Delhi High Court Sh. Subhash Chand, Sh. Radhey Sham ... vs Sh. P.K. Jain And Ors., D.C.M. ... on 6 August, 2002 Author: V Jain Bench: V Jain JUDGMENT Vijender Jain, J. 1. The petitioner, aggrieved by the award of the Industrial Tribunal, has filed this writ petition. The Industrial Tribunal in view of the award dated 25.1.90 on a reference from the appropriate Government held that the term of reference was capable of only a negative answer. It was further held that the Industrial Tribunal could not create a new term of reference and is bound to limit the adjudication to the term of reference. It was held in the award that in view of provision of Contract Labour Regulation and Abolition Act, 1970, the decision of the Labour Commissioner in terms of the said Act and pursuant to the authority of Supreme Court in Canon India Ltd. 1974, Labour Indian Cases 707 , shall be final and in view of , reference under Section 10 of the Industrial Disputes Act, 1947 cannot be made in respect of contract labour after enforcement of Contract Labour Regulation and Abolition Act, 1970. 2. Unfortunately, workmen did not challenge the award but choose to file application under Section 33-A of the Industrial Disputes Act. That application was dismissed. 3. During the pendency of these proceedings, I.D. No. 10/81 was filed before the award was made by the Industrial Tribunal. Mr. Sabharwal counsel for the petitioner has vehemently contended that dismissal of I.D. No. 10/81 was beyond the scope of Section 33(2) of the Industrial Disputes Act. 4. Mr. Sabharwal has contended that the dispute raised by the petitioner against the management was industrial dispute as defined under Section 2(k) of the Industrial Disputes Act 1947. Another contention of the counsel for the petitioner was that the services of the petitioner were terminated during the pendency of the proceedings in relation to the said industrial dispute which could not have been done without taking requisite approval under Section 33(2)(b) of the Industrial Disputes Act. It was further contended by Mr. Sabharwal that the expression used in Section 33(2)(b) of the Industrial Disputes Act is "During the pendency of any proceedings in respect of an Industrial Dispute". The proceedings referred to in the above expression means de facto proceedings. It does not mean that if the reference is not valid then pendency of such proceedings under an invalid reference order was not treated as covered in the above expression and in this context the object of the said provision has to be kept in view. Counsel for the petitioner in support of his contention has cited the authority of Supreme Court in Raja Kulkarni and Ors. v. State of Bombay, LLJ 1954 (1). 5. On the basis of the aforesaid authority Mr. Sabharwal has contended that the proceedings referred to in the above expression will include a reference which is ultimately found to be incompetent but such a pendency is very much the pendency of proceedings in respect of an industrial dispute as contemplated in Section 33 of the Industrial Disputes Act. In support of his contention Mr. Sabharwal has cited Standard Vaccum Refining Company of India Ltd. v. Their Workmen, 1960-II, LLJ 233. 6. On the other hand, counsel for the respondent has contended that the definition of 'workman' for the purpose of industrial disputes does not take into its fold workman employed through contractor. He has contended that the definition of workman as defined under Section 2(s) of the Industrial Dispute Act, 1947 and the definition of workman as defined un-

der Section 2(I) of Contract labour (Regulation & Abolition) Act 1970 covers workman for two distinct and different purposes. Relying on the decision of Supreme Court in Steel Authority of India Ltd. and Ors. v. National Union Waterfront Workers, 2001 (7) JT 268, it has been contended that until and unless the employment of workman through a contractor is a camouflage only in that case there shall be a relationship of master and servant between the principal employer and the workman for the purposes of Industrial Disputes Act. But if there is no finding that there was no such relationship or the contract was not sham or bogus then the workman will not be in fact the employee of the principal employer and he will be a contract labour. He has further contended that the expression 'employed' used in Section 2(s) of the Industrial Disputes Act is used in the sense of relationship brought about by express or implied contract of service in which the employee renders service for which he is engaged by the employer. It discloses a relationship of command and obedience and unless a person is employed there is no question of working within the definition of workman as contained in the Act. Where a contractor employs a workman to do the work which he contracted with a third person to accomplish on definition as it stands, the workman of the contractor would not without something more become the workman of that third person. In support of his contention counsel for the respondent has also cited Gowrishanker Oil Mills v. Industrial Tribunal and Ors. 1962, LLJ and The Management of Pheros & Co. P. Ltd. Bamunimaidan Gauhati v. The Presiding Officer, Labour Court, Assam and Ors. , LLJ, 1971, 608, which also took into consideration Raja Kulkarni's case (Supra) as well as Shalimar Paints Ltd. v. Third Industrial Tribunal, 1974, 213. 7. I have given my careful consideration to the arguments advanced by the counsel for the parties. To my mind the order of reference in the main dispute under Section 10 of the Industrial Disputes Act was T.D. 71/75, which ceased to exist and in the award it was held as follows: "The present reference, as already noted, is in respect of contract labour. Hence, the provision of Contract Labour Regulation and Abolition Act, 1970 will clearly be applicable in respect to wages etc. including D.A. The ruling of Hon'ble Supreme Court in Cannon India ltd. 1974, Labour Indian Cases 707 is clear authority for the proposition that the decision of the Labour Commissioner under Central Rule 25(2)(v)(a) and (b) shall be final. In Vegoils case and Supreme Court has held that reference under Section 10 of I.D. Act, 1947 cannot be made in respect of Contract Labour after enforcement of Contract Labour Regulation and Abolition Act, 1970. In this view of the matter in respect of Issue No. 1 framed on 23.9.76, I hold that the reference is barred by the provisions of Contract Labour Regulation and Abolition Act, 1970 and when the reference itself is barred, this Tribunal can have no jurisdiction to entertain and decide the same". 8. This award was neither assailed nor impugned in any proceedings. The same has attained finality. The effect of this award is that the reference under Section 10(1) of the Act cannot be held to be a valid reference and for all purposes the orders of reference ceased to exist. It cannot be lost sight of the fact that Section 33(3) of the Industrial Disputes act is attracted only when there is a valid reference under Section 10(1) of the Act. If there is no reference pending

or if the reference made by the appropriate Government has been declared to be invalid and quashed it cannot in my view be said that Section 33(2) of the Act is attracted. Therefore, the result is that in a case where the main reference under Section 10(1) of the Act has been quashed or declared invalid, by no means it can be said that a proceeding is pending before the Tribunal as contemplated by Section 33(2) of the Act and therefore, an employee cannot invoke Section 33(A) of the Act. The Division Bench of Calcutta High Court in Shalimar Paints (Supra) held as under: "If it is held that the third respondent is entitled to relief under Section 33A of the Act, it would lead to an extremely incongruous and altogether untenable consequence. Such a conclusion would amount to this that the employee would be entitled to be reinstated by an order which could not be made by a tribunal because there was no valid pending reference. This would mean that an employee who seeks the assistance of the industrial tribunal under Section 33-A of the Act, would be given a statutory relief, although the precondition of grant of such a relief has ceased to exist and cannot be satisfied. 9. After coming into force the Contract Labour (Regulation & Abolition) Act 1970, if the case is covered by Contract Labour (Regulation & Abolition) Act 1970, a reference under Section 10 of the Industrial Disputes Act cannot be made. The contention of Mr. Sabharwal that there was still a pendency of the industrial disputes is of no avail to the petitioner. The I.D. 71/75 was the basis of the application filed by the petitioner under Section 33A and once very foundation of filing the application ceased to exist no proceeding was pending in relation to any industrial disputes. Therefore, I do not see any infirmity with the impugned order. 10. Writ petition stands dismissed.