

I/375052/2023

Government of West Bengal  
Labour Department, I. R. Branch  
N.S. Building, 12<sup>th</sup> Floor  
1, K.S. Roy Road, Kolkata - 700001

No. Labr/.187../(LC-IR)/

Date: 14-03-2023.

**ORDER**

WHEREAS under the Government of West Bengal, Labour Department Order No. Labr/976/(LC-IR)/ dated 25/09/2017 the Industrial Dispute between M/s. Graphite India Ltd., Sagarbhangra, Durgapur - 713211 and A Group of workmen represented by one of them namely, Sri Nibir Chakraborty, S/o. Anath Bandhu Chakraborty, House No. 231, Shympur Colony, Durgapur - 713201. regarding the issue mentioned in the said order, being a matter specified in the Second / Third Schedule to the Industrial Dispute Act, 1947 (14 of 1947), was referred for adjudication to the Judge, Fifth Industrial Tribunal, West Bengal.

AND WHEREAS the Ninth Industrial Tribunal, West Bengal, has submitted to the State Government its award dated 13/02/2023 on the said Industrial Dispute vide memo no. 14 - I.T. dated - 21/02/2023.

NOW, THEREFORE, in pursuance of the provisions of Section 17 of the Industrial Dispute Act, 1947 (14 of 1947), the Governor is pleased hereby to publish the said award as shown in the Annexure hereto.

**ANNEXURE**

(Attached herewith)

By order of the Governor,

*sd*

Sr. Deputy Secretary  
to the Government of West Bengal

/375052/2023

No. Labr/. 187/1(5) (LC-IR)

Date: 14-03-./2023.

Copy, with a copy of the Award, forwarded for information and necessary action to:

1. M/s. Graphite India Ltd., Sagarbhangra, Durgapur - 713211.
2. Sri Nibir Chakraborty, S/o. Anath Bandhu Chakraborty, House No. 231, Shympur Colony, Durgapur - 713201.
3. The Assistant Labour Commissioner, W.B. In-Charge, Labour Gazette.
4. The O.S.D. & E.O. Labour Commissioner, W.B. New Secretariate Building, 1, K. S. Roy Road, 11<sup>th</sup> Floor, Kolkata- 700001.
- ✓ 5. The Sr. Deputy Secretary, IT Cell, Labour Department, with the request to cast the Award in the Department's website.

P/H IT M  
15/3/23  
Dipankar/Ananda  
15/03/2023

Sr. Deputy Secretary

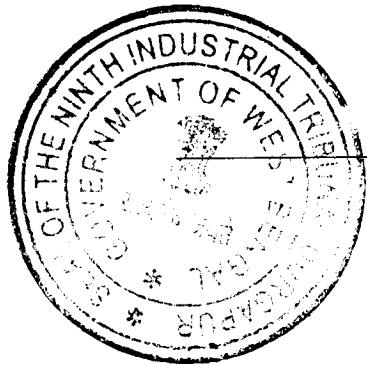
Date: 14-03-./2023.

Copy forwarded for information to:

1. The Judge, Ninth Industrial Tribunal, West Bengal, Durgapur, Administrative Building, City Centre, Pin - 713216 with reference to his Memo No. 14- I.T. dated - 21/02/2023.
2. The Joint Labour Commissioner (Statistics), West Bengal, 6, Church Lane, Kolkata -700001.

Sr. Deputy Secretary

In the matter of an Industrial dispute between M/S. Graphite India Ltd., Sagarbhangra, Durgapur-713211 & a group of workmen (named in the enclosed list of the order of reference) represented by one of them namely, Sri Nibir Chakraborty, son of Sri Anath Bandhu Chakraborty, House No.231, Shyampur Colony, Durgapur-713201.



Case No. X- 05 / 2017

BEFORE THE 9<sup>TH</sup> INDUSTRIAL TRIBUNAL,  
DURGAPUR, WEST BENGAL, KOLKATA.

PRESENT :- SHRI SUJIT KUMAR MEHROTRA,  
JUDGE, 9<sup>th</sup> INDUSTRIAL TRIBUNAL,  
DURGAPUR.

Ld. Advocate for the Workmen:- Mr. Saradindu Panda & Smt. Anima Maji.

Ld. Advocate for the O.P./Employer:- Mr. Soumalya Ganguly and  
Smt. Tanaya Sengupta.

The award dated 13<sup>th</sup> day of February, 2023.

A W A R D

The Govt. of West Bengal through its Assistant Secretary, Labour Deptt. vide reference no. Labr./976/(LC-IR) dated 25.09.2017 referred to the

IR/11L-63/17

Industrial Disputes between the M/S. Graphite India Ltd. and a group of workmen who were engaged by M/S. ACE Protection Group, YS Zonal Centre, Durgapur-713211 for adjudication under the Industrial Disputes Act, 1947 (hereinafter referred to as Act of 1947) for adjudication.

The Assistant Commissioner in exercise of the power conferred by U/S 10 of the Act, 1947 referred the Industrial Disputes for adjudication after framing the following issues :

- 1) Whether the Act of management of M/S. Graphite India Ltd., Durgapur – 713211 is justified in refusing employment of 40

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NINTH INDUSTRIAL TRIBUNAL  
GOVT. OF WEST BENGAL  
DURGAPUR

workers (List enclosed) and their contractor with effect from 01.05.2016?

2) If not, to what relief the concerned workmen are entitled?

After received of the aforementioned reference order this tribunal registered the instant case U/S 10 of the Act of 1947 and issued notice to the parties referred.

CR reveals that after received of the notice both the parties appeared through their engaged Ld. Lawyers and filed their statement by way of their WS.

As per WS of the workmen they were bonafide employees of so -called contractor M/S. ACE Protection Group and were performing their duties in the factory premises of M.S. Graphite India Ltd., who is their principal employer.

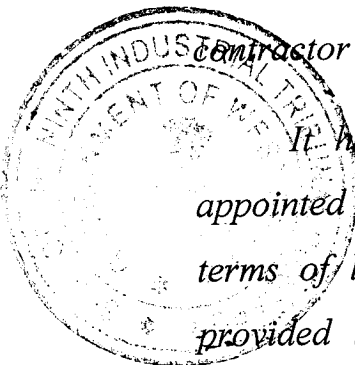
It has further been averred by the workmen that they were under direct supervision and the control of the principal employer from the date of their appointment and were used to get salary regularly and also used to enjoy all service benefits including Employees' State Insurance.

The workmen further stated that they were illegally retrenched / refused employment on and from 01.05.2016 without any previous notice and without any rhyme and reason and that thereafter they made several appeals before the principal employer and their contractor but the same did not yield any result. They further stated that finding no other way they approached the Deputy Labour Commissioner (DLC), Durgapur on 18.10.2016 for conciliation proceeding and accordingly conciliation proceeding was initiated but the same failed to yield any result.

CR reveals that M/S. Graphite India Ltd. in its WS categorically denied such claim of the workmen and specifically pleaded that those workmen were not appointed by it but they were appointed by the contractor M/S ACE Protection Group and they used to draw salary from the said contractor and were under the control of the said contractor.

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M/S. Graphite India Ltd. in its WS further pleaded that the workmen did not come under the definition of "workman" U/s 2(s) of the Act of 1947 and the Industrial Dispute is actually in between the workmen and their employer i.e. Contractor M/S ACE Protection Group.



It has further been stated by the M.S. Graphite India Ltd. that it appointed contractor M/S ACE Protection Group to provide security guards in terms of letter dated 01.04.2013 and accordingly its said contractor was provided security guards. That on 30.04.2016 M/S. Graphite India Ltd. terminated the contract with its contractor M/S ACE Protection Group and in its place appointed M/S Gorkha Securitas on and from 01.05.2016.

M/S. Graphite India Ltd. further stated that as those workmen were appointed by and were directly under control and supervision of their employer i.e. M/S ACE Protection Group, so there is/was no industrial disputes between it and those workmen and accordingly the claim of the workmen against it is liable to be dismissed.

To establish their pleading case the workmen examined their representative Mr. Nibir Chakaraborty as P.W-1 on their behalf and the authorised employee of the office of the DLC, Durgapur – Mr. Sujoy Karmakar, as P.W.2. This apart, Following documents have been admitted in evidence from their side vide orders dated 19.04.2018 & 28.11.2018 passed by the then Ld. Judge of this tribunal.

- 1) Copy of the letter dated 22.04.2016 addressed to Vice-President (Works), M/S. Graphite India Ltd.----Exbt.1,
- 2) Copy of the letter dated 29.04.2016 addressed to the O.C , Coke Oven P.S—Exbt.2,
- 3) Copy of the letter dated 05.05.2016 addressed to the SDO, Durgapur---Exbt.3,
- 4) Copy of the letter dated 05.05.2016 addressed to the DLC---Exbt.4,
- 5) Copy of the letter addressed to the Hon'ble Chief Minister----Exbt.5,
- 6) Copy of the letter dated 17.05.2017 ---Exbt.6,

*sdh*

- 7) Copy of the letter dated 18.05.2017 addressed to D.M, Asansol---  
Exbt.7,
- 8) Copy of the letter dated 19.05.2017 addressed to the SDO,  
Durgapur---Exbt.8.
- 9) Copy of the letter dated 19.05.2017 addressed to the DLC ,  
Durgapur ---Exbt.9,
- 10) Copy of the entire conciliation proceeding filed by DLC,  
Durgapur---Exbt.10.

Similarly, M/S. Graphite India Ltd. examined its executive Vice - President (Works) Mr. Sarjerao Gulabrao Khune as O.P.W-1 and the following documents have been admitted in evidence from its side :

- 1) Salary certificate issued by M/S. ACE Protection Group -Exbt. A(with objection),
- 2) Challan of Employees' Provident Fund Organisation, Durgapur and electronic challan and return ---Exbt. B (with objection),
- 3) Monthly Muster sheet issued by M/S. ACE Protection Group ---  
Exbt. C (with objection),
- 4) Posting / transfer order issued by M/S. ACE Protection Group---  
Exbt. D (with objection),
- 5) Security contract dated 01.04.2013 ---Exbt. E (without objection),
- 6) Certified copy of Board resolution ---Exbt. F.

CR further reveals that as per prayer of the M/S. Graphite India Ltd. the proprietor of M/S. ACE Protection Group Mr. Arun Banerjee has also been examined as O.P.W-2 in this case as a summoned witness and he produced the following documents in course of his adducing evidence and those documents have been marked in the following manners :-

- 1) Posting / transfer order of workman Umar Ali Mallick ----Exbt.-  
G,
- 2) Posting / transfer order of workman Lakshman Hazra -Exbt. H,
- 3) Posting / transfer order of workman Norseum Sk.-- -Exbt. I,
- 4) Posting / transfer order of workman Apurba Mishra -Exbt. J,
- 5) Posting / transfer order of workman Dayamoy Dutta -Exbt. K,

- 6) Posting / transfer order of workman Ujjwal Char –Exbt. L,
- 7) Posting / transfer order of workman Avijit Mondal –Exbt. M,
- 8) Posting / transfer order of workman Jiban Ghosh –Exbt.-N.

On the basis of the evidence in cross-examination of O.P.W-2 the original security service contract have also been collectively marked as Exbt. 'O' and letter of discontinuation of security contract dated 31.03.2016 has been marked as Exbt. 'P'.

It is also pertinent to mention herein that the Assistant Manager (Personnel and Admin.) Mr. Somnath Banerjee of M/S Graphite India Ltd. has also been examined as summoned witness as O.P.W-3 in this case and as per his evidence on oath the following documents have been admitted in evidence:

- 1) Copy of letter of authorisation ---Exbt. Q,
- 2) Copy of discontinuation of security contract letter dated 31.03.2016 –Exbt. R,
- 3) Copy of security services contracts dated 16.10.2015, 30.03.2015, 27.11.2014, 24.03.2014, 24.09.2013 & 13.03.2013 have been marked as Exbt- S (collectively),
- 4) Copy of security contract dated 01.04.2013---Exbt. T.

### **Argument from the side of the Workmen**

It was contended by the ld. lawyer that from the oral as well as documentary evidence, as adduced from the side of the workmen as well as the evidence in cross-examination of the O.P.W-1 & 2, it has clearly been evident that the workmen were actually employed by the principal employer i.e. M/S. Graphite India Ltd. and not by the contractor M/S. ACE Protection Group.

Ld. lawyer further contended that M/S. ACE Protection Group is nothing but a shadow contractor of the principal employer and the said fact has also been established from his conduct as he remained in shadow throughout the hearing of the instant case.

It was also submitted by the ld. lawyer that from the Clause 15 of the Contract dated 01.04.2013 it is established that the terms and conditions of

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employment of the workman was completely under direct control of the principle employer i.e. M/S. Graphite India Ltd. and accordingly the pleading of the principal employer that it is the contractor who used to control and supervise the duty of the workmen has got no evidential value.

To substantiate his such argument the ld. lawyer relied upon the case of **Hussainbhai , Calicut Vs. Aladh Factory Thozhilali, 1978 AIR 1410 SC** and further submitted that the Hon'ble Supreme Court has been pleased to decide on the issue of sham and camouflage contractor in the said case.

The ld. Lawyer also submitted that the said judgement has also been relied upon by the constitutional bench of the Hon'ble Supreme Court in the case of **Steel Authority of India Ltd. Vs. National Union Waterfront workers, (2000)7 SCC I**. He also relied upon the case of **Airport Authority of India Vs. International Airport Cargo workers Union and another, JT 2019 (8) SCC 661**.

To substantiate the case of the workers the ld. lawyer by relying upon the case of **Kanpur Electricity Supply Co. Ltd. Vs. Shamim Mirja, Civil Appeal 6585 of 2008** and submitted that the burden of proof that the worker was in the employment of a particular management primarily lies on the person who claim to be so and in the instant case the workers have been able to prove the same.

In concluding this argument the ld. lawyer also contended that since admittedly before termination/retrenchment/refusal of employment to these workmen by the principal employer no procedure as laid down in Sec.25F has been followed, so the said order by which the workmen were refused to be employed by the principal employer has got no legal value and the same is liable to be set aside. He further prayed that all the workmen as mentioned in the list annexed with the reference order, be reinstated into their service with full back wages.

#### **Argument from the side of the Employer M/s. Graphite India Ltd.**

Per contra, the ld. lawyer argued that the burden of proof lies upon the workmen to prove that they were actually employed by the M/S. Graphite India

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Ltd. and not by their contractor M/S. ACE Protection Group but they miserably failed to discharge their such legal obligation.

To substantiate his such argument he relied upon the case of **General Manager, Andaman & Nicobar Islands Integrated Development Corporation Ltd. Vs. A.G. Roy and another, (2005) 2 CHN 503.**

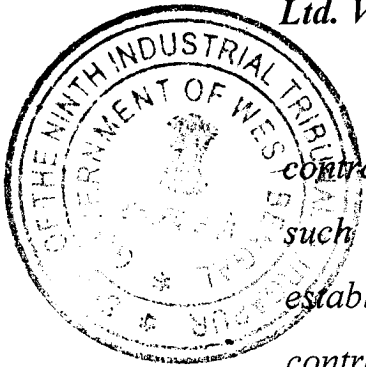
It was also submitted by the ld. lawyer that from the oral evidence of the contractor M/S. ACE Protection Group as well as the documentary evidence such as attendance sheet, posting orders of some of the workmen it is established beyond any doubt that these workmen were appointed by the contractor and their employment was supervised and controlled by the said contractor and not by the management of M/S. Graphite India Ltd.

Ld. lawyer also argued that from the contract dated 01.04.2013 it is crystal clear that M/S. Graphite India Ltd. gave contract to M/S. ACE Protection Group for providing security guards in its industrial premises for 6 months and the said contract period was enhanced from time to time till the same was terminated on 30.04.2016.

Banking upon the documentary evidence such as the terms of the contract as well as documents relating to the appointment, payment and wages & the documents relating to service under various scheme benefits, the ld. lawyer further argued that those documents clearly discard the claim of the workmen regarding M/S. Graphite India Ltd. being the principle employer.

In continuation with his such argument, the ld. lawyer further submitted that since the workmen miserably failed to prove that they are the workers of the M/S. Graphite India Ltd. within the terms of workman as defined in Sec. 2(s) of I.D.Act.1947, so question of entertainment of their prayer for reinstatement in the service of M/S. Graphite India Ltd. under the Act, 1947 does not arise at all.

Ld. lawyer also submitted that since it is the undisputed fact of this case that the workmen were appointed and were working under the control and supervision of the contractor M/S. ACE Protection Group, so the industrial dispute, if there be any, is in between them and their employer and not in



between them and M/S. Graphite India Ltd. and accordingly both the issues are to be decided against the workmen.

**Issue No.1 :**

The instant referred issue is the crux of the dispute between the parties and to adjudicate on the same this tribunal has to first decide who was the employer, as per Sec. 2(s) of the Act, 1947, and of the workers.

Before setting motion to our discussion on the issue in hand it would be pertinent to lay down the undisputed facts, as evident from the pleadings of the parties as well as oral and documentary evidence of the parties.

1. The workers, as referred in the reference order and list annexed with the same, undisputedly worked as security guard from 01.04.2013 till 30.04.2016 in the factory premises of the M/S. Graphite India Ltd.
2. The workers have been refused to their such employment on and from 01.05.2016. In other words, those workers were not allowed to join their duties as security guards in the factory premises of M/S. Graphite India Ltd. on and from 01.05.2016.
3. The contractor M/S. ACE Protection Group was involved in the employment of these workers as security guards in the factory premises of the M/S. Graphite India Ltd.
4. That the conciliation proceeding was conducted by the DLC, Durgapur but the same failed and the failure report was sent to the LabourDept. Govt. of W.B. by the DLC, Durgapur.

Adverting back to the pleading case of the workers it is needless to mention herein that they stated that they have been employed by the M/S. Graphite India Ltd. as principal employer through its sham contractor M/S. ACE Protection Group and accordingly they performed their duty as security guards in unblemished manner on and from 01.04.2013 till the date of refusal of employment i.e on and from 01.05.2016.

On the other hand, as per pleading case of the M/S. Graphite India Ltd. that it did not appointed these workers to work as security guards in its industrial establishment of M/S. Graphite India Ltd. but it entered into an

agreement with the contactor M/S. ACE Protection Group to provide security guards for protection of its property in its factory premises initially for six months subject to extension of further time from time to time and accordingly the contactor appointed these workers and it used to pay wages to them as well as used to supervise and control the employment of these workers.

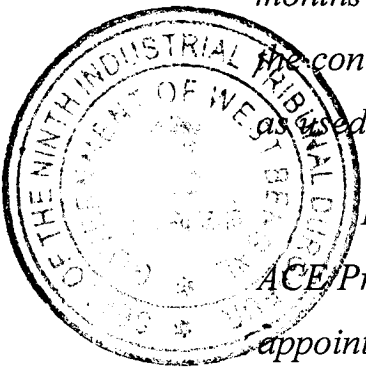
It has further been pleaded that its agreement with the contractor M/S. ACE Protection Group came to an end on 30.04.2016 and another agency was appointed to provide security guards in its factory.

It has further been averred by the M/S. Graphite India Ltd. that there was/is no industrial dispute between it and these workers and the industrial dispute was/is existed if any, in between these workers and their employer i.e. M/S. ACE Protection Group under the Act, 1947.

In other words, M/S. Graphite India Ltd. denied its having any relationship as employer and employee with these workers at any point of time.

Now, the question arises upon whom the burden of proof lies to establish the alleged relationship of employer and employee between these workers and M/S. Graphite India Ltd. As per Sec. 101 of the Indian Evidence Act, 1872 the burden of proof lies upon a person who asserts the existence of any fact in a case. That apart, the Hon'ble High Court in the case of **General Manager, Andaman & Nicobar Islands Integrated Development Corporation Ltd. (Supra)** also observed that the burden of proof lies upon the workmen who pleaded that he was illegally retrenched from his service by the employer.

In this regard, we may refer the case of **Kanpur Electricity Supply Co. (Supra)** as relied upon by the workers of this case wherein the Hon'ble Apex Court observed that "it is trite that burden to prove that a claim was in the employment of a particular management, primarily lies on the person who claims to be show but the degree of proof, so required, varies from case to case. It is neither feasible nor advisable to lay down an abstract rule to determine the employer and employee relationship. It is essentially a question of fact to be determined by having regard to the cumulative effect of the entire



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 MEMBER  
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material placed before the adjudicatory forum by the claimant and the management".

Thus, from the above dictum of the Hon'ble Supreme Court and the Hon'ble High Court as well as the relevant provisions of Indian Evidence Act, it is crystal clear that considering the pleading case of the workers claiming having any relationship of employer and employee with the M/S. Graphite India Ltd. , the burden of proof to establish the same lies upon the workers and not upon the management of the M/S. Graphite India Ltd.

During the course of argument it was argued from the side of the workers that as it is the undisputed fact of the instant case that these workers were performing duties as security guards in the industrial establishment of M/S. Graphite India Ltd. under the control and supervision of it and so it has M/S. Graphite India Ltd. which is their principal employer and not the contractor M/S. ACE Protection Group.

To substantiate his such argument the ld. lawyer relied upon the case of **Hussainbhai , Calicut (Supra) Steel Authority of India Ltd. and Airport Authority (Supra).**

On the other hand, the ld. lawyer for the M/S. Graphite India Ltd. refuted such argument by simply relying upon the documentary evidence i.e. appointment letter, salary certificate, documents relating to the service benefits under various Scheme as well as documents relating to its agreement with the contractor M/S. ACE Protection Group.

So far as the relevant factors to be taken into consideration to establish employer and employee relationship, the Hon'ble Supreme Court in the case of **Bharat Heavy Electricals Ltd. Vs. Mahendra Prasad Jakhmola and ors, Civil Appeal 1799 – 1800 of 2019** had he occasion to deal with the same and reiterated its observation as made in the case of **Basti Sugar Mills Vs. Ram Ujagar and Ors., (1964) SCR 838, International Airport of India (Supra), Bengal Nagpur Cotton Mills, Rajnandgoan Vs. Bharat Lala and another , (2011) 1 SCC 635 and Nalco case (2014) 6 SCC 756** and finally laid down the

factors to be relevant for consideration to establish an employer and employee relationship in the following manner :

- i) who appoints the workers;
- ii) who pays the salary/remuneration;
- iii) who has the authority to dismiss;
- iv) who can take disciplinary action;
- v) whether there is continuity of service; and
- vi) extent of control and supervision i.e. whether there exists complete control and supervision.

As regards the extend of control and supervision, the Hon'ble Apex Court took note of its observation as made in the case of **Bengal Nagpur Cotton Mills (Supra) and Airport Authority case (Supra)**.

The Hon'ble Supreme Court in the case of **Bengal Nagpur Cotton Mills (supra)** held that well recognised tests to find out whether the contract labourers are the direct employees are as follows :

“ It is now well settled that if the industrial adjudicator finds that the contract between the principal employer and the contractor to be a sham, nominal or merely a camouflage to deny employment benefits to the employee and that there was in fact a direct employment, it can grant relief to the employee by holding that the workman is the direct employee of the principal employer. Two of the well-recognised tests to find out whether the contract labourers are the direct employees of the principal employer are: (i) whether the principal employer pays the salary instead of the contractor; and (ii) whether the principal employer controls and supervises the work of the employee. In this case, the Industrial Court answered both questions in the affirmative and as a consequence held that the first respondent is a direct employee of the appellant”.

In the case of **International Airport Authority of India Ltd. (Supra)** the Hon'ble Supreme Court further explained the expression “control and supervision in Para 38 which runs as follows :-

“ If the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the



principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by a contractor, if the right to regulate the employment is with the contractor, and the ultimate supervision and control lies with the contractor.

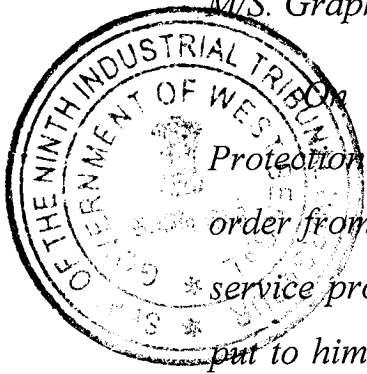
The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be assigned / allotted to or used otherwise. In short, worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor".

Keeping the above settled proposition of law, as made by the Hon'ble Supreme Court in those case laws in mind, we are to discuss parties evidence regarding those mentioned 6 (six) relevant factors to see how far these workers have been able to establish their claimed relationship of employer and employee with M/S. Graphite India Ltd.

So far as factor no. (i) concerned these workers in Para-I of their pleading i.e WS stated that they are all bonafide employees of the so-called contractor i.e M/S. ACE Protection Group. It is not their pleading case that they were actually appointed by the management of the M/S. Graphite India Ltd.

P.W-1 in his entire evidence-in-chief on affidavit nowhere stated that he and other 39 workers were actually appointed by the management of the M/S. Graphite India Ltd. No documentary evidence such as appointment letter or any other relevant documents such as copy of their application made to the management of the M/S. Graphite India Ltd. has been produced from the side of these workers in support of their alleged appointment by the management of the M/S. Graphite India Ltd. P.W.1 in his cross examination unequivocally stated that no appointment letter was issued to him by M/S Graphite India Ltd.

for the post of security Guard. Consequently, there is no evidence from the side of these workers regarding their appointment by the management of the M/S. Graphite India Ltd.



On the other hand, O.P.W-2 who is the proprietor of M/S. ACE Protection Group in his evidence-in-chief on oath clearly stated that he got order from M/S. Graphite India Ltd. for 6 (six) months and on satisfaction of service provided by him the same was extended or renewed. No question is put to him in his cross-examination from the side of these workers suggesting that they have not been appointed by the M/S. Graphite India Ltd..

On perusal of the pleading and evidence as adduced from the side of these workers it is evident that they claimed their alleged relationship as employee and employer with the M/S. Graphite India Ltd. solely on the basis of the factor of their being allegedly remained under control and supervision of the management of the M/S. Graphite India Ltd. and not on any other factor.

O.P.W-1, who is the Executive Vice-President (Works) and who has been authorised by the M/S. Graphite India Ltd. to adduce evidence on its behalf vide authorisation letter i.e. Exbt. , in his evidence-in-chief clearly stated that his organisation entered into an agreement with M/S. Graphite India Ltd. to provide security guards in the industrial establishment on and from 01.04.2013. He in his cross-examination from the side of the workers remains absolutely unshaken on that issue.

O.P.W-2 who is the proprietor of M/S. ACE Protection Group in his evidence on oath clearly corroborates his oral evidence of O.P.W-1 and also produced the letter of allotment and agreement between his organisation and M/S. Graphite India Ltd. which have been marked as Exbts. O, P, S & T in the instant case. It reveals from the CR that those documentary evidence have been admitted in evidence from the side of the contractor M/S. ACE Protection Group with an endorsement of 'with objection' by the then Ld. Judge of this tribunal. However, during the course of hearing of the argument from the side of the workmen no argument was put forward regarding the reason of raising objection at the time of marking of those documents in the instant case.

Sd/-

*In my considered view, burden of proof lies upon the party who raises objection in admission of any particular documentary evidence and the party has to satisfy the court/tribunal of the reason of raising such objection.*

*This apart, it is the settled proposition of law that the provisions of India Evidence Act, 1872 do not apply in strict sense so far as admissibility of any documentary evidence is concerned. Sec. 11(3) of the Act, 1947 simply vested this tribunal with the powers of Civil Court under the court of Civil Procedure 1908 with respect to certain specified matters. Barring that there is no provision in the Act, 1947 which makes the applicability of all the provisions of Indian Evidence Act, 1872 in a reference providing U/s 10 of the Act, 1947.*

*Moreover, since the proceedings before the Tribunal is not wholly a judicial proceeding, but merely quasi-judicial in nature and Sec. 1 of the Evidence Act 1872 does not make the Act applicable of its own force, so it cannot be said that the provisions of the Evidence Act apply in strict sense.*

*The Hon'ble Calcutta High Court in the case of Palan Chandra Naskar Vs. State of Maharashtra, LAWS (CAL) 2020 12 30 observed that the provisions of Indian Evidence Act are not applied in a strict sense. In disciplinary proceedings under the Act of 1947.*

*In view of my above discussion it is crystal clear that the workmen failed to satisfy this tribunal about having any valid reason for raising objection in the process of admissibility of those documentary evidence on the basis of oral evidence of O.P.W-2 i.e the proprietor of contractor M/S. ACE Protection Group.*

*I must make it clear that this tribunal is not out of sight to the fact that the process of admission of a document as an evidence in a reference proceeding or in a suit and its evidentiary value with respect to the issues between the parties are two different aspects.*

*Now, come back to the fact of the instant case with respect to the evidential value the documentary evidence.*

*SAV*



On perusal of the Exbt. O (collectively) it is evident that there was a process in engagement of M/S. ACE Protection Group for providing security guards in the industrial establishment of M/S. Graphite India Ltd. and as a result of which it has been agreed upon between the M/S. Graphite India Ltd. and M/S. ACE Protection Group that M/S. ACE Protection Group to provide 34 numbers of security guards in the industrial establishment of the M/S. Graphite India Ltd. on and from 01.04.2013.

The workers in their pleading also admitted the said fact but they simply denied that they were actually working under the supervision and control of the contractor M/S. ACE Protection Group. Thus, the evidence, as discussed above, clearly established that these workers were appointed by the contractor M/S. ACE Protection Group after getting his Work Order dated 01.04.2013 from the M/S. Graphite India Ltd.

Now, let us discuss the relevant factor as mentioned in Clause (ii) of the judgement of BHEL (Supra) which speaks about the authority for making payment of salary.

In the case in hand the workers in Para 5 of their WS stated as follows :-

"That the concerned workmen used to get their salaries regularly and used to enjoy all service benefits including said employees' State Insurance". But their pleading is conspicuously silent about the person from whom they used to get their salaries and service benefits.

These workmen know very well from whom they used to get their salaries and all service benefits but they intentionally did not mention about the same in their pleading. Their such conduct itself shows that they intentionally tried not to place all the relevant facts or factor or materials before this tribunal for proper and effective adjudication of the referred industrial establishment by this tribunal.

Their such undesirable conduct should be taken into consideration while considering reliability of evidence as adduced from their side on the aspect of the Clause-(ii) as well as the instant issue.

Admittedly, the workmen did not produce any documentary evidence such as monthly pay slip or statement of salary in the instant case. Had they produced the same, then it could be seen but this tribunal to ascertain who used to pay salary and other service benefits to these workmen i.e either by the contactor M/S. ACE Protection Group or by M/S. Graphite India Ltd.

In this aspect the evidence in cross-examination of the representing workman i.e P.W-1 is very much relevant.

P.W-1 in his entire evidence affidavit-in-chief nowhere stated that he and other workman used to get their monthly salary and service benefit from M/S. Graphite India Ltd. But he in his cross-examination by the M/S. Graphite India Ltd. tried to dodge the question of M/S. Graphite India Ltd. by stating that "I was drawing salary from M/S. Graphite India Ltd. via agency". When he was confronted with the Annexure 'A' i.e salary statement for the month of April, 2016 he states that "It is true that in Annexure-'A' my name is shown in Sl.No.2 in the salary register for the month of April, 2016, but in signature column I did not put my signature. I cannot recollect whether I received my salary of the said month or not"?

From the trend of his such reply it can safely be inferred that he somehow tried to negate the case of M/S. Graphite India Ltd. that he and other workers were provided salary by the contactor M/S. ACE Protection Group by concealing the actual facts.

P.W-1 in his further cross-examination also expressed his inability to say whether M/S. Graphite India Ltd. or M/S. ACE Protection Group(Agency) deducted the amount towards PF and ESIC from his salary or not. I am really surprised from such reply of the workers as because a worker or employee is the best person to say at whose instance they were getting service benefits.

On the other hand, O.P.W-1 in his evidence- in -chief as well as in his cross-examination very categorically stated that it is the contractor M/S. ACE Protection Group who used to pay salary to the security guards as well as all service benefits.

To substantiate the same M/S. Graphite India Ltd. also examined the contactor i.e O.P.W-1 as summoned witness in this case.

O.P.W-2 while adducing evidence produced the salary certificate, challans of its employees and monthly muster sheet and those have been marked as A, B & C in this case. He in his cross-examination clearly stated that the workers got the benefit of PF, Gratuity and ESI in the course of their duty. During the course of his cross-examination by the workers no question was put to him suggesting that it is the M/S. Graphite India Ltd. which was making payment of salaries, contribution to the PF and ESI of these workers during their service tenure.

Had it been a fact that contractor M/S. ACE Protection Group was not making payment of salary and other service benefits of these workmen during the course of its having contract with M/S. Graphite India Ltd., then the said fact should have been denied by the workman in the cross-examination of O.P.W-2. They are not making any endeavour to deny the same makes the evidence of O.P.W-2 more reliable, especially when the same is corroborated by documentary evidence.

It is evident from Exbt. A i.e the statement of salary for the month of April, 2016 that the same was maintained by M/S. ACE Protection Group for its workers deployed in the M/S. Graphite India Ltd. industrial establishment. It is further evident from Exbt. B (collectively) that it is the M/S. ACE Protection Group which had deposited its contribution on the PF for these workers for the period mentioned therein which includes the period by these workers deployment in the M/S. Graphite India Ltd. industrial premises.

As I have already mentioned herein above that no documentary evidence has been adduced from the side of these workers to establish that they were getting salary and other service benefits from the M/S. Graphite India Ltd. and not from their contractor M/S. ACE Protection Group, so evidence of the contractor M/S. ACE Protection Group are much more convincing and reliable to rebut workers such pleading case.

*Self*

*In other words, from my above discussion it is crystal clear that these workmen failed to establish that they were getting salaries and other service benefits from M/S. Graphite India Ltd. being their principal employer.*

*So far as Clause-(iii) & (iv) of relevant factors are concerned, I am of the view that since the evidence from the side of these workmen regarding Clause (i) & (ii) are quite insufficient, so the same lead to the conclusion that it is the contractor M/S. ACE Protection Group which has the authority to dismiss or to take disciplinary action against any of these workmen.*

*Clause-(v) of the relevant factor it is the undisputed fact of this case as evident from pleading of the parties as well as documentary evidence i.e. Exbt. O (collectively) and S (collectively) that these workmen were in continued service for the period of subsistence of the contract between M/S. Graphite India Ltd. & M/S. ACE Protection Group i.e for the period from 01.04.2013 to 30.03.2016.*

*Clause-(vi) of the relevant factor is the crux of the issue in hand.*

*So far as relevant factor of extend of control and supervision of M/S. Graphite India Ltd. over these workers employment is concerned, it has been specifically pleaded by the workers in their WS that their job was perennial and permanent nature at their deployment and movement in the factory premises was directly supervised and controlled by the principal employer i.e. M/S. Graphite India Ltd.*

*To establish their such pleading case the workers only relied upon the oral evidence of P.W-1 and clause 12 & 15 of the security contract dated 01.04.2013 i.e Exbt.E.*

*During the course of hearing of argument the ld. lawyer for the workers by referring clause 15 of Exbt. E contended that as the same empowers the Vice-President (works) /General Manager(Works) of M/S. Graphite India Ltd. to decide on unsuitability of security personnel and his binding nature of such decision and submitted that the same clearly established that these workers were under the complete control of the management of the M/S. Graphite India Ltd. and not under the contractor M/S. ACE Protection Group. But, on perusal*

of the clause 15 I find that the same does not reveal about the matter as contended from the side of the workers. The said clause simply provides that M/S. ACE Protection Group shall immediately change/replace the personnel employed by it if he is found unsuitable by the security officers of M/S. Graphite India Ltd. By stretch of no imagination it can be inferred from the clause 15 of Exbt E that the security personnel i.e these workers were under direct control and supervision of the management of M/S. Graphite India Ltd. On the contrary, the same reveals that the contractor M/S. ACE Protection Group shall be under obligation to replace the unsuitable personnel deployed by it in the industrial premises of the M/S. Graphite India Ltd. if the security officers found he/they unsuitable for the work for which contract was provided to M/S. ACE Protection Group.

On the other hand, M/S. Graphite India Ltd. rebut the workers' claim by taking the plea that these workers were employed under the direct control and supervision of their employer M/S. ACE Protection Group and to substantiate the same they relied upon the oral evidence of P.W-1 and O.P.W-2 as well as the documentary evidence such as muster roll, attendance sheets, transfer orders and service benefits provided to these workers by the contractor M/S. ACE Protection Group.

O.P.W-2, who is the proprietor of M/S. ACE Protection Group, in his examination in chief on oath clearly stated that "We give direction to the employees about the duty hours and we maintain their attendance. The employees were under the control of our company M/S. ACE Protection Group".

He in his cross-examination further stated that "the authority of M/S. Graphite India Ltd. time to time to give instruction to our firm and accordingly we give instruction to security personnel and Gunman to do their jobs". After having meticulously gone through the entire cross-examination of O.P.W-2 I find that there is no denial of the evidence in chief, as mentioned herein above, in the cross-examination from the workers for the reason best known to them. As a result of which the said piece of evidence in chief regarding giving direction to these workers about duty hours and maintaining their attendance

and having control over them by the M/S. ACE Protection Group remains intact being unchallenged.

Moreover, it is further evident from the cross-examination of O.P.W-2 that these workers were actually under the control and supervision of the contractor M/S. ACE Protection Group and not under the control and supervision of M/S. Graphite India Ltd.

Furthermore, it is evident from Exbt. A i.e the salary statement for the month of April, 2016, Bonus calculation sheet from Oct., 2015 to April, 2016 that these workers and other workers of M/S. ACE Protection Group that they received salary and bonus from M/S. ACE Protection Group and not from the M/S. Graphite India Ltd.

Moreover, it is further evident from Exbt. C i.e monthly muster sheet that the attendance sheet of these workers and other workers of M/S. ACE Protection Group was being maintained by M/S. ACE Protection Group and not by the management of the M/S. Graphite India Ltd.

Besides that Exbt. D which are the posting / transfer orders of P.W-1 and some other workers clearly supports the case of the M/S. Graphite India Ltd. that the posting and transfer of these workers were made by its contractor M/S. ACE Protection Group and not by its management.

At this juncture, it is pertinent to mention herein that the workers although claimed that it is the M/S. Graphite India Ltd. which used to control and supervise their employment directly but they failed to produce any reliable piece of evidence in support of their such claim. They mainly produced their representation made to the various authorities after alleged termination / refusal of employment on and from 01.04.2016 in the industrial premises of the M/S. Graphite India Ltd. i.e. Exbt. Nos. 1 to 9.

From my above discussion it is crystal clear that no convincing evidence has been adduced from the side of these workers to establish their claim that M/S. Graphite India Ltd. had the absolute control and supervision over the management of these workers during that period. On the contrary, the evidence as discussed herein above and produced from the side by the M/S.

Graphite India Ltd., are much more convincing and reliable to rebut these workers' such claim.

I have already discussed herein above the dictum of the Hon'ble Apex Court regarding the well-recognised tests to find out about the actual nature of contract as mentioned in the **Bengal Nagpur Cotton Mills Case(Supra)** and **International Airport Authority of India (Supra)**.

Taking note of such observations of the Hon'ble Supreme Court and the evidence discussed herein above I am of the view that security contract in between M/S. Graphite India Ltd. and the contractor M/S. ACE Protection Group cannot be said to be a contract of engagement of sham contractor just to deprive the statutory benefits of these workers by the M/S. Graphite India Ltd. In other words, no evidence has been led from the side of these workers to establish their claim of employee and employer relationship between them and M/S. Graphite India Ltd.

Sec. 2(k) of the Act of 1947 defines 'Industrial Dispute' as means any dispute or difference between employers and employees, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any persons;

From such definition of Industrial Dispute under the Act of 1947 it is very much clear that to invoke jurisdiction of the tribunal there must be an existence of relationship of employer and employee between these workers and M/S Graphite India Ltd. and thereafter, the other factors of the dispute are to be taken into consideration. Where there was nothing to show that the relationship between these workers and M/S Graphite India Ltd. was that of an employer and employee, the reference to the Industrial Tribunal was without jurisdiction.

Having regard to my above discussion I am of the view that these workers miserably failed to establish the employer-employee relationship between them and M/S. Graphite India Ltd. and accordingly it cannot be said that there exists any industrial dispute between them under the Act, 1947.

sd/-

Consequently, the refusal of employment to these workers on and from 01.04.2016 cannot be said to be made by the management of M/S. Graphite India Ltd. Thus, the instant referred issue is disposed of accordingly.

Before parting with this judgement I must mention herein that I refrain from discussing the other case laws as referred by the parties, as mentioned herein above, as those are clearly distinguishable on factual matrix with the facts of the case in hand.

In view of my findings regarding the referred Issue no.1, the question of giving any relief to these workers under the Act of 1947 does not arise at all. Thus, both the referred issues are disposed of accordingly.

The instant proceeding fails on contest.

Hence, it is

### ORDERED

that the proceeding U/S 10 of the I D Act, 1947 is dismissed on contest against the O.P / Messrs Graphite India Ltd. but without cost.

Accordingly, an award is passed to that effect.

Send a copy of this order to the Principal Secretary, Labour Department, Govt. of West Bengal for his doing the needful.

D / C by me,  
Sri Sujit Kumar Mehrotra  
Sd/- Judge, 13.02.2023,

JUDGE  
NINTH INDUSTRIAL TRIBUNAL DURGAPUR  
GOVT. OF WEST BENGAL

Sri Sujit Kumar Mehrotra  
Sd/- Judge, 13.02.2023,

(Sujit Kumar Mehrotra)

9<sup>th</sup> Industrial Tribunal, Durgapur.

JUDGE  
NINTH INDUSTRIAL TRIBUNAL DURGAPUR  
GOVT. OF WEST BENGAL