CASE NO.:
Appeal (civil) 1351-53 of 2002

PETITIONER:
Workmen of Nilgiri Coop. Mkt.Society Ltd.

RESPONDENT:
State of Tamil Nadu & Ors.

DATE OF JUDGMENT: 05/02/2004

BENCH:
Y.K. Sabharwal & S.B. Sinha.

JUDGMENT:
JUDGMENT

S.B. SINHA, J :

BACKGROUND FACTS:

'Nilgiris' is a hill district in the State of Tamil Nadu. Mettupalayam is a small town situate in Nilgiris. The villagers of the surrounding villages for their livelihood depend on growing of vegetables and tea. With a view to see that the small vegetable growers are not exploited by the vegetable merchants, a society known as 'Nilgiris Cooperative Marketing Society Limited' (Society for short) was formed as far back as in 1935 with only 116 members.

The Society, however, grew in course of time and at present it has about 22000 members. The memberships of the Society are of two categories. In the first category only the vegetable or food growers, agricultural cooperative credit societies and agricultural improvement societies are A-class members having voting rights; whereas traders, commission agents and merchants dealing in the commodities grown by the agriculturists are classified as B-class members. They have no right to vote or participate in the management of the Society. The B-class members only, however, are entitled to take part in auctions held in the marketing yards of the Society. Any dispute between the seller member and the purchaser member is resolved through arbitration in terms of the provisions of the Tamil Nadu Cooperative Societies Act, 1961.

The land holdings of the members of the society varies from 1/4th acre to five acres averaging two acres per member. They mainly depend on the rainfall as irrigational facilities are not available. The small farmers are economically weak and have no holding power. Many of them have to take loans for their subsistence, when the weather is not good. Many of them are illiterate. The vegetables produced from their lands being subjected to the vagaries of the weather, the merchants with a view to pressurize them either used to force them to sell that at a very low price or would make them wait for days so that the vegetables become useless. The majority of the members belong to 'Badaga' community which had been declared to be a backward class by the Government of Tamil Nadu. Mettupalayam is a

centre for potatoes and vegetables trade.

The Society has two big marketing yards at Mettupalayam. In the said yards, auction of vegetables takes place. Infrastructure therefor such as offices, godowns yards, weighing machines etc. are provided by the Society. There are two separate yards with pucca godowns, one for potatoes and another for vegetables. The primary members of the Society bring their agricultural produce to the yards by hired lorries or trucks. They remain present till the agricultural produce brought by them is auction-sold and they receive the sale price. The number of primary members visiting the marketing yards of the Society, depending upon the season varies from 100 to 200 members per day. The number of merchants coming to purchase these commodities also varies from 30 to 100. The Society provides for accommodation to the members on a nominal rent. It also provides dormitory type of accommodation free of charge. The months of July to October of year are said to be a peak season. Whereas during the peak season about 100 lorries arrive everyday; during the 'off season' average number of lorries arriving at the yard would be around 10. For the purpose of bringing potatoes gunny bags are supplied by the Society free of cost.

The following main jobs are carried out in the said premises:

i) unloading of the gunny bags containing potatoes from the lorries;

ii) unpacking the gunny bags and keeping the potatoes in lots inside the godown;

iii) grading the potatoes into different sorts;

iv) weighing the auctioned potatoes in 45 kgs. and packing them into gunny bags brought by the merchants;

v) stitching the gunny bags and loading them into lorries hired by the merchants.

Throughout the process, lots brought by the primary members are kept separate with clear demarcation as regard the ownership theref. Sometimes small farmers unload the bags of potatoes themselves; some of them bring their potatoes upon proper grading in their farms and place it in the yard in a sorted condition. However, if proper grading is not done by the vegetable growers, they are graded into the different sorts.

The number of persons undertaking the job varies depending upon the quantum of work.

Admittedly an industrial dispute was raised by 407 persons; of whom 73 are potters and 335 are graders. The job of unloading, unpacking of gunny bags, stitching the gunny bags and putting them into lorries are done by porters whereas gradation of potatoes, weighing the auctioned potatoes in 45 kgs. and packing them into gunny bags are done by graders. Most of them are women.

It is stated that the members of the Society or their authorized representatives remain present throughout the auction. The auction is confirmed only with the consent of the members. The member has a right to decline to sell his produce, if he is not satisfied with the highest rate offered by the merchants and is entitled to hold over the same till the next auction takes place.

The Society contends that for doing various items of work in the yards, services of certain third parties are made available to the members. They are always available in the yards and any member whether producer or merchant may engage them. The work is done through the workers of the concerned third parties. Payment therefor is to be made by the persons engaging them to the said third parties (contractors). However, sometimes as the producer members may not have enough money with them, the Society makes the payment on their behalf by way of advance, wherefor allegedly written authority is obtained. The Society further contends that the farmers and merchants are at liberty to engage their own men for doing these items of work and some of them do the work themselves. There is no obligation on the part of the member to bring his produce to the Society's yards. He is free to sell is produce in any manner thought it.

It is not in dispute that the Society does not maintain any attendance register or wages register. The third parties are free to engage men of their own choice and no working hours are fixed or insisted. Any person normally doing the job may come on any day to work. The third parties engage more number of persons during peak season and during lean season less number of persons are engaged. The porters and graders may take up any other job.

DISPUTE BETWEEN THE PARTIES:

The appellant-Union, however, on or about 19.4. 1982 served a charter of demands upon the Society claiming, inter alia, permanency in service and other benefits. A strike notice was also given wherefor a conciliation proceeding was initiated. The Society thereafter filed a suit being O.S. No.2293 of 1982. A writ petition was filed before this Court being W.P. No.23 of 1983 praying for minimum facilities like drinking water, toilet, rest-room, maternity benefits etc. The Society is said to have declared a lock out and a conciliation proceeding thereupon started again. The writ petition was thereafter withdrawn. The conciliation proceeding ended in a failure.

REFERENCE:

On or about 19.5.1984, the State of Tamil Nadu issued a notification in exercise of its power under Section 10(1)(d) of the Industrial Disputes Act, 1947 referring the following disputes for adjudication of the Industrial Tribunal :

"i) Whether the non-employment of the workmen referred in the reference is justified ?

ii) To what relief ?"

PROCEEDINGS BEFORE THE TRIBUNAL:

In the aforementioned industrial reference before the Tribunal, witnesses were examined on behalf of the parties. Documents were also produced. By reason of an award dated 5.9.1989, the Tribunal opined that there did not exist any relationship of employer and employee between the Society and the concerned persons, observing :

"36. In view of the above finding, if we approach this case, there is no convincing evidence placed by the petitioner to establish the master and servant relationship to hold that the persons referred in this dispute are only workmen of the Respondent-Society.

37. Viewed from any angle, either on facts or on law, the petitioner-Union has not substantiated that the persons mentioned in the Annexure are workmen and therefore their non-employment is not justified. Hence this point is found against the Petitioner Union."

On the said findings the reference was rejected.

PROCEEDINGS BEFORE THE HIGH COURT:

Aggrieved thereby the appellant preferred a writ petition before the High Court marked as Writ Petition No.14659 of 1989.

During the pendency of the said proceeding, other disputes also ensued resulting in closure of the yards; whereafter, again conciliation proceedings were initiated on or about 3.8.1985. The respondent-Society issued an advertisement in a Tamil newspaper inviting tenders for operations. Questioning the said action on the part of the Society, a writ petition was filed in the Madras High Court which was marked as W.P. No.9333 of 1985 praying therein for issuance of writ of mandamus directing the State to prohibit introduction of contract labour system in the Society. Another writ petition being W.P. No.9334 of 1985 was also filed wherein the petitioners prayed for issuance of a writ of or in the nature of mandamus directing the Society not to engage contract labour purported to be on the ground that the same is contrary to Sections 25-O and 25-T of the Industrial Disputes Act and Sections 7 and 12 of the Contract Labour (Regulation and Abolition) Act, 1970. Certain interim orders were passed by the High Court and some appeals were also filed and the matter came up before this Court also, being Civil Appeal No.5381 of 1985 on or about 26.9.1986 wherein this Court passed the following order :

"On behalf of the Marketing Society, Dr. Y.S. Chitale, learned Counsel

assures us that hereafter workmen will not be permitted to be employed by contractors to work within the yard of the Society. He also assures us that the 407 workers previously employed may come back and work in the yard without any objection. It is open to any worker to go and seek employment, but contractors will be excluded. The case now pending before Industrial Tribunal may be disposed of expeditiously. Civil Misc. Petition is disposed of accordingly."

By another interim order passed in Writ Petition No.19310 and 19311 of 1986, a learned Single Judge of the Madras High Court directed :

"The third respondent shall give employment directly to all the 407 workers. If, after providing employment to these 407 workers, any more lands are required, then the management is free to give employment to such of these persons. The Collector of Coimbatore will see to it that the order of the Supreme Court extracted above is implemented in its true spirit."

In an appeal carried out by the Society being W.A. No. 1372 of 1986, the High Court of Madras issued the following directions :

"Apparently it appears to us that the order made by the learned single Judge runs counter to the order of the Supreme Court dated 4.12.1985. Therefore, the order of the learned Single Judge is stayed. Since the order which is in controversy is that of the Supreme Court, this is eminently a fit case where the parties are at liberty to get necessary clarification from the Supreme Court. Till the order is clarified by the Supreme Court, if the parties approach the Supreme Court for this, the appellant will implement the order dated 4.12.1985 by way of an interim arrangement."

On an application, this Court by an order dated 13.4.1987, observed :

"The interim arrangement will continue till disposal of the writ petition in the High Court. Meanwhile the trial of the industrial dispute will be stayed. No order on the application for impleading party. All the CMPs are disposed of accordingly."

Another interim order was passed on 29.8.1988 in Writ Petition NO.9334 of 1985 in the following terms :

"In the result, the 3rd respondent is directed to give employment directly to all the 407 workers and pay the wages directly to them as per the order of the Supreme Court dated 4.12.1988. This petition is ordered accordingly."

On an appeal preferred by the Society before a Division Bench marked as W.A. No.1261 of 1988, it was directed :

"To give quietus to the controversy in the writ petition, we direct that W.P. 9334/85 along with the connected writ petition viz. W.P. No.9333/85 be listed for final hearing on 26.10.1988 at the top of the list before the learned Single Judge, who hears the date-fixed writ petitions."

JUDGMENT OF THE HIGH COURT:

All the three writ petitions came up for hearing before a learned Single Judge of the Madras High Court. The said writ petitions were dismissed observing :

"The writ petitions are liable to be dismissed. However, having regard to the fact that the petitioner has made an application to the State Government as early as on 9.8.1985 as seen from paragraph 13 of the affidavit to prohibit the employment of contract labour under section 10 of the Act for loading, unloading and other activities of the 3rd respondent society, a reference to the counter affidavit filed by the government is necessary. Paragraphs 12 and 13 of the counter affidavit are extracted :

"It submit that the averments in paragraph 13 are not correct. The Union has applied to the State Advisory Contract Labour Board to issue directions to the Management prohibiting the employment of contract labour under Sec.10 of the Act. I submit that after consultation with State Advisory Contract Labour Board the Government will take a decision in this matter."

This counter affidavit has been sworn to on 5th December, 1986. Even though there was no order pending these W.Ps.

Prohibiting the Government from passing orders under Sec. 10 of the Act, the Government has not taken any action in spite of the averments contained in paragraphs 12 and 13 of the counter affidavits. It is for the Government to pass orders under Sec. 10 of the Act as expeditiously as possible, one way or other."

Three letters patent appeals were preferred by the appellant herein being aggrieved by and dissatisfied therewith. By reason of the impugned judgment the said appeals were dismissed.

The appellant is, thus, before us in these appeals. Civil Appeal No.1351-52 arise out of Writ Petition No.109 and 110 of 1989 wherein certain interim orders were passed. Civil Appeal No.1353 of 2001 is the main appeal which arises out of an award of the Industrial Tribunal.

SUBMISSIONS:

Mr. N.G.R. Prasad, learned counsel appearing on behalf of the appellant would take us through the evidences adduced by the parties both oral and documentary as also the findings of the Industrial Tribunal and would submit that it and consequently the High Court committed a manifest error:

(i) in passing the impugned award insofar as they failed to apply the 'organisation test' in the light of the decisions of this court;
(ii) despite having arrived at the conclusion that the respondents society exercises supervision and control over the concerned workmen, in concluding that such supervision and control were not on its own behalf but on behalf of its members;
(iii) in arriving at the finding that as the society does not carry out any manufacturing activities; it is not industry, inasmuch as supply of the services by an organisation would also give rise to formation of relationship of an employer and employees.

Elaborating his submissions, Mr. Prasad would contend that it is not in dispute that the 407 workmen had been working in the market yard on a daily wage basis and although they are said to have been employed by the third parties but indisputably, the society pays wages to them although the same is said to be reimbursed by the members of the society. It was pointed out that the dispute between the members and members are resolved by the society and furthermore as the concerned persons have been given token and are given gifts during festival season, would lead to an irresistible inference that the concerned workmen are employees of the society.

Mr. Prasad would argue that the principal question which was required to be asked was for whom do the workmen work and to whom they look up for their wages. It was submitted that the relationship between the Society and the workmen was required to be determined having regard to the following fact:

(i) work is being carried out in the premises belonging to the society;
(ii) wages are paid by the society;
(iii) from Ex. W7 and W8, it would appear, that the society exercises control over the workmen;
(iv) on festival occasions, the workmen look to the society for gift.

It was contended that the Tribunal and the High Court overlooked the evidences on record as regard nature of the job performed by the workmen as has been admitted by MW1 and furthermore no finding has been arrived at to the effect that the so-called third parties are contractors.

The learned counsel would submit that the Tribunal has committed a manifest error also in holding that only because the society takes commission from its members, it cannot be an employer. It was contended that for determining the question as regard existence of the relationship of employer and employee what is required to be considered is as to whether the concerned workmen are part and parcel of the organisation. Economic reality, the learned counsel would contend, has also some role to play.

The learned counsel would urge that this Court in a large number of cases lifted the veil so as to come to the conclusion that the engagement of third parties or contractors may be a camouflage and there existed a relationship of employer and employee. Determination of such relationship, Mr. Prasad would aruge, do not depend upon the statutory liability of the employer as even in relation to non-statutory canteens this Court has held that the so-called workmen of the contractors are in effect and substance the workmen of the principal employer.

Mr. Sudarsh Menon, learned counsel appearing on behalf of the respondent society, on the other hand, would submit that the society is a service society and having regard to the fact that the members are both growers and merchants and as the porters and the graders are appointed by both growers and merchants independently, it cannot be said that the society is the employer of the concerned workmen. The learned counsel would contend that the Industrial Tribunal, the learned Single Judge as also the Division Bench of the High Court having arrived at a finding of fact that there does not exist any relationship of employer and employee, this Court should not interfere therewith.

DETERMINATION OF RELATIONSHIP:

Determination of the vexed questions as to whether a contract is a contract of service or contract for service and whether the concerned employees are employees of the contractors has never been an easy task. No decision of this Court has laid down any hard and fast rule nor it is possible to do so. The question in each case has to be answered having regard to the fact involved therein. No single test - be it control test, be it organisation or any other test - has been held to be the determinative factor

for determining the jural relationship of employer and employee.

There are cases arising on the borderline between what is clearly an employer-employee relation and what is clearly the independent entrepreneurial dealing.

TESTS:

This Court beginning from Shivanandan Sharma Vs. Punjab National Bank Ltd. [1955] 1 L.L.J. 688 : AIR 1955 SC 404 and Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra and others [1957] 1 L.L.J. 477 : AIR 1957 SC 264 observed that supervision and control test is the prima facie test for determining the relationship of employment. The nature or extent of control required to establish such relationship would vary from business to business and, thus, cannot be given a precise definition. The nature of business for the said purpose is also a relevant factor. Instances are galore there where having regard to conflict in decisions in relation to the similar set of facts, the Parliament has to intervene as, for example, in the case of workers rolling bidis.

In a given case it may not be possible to infer that a relationship of employer and employee has come into being only because some persons had been more or less continuously working in a particular premises inasmuch as even in relation thereto the actual nature of work done by them coupled with other circumstances would have a role to play.

In V.P. Gopala Rao Vs. Public Prosecutor, Andhra Pradesh [1970] 2 L.L.J. 59 : AIR 1970 SC 66, this Court said that it is a question of fact in each case whether the relationship of master and servant exists between the management and the workmen and there is no abstract a priori test of the work control required for establishing the control of service. A brief resume of the development of law in this point was necessary only for the purpose of showing that it would not be prudent to search for a formula in the nature of a single test for determining the vexed question.

RELEVANT FACTORS:

The control test and the organization test, therefore, are not the only factors which can be said to decisive. With a view of elicit the answer, the court is required to consider several factors which would have a bearing on the result : (a) who is appointing authority; (b) who is the pay master; (c) who can dismiss; (d) how long alternative service lasts; e) the extent of control and supervision; (f) the nature of the job, e.g. whether, it is professional or skilled work; (g) nature of establishment; (h) the right to reject.

With a view to find out reasonable solution in a problematic case of this nature, what is needed is an integrated approach meaning thereby integration of the relevant tests wherefor it may be necessary to examine as to whether the workman concerned was fully integrated into the employer’s concern meaning thereby independent of the concern although attached therewith to some extent.

I.T. Smith and J.C. Wood in 'Industrial Law', third edition, at page 8-10 stated:

"In spite of the obvious importance of the distinction between an employee and an independent contractor, the tests to be applied are vague and may, in a borderline case, be difficult to apply. Historically, the solution lay in applying the 'control' test, i.e., could the employer control not just what the person was to do, but also the manner of this doing it - if so, that person was his employee. In the context in which it mainly arose in the nineteenth century, of domestic, agricultural and manual workers, this test had much to commend it, but with the increase sophistication of industrial processes and the greater numbers of professional and skilled people being in salaried employment, it soon became obvious that the test was insufficient (for example in the case of a doctor, architect, skilled engineer, pilot, etc.) and so, despite certain attempts to modernise it, it is now accepted that in itself control is no longer the sole test, though it does remain a factor and perhaps, in some cases, a decisive one. In the search for a substitute test, ideas have been put forward of an 'integration' test, i.e. whether the person was fully integrated into the employer's concern, or remained apart from and independent of it. Once again, this is not now viewed as a sufficient test in itself, but rather as a potential factor (which may be useful in allowing a court to take a wider and more realistic view). The modern approach has been to abandon the search for a single test, and instead to take a multiple or 'pragmatic' approach, weighing upon all the factors for and against a contract of employment and determining on which side the scales eventually settle. Factors which are usually of importance are as follows - the power to select and dismiss, the direct payment of some form of remuneration, deduction of PAYE and national insurance contributions, the organisation of the workplace, the supply of tools and materials (though there can still be a labour-only sub-contract) and the economic realities (in particular who bears the risk of loss and has the chance of profit and whether the employee could be said to be 'in business on his own account'). A further development in the recent case law (particularly concerning atypical employments) has been the idea of 'mutuality of obligations' as a possible

factor, i.e. whether the course of dealings between the parties demonstrates sufficient such mutuality for there to be an overall employment relationship."

(See also Ram Singh and Others Vs. Union Territory, Chandigarh & Ors. JT 2003 (8) SC 345)

In Mersey Docks and Harbour Board Vs. Coggins & Griffith Liverpool Ltd. [1947] A.C. 1, Lord Porter pointed out:

"Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed, have all to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject-matter under discussion but amongst the many tests suggested I think that the most satisfactory, by which to ascertain who is the employer at any particular time is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged."

If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract and the person doing the work will not be a servant. (See Ready Mixed Concrete (South East) Ltd. Vs. Minister of Pensions and National Insurance, 1 [1968] 2 W.L.R. 775)

The decisions of this Court lead to one conclusion that law in this behalf is not static. In Punjab National Bank vs. Ghulam Dastagir [(1978) 1 I.L.J. 312 = (1978) 2 SCC 358], Krishna Iyer, J. observed "to crystalise criteria conclusively is baffling but broad indications may be available from decisions".

The case at hand, as noticed hereinbefore, poses intricate question having regard to the facts and circumstance of the case.

In our endevour to find out an answer, let us at the first instance look at the object of the Society.

SOCIETY:

The Society had a humble beginning but it had a laudable object, as would appear from its bye-laws. The objects of the Society are stated as under :

"a) To encourage self help, thrift and cooperation among members;

b) To purchase seeds, manure, implements and other agricultural requirements for sale or

distribution to members or members of the affiliated cooperative societies or to other cooperative societies;

c) To arrange for sale of potatoes, other vegetables and fruits of the members and the members of affiliated cooperative societies to their best advantage;

d) To advance loans to members and members of affiliated cooperative societies on the pledge of their agricultural produce and for the purchase of manure to deserving members of primary societies provided the loans are given to such members through the societies concerned;

e) To act as agents of the cooperative institutions in marketing their produce;

f) To act as agents for the joint purchase of the domestic and other requirements of its members and members of affiliated cooperative societies;

g) To act as agent of those members which are affiliated societies in the matter of disbursing and receiving loans sanctioned to individual members of such societies;

h) To act as the agent of those members which are affiliated societies in the matter of receiving for safe custody in its godowns or elsewhere the produce pledged to such societies by their individual members;

i) To propagate and supply pure seeds;

j) To own and hire lorries whenever necessary for the use of the members, members of affiliated cooperative societies and other public for hire, for the transport of manure, potatoes, other vegetables, fruits, implements etc.;

k) To disseminate among the members and members of the affiliated cooperative societies a knowledge of the latest improvement in agriculture by arranging actual demonstration carried out by each individual member in his own land according to the advice of the

agricultural department;

l) To process raw material belonging to the members and members of affiliated cooperative societies or purchased by the society; and

m) To arrange for packing and grading of agricultural produce of the members and members of the affiliated cooperative societies.

n) Economically weak and small farmers having no holding power, thus, subjected to exploitation of the trading community are the beneficiaries.

o) Clause 34 of the bye-laws states :

"That the Board of Directors may arrange for the sale of produce of members and members of affiliated cooperative societies pledged to or deposited with the society and disburse sale proceeds to them immediately after such lots are sold. In arranging for the sale they shall act only as the agent of the members and members of affiliated cooperative societies concerned and shall not do the business as owner on behalf of the society. Any loss arising out of the business shall be borne by the members of the affiliated cooperative societies concerned and not by the society."

It is not in dispute that the Society is not a trading society. It cannot buy or sell the agricultural produce or the fruits except in a case where the proviso appended to bye-law 34 is attracted which is in the following terms :

"When the society enters into a contract with the Government of Military Department of cooperative institutes or with any firm which has entered into a contract with the Government or military department for supply of produce, the Board may purchase the produce outright whenever necessary and sell it as owner on behalf of the society."

BURDEN OF PROOF:

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.

In N.C. John Vs. Secretary Thodupuzha Taluk Shop and Commercial Establishment Workers' Union and Others [1973 Lab. I.C. 398], the Kerala High Court held:

"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."

In Swapan das Gupta and Others Vs. The First Labour Court of West Bengal and Others [1975 Lab. I.C. 202] it has been held:

"Where a person asserts that he was a workmen 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."

The question whether the relationship between the parties is one of the 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.

APPLICATION OF LAW IN THE PRESENT CASE:

Having regard to the materials on records, we may at the outset notice the findings of the Industrial Tribunal which are : (1) having regard to the object of the Society, there is no need to employ labourers far less giving continuous employment to them. Exs.W-7, W-8 and W-12 do not show that superintendence control in respect of grading, weighing etc. is absolute. The memo. dated 27.8.1982 appears to have been issued having regard to a complaint made by traders who participate in the auction to the effect that the staff are not showing proper care in grading, weighing and stacking the goods in the Society and they have to purchase the under-quality and under-weight vegetables resulting in continuous loss to them. It is in that situation a direction was issued. A further complain was made that the Society employs small boys in grading, weighing and stacking of goods. In that situation the Godown Assistants were directed to see that no person who is less than 18 years is engaged for unloading, grading and stacking of cabbage and the workmen should be classified into two groups, one for unloading and another for grading, weighing and stacking.

The Tribunal in this behalf observed :

"...Incidentally it is also significant to note that the society has been formed to protect the interest of the members. The society cannot keep quiet by stating it is the contractors job and it has no responsibility. In my opinion nothing is wrong in issuing the circular Ex.W-8, only to pull up the irresponsible of the staff and other workers. Therefore it would not amount to that the Respondent-Society has exercised its powers on their own workers and therefore they are employees."

Although in the said letter, the word 'workmen' of the Society had been used, in all probability, the said expression had been used loosely. The Office Order dated 22.8.1963 provides for the job assigned to their regular staff.

The job of the Marketing Supervisor is as under :

"7. Marketing supervisor :

He should attend to the speedy disposal of the potato stocks of the members to their best advantage. He *should see that all the stocks purchased by the Merchants are taken delivery of without delay. He should control the staff working in the potato godowns and see that no complaints are received from members and merchants etc., regarding purchase or sale of potatoes. He should supervise grading, weighing and packing of potatoes promptly and properly."

The job of the Marketing Supervisor, therefore, do not show that complete control and supervision is upon the society. The Marketing Supervisor was allotted the job to see that the work is carried out smoothly so that neither the purchaser members nor the merchant members are put to any disadvantage.

Having regard to the interest of the farmers as also the merchants, the Marketing Supervisor was asked to supervise grading, weighing and packing of potatoes promptly and properly.

The purported decision of the Society to give certain benefits to the workmen too is not decisive as the same had become a conciliation proceeding. The said conciliation proceeding, as noticed hereinbefore, had to be initiated having regard to the consequence upon a strike notice given by the workmen which could be averted due to conciliatory efforts. It would appear from the same that the conciliation efforts were made by the concerned Conciliation Officer. However, despite conciliation, graders and porters went on strike on 19.10.1982 whereafter again a conciliation proceeding was held pursuant whereto or in furtherance whereof certain advises and suggestions had been given by the conciliation officer based on agreement between the parties.

The finding of the Tribunal in respect of Ex.W-12 is in the following terms :

"...Even under Ex.W-12 it has been stated to pay the festival advance to the graders through the representatives. Therefore it cannot be said they have been asked to pay directly the festival advance amount. That apart, it is relevant to note at this stage that this document has not been signed by any

party. Considering these above facts and mianly taking into account the object of the society coupled with the duties envisaged under Clause 34 under Ex.M-22 bye-laws, it is impossible to come to a conclusion that the society has exercised these powers under Ex.W-7, Ex.W-8 and Ex.W-12 as an employer..."

The Tribunal has further come to the conclusion that token number had been given to the porters during emergency to save them from police harassment and no such token was issued after cessation of emergency.

It is true, as contended by Mr. Prasad, that the Tribunal sought to distinguish certain cases relied upon by the learned counsel for the parties holding that in those cases, the employers were manufacturing units and were doing regular work but the observation of the Tribunal must be understood having regard to the totality of the circumstances as it has observed that in such cases employers being manufacturing units and were doing regular work and the nature of business was such which required continuous supervision and furthermore the workmen who were required to work on fixed hours which was not the case in the present one.

The learned Tribunal has further found that the volume of job as also the number of persons working depend upon the season inasmuch in the peak season a large number of persons would be appointed whereas in the off season the number of appointments would be less. The Tribunal had further held that the Society acts as a commission agent. The submission of Mr. Prasad to the effect that the Tribunal has ignored the question of employment of contractor, some of whom may be under a legal incapacity to do so but the same again would not be decisive. Furthermore, even in terms of Section 21 of the Contract Labour (Regulation and Abolition) Act, the principal employer has a statutory obligation to see that the concerned employees are paid their wages and deduct the same from the bills of the contractors. It has also come on records that the remuneration paid by the Society on behalf of its members are done through Maistry and not directly to the concerned workers. We have noticed hereinbefore in details the nature of the services rendered by the Society to the different categories of its members, as also the right of the members to approach the third parties to take the services of the workmen working under them for unloading, grading and loading.

In nutshell, the following can be deduced :

1. Growers and merchants are free to engage their own porters and graders or can do the work by themselves. There is, thus, no obligation on the societies godown or engage service of the workers, waiting in the yard.

2. No attendance registers or wage registers are maintained in respect of graders and porters.

3. The society has no control as who should do the work and the members are free to engage

any worker available in the yard.

4. No working hours are fixed for porters and graders. They are free to come and go at will.

5. The workmen have no obligation to report to work everyday.

6. Society has no control regarding the number of workers to be engaged and the work to be turned out by the porters and graders.

7. No appointment order is issued by the society.

8. No disciplinary control over the porters and graders is exercised by the Society.

9. Total supervision or control is not exercised by the Society over the work done by porters or graders.

10. Porters and graders can go for other work and there is no obligation to work only in the yards.

11. Payment is normally made to a worker by the member. No direct payment is made to workers by the society. The society makes payment only on the authorization on behalf of that member.

12. Under the price guarantee scheme introduced by the society if the prices offered by the merchants are not acceptable to the members then the society guarantees the minimum price. If the produce sold by the society fetches more than the minimum guaranteed price excess is passed on to the member, if the price is less than the minimum price, the loss therefor is borne by the society.

13. Porters and graders also work under the supervision of members and merchants. Amounts paid by the society to a worker/authorized by a member is distributed by him to other workmen and the Society is not concerned with the number of workers engaged and amounts distributed to them.

The farmers themselves are indigent persons. It is not a case where the concerned workmen are without any master. The third parties employ and pay them their salary or wages invariably. They have the right to appoint or not to appoint and the little amount of supervision made by the officers of the Society are for the purpose of overseeing the smooth transactions and not for its own benefit. The contract is entered into by different parties for different purposes. The services of the workmen by the farmers or traders may or may not be taken. There may be disputes between one class of members with the other which incidentally may have some bearing on the performance of job

by the concerned workmen.

We may further notice that the learned counsel appearing on behalf of the respondents has drawn our attention to the statements made in the counter affidavit to the effect that the President of Petitioner Association runs the biggest private mundy in Mettupalayam and adopts the same procedure of engaging workers and the job of unloading, cleaning, sorting, grading etc. is done by the Respondent society. It has further been stated that there are about 60 such private mundies at Mettupalayam and although every mundy adopts the same pattern of engaging workers but except in the case of the respondent no industrial dispute had been raised in respect of any other mundy.

EMPLOYMENT AND NON-EMPLOYMENT :

Employment and non-employment indisputably is a matter which is specified in the Second and the Third Schedules of the Industrial Disputes Act. The concept of employment involves three ingredients, which are : (i) Employer - one who employs, i.e. engages the services of other persons; (ii) Employee - one who works for another for hire; and (iii) Contract of employment - the contract of service between the employer and the employee whereunder the employee agrees to serve the employer subject to his control and supervision. On the other hand, non-employment being negative of the expression "employment" would ordinarily mean a dispute when the workmen is out of service. When non-employment is referable to an employment which at one point of time was existing would be a matter required to be dealt with differently than a situation where non-employment would mean a contemplated employment.

The question of non-employment in the later category would arise only when the employer refuses to give work to a person who pleads and proves to the satisfaction of the management that he was entitled thereto. However, the dispute regarding the refusal to employ the persons who were promised to be employed is not connected with the employment or non-employment within the meaning of Section 2(k) of the Act. (See Workers of Sagar Talkies VS. Odean Cinema [1957] 1 L.L.J. 639)

The reference made by the State of Tamil Nadu was absolutely vague. The very fact that reference suggests that the workmen are not being employed by the Society is itself a pointer to the fact that it is not the case where the State Government has proceeded on the basis that there existed such a relationship. Save and except in certain situations, as for example when there exists a provision in the standing order certified under Industrial Employment (Standing Orders) Act, 1946 or a memorandum of settlement require the employer to employ certain persons, directions ordinarily cannot be issued by the Tribunal directing the employer to give employment.

CAMOUFLAGE:

Whether a contract is a sham or camouflage is not a question of law which can be arrived at having regard to the provisions of Contract Labour (Regulation and Abolition) Act, 1970. It is for the industrial adjudicator to decide the said question keeping in view the evidences brought on

records.

In Municipal Corporation of Greater Mumbai Vs. K.V. Sharamik Sangh and Others [(2002) 4 SCC 609], non-maintenance of records by the contractors was held to be not conclusive for determination as to whether the workmen were working under the contractor. The Court held that such disputed questions of fact cannot be gone into in a civil proceeding.

In Sarva Shramik Sangh vs. M/s Indian Smelting & Refining Co. Ltd. & Ors. [JT 2003 (8) SC 243], this Court observed :

"...A jurisdictional fact is one on the existence or otherwise of which depends assumption or refusal to assume jurisdiction by a court, tribunal or the authority. Said fact has to be established and its existence proved before a Court under the Maharashtra Act can assume jurisdiction of a particular case. If the complaint is made prima facie accepting existence of the contractor in such a case what has to be first established is whether the arrangement or agreement between the complainant and the contractor is sham or bogus. There is an inherence admission in such a situation that patently the arrangement is between the complainant and the contractor and the claim for a new and different relationship itself is a disputed fact. To put it differently, the complainant seeks for a declaration that such arrangement is not a real one but something which is a fagade. There is no direct agreement between the complainant and the principal employer and one such is sought to be claimed but not substantiated in accordance with law. The relief in a sense relates to a legal assumption that the hidden agreement or arrangement has to be surfaced..."

It was also observed :

"The common thread passing through all these judgments is that the threshold question to be decided is whether the industrial dispute could be raised for abolition of the contractor labour system in view of the provisions of the Maharashtra Act. What happens to an employee engaged by the contractor if the contract made is abolished is not really involved in the dispute. There can be no quarrel with the proposition as contended by the appellants that the jurisdiction to decide a matter would essentially depend upon pleadings in the

plaint. But in a case like the present one, where the fundamental fact decides the jurisdiction to entertain the complaint itself the position would be slightly different. In order to entertain a complaint under the Maharashtra Act, it has to be established that the claimant was an employee of the employer against whom complaint is made, under the ID Act. When there is no dispute about such relationship, as noted in paragraph 9 of CIPLA's case (supra) the Maharashtra Act would have full application. When that basic claim is disputed obviously the issue has to be adjudicated by the forum which is competent to adjudicate..."

CASE LAWS :

In the aforementioned backdrop, let us take note of certain decisions operating in the field vis-'-vis the factual matrix obtaining therein.

D.C. Dewan Mohideen Sahib & Sons vs. The Industrial Tribunal, Madras [(1964 (7) SCR 646 = 1964 (2) LLJ 633] is a case which involved workers who used to take leaves home for cutting them in proper shape. However, the actual rolling by filling the leaves with tobacco took place in places what were called contractors' factories. The bidis so rolled would be delivered to the appellant and nobody-else. The price of the raw-material as also the finished product would remain the same as fixed by the appellant therein. This Court having regard to the materials on records arrived at a finding of fact that the intermediaries were mere agents or branch managers appointed by the management and the relationship of employer and employee subsisted between the appellant and the bidis rollers, inter alia, on the ground that the so-called independent contractors served no particular duties and discharged no special functions and had no independence at all. They were impecunious persons who could hardly afford to have any factory of their own and in fact some of them were ex-employees of the appellant.

In Silver Jubilee Tailoring House and Others vs. Chief Inspector of Shops and Establishments and Another [(1974) 3 SCC 498], the job required to be performed was skilled and professional in nature. Mathew, J. speaking for the Bench observed that the test of right to control the manner of doing the work as traditionally formulated cannot be treated as an exclusive test. The court applied organization test in the fact situation obtaining therein laying importance on the fact that the employer provides the equipment and stating that where a person hires out a piece of work to an independent contractor, he expects the contractor to provided all the necessary tools and equipments, whereas if he employs a servant he expects to provide the same himself. The supply of machine was highlighted having regard to that fact that the sewing machine on which the workers do the work generally belong to the employer is an important consideration for deciding the relationship of master and servant. Besides the same the right of the employer to reject the end product and directing the worker to restitch it also led this court to conclude that the element of

control and supervision was also present.

However, in a slightly different fact situation where a person working as a part-time accountant for a long number of years who used to look after his own partnership business after working hours, was held to be not a workman. (See W.H.D. Cruz & Sons Vs. M.E. Thomas [1996] 1 L.L.J. 706 (Ker.))

In M/s Shining Tailors vs. Industrial Tribunal II, U.P., Lucknow and Others [(1983) 4 SCC 464], payments used to be made to the workmen on piece-rates in a big tailoring establishment. Desai, J. in the facts and circumstances of the case observed that right of removal of the workmen or not to give the work had the element of control and supervision which had been amply satisfied in that case. The question which arose for consideration was as to whether only because the concerned workman was paid on piece rate was itself indicative of the fact that there existed a relationship of principal employer and independent contractor.

It is, however, relevant to note that therein also an observation was made to the effect that the method of payment in various occupations is different in different industries.

In Indian Overseas Bank vs. I.O.B. Staff Canteen Workers' Union and Another [(2000) 4 SCC 245], this Court observed :

"The standards and nature of tests to be applied for finding out the existence of master and servant relationship cannot be confined to or concretized into fixed formula(e) for universal application, invariably in all class or category of cases. Though some common standards can be devised, the mere availability of any one or more or their absence in a given case cannot by itself be held to be decisive of the whole issue, since it may depend upon each case to case and the peculiar device adopted by the employer to get his needs fulfilled without rendering him liable. That being the position, in order to safeguard the welfare of the workmen, the veil may have to be pierced to get at the realities. Therefore, it would be not only impossible but also not desirable to lay down abstract principles or rules to serve as a ready reckoner for all situations and thereby attempt to compartmentalize and peg them into any pigeonhole formulae, to be insisted upon as proof of such relationship. This would only help to perpetuate practicing unfair labour practices than rendering substantial justice to the class of persons who are invariably exploited on account of their inability to dictate terms relating to conditions of their service. Neither all the tests nor guidelines indicated

as having been followed in the decisions noticed above should be invariably insisted upon in every case, nor the mere absence of any one of such criteria could be held to be decisive of the matter. A cumulative consideration of a few or more of them, by themselves or in combination with any other relevant aspects, may also serve to be a safe and effective method to ultimately decide this often agitated question. Expecting similarity or identity of facts in all such variety or class of cases involving different type of establishments and in dealing with different employers would mean seeking for things, which are only impossible to find."

Having regard to the fact that therein a cooperative canteen was promoted with the consent of the management by serving members of the Bank staff, which was running within the bank's premises and with the funds, subsidy and infrastructural facilities provided exclusively by the Bank, it was held that there existed a relationship of master and servant.

However, we may notice that almost in a similar situation in Employers in relation to the Management of Reserve Bank of India vs. Workmen [(1996) 3 SCC 267], it was held that in the absence of statutory or other legal obligations and in the absence of any right in the Bank to supervise and control the work or details there in any manner regarding the canteen workers employed in the three types of canteens, it cannot be said that relationship of master and servant existed between the Bank and the various persons employed in the three types of canteens and in that situation, the demand for regularization was considered to be unsustainable.

In our opinion, the statutory canteen or other canteen run by the employer in his premises stands absolutely on a different footing. In determining the relationship of employer and employee, as has been noticed by this Court in Steel Authority of India Ltd. & Others vs. National Union Waterfront Workers and Others [(2001) 7 SCC 1], the said question has no relevance.

In Mishra Dhatu Nigam Ltd., etc. vs. M. Venkataiah & Ors. etc. etc. [JT 2003 (7) SC 95], as the appellants were required by the Factories Act to provide canteen facilities and since the workers engaged through the contractors had been held to be the employees of the principal employers, this Court held that the workers engaged through contractors were entitled for regularization of their services. Although we have reservation about the correctness or otherwise of the said decision but we need not go into the said question inasmuch even therein, the court noticed that the decision in Steel Authority of India Ltd. (supra) stands on a different footing.

In Indian Banks Association vs. Workmen of Syndicate Bank and Others [(2001) 3 SCC 36], the question which arose for consideration was as to whether the deposit collectors

who received commission is in reality a wage which would depend on the productivity. Such commission was paid for promoting the business of the bank. Having regard to the fact that the banks have control over the deposit collectors, they were considered to be their own workers.

In Indian Banks Association (supra) the reference which was made for adjudication of the Industrial Tribunal was as follows :

"Whether the demands of the Commission Agents or as the case may be Deposit Collectors employed in the banks listed in the annexure that they are entitled to pay scales, allowances and other service conditions available to regular clerical employees of those banks is justified ? If not, to what relief are the workmen concerned entitled and from which date ?"

Having regard to the evidences both oral and documentary led by the parties, the Tribunal directed :

"All those Deposit Collectors and Agents who are below the age of 45 years on 3.10.1980 (the date of the first reference of this industrial dispute) shall be considered for regular absorption for the post of clerks and cashiers if they are matriculates and above including qualified graduates and postgraduates. They may be taken to banks services as regular employees if they pass the qualifying examinations conducted by the banks. Those who are absorbed shall be treated on a par with regular clerical employees of the Bank. Those who have qualified 8th class and below matriculation shall be considered for absorption as sub-staff by conducting qualifications examination.

As regards the Deposit Collectors and Agents who are above 45 years of age on the date 3.10.1980 and also those who are unwilling to be absorbed in regular banks service shall be paid the full back wage of Rs.750.00 per month linked with a minimum deposit of Rs.7500.00 per month and they should be paid incentive remuneration at 2% for collection of over and above 7500.00 per month and they should also pay uniform conveyance of Rs.50 per month for deposit of less than Rs.10,000.00 and Rs.100.00 per month for deposits of more than Rs.10,000.00 up to or above Rs.30,000.00 per month they should be paid gratuity of 15 days' commission for each year of service rendered."

Thus in that decision, a scheme was formulated.

However, we may notice that in Union of India and Others vs. K.V. Baby and Another [(1998) 9 SCC 252], this Court observed :

"...However, persons who are engaged on the basis of individual contracts to work on a commission basis cannot, by the very nature of their engagement, be equated with regular employees doing similar work..."

In Bharat Heavy Electricals Ltd. vs. State of U.P. & Others [(2003) 6 SCC 528], the concerned workmen were engaged as gardeners to sweep, clean, maintain and look after the lawns and parks inside factory premises and campus of the residential colony of the appellant through the agencies of the Respondent Nos.3 to 5; therein their services were terminated pursuant whereto an industrial dispute was raised before the Tribunal, the employer did not produce any records. Having applied the control test and in view of the fact that the records of the concerned workmen had not been produced, this Court did not interfere with the award of the Tribunal and the judgment of the High Court.

In Shri Chintaman Rao and Another vs. The State of Madhya Pradesh [1958 SCR 1340], this Court observed :

"...The concept of employment involves three ingredients (1) employer (2) employee and (3) the contract of employment. The employer is one who employs, i.e. one who engages the services of other persons. The employee is one who works for another for hire. The employment is the contract of service between the employer and the employee whereunder the employee agrees to serve the employer subject to his control and supervision..."

Following the decision of this Court in Shri Chintaman Rao (supra), this Court in Shankar Balaji Waje vs. The State of Maharashtra [AIR 1962 SC 517], held:

"Employment brings in the contract of service between the employer and the employed. We have mentioned already that in this case there was no agreement or contract of service between the appellant and Pandurang. What can be said at the most is that whenever Pandurang went to work, the appellant agreed to supply him tobacco for rolling bidis and that Pandurang agreed to roll bidis on being paid at a certain rate for the bidis turned out. The appellant exercised no control and supervision over Pandurang"

In Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra & Ors. [AIR 1957 SC 264], this Court upon noticing several authorities held :

"The principle which emerges from these authorities is that the prima facie test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work, or to borrow the words of Lord Uthwatt at page 23 in Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Ltd., [[1947] 1 A.C. 1, at p. 23.], "The proper test is whether or not the hirer had authority to control the manner of execution of the act in question". The nature or extent of control which is requisite to establish the relationship of employer and employee must necessarily vary from business to business and is by its very nature incapable of precise definition. As has been noted above, recent pronouncements of the Court of Appeal in England have even expressed the view that it is not necessary for holding that a person is an employee, that the employer should be proved to have exercised control over his work, that the test of control was not one of universal application and that there were many contracts in which the master could not control the manner in which the work was done (Vide observations of Somervell, L.J., in Cassidy v. Ministry of Health (supra), and Denning, L.J., in Stevenson, Jordan and Harrison Ltd. v. MacDonald and Evans (supra).)

The correct method of approach, therefore, would be to consider whether having regard to the nature of the work there was due control and supervision by the employer or to use the words of Fletcher Moulton, L.J., at page 549 in Simmons v. Health Laundry Company [[1910] 1 K.B. 543 at pp. 549, 550] :-

"In my opinion it is impossible to lay down any rule of law distinguishing the one from the other. It is a question of fact to be decided by all the circumstances of the case. The greater the amount of direct control exercised over the person rendering the services by the person contracting for them the stronger the grounds for holding it to be a contract of service, and similarly the greater the degree of independence of such control the greater the probability

that the services rendered are of the nature of professional services and that the contract is not one of service."

In Management of M/s Puri Urban Cooperative Bank vs. Madhusudan Sahu and Another [AIR 1992 SC 1452], this Court observed :

"...It stands established that Industrial Law revolves on the axis of master and servant relationship and by a catena of precedents it stands established that the prima facie test of relationship of master and servant is the existence of the right in the master to supervise and control the work done by the servant (the measure of supervision and control apart) not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work..."

However, we may note that in Workmen of the Canteen of Coates of India Ltd. vs. Coates of India Ltd. (Civil Appeal No.3479/1987 disposed of on 28.8.1996, this Court observed :

"...some requirement under the Factories Act of providing a canteen in the industrial establishment, is by itself not decisive of the question or sufficient to determine the status of the persons employed in the canteen. The effect, if any, relating to compliance of the provisions of Factories Act is a different matter which does not arise for consideration in the present case."

[See also Bombay Canteen Employees' Association vs. Union of India, [(1997) 6 SCC 723].

On the aforementioned backdrop of legal principles, We may now consider the Constitution Bench judgment of this Court in Steel Authority of India Limited (supra). The principal question which arose for consideration therein was as to whether having regard to the provisions contained in Section 10 of the Contract Labour (Regulation and Abolition) Act, the workmen employed by the contractors in the event of abolition of contract labour were entitled to be automatically absorbed in the services of the principal employer. While answering the question in the negative the court reversed the earlier decision of this Court in Air India Statutory Corporation and Others vs. United Labour Union and Others [(1997) 9 SCC 377]. This Court referring to a large number of decisions and tracing the history of the Contract Labour (Regulation and Abolition) Act, noticed that the Industrial Tribunal although prior to coming into force could issue directions for such regularization but such directions could not be issued after coming into force of the Act. In view of the Constitution Bench decision in M/s Gammon India Ltd. and Others etc. vs. Union of India and Others [(1974) 1 SCC 596], the Court held that although the

principle that a beneficial legislation needs to be construed liberally in favour of the class for whose favour it is intended, the same would not extend to reading in the provisions of the Act what the legislature has not provided whether expressly or by necessary implication, or substituting remedy or benefits for that provided by the legislature. Upon analyzing the case law, the categories of cases were sub-divided into three stating :

"An analysis of the cases, discussed above, shows that they fall in three classes : (i) where contract labour is engaged in or in connection with the work of an establishment and employment of contract labour is prohibited either because the industrial adjudicator/court ordered abolition of contract labour or because the appropriate Government issued notification under Section 10(1) of the CLRA Act, no automatic absorption of the contract labour working in the establishment was ordered; (ii) where the contract was found to be a sham and nominal, rather a camouflage, in which case the contract labour working in the establishment of the principal employer were held, in fact and in reality, the employees of the principal employer himself. Indeed, such cases do not relate to abolition of contract labour but present instances wherein the Court pierced the veil and declared the correct position as a fact at the stage after employment of contract labour stood prohibited; (iii) where in discharge of a statutory obligation of maintaining a canteen in an establishment the principal employer availed the services of a contractor the courts have held that the contract labour would indeed be the employees of the principal employer."

The instant case although was sought to be put in category (ii) as referred to Steel Authority (supra) by Mr. Prasad, he, as noticed hereinbefore, took us also to the case law falling in Class (i) and Class (iii) aforementioned.

There cannot be any doubt whatsoever that where a person is engaged through an intermediary or otherwise for getting a job done, a question may arise as the appointment of an intermediary was merely sham and nominal and rather than camouflage where a definite plea is raised in Industrial Tribunal or the Labour Court, as the case may be, and in that event, it would be entitled to pierce the veil and arrive at a finding that the justification relating to appointment of a contractor is sham or nominal and in effect and substance there exists a direct relationship of employer and employee between the principal employer and the workman. The decision of this Court in Hussainbhai, Calicut vs. The Allath Factory Thezhilali Union, Kozhikode and Others [(1978) 4 SCC 257] will fall in that category.

ANALYSIS:

Having regard to the aforementioned findings, we are of the opinion, the High Court has rightly affirmed the award of the Industrial Tribunal. The Tribunal as also the High Court further rightly arrived at a finding to the effect that the concerned workmen were not able to discharge their burden of proof that they were employed by the Society.

The decisions referred to hereinbefore are indicative of the fact that the different tests have been applied in different cases having regard to the nature of the problem arising in the fact situation obtaining therein. Emphasis on application of control test and organization test have been laid keeping in view the question as to whether the matter involves a contract of service vis-'-vis contract for service; or whether the employer had set up a contractor for the purpose of employment of workmen by way of a smoke screen with a view to avoid its statutory liability.

In the present case we are faced with a peculiar situation. The society is a service society which has been formed with the object of protecting the growers from being exploited at the hands of the traders.
It has been found that the employment of the workmen for doing a particular piece of work is at the instance of the producer or the merchants on an ad hoc basis or job to job basis and, thus, the same may not lead to the conclusion that relationship of employer and employee has come into being. Furthermore, when an employee has a right to work or not when an offer is made to him in this behalf by the producer or by the merchants will also assume significance.

For the purpose of earning livelihood, a person has to involve himself into certain kinds of activities wherefor, he must subject himself to some sort of discipline or control, which is even otherwise implicit.

The findings arrived at by the learned Tribunal as well as the High Court would clearly go to show that the concerned workmen are engaged both by the growers as also the traders. Only on some occasions, payment is made to the concerned workmen through the third parties only in a case where the grower is not immediately in a position to pay the same as he was yet to receive the price of the vegetables to be auctioned. We must bear in mind that the Society deals with small and marginal farmers who themselves look after the Society for obtaining such assistance as may be necessary from not being exploited by the traders and had been facing the problem of a forced sale of their produce at the throw away price. The totality of the circumstances as opined by the Tribunal and affirmed by the High Court would clearly go to show that although certain activities are carried out in the market yards wherefor requisite infrastructures are provided, the Society in general does not have the necessity of employing any workman either for the purpose of loading, unloading or grading. Ultimately, the remuneration to the concerned workmen are borne either by the farmers or by the merchants. Presumably the amount paid to the loaders, unloaders and the graders would vary, as for example whereas there would be cases where the growers themselves would unload their merchandise either from trucks or carts. In case growers take the assistance

of the concerned persons for unloading after the auction is held the payment would be made by the traders. In a situation of this nature and particularly having regard to the fact that the respondent is a cooperative society which only renders services to its own members and despite the fact that in relation thereto it receives commission at the rate of one per cent both from the farmers as also the traders; it does not involve in any trading activity. Although rendition of such service may amount to carrying out an industrial activity within the meaning of the provisions of the Industrial Disputes Act, 1947 but we are in this case not concerned with the said question. What we are concerned with is as to whether the concerned workmen have been able to prove that they are workmen of the Society. They have not.

CONCLUSION :

In view of what has been found hereinbefore, we are of the opinion that the decision of the Tribunal as affirmed by the High Court cannot be said to be perverse warranting our interference.

For the reasons aforementioned, we do not find any merit in these appeals which are dismissed accordingly. No costs.

However, before parting with the matter, we may observe that we have no doubt in our mind keeping in view the assurances given to the High Court by the Society, as recorded in its order dated 12.12.2000, the Respondent will continue to see that the concerned employees are provided with employment.