> (v) whether there is continuity of service; and
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> (vi) extent of control and supervision i.e. whether there exists complete control and supervision.
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> As regards extent of control and supervision, we have already taken note of the observations in *Bengal Nagpur Cotton Mills case* [(2011) 1 SCC 635]*, International Airport Authority of India case* [2009 13 SCC 374] and *Nalco case* [(2014) 6 SCC 756]."

22. However, Ms. Jain has pointed out that contractors were frequently changed, as a result of which, it can be inferred that the workmen are direct employees of BHEL. There is no such finding of the Labour Court or any reference to the same by the High Court. Consequently, this argument made for the first time in this Court together with judgments that support the same, is of no consequence.

23. Ms. Jain also pointed out three judgments of this Court in '*Calcutta Port Shramik Union* v. *Calcutta River Transport Association and Others* [1988 (Supp) SCC 768], *Pepsico India Holding Private Limited* v. *Grocery Market and Shops Board and Others* [2016 4 SCC 493] and *'Harjinder Singh* v. *Punjab State Warehousing Corporation*' [(2010) 3 SCC 192] for the proposition that judicial review by the High Court under Article 226, particularly when it is asked to give relief of a writ of certiorari, is within well recognised limits, and that mere errors of law or fact are not sufficient to attract the jurisdicton of the High Court under Article 226. There is no doubt that the law laid down by these judgments is unexceptionable.

A We may only state that these judgments have no application to the facts of the present case. The Labour Court's Award being perverse ought to have been set aside in exercise of jurisdiction under Article 226.

24. Ms. Jain then argued that since no backwages were granted but only reinstatement was ordered, we should not exercise our jurisdiction B under Article 136 to set aside the said Award. When it is found that the findings of the Labour Court are perverse, it is difficult to accede to this argument. Equally, the argument that the so-called employer has not complied with the Labour Court's Award, despite there being no stay, is an argument that must be rejected. In that a contempt petition could always have been moved on behalf of the workmen for implementation. C No such thing has been done in the present case.

25. The argument that the contractor, in the facts of the present case, gets only a 10 per cent profit and nothing more, is again an argument that needs to be rejected in view of the clear and unequivocal evidence that has been led in this case. The workmen have themselves admitted D that there is no appointment letter, provident fund number or wage slip from BHEL insofar as they are concerned. Apart from this, it is also clear from the evidence led on behalf of BHEL, that no wages were ever been paid to them by BHEL as they were in the service of the contractor. Further, it was also specifically pointed out that the names E of 29 workers were on the basis of a List provided by the contractor in a bid that was made consequent to a tender notice by BHEL.

26. Ms. Asha Jain's reliance upon the judgment in '*Steel Authority of India Ltd. And Others'* [(2001) 7 SCC 1] is also misplaced. There is nothing on facts to show that the contract labour that is engaged, even F *de hors* a prohibition notification, is in the facts of this case 'sham'.

27. Given this, we set aside the impugned judgments of the High Court and the Labour Court's Award.

The appeals are allowed in the aforesaid terms.

Devika Gujral Appeals allowed.