MANU/OR/0338/2007

IN THE HIGH COURT OF ORISSA

Decided On: 31.08.2007

Appellants: **Paradip Port Trust**
Vs.
Respondent: **General Secretary, Utkal Port and Dock Workers Union, Paradip Port and Ors.**

Hon'ble Judges/Coram:
A.K. Ganguly, C.J. and I. Mahanty, J.

Case Note :
Labour and Industrial - Employee - Regularization of - Article 226 of Constitution of India and Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 - Respondent was union of worker who worked as labourer in Appellants premises - Respondent raised dispute to treat its workers as employee of Appellants before Industrial Tribunal - Tribunal passed award in favour of respondent - Appellant filed writ petition - Writ court affirmed order of Tribunal - Hence, present appeal - Held, it is well settled that this Court in exercise of its certiorari jurisdiction can interfere with award of Tribunal if same is patently perverse or is based on no evidence or same is based on such conclusion as cannot be entertained by men of ordinary prudence - But it is well settled that that jurisdiction under Article 226 of constitution is not same as that of adjudicatory authority which is vested in Tribunal on reference under Section 10 of Act - Court can in exercise of its certiorari jurisdiction only examine whether award of Tribunal suffers from any jurisdictional error or has been rendered in violation of principles of natural justice or is suffering from errors apparent on face of record - None of any infirmities find in award in instant case - Keeping above principles in mind, this Court affirmed award of Tribunal, writ Court has not committed any error in law which calls for interference by this Court in present Letters Patent Appeal - Hence, appeal dismissed

JUDGMENT

A.K. Ganguly, C.J.

1 . This appeal has been filed by the Management of Paradip Port-Trust (hereinafter referred to as "PPT") challenging the Judgment dated 23.7.2004 passed by a Learned Judge of the writ Court in W.P. (C) No. 6393 of 2003. By the said Judgment the Learned Judge has dismissed the Writ Petition filed by PPT challenging the award of the Industrial Tribunal.

An the Writ Petition PPT challenged the award passed by the Central Government Industrial Tribunal-cum-Labour Court, Bhubaneswar in Tr. Industrial Dispute Case No. 112 of 2001. Though three items of dispute were involved in the reference, PPT's challenge was confined to one item. The said item of dispute is as follows:

> Whether, the claim of the Union regarding 40 workers as per list enclosed should be treated as regular workers of Paradip Port Trust and paid regular wages at par with the similar worker of Paradip Port Trust Management. If so,

to what relief the workers are entitled and from which date?

2. The Learned Judge has noted the case of the respective parties and from the noting of the Learned Judge it appears that the case of PPT is that the Central Store under the Materials Management Department receives materials from the supplier or through the transporters of the supplier. The loading and unloading of those materials are carried out by the labourers engaged by the supplier and other transporters. It has been further urged by the Learned Counsel for PPT that the payments to those labourers for loading and unloading of the materials are made by the supplier and the transporters. PPT is in no way concerned with the engagement of any labourer for loading or unloading of materials which are received in its Central Store. So the case of PPT is that the workers who were raising the dispute were never engaged by them directly for the for the purpose of loading and unloading of the materials in the Central Store. But gate passes have been given to them by PPT for the purpose of entering into the prohibited area, namely, the Central Store. Merely because the gate passes were issued to them for entering into the prohibited area, it was urged that the workers cannot claim that they are the employees of PPT.

3. On the other hand, the case of the workers is that the aforesaid dispute is a part of their Charter of Demand being Demand No. 10 in the Charter of Demand dated 6.11.1995. The said demand is that 40 workers are continuously working in the Central Store of PPT which is within the prohibited area, and such work is in the nature of loading, unloading and stacking of materials in the Central Store belonging to PPT. That being the nature of work, gate passes are issued to them by PPT and out of those 40 workers, 30 are working since 1975 and 10 of them are working since 1994. They are claiming for regularizing their work in the Central Store and extension of consequential benefits, which are given to the regular employees of the Central Store. Further case of the workers is that they are discharging similar job which is being discharged by the Khalasis and helpers working in the Central Store of PPT and therefore, they are entitled to the same pay of which they have been deprived by the Management of PPT and this amounts to unfair labour practice by treating them as contract labourers.

4. On the aforesaid facts, the Tribunal came to the conclusion that the workers are working for a long time and are still continuing and their work is perennial in nature. Therefore, their claim for treating them at par with the regular employees of PPT doing the same work is justified. The Tribunal, therefore, held that the workers are entitled to regularization as well as the wages at par with the employees of PPT.

5. Learned Judge before dismissing the Writ Petition took into account the submission made by the Learned Counsel for the PPT that the work of stacking of material is done by the regular labourers and those forty workers are also engaged by the PPT for the same work and they are also paid for such engagement by the PPT. Before the Learned Judge, Learned Counsel for the PPT submitted that there is no relationship of employer and the employees between those workers and the PPT. Learned Judge of the first Court noted the facts which was adduced before the Tribunal and also noted the facts which were urged on behalf of the workers. On those facts the findings reached by the Tribunal and noted by> the Learned Judge are set out below:

(1) All the 40 workers are given Gate passes to enter inside the prohibited area of the Paradip Port Trust where the Central Store is located.

(2) The workers are used for loading, unloading of materials and are also used for the purpose of stacking of materials inside the Central Store.

(3) On some occasions they have been engaged by the management of the Paradip Port Trust for doing such work and have been paid by the management directly for the said work.

(4) The work in the Central Store is continuous and perennial in nature as all the materials required by the Paradip Port Trust are stored in the Central Store.

(5) Out of 40 workers, 30 are working since 1975 and 10 are working since 1994.

Learned Judge thereafter came to the conclusion that the Management of the PPT has effective control with regard to entry into the prohibited area over all the forty workers by issuing passes to them. Learned Judge has also come to the conclusion that there is no dispute that the workers have been engaged not only for loading and unloading of materials inside the Central Store, but they are also engaged in stacking the materials inside the Central Store. So far as stacking of materials inside the Central Store is concerned, the Management has full control over the workers as the workers cannot stack materials wherever they want and do so only under the instruction of the management. The third aspect is that the workers were paid wages on certain occasions by the management whenever they were engaged by the management. This has been going on for quite sometime in the past.

6. On those facts, Learned Judge of the first Court held that not only the Management bas effective control over the entry of workers into the prohibited area but also has effective control on the movement of workers inside the Central Store. There is no dispute that the workers are working in the Central Store from 1975 to 1994 and the said work is perennial in nature. Therefore, the Learned Judge refused to interfere with the finding of the Tribunal.

7. Learned Counsel for the Appellant while assailing the Judgment of the Learned Judge of the Writ Court did not dispute the facts which have been noted by the Learned Judge, but urged that in view of the legal position which has been developed by several Judgments of the Hon'ble Supreme Court, even on those facts no case of regularization of workers is made out inasmuch as those workers were never employed by the PPT and there is no relationship of employer and the employees between those workers and the PPT, they have no attendance register and the PPT has no disciplinary control over them.

8. Learned Counsel first relied on the decision of the Supreme Court in the case of Workmen of Nilgiri Co-operative Marketing Society Ltd. v. State of Tamil Nadu and Ors. reported in MANU/SC/0100/2004 : (2004)IILLJ253SC in support of his contention. Bu the present case stands on different facts from those which were considered in the case of Niligiri Cooperative Marketing Society Ltd. There is a substantial difference between the nature of activities between Niligiri Cooperative Marketing Society Ltd. and the PPT. In paragraph 100 of the Judgment at page 1657 of the report, Learned Judges of the Hon'ble Supreme; Court held that the Society in question was merely dealing with small and marginal farmers who themselves look after the Society for obtaining such assistance as may be necessary for not being exploited by the traders. Therefore, the Society only renders services to its own members and receives commission at the rate of one percent both from the farmers as also from the traders. The Society is also not involved in any trading activities. Apart from that, from the admitted facts in Niligiri Cooperative Marketing Society Ltd., we find that, the job of unloading and unpacking of gunny bags, stitching the gunny bags and putting them into lorries are done by the

Porters. Most of such workers are women. But for doing various items of work in the yards services of certain third Parties are made available to the members of the Society. The said work is done through the workers of the concerned third parties and the entire payment is made to the workers by third parties. Sometimes, the producer members may not have enough money with them and the Society makes the payment on behalf of the members by way of advance. There is no obligation on the Societies godown to engage service of the workers waiting in the yard. The society has no right to decide who should do the work and the members are free to engage any worker available in the yard and no working hours' are fixed for porters and graders. They are free to come and go at will and their number is also not fixed.

9. In the instant case, the factual position is not the same. Here, admittedly, there is a fixed number of workers, who are forty in number. They have fixed nature of job, which have been discussed above. Their entry and exit from the Central Store of PPT is controlled by the passes given by the PPT. Apart from loading and unloading, those forty workers were also engaged in a different work of stacking by the PPT. It is totally done under the control of the PPT and for the work of stacking, they are also paid by the PPT. They are doing the same work for more than twenty years and the PPT is a State under the meaning of Article 12. Therefore, it has all the Constitutional liability of working as a model employer and PPT has regular trading activities. The status of the PPT cannot be compared with a Cooperative Society. Therefore, the factual matrix between the two cases is not the same. Apart from that, in the case of Niligiri Marketing Cooperative Society Ltd. on a reference, the Tribunal held that the workers are not able to establish their case before the Tribunal on facts. The said finding of the Tribunal was affirmed by the High Court and also by the Supreme Court. Here the position is just the reverse. The Tribunal has passed an award in favour of the workers and the Learned Single Judge of the High Court has affirmed the same.

10. Learned Counsel for the Appellant also placed reliance on the Judgment of the Supreme Court in the case of Steel Authority of India Ltd. v. National Union Waterfront Workers and Ors. reported in MANU/SC/0515/2001 : (2001)IILLJ1087SC . That was a case, which discussed the consequences of a notification under Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970. The Learned Judges held that as a result of such a notification prohibiting employment of contract labour in a Government Company, the contract labour who were appointed would not automatically become workers of the principal employer. We are not concerned with that question here. Here the reference of the relevant dispute before the Tribunal is not on that basis at all. Therefore, the Supreme Court's decision, which was rendered in the aforementioned context is of a totally different legal and factual question and therefore, cannot be applied to the facts of the present case.

11. The Learned Counsel also relied on the decision in the case of Indian Drugs &. Pharmaceuticals Ltd. v. Workmen, Indian Drugs & Pharmaceuticals Ltd. reported in MANU/SC/4993/2006 : (2007)1SCC408 . That Judgment was in the realm of public employment, namely, employment to which Articles 14, 16 and 309 are applicable. In the instant case we are dealing with industrial adjudication by a Tribunal. Industrial adjudication by the Tribunal stands slightly on a different footing. Apart from that this Court finds that Indian Drugs and Pharmaceuticals Limited was a sick Company and was declared so by BIFR. The Supreme Court found that the number of sanctioned posts for the company are only 1049, but already 1299 employees are working there. In that context, the direction of the High Court to regularize 10 employees who were appointed without going through regular employment process was not approved by the Hon'ble Supreme Court, even though the High Court held that those persons are not entitled to

regularization in view of the decision of the Supreme Court in the case of Madhyamik Shiksha Parisad, U.P. v. Anil Kumar Mishra. The Court also took into account the fact that the company was before the BIFR and was going through a revival package and at that time it was not proper for the High Court to saddle it with further liabilities as there was no vacancy in the Company and it was in a poor financial condition. These facts are not present in the case at hand. The Learned Counsel also relied on another decision of the Supreme Court in the case of Surinder Prasad Tiwari v. U.P. Rajya Krishi Utpadan Mandi Parishad and Ors. reported in MANU/SC/8476/2006. That was also a decision of the Supreme Court in the realm of public employment and the Hon'ble Supreme Court referred to Articles 14, 16 and 309 of the Constitution and held that in the constitutional scheme there is no room for back door entry in the matter of public employment. In that case the employee was initially appointed for a period of three months on contractual basis for conducting a survey in the deficiency of procurement of the agricultural produce of Meerut Division of U.P. Rajya Krishi Utpadan Mandi Parishad. Thereafter the Appellant was again appointed for a period of three months on 6.12.1989. The Appellant was again appointed on 23.3.1990 on contractual basis for a period of five months. Thus appointment was continued from time to time on contractual basis. Ultimately when the Appellant's service was not continued, he approached the High Court and the High Court dismissed the petition. Then the Appellant approached the Hon'ble Supreme Court. In that background, the Hon'ble Supreme Court held, relying on the decision of the Supreme Court in the case of Secretary, State of Karnataka v. Umadevi (3) and Ors. reported in MANU/SC/1918/2006 : (2006)IILLJ722SC that public appointment cannot be made through back door method and nobody, who has been appointed through back door method has any right to ask for regularization. We are of the view that those observations have been made in the context of public appointment which are controlled by Rules framed under Article 309 of the Constitution. In the instant case, the considerations are slightly different.

12. The reliance was also placed by the Learned Counsel for the Appellant on the Judgment in the case of Punjab Water Supply & Sewerage Board v. Ranjodh Singh and Ors. reported in MANU/SC/8745/2006 : (2007)2LLJ1052SC . In that case the Supreme Court held that the Punjab Water Supply & Sewerage Board is a statutory Board and a State within the meaning of Article 12 of the Constitution of India. The same is also an autonomous body. Such an autonomous body is not bound to carry out the circular of the State Government which is not even a statutory instrument. The Hon'ble Supreme Court held that such an autonomous body has to fulfill its constitutional duty under Articles 14 and 16 and as such the direction of the State Government which is not based on any statutory scheme is not binding on it. In the instant case we are not at all concerned with those questions. Here the rights of the parties were governed by Industrial Adjudication and there is an award passed by the Industrial Tribunal which has been affirmed by the Learned Judge of the Writ Court. So the decision in the case of Punjab Water Supply & Sewerage Board is not applicable to the facts of the case.

13. Next decision which was cited by the Learned Counsel for the Appellant was rendered in the case of Pushkar Nath Nehru and Ors. v. Administrator, Municipality, Srinagar and Anr. reported in MANU/SC/0679/1987 : AIR1987SC1311 . In that case the Supreme Court was considering the Judgment of the Learned Single Judge of the High Court of Jammu & Kashmir under Article 32(2-A) of the Constitution. The Court held that an order passed by a Single Judge granting a writ of mandamus under Article 32(2-A) is a Judgment in exercise of original civil jurisdiction of the High Court and therefore appealable under Clause 12 of the Letters Patent. This Court fails to appreciate the relevance of that Judgment to the facts of the present case.

14. The Learned Counsel for the Appellant very much relied on the decision of the Supreme Court in the case of Secretary, State of Karnataka v. Umadevi (3) and Ors. reported in MANU/SC/1918/2006 : (2006)IILLJ722SC .

The decision in the case of Umadevi was rendered in a totally different context. If we look at the Judgment of Umadevi, it will be*clear that the matter was referred to the Constitution Bench in view of some divergence of judicial Opinion. The other reason for reference is to find out whether the scheme for regularization in the Judgment of Karnataka High Court is repugnant under Article 16(4), 309, 320 and 335 of the Constitution and argument was advanced that such a scheme is consistent with the provisions of Articles 14 and 21 or the Constitution. In the background of these facts, the matter was referred to the Constitution Bench for a decision. Therefore, the basic question which was considered in Umadevi is not at all relevant here. In the instant case, the admitted factual position is that on a reference under Industrial Disputes Act by the Central Government, the Industrial Tribunal, after considering the facts of the case and the materials on record, gave an award in favour of the claim of the forty workers for regularization. The said award has been affirmed by the Learned Judge of the writ Court. Therefore, this is essentially a case of Industrial adjudication and the workers here have followed the due process of law by raising a reference and going to the Tribunal as the matter was contested on the basis of factual claims and counter claims. There is no question of any back door entry and not following the Constitutional scheme in pursuing a reference under Industrial Disputes Act in which on a contested hearing an award in favour of the workers has been given by the Tribunal and which has been affirmed by the Learned Judge of the Writ Court. Therefore, the question is whether this Court of appeal should interfere with such concurrent findings of fact. Here the case of the workers cannot be equated with back door entry which has been frowned upon in Umadevi. Even in Umadevi in paragraph 53 at page 42 of the report, Hon'ble Supreme Court held that persons who have worked for ten years or more, in their case the question of regularization may have to be considered on merit and the Government should take steps to regularize such workers as a one time measure. In the instant case, the claim of the workers has been correctly appreciated by the Tribunal in view of the clear deposition of Witness No. 2 for the Management namely, Shyamsundar Naik before the Tribunal. The said witness in cross-examination deposed as follows:

> Deposition of Witness No. 2 for the Management namely, Shyamsundar Naik, son of Bholanath Naik, of Sitol, P.S. Tirtol, Dist. Jagasinghpur recorded on 5th September, 2002.
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> **6.** In the Central Store there are five Sections and each Section is managed by one Superintendent. The Asst. Engineer(Stores) is the immediate authority of the store to manage the stores. I see the 2nd Party members since 1978 working in the Central Stores. By the time, I retired there are 40 persons working along with Babaji in the Central Stores of the Management. At the time of necessity the services of the members of the 2nd Party has been utilized by the Central Stores directly and payment has been made to them as per Ext. 6. At the time of verification, the tick mark has been given where the records were available in the Ext. 3 series.
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> **7.** Except medicines all the materials required for the Management are being purchased through material division and kept in the Central Store. I cannot say if any department can purchase directly any materials without knowledge of Materials Division. The vehicle of the Management comes to the Central Store with officer concerned to lift the materials from the Central Store. The

department persons come to shift the materials and sometimes the members of the 2nd Party also attend the shifting of materials with the department persons. Once the materials received by the Central Store, it become the properties of the Management, Paradip Port. The work of stacking is being done by the 2nd Party members. As per our instruction, the stacking work was being done.

8. Except holidays the members of the 2nd Party work everyday in the Central Stores. In each Section is having one Assistant and one helper. They also supervise the works of the members or the 2nd Party.

Sd/- Presiding Officer

15. It also appears that the workers applied for regularization of their services and the Manager (Materials) by his note dated 30.11.1999 recommended their case to be considered by the Chairman and for passing necessary order. The said note of the Manager (Materials) dated 30.11.1999 has been marked an exhibit before the Tribunal. The said note is set out below:

Notes pre-page. Representation of labourers at p. 131/c. and orders of Chairman on the body of the letter may kindly be seen.

The labourers are engaged by various contractors for drawl of steel, cement from Central Stores regularly by issuing Annual passes to them. The contractors are applying for their Annual Passes and Traffic Department is issuing passes to them. As they do the loading and unloading in the Central Stores, they claim to be Central Stores labourers. It is also a fact that sometimes when we require their services, they are also being engaged by Central Stores.

There is an Industrial Dispute Case No. 54/96 (C) pending on this issue wherein they have claimed for regularization of their services. So far as relief to them is concerned we have provided 4 Kg. Rice, to each family as relief.

Considering that they are working for various contractors for loading of materials at stores, Chairman may kindly consider their request and pass necessary orders.

Sd/ - Manager (Materials)
Dt. 30.11.1999

16. In the context of aforesaid facts, the decision in the case of Umadevi is not strictly applicable here.

17. However, the Judgment of the Learned three Judge Bench of the Supreme Court in Hussainbhai v. The Math Factory Tezhilali Union and Ors. reported in MANU/SC/0265/1978 : (1978)IILLJ397SC has substantial relevance to the facts of the present case. In that decision, Justice Krishna Iyer, with characteristic lucidity, indicated the true lest to find out who is the employer and who is regarded as an employee in an Industrial Dispute between the workers and the Management. In paragraph 5, Learned Judge has emphasized that such a question has to be considered in the background of labour legislation which casts welfare obligations on the State in the light of Articles 38, 39, 42, 43 and 43A of the Constitution. The exact words or the Learned Judge in paragraph 5 at page 1412 of the Judgment are quoted below:

5. The true test may, with brevity, be indicated once again. Where a worker or group of workers labours to produce goods or service 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 contractu 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 the mischief and achieve the purpose of the law and not be misled by the may a of legal appearances.

18. The aforesaid concept introduced in Hussainbhai has not been overruled by any subsequent Judgment of the Supreme Court. On the other hand, we find that the decision in Hussainbhai has been quoted with approval by the Supreme Court in the case of Steel Authority of India Ltd. (supra) reported in MANU/SC/0515/2001. In paragraph 112 at page 3564 of the Judgment, the above observation of Justice Krishna Iyer has been quoted.

19. In the instant case from the facts which have been disclosed before the Tribunal a case of unfair labour practice has been made out against the Appellant, if we consider the provisions of Item 10 of the 5th Schedule of the Industrial Disputes Act, 1947. Item 10 of the 5th Schedule is as follows:

> 10. To employ workmen as casuals or temporaries and to continue them as such for years with the object of depriving them of the status and privileges of permanent workmen.

In the instant case from the facts which have been discussed hereinabove, it is not in dispute that the workmen are working in the premises of PPT for a very long time, i.e., 30 workmen are working from 1975 which comes to about 32 years and 10 workmen are working from 1994 which comes to about 13 years. But they are denied the status of regular workers of PPT, even though PPT exercises substantial control over them, as is clear from the evidence of Witness No. 2 for the Management. In the background of these facts, it is difficult for this Court to interfere with the Judgment of the Learned Judge of the writ Court which has affirmed the award of the Tribunal.

20. The Supreme Court has given clear guidelines as to how The Court should deal with the award of an Industrial Tribunal in the case of Calcutta Port Sharmik Union v. The Calcutta River Transport Association and Ors. reported in 1959 I LLJ 223. It has been held in paragraph 10 of the said Judgment by the Learned Judges of the Supreme Court that as and when a reference is made to an Industrial Tribunal, it has to be presumed that there is a genuine industrial dispute between the parties which requires to be resolved by adjudication. The Courts exercising judicial review should attempt to sustain the awards made by the Tribunal as far as possible instead of picking holes in the Award on trivial points, ultimately frustrating the entire adjudication process before the Tribunal by striking down awards on hyper-technical grounds.

21. It is well settled that this Court in exercise of its certiorari jurisdiction can interfere

with an award of the Tribunal if the same is patently perverse or is based on no evidence or the same is based on such conclusion as cannot be entertained by men of ordinary prudence. But it is well settled that that the jurisdiction under Article 226 is not the same as that of adjudicatory authority which is vested in a Tribunal on a reference under Section 10 of the Act. The Court can in exercise of its certiorari jurisdiction only examine whether the award of the Tribunal suffers from any jurisdictional error or has been rendered in violation of principles of natural justice or is suffering from errors apparent on the face of the record. None of those infirmities vitiate the award in the instant case. The Writ Court is not normally competent to review the evidence adduced before the Tribunal and the question of sufficiency of evidence is also not open to be questioned before the Writ Court.

22. Keeping those principles in mind, this Court is of the opinion that by affirming the award of the Tribunal, Learned Judge of the Writ Court has not committed any error in law which calls for interference by this Court in this Letters Patent Appeal.

For the reasons aforesaid, this appeal is dismissed and the order of the Learned Judge of the Writ Court is affirmed.

I. Mahanty, J.

23. I agree