

(1994) 06 BOM CK 0047

In the Bombay High Court

Case No : Writ Petition No. 2916 of 1990

Contract Laghu Udyog Kamgar Union

APPELLANT

Vs

K.K. Desai and Others

RESPONDENT

Date of Decision : 23-06-1994

Acts Referred:

Contract Labour (Regulation and Abolition) Act, 1970 — Section 10
Industrial Disputes Act, 1947 — Section 2(s)
Trade Unions Act, 1926 — Section 28

Citation : (1994) 06 BOM CK 0047

Hon'ble Judges : S.H. Kapadia, J

Bench : Single Bench

Judgement

S.H. Kapadia, J.—By this petitioner, the petitioner-Union representing Contract Labour seek to challenge the order dated 30th August, 1990 passed by the Industrial Court, Bombay, in the Complaint (ULP) No. 1086 of 1985. By the impugned order, the said Complaint (ULP) No. 1086 of 1985 came to be dismissed and, therefore, the Union has filed the present petition.

2. It may be mentioned at this stage that the Complainant Union represents about 73 workers who are working with Hindustan Lever Ltd. since prior to 1985 and who are styled and treated as Contract Workers. The said workmen in the said Complaint have alleged that they are direct employees of Hindustan Lever Ltd., (hereinafter referred to as "Hindustan Lever") and that the Contractor in each of the seven employments was merely a name lender; that the contract was a sham and the said contract was a subterfuge to deprive the workmen employed in various employments for last several years of the benefit of permanency.

3. In the present case, before coming to the facts, it would be relevant to observe the scheme of the industrial Dispute Act, 1947, the provisions of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1970 (hereinafter referred to as "ULP Act") as well as the Contract

Labour (Regulation and Abolition) Act, 1970 (hereinafter referred to as "the Contract Labour Act"). In the present case, the Complaint was filed by the Union, inter alia, alleging unfair labour practices on the part of Hindustan Lever. Item 9 of the Schedule IV to the ULP Act is the main item which is required to be considered in the facts of the present case. Item 9 deals with unfair labour practices committed by the employer. It inter alia provides for failure to implement award, settlement or agreement. Section 2(K) of the Industrial Dispute Act inter alia lays down the meaning of the expression "industrial dispute" to mean any dispute or difference between employers and employees, or between employers and workman, 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 person. Section 2(s) of the Industrial Disputes Act lays down the meaning of the definition of the word "workman", to mean any person employed in an industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceedings under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute. On the other hand, we have the provisions of Section 10 of the Contract Labour Act. The Act deals with regulation and abolition of the contract system. Section 10 of the Contract Labour Act, 1970 lays down that in appropriate cases, the Government may, after consultation with the Central Board, prohibit, by notification in the official Gazette, employment of contract labour in any process, operation or other work in any establishment. u/s 10(2), it is laid down that before issuing any notification under Sub-section (1) in relation to an establishment, the appropriate Government shall have regard to the conditions of work and benefits provided for the contract labour in that establishment and other relevant factors, such as nature of work, process, operation or work incidental to the industry, trade, business, manufacture or occupation, as to whether the contract system should be abolished or continued.

4. The above provisions of the three Acts have been discussed herein above for two reasons : Firstly, we have to construe the word "agreement" which finds place in Item 9 of Schedule IV of the ULP Act, 1971 in the light of Item 9 of Schedule IV. This is because the main argument advanced on behalf of the Company in the present case is : that the above Complaint in effect seeks abolition of the Contract Labour System which is in existence in Hindustan Lever for the last several years and such a dispute could only be decided u/s 10 of the Contract Labour, 1970. In this context this Court is required to examine the true scope of Section 28 read with Item 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as the said Act). At the very outset it may be noted that the Contract Labour Act, 1970 proceeded on the basis that the Company has an independent Contractor who undertakes to produce a given result for the

establishment through Contract Labour. He may be a contractor for many establishment. The Contractor for many establishments. The Contractor is not under the supervision and control of the principal employer. In such cases the Competent Authority may abolish the systems in the circumstances enumerated in Section 10 of the Contract Act are satisfied. On the other hand, the industrial Court exercises a different jurisdiction. In appropriate cases in order to ascertain the true nature of employer-employee relationship, it is entitled to lift the veil and come to the conclusion that there was no valid contract; that there was a bogus contractor; that the contract was only a paper arrangement to deny the benefit of permanency to the Contract Workers. In the case of *Ceats of India Ltd. v. 4th Industrial Tribunal, West Bengal*, reported in 1990 LIC 1126, the Calcutta High Court has laid down that merely because the workmen are actually appointed by an independent Contractor is not relevant to the question as to whether the said workers were employed in an industry. Here existence of an independent contractor is not the end of the matter. It is further observed in the said judgment that the expression "employed in any industry" in Section 2(a) of the Industrial Disputes Act would take in employees who are employed in connection with operation incidental to the main industry. An employee who is engaged in any work or operation which is incidentally connected with the main industry of the employer would certainly be a "workman" provided u/s 2(s) of the Industrial Dispute Act. It is also further held that in the modern world industrial operations have become complex and complicated and for the efficient and successful functioning of any industry, several incidental operations are called in aid and it is the totality of all these operations that ultimately constitutes the industry as a whole. In *Hussainbhai v. Alath Factory Tezhilali Union*; reported in 1978 2 LLN 276 it is laid down that the true test is : that where the workmen are engaged to produce goods or services for the business of another is the employer. Where there is economic control over the workers" subsistence, skill and continued employment and if for any reason he checks off, the workers is laid off them that another is the employer. The presence of immediate contractor with whom the workers have immediate contract with whom the workers have immediate contract or relationship is of no consequences when on lifting the veil or looking at the conspectus of factors governing employment the Court discerns the naked truth, though dropped in prefect paper arrangement that real employer is the management and not the immediate Contractor. In the case of *Silver Jubilee Tailoring House v. Chief Inspector of Shops*, reported in AIR 1974 SC 73 it has been held by the Apex Court that in view of the complex nature of industrial activities, a complex test of criteria is required to be applied to the facts of each case, viz., control, ownership of the tools, the chances of profit, the risk of loss and that test of control in itself is not always a conclusive test. In the present case, therefore, it is important to find out as to whether the industrial Court has to whether the industrial Court has considered the above tests and whether the Industrial Court has applied these tests to the facts of the above seven employments. This is also important for the reason that it has been argued on behalf of the Company that the Industrial Court has given a finding of fact on

each of the seven employments and has come to the conclusion that employer and employee relationship did not exist and since it is a finding of fact, this Court cannot sit in judgment as an Appeal Court, because this Court's jurisdiction under Article 226 is very limited. This is a well settled proposition. As stated above, if relevant tests are not appreciated and applied by the Industrial Court to the facts of the present case, then this Court would certainly be entitled to intervene under Article 236 of the Constitution.

5. Briefly, the facts giving rise to this writ petition are as follows :

The above Complaint (ULP) No. 1086 of 1985 was filed by the Union alleging unfair labour practices committed by the Company under Item Nos. 1, 4 and 6 of Schedule II and Item Nos. 3, 6, 7, and 9 of Schedule IV a of the said Act, 1971. Exhibit "A" to the said Complaint gives nature work carried out by the contract worker. Exhibit "A" also gives names of seven contractors employed by Hindustan Lever. It also gives the numbers of years of service which each of the workmen has rendered under the above contractors. In the Complaint, it is alleged that the work done by the workmen was incidental to the work that is carried out by Respondent No. 1 Company; that the work carried out by the said workmen was of a perennial and regular nature; that there was sufficient work with the Company to employ all the workmen as regular and full time employees; that the said workmen are entitled to be treated as permanent employees of Respondent No. 1 Company. In the above circumstances, the workmen have alleged in the Complaint that the various contracts were sham and they were entered into by the Company with mala fide intention of denying them permanency and benefits under the settlement with the permanent workmen. In the above circumstances, it was alleged that the Company was guilty of unfair labour practices under the above items. The Company has filed the written statements denying the above allegations. It was contended by the Company that in effect the Union was seeking abolition of the contract work and to treat the contract workers as employees of Hindustan Lever and, therefore, such a Complaint could fail only u/s 10 of the Contract Labour Act and the Industrial Court had no jurisdiction to abolish the contract system under the said Act, 1971.

6. In the light of above pleadings, evidence was led and ultimately by the impugned order, the Complaint came to be dismissed.

7. In order to facilitate the dictation of this judgment, in the present case we have to go by each of the independent seven employments to ascertain as to whether the relationship of employer and employee stood established vis-a-vis each of the said employments.

(I) The first employment which is required to be considered in the light of the evidence led by the Union of as well as the Company is the "cleaning activity" at the Research Centre of the Company for which the Company entered into a contract with one Pandu Karchande. The Industrial Court, after considering the

evidence on record, came to the conclusion that Hindustan Lever had engaged Pandu Karchande as a Contractor for cleaning floors, walls and windows, vide agreement Exhibit C-28/1. According to the Industrial Court, it was a written contract on a stamp paper. The Industrial Court rejected the contention of the Union that Karchande was a bogus Contractor. The industrial Court came to the conclusion that in view of the Contract (Exhibit "C"-28) it cannot be said that Pandu Karchande was a bogus Contractor. The industrial Court found that the Contract was on a stamp paper; that the terms were well spelt out and that there was no control of the Company over Pandu Karchande. The Industrial Court rejected the contention of the Union that the Wage register and the attendance registers were maintained under the supervision of the Company. In the above circumstances, the Industrial Court rejected the contention of the Union that the work of cleaning was a work of permanent nature and it was the work of the organisation. Now, in the present case the nature of the work was one of the important circumstances which the Industrial Court should have taken into account. In the present case, the industrial Court was required to examine as to whether the work of cleaning was the work connected with the establishment. Cleaning of floors, walls, etc., would certainly be connected with the work of the establishment. Thus most important criteria has not at all been discussed by the industrial Court. The workmen came to the Court alleging that the cleaning activity was the work of the Company. It was the work directly connected with the establishment and in the circumstances over a period of time, the concerned workmen who were employed through a bogus contractor were in fact doing the work of Hindustan Lever and they were certainly entitled to be treated as employees of the said Company. Secondly, the circumstances that the Company had economic control over the contracts workers has not been considered. In the present case, the Company has not denied the fact that the cleaning is not the work of the main organisation. There is nothing to indicate that it is not the work of the main organisation. Even the evidence of one Aspi Elavia, the Officer of the Company, shows that the Company maintained supervision and control in the matters of wage and Attendance Registers. In the present case, I find that the Industrial Court has merely seen the paper arrangement between the Company and the so-called Contractor Pandu Karchande. In the present case, as far as the cleaning activity is concerned, the workmen have proved that they were doing the work of cleaning floors and walls. The Contractor Pandu Karchande did not step into the witness box. There is nothing to show as to what was the arrangement between the Contractor Pandu Karchande and the Company. Secondly, the terms of the contract between Pandu Karchande and Hindustan Lever are not even discussed by the Industrial Court. There is nothing to indicate as to whether the consideration payable to Pandu Karchande under the contract with Hindustan Lever was to cover the wages of the workmen employed by the Contractor. The evidence on behalf of the Company is that one of Mr. Aspi Elavia, who was an officer of Hindustan Lever, used to sit and ascertain as to whether the workmen had signed the Wage Register or not. This fact is not disputed by the Company. This is an indication of the fact the supervisory control was there

of Hindustan Lever with regard to payment of salary to each of the workman employed by so-called contractors. The main argument of the Company is that there are findings of fact and, therefore, this Court should not interfere. As stated hereinabove, none of the tests discussed above to establish the relationship of employer and employee have been applied. The Industrial Court has merely seen the written agreement between Pandu Karchande and Hindustan Lever and has come to the conclusion that there was no employer relationship between the workmen and the Company. In the present case the workmen have proved that the Company's Officer Mr. Aspi Elavia used to supervise payment of their wages, attendance, etc. Pandu Karchande did not step into the witness box. The burden was on the Company prove the arrangement with the said Pandu Karchande viz., whether the consideration mentioned in the Contract covered the wages of the workmen employed by Pandu Karchande or whether wages were paid by Hindustan Lever separately and apart and apart from the consideration payable to Pandu Karchande. The evidence of Mr. Aspi Elavia shows that he supervised the payment of wages and the attendance of the workers. I have also seen the wage register. It indicates paltry amount being paid to each of the workmen over the years. It does not indicate as to whether the amount was paid by Hindustan Lever or by the Contractor. Despite the fact that the Contractor did not step into the witness box, the Industrial Court come to the conclusion that Pandu Karchande was an independent contractor and, therefore, there was no relationship of employer and employee between the parties. In the present case, it was the case of the Union that each of the contractors including Pandu Karchande were bogus contractors; they were like Mukadams and that the above arrangement between was only a paper arrangement between the Company and the so-called contractors. No licence was obtained even under the Contract Labour Act. 1970.

9. In the above circumstances, I am of the view that the Union has proved that the said workmen were in fact doing the work of the Company over the years and that they were the employees of the Company and by denying the permanency the Company was guilty of unfair labour practices.

9-A. Now, coming to the next employment : watering, lifting, and mixing in the Agricultural Laboratory of Hindustan Lever Research Unit at Andheri, it may be mentioned that the evidence on record shows that the above work had direct nexus to the working of the Laboratory. The Company carries out research on plants for which the above Agricultural Laboratory is established. The evidence shows that the workers did the work of watering plants which was connected with the work of the Organisation. They were also required to do the work of mixing the manure. The Company has not denied that the above work is not the work of the Laboratory. The industrial Court has not considered the nature of the work. The evidence of Aspi Elavia shows control of the Company in the matter of payment of wages and attendance of the said workmen. Here also the Company claims to have appointed one A. J. Mendonca as a Contractor. He did not step into the witness-box. His son stepped into the witness - box and stated that his

father A. J. Mendonca was not not the Contractor but one Misquita was the Contractor and that he was the Manager of Misquita. The Industrial Court in para twenty of the impugned judgment has come to the conclusion that there was utter confusion as to who was the Contractor employed by Hindustan Lever for the above employment. Despite the said finding, the Industrial Court has come to the conclusion that the contract was proved and the workers were not doing the work of the Company. In this connection, it may be mentioned that the terms and conditions of the contract and the nature of duties performed by the workmen have also not been considered by the Court below. The Union has all throughout been contending that the Company has been engaging bogus contractors. In the above circumstances, it was for the company to prove who was their Contractor and that the privity of contract between the Company and the alleged contractor. Here also there is nothing to indicate as to how wages were paid each month to the workmen. No written contract existed. The letters do not indicate the consideration payable to A. J. Mendonca. Agricultural Laboratory is a part of the industrial activity. The nature of the work performed in the Agricultural Laboratory; the nature of duties performed by each of the workmen who did the work of watering, lifting and mixing, are required to be considered. These facts have not all been considered. The Contractor did not step into the witness - box. One fails to under stand how it could be said that Mendonca or Misquita exercised the control over the workmen when the Contractor did not step into the witness-box. Even with regard to the fact as to whether who was the real contractor, the industrial Court has come to the conclusion that it was for the workmen to prove as to whether there was an employer and employee relationship and since the real contractor did not come into the witness-box and since there was confusion, an adverse inference is drawn against the workmen. This finding is perverse. The Company alleged that A. J. Mendonca was Contractor. But Mendonca's son denied it. In the circumstances, it was for the company to prove who was the Contractor. Further, it is also important to bear in mind that the workmen all throughout have contended that they were under the direct supervision and control of Hindustan Lever. They have proved by evidence that it was Aspi Elavia of Hindustan Lever who used to supervise their work. They have established that each of the employees of Hindustan Lever and particularly Aspi Elavia used to see whether the wages were paid to the workmen in their presence. In the above circumstance, the workmen have certainly discharged their burden. The workmen have also prove the nature of work. Surely, the work of watering, lifting and mixing, which was a part of the Agricultural Laboratory of Hindustan Lever's Research Centre would certainly be a part of the Organisation and, therefore, one fails to understand how without considering the nature of the work, the Industrial Court has come to the conclusion that the relationship of an employer and employee has not been proved. Here also it has been contended by Mr. Rele, learned counsel appearing on behalf of Hindustan Lever that these are the questions of facts and, therefore, the Court should be intervene. Mr. Rele further submitted that in the present case supervision and control was the test and since

that criteria is not satisfied, the Industrial Court was right in rejecting the Complaint. There is no merit in the said contention. The finding recorded by the Industrial Court is not in accordance with the evidence on record. In fact, it is perverse. Once the Industrial Court comes to the conclusion that there is a confusion regarding identity of the Contractor between Misquita and Mendonca and once it is found that Misquita did not step into the witness-box, the Industrial Court should have come to conclusion that looking to the nature of the activity, the relationship of employer and employee between the workmen and Hindustan Lever was duly established. On the one hand, the Industrial Court has observed that there is confusion regarding the identity of the contractor and on the other hand it has come to conclusion that A. J. Mendonca was the Contractor for fabrication and Misquita was for work in the Laboratory. Here also it is important to bear in mind that no written contract was produced between Misquita and Hindustan Lever. Misquita too did not step into the witness-box. Mr. Rele further contended that the circumstances as to whether the work was of a regular nature is relevant only for the purposes of Section 10 of the Contract Labour Act and it is not relevant for the purpose of deciding the complaint under Item 9 of Schedule IV to the ULP Act. I do not see any merit in the said contention. As stated hereinabove, the Industrial Court is certainly entitled to go behind the paper arrangement and ascertain from the nature of duties and the other circumstances as to whether the workers were employed in the industry or not; whether they were doing the work of the Company or not; whether the Company exercised economic control over them or not, and if it is so established, then the Industrial Court would be entitled to come to the conclusion that the contract was not genuine and consequently the Industrial Court is entitled to lift the veil and hold that the said workers were employed in the Company and they were the workmen u/s 2(s) of the Industrial Dispute Act. (See *Standard Vacuum v. Workmen*, AIR 1960 SC 848. Secondly, as stated above, Section 10 of the Contract Labour Act, 1970 applied to the case where there is a bona fide contract and the workers claim its abolition. That is quite distinct from the case where the workmen allege that over the years they have been deprived of the benefit of permanency on the basis of a sham contract as in the present case. In the circumstances, the industrial Court was in error in rejecting the case of the workmen regarding the employment of workmen in connection with watering, lifting and mixing in the Agricultural Laboratory of the Research Centre of Hindustan Lever.

11. Now, coming to the Canteen, the Contractor is Neeta Caterers. The workmen were employed in the Canteen. It is the case of the workmen that u/s 46 of the Factories Act, Hindustan Lever was required and statutorily duty bound to have a canteen. It was the case of the workmen that even in this case the Contractors Neeta Caterers were not independent Contractors. In the present case, it is important to note that the Industrial Court has come to the conclusion that no relationship of employer and employee was established, because according to the Industrial Court, the evidence on behalf of Neeta Caterers indicated that there

was a contract between Hindustan Lever and Neeta Caterers; that one Bhandari was running the said Canteen as a sole proprietor in the name of Neeta Caterers in between the years 1982 and 1984; that by June 1984 Bhandari left the said Canteen as he had entered into a contract with another company - Wyeth Laboratories at Ghatkopar, that during the year 1984 he was also running a canteen in another company - Hind Recitifers; that on termination of contract with Hindustan Lever, he had discharged his canteen workers by paying them one month's salary apart from their earned wages; and in the circumstances although the Canteen functions throughout the year and although there is a Canteen Committee consisting of permanent employees of the Company but since the Canteen was not the main activity of Hindustan Lever, the workmen had failed to prove the relationship of an employer and employee. In the circumstances, the Complaint to that extent came to be rejected. In this connection, before going to the various judgments, it may be mentioned that merely because the Company is required to have a statutory canteen u/s 46 of the Factories Act, it cannot be said that the canteen per se becomes part of the main activity. I am not required in the present case to examine that fact although it is sought to be raised by Mr. Singhvi, the learned counsel for the Union. Basically, the question before me is whether the said Contractors - Neeta Caterers were an independent Contractor or whether the arrangement was a subterfuge. The cases which I am required to consider is whether the contract between Hindustan Lever and Neeta Caterers could be said to be a bona fide contract. As laid down in the case of Dena Nath and others Vs. National Fertilisers Ltd. and others, , wherein the Supreme Court has set out in extenso its judgment in the case of The Standard-vacuum Refining Co. of India Ltd. Vs. Its Workmen and Others, to the effect that if the contract is mala fide and it is a cloak of suppressing the fact that the workmen are really the workmen of the Company, then the Tribunal would be justified in ordering the Company to take over the entire body of workmen and treat is as own workmen. But if the contract is bona fide, then the Tribunal may no order to take over the entire body of workmen. Even if the contract is found to be bona fide, the Tribunal may, in appropriate cases, decide the number of employees to be absorbed depending on the capacity of the principal employer to give employment. In the present case, therefore, the question is whether the contract with Neeta Caterers, on fact, could be said to be a bona fide contract. Now, in the present case the evidence on record indicates that Neeta Caterers did not have any registration with the competent authority under the Contract Labour Act. No letter-heads of Neeta Caterers were produced.

The provident fund code account number is that of Hindustan Lever. No letters nor any contract with Neeta Caterers have been produced. It is by virtue of correspondence that is ought to be argued that there was a regular contract with Neeta Caterers. It was on the basis of the letters exchanged between Hindustan Lever and Neeta Caterers that it was sought to be established that the contract existed between the principal employer and Neeta Caterers. Now, it is interesting

to note that there is no contract between parties. Even the letters do not indicate the consideration payable by Hindustan Lever to Neeta Caterers. The letters do not indicate the amount for which the contract was given to Neeta Caterers. This is very important because here also it is the case of the workmen that the contract was bogus; that salary was in fact paid by Hindustan Lever and in the absence of any contract it is not clear as to how wages were paid to the workmen by Neeta Caterers. Whether the wages were paid from the total consideration paid by Hindustan Lever or that the wages were paid by Hindustan Lever directly to each of the workmen of Neeta Caterers. It is either for Hindustan Lever or for Neeta Caterers to produce records to show that a fixed amount was payable by Hindustan Lever as a consideration to the Contractor and that wages were paid by Neeta Caterers from that fixed amount or from the income of the Caterers. No such evidence has been produced. Canteen is undoubtedly a work of perennial nature. In the present case, if that be the touchstone and if the contract is a sham and bogus contract, in the sense that Neeta Caterers were not independent contractors, then certainly the workmen employed by the said Caterers were entitled to be absorbed by the principal employer. Secondly, in the present case there is nothing to indicate that the workmen employed by the Caterers have also worked for other establishments. Neeta Caterers have not come forward to prove that they are the caterers in other companies. This is also one of the important circumstances to show that the workmen have worked for large number of years in the Company without security of service. Thirdly, even the correspondence between Hindustan Lever and Neeta Caterers is not on the letter-heads of Neeta Caterers. One does not know as to whether Neeta Caterers was a partnership firm or an independent firm. Even the alleged contract with Neeta Caterers does not indicate consideration. Even the records do not indicate the basis on which the wages were paid. The extracts of the salary registers do not even indicate the regular name of the Caterers and in the above circumstances the workmen are right in saying that Neeta Caterers also were only bogus Contractors. One more fact may be mentioned that even according to the evidence of Aspi Elavia wages were paid in his presence by the Contractor. This also indicates control and supervision of Hindustan Lever. It also shows that the Industrial Court has not all considered the nature of duties required to be carried out in the Canteen by the workmen. It also shows that the workmen were discriminated as against workmen by Hindustan Lever and the workmen have been exploited for profit or gain and in the circumstances the Industrial Court has not at all considered the relevant decisions or criteria and has wrongly come to the conclusion that the relationship of an employer and employee is not established. The Company has failed to prove that there was no control or supervision. The Canteen belongs to the Company; the furniture belongs to the Company; the utensils belong to the Company. In the circumstances, the ratio of the decision in the case of Chandran Nair v. Indo French 1982 1 LLN 489 applies. In the above circumstances, I find that the work was of the Organisation and the employees were employed in the Industry as defined u/s 2(2) of the Industrial Dispute Act.

12. The next employment involved is that of house-keeping which is carried out by the Contractors M/s. Perpetual Industries Services. With regard to the said activity also, the Industrial Court has come to the conclusion that there is a written contract between the Company Hindustan Lever and Perpetual Industries Services; that in view of the contract the principal Company has proved that there was no relationship of employer and employee. The Industrial Court has considered the evidence of one Martin, the Manager on behalf of Perpetual Industrial Services. He has shown that the contract was duly registered. The said Perpetual Industrial Services had contracts with other companies and in the circumstances the Industrial Court came to the conclusion that there was no merit in the Complaint filed by the Union. Now, in the present case, once again it is important to note that the Industrial Court has not at all considered the nature of work. House-keeping would certainly be a part of the organisation. It cannot be treated as work unconnected with the work of the organisation. Fifteen workers are employed to carry out the work of house-keeping. The nature of work is not examined by the Industrial Court. The proprietor one Alexendra did not step in the witness-box. The said Proprietor has not shown the arrangement between Hindustan Lever and its firm of M/s. Perpetual Industrial Services. He has not proved the existence of contracts between his company and other companies. Martin is his Manger. The Manger is not in a position to explain the privity of contract with Hindustan Lever or with other companies. Here also the Industrial Court has failed to consider that the articles required for house-keeping were supplied by Hindustan Lever and not by Perpetual Industrial Services. This is one of the important tests laid down by the various judgments of the Supreme Court. Here also one finds that the work of house-keeping is done by fifteen workers throughout the year and only for Hindustan Lever. It is proved that the work of house-keeping was the work of the Company. It is proved that workers were paid wages by Hindustan Lever. In the above circumstances, notwithstanding the fact that a contract existed on paper between the Company and Perpetual Industrial Services, which was duly registered, the workmen did the work of the Company; that they were in the employment of the Company and, therefore, their relationship was proved. It is important to bear in mind that it is for the Industrial Court while examining the fact as to whether contract was with an independent contractor or not; to ascertain the number of years the workmen have put in; the salary which the workmen have being receiving over the years; the nature of work the workmen are required to do throughout the year and whether the work was of a perennial natural or of a temporary nature. It cannot be said that this inquiry could be done only under the Contract Labour Act and not under Item 9 of Schedule IV to ULP Act. Even in the present case, as stated above, the articles and tools for carrying out the work have been supplied by Hindustan Lever. This fact is also not considered by the Industrial Court. If the Industrial Court has merely to go by the paper arrangement, then it would certainly fail in its duty or examining the true relationship. It is the duty of the Industrial Court to examine by going behind the paper arrangement to find out whether the agreement was a sham or

bogus agreement. In the present case, the above evidence clearly shows that Perpetual Industrial Services were only name lenders. In the case of *Workmen of Swatantra Bharat Mills Canteen v. Management of Swatantra Bharat Mills*. The Delhi High Court, after considering the definition of the word "employer" u/s 2(g) of the Industrial Dispute Act and the definition of the "Industrial Dispute" in similar circumstances, has come to the conclusion that the question about the existence of the relationship of employer and employee is required to be decided with reference to the facts and circumstances of each individual case. Who are the parties to the Contract; who pays the wages; who has the power to dismiss and what is the nature of the work, are some of the important circumstances to be considered. Merely because of a contractor is employed to look after the canteen, it cannot be said that the workmen employed by such contractor are not entitled to claim direct relationship with the principal employer. The test of supervision and control is decisive but not a conclusive test. The Court can always lift the veil and go behind the paper arrangement between the parties to ascertain whether the contract was a subterfuge to deprive the rights of the Contract Labour. This was a case under the provisions of the Industrial Disputes Act. The tests laid down in that judgment would squarely apply to the facts of the present case. In the present case, it was the duty of the Company as well as the Contractor to show as to how consideration was received from Hindustan Lever by the Contractor and how he discharged his liability to pay wages to the workmen. Supervision and control is not the only test. It is not the conclusive test and the totality of facts are required to be examined. In the present case, the Industrial Court should have lifted the veil. In the above circumstances, applying the ratio of the said judgment of the Delhi High Court to the facts of the present case, I hold that the said workers were the employees of Hindustan Lever.

13. The next employment concerns gardening in the Company's Research Centre which carries on experiments on plants, flowers, etc. At the outset, it may be mentioned that the Union has proved by evidence that one Janabai has worked for eighteen years. She carried out the activity of gardening along with other workers in the Research Centre. The Company relied upon the evidence of one Vijay Thakre, who claims to be the Contractor appointed by Hindustan Lever for carrying out the work of gardening. According to the Industrial Court, the Contract between the Company and Shri Vijay Thakre was duly proved and once a contract is proved along with their circumstances like the Wage Register and the correspondence, it was, according to the Industrial Court, a case of abolition of contract and, therefore, the workers were not entitled to claim permanency. In the present case, the evidence of Thakre shows that own Nana Thakre had two contracts with Hindustan Lever - one contract was in respect of painting and another contract was in respect of gardening. According to Vijay Thakre, he was the Contractor incharge of gardening only. The Company filed Exhibit "C"/28/13 and Exhibit "C"/28/14. Both these Contracts were entered into by the Company with one Vijay Thakre and not with Nana Thakre on 12th August, 1976. Contract

at Exhibit "C"/28/13 was between the Company and Vijay Thakre for painting and not for gardening. Before the Court, one Nana Thakre was examined. Nana Thakre stated that his son was the proprietor of Vijay Thakre and Company, which has taken up the gardening work for the Research Centre of the Company at Andheri and that Nana Thakre was its Manager. It is important to note that Vijay Thakre, the so-called proprietor of Vijay Thakre and Company, did not step into the witness-box. In the circumstances, the testimony of Nana Thakre is not reliable. Once again there is confusion between the contracts for gardening and painting. Once against the identity of the Contractor for gardening is not established and still Industrial Court has come to the conclusion that there was an independent contract. Once again, with regard to this activity, it may be stated that Vijay Thakre has not come forward to give evidence to prove as to on which terms and conditions Hindustan Lever had appointed him. Vijay Thakre has not indicated the consideration amount paid by Hindustan Lever to him. Vijay Thakre has not communicated the mode of payment of wages to individual workmen. The workmen have proved that gardening is a full-time regular employment. In the present case, we are concerned with the Research Centre at Andheri. Gardening is definitely work directly nexus with the organisation. It is not in dispute that the said work is not of a perennial nature. The Company has not led my evidence to show that the said work is of a seasonal nature. The evidence indicates that gardening is required to be done throughout the year; that the workers were employed and they were working throughout the year. In the circumstances, the activity was also of a perennial nature. To take an illustration, Janabai, one of the workers working in the garden has worked on a paltry salary for eighteen years as gardener. There is nothing to indicate that she has not worked as gardener throughout the year and she has been denied the benefit of security of service. She is also not getting the wages which are payable to the permanent employees. In the above circumstances, the workmen have clearly established that the Contract between the Company and Vijay Thakre was a sham and bogus contract. It was not a genuine contract. Vijay Thakre has not been able to show that he was an independent contractor. Vijay Thakre has not been able to show that he has been working for other companies too. In the above circumstances, the relevant consideration has not been taken into the account by the Industrial Court. In the above circumstances, I hold that the said employees are certainly the workmen of Hindustan Lever and that the relationship of employer and employee has been duly proved. I am fortified by the judgment of the Division Bench of this Court decided on 3rd of May, 1991. That was in the case of Sarya Mazdoor Sangh v. Contract Labour Board. Original Side Writ Petition No. 1349 of 1991 (unreported). In the said case, one of the issues was whether a Mali in relation to an industrial undertaking is a direct employee of the Company. In view of the judgment of the Supreme Court in the cases of J. K. Cotton Spinning and Weaving Mills Co. Ltd. v. Labour Appellate Tribunal of India, 1963 (II) LLJ 686, the Division Bench of this Court took the view that the work of a gardener was directly connected with the work of the organisation. A Mali carries out the work which is of a perennial nature. He is

required to do the work on a regular basis and applying the above decisions and particularly in view of the fact that a Research Centre is the establishment in question, I hold that in present case gardeners are direct employees of Hindustan Lever. This is also in view of the fact that Vijay Thakre and Company have not come forward to show that there was a bona fide arrangement between Hindustan Lever and the said Contractor. The workmen have established beyond shadow of doubt that the contract referred to was bogus contract and it was only a subterfuge arrived at between the principal Company and the Contractor to deprive them of benefit of permanency. These relevant facts have not at all been considered by the Industrial Court. I am conscious of the fact that I am not sitting in appeal over the said decision. However, I find that in the entire impugned order, the industrial Court has not applied any of the tests laid down by the decisions referred to above. In the above circumstances, the Industrial Court's order also with regard to gardening activity is erroneous and is set aside. Here also one more fact may be mentioned that in this case also Aspi Elavia on behalf of Hindustan Lever in his evidence has deposed that wages were paid to the gardeners in his presence; that he was supervised that work and in the above circumstances, it cannot be denied that there was supervision and control over the working of the said gardeners. Applying all the above tests indicated hereinabove in the proceedings paragraph of this judgment, I hold that the said employees have proved that the relationship of employer and employee with the Company. The above the facts prove that Contracts were bogus; the Contractors were not independent Contractors and that they were merely Mukadams. This fact also has not been considered by the Industrial Court ask in the activity of gardening is treated as the part of an organisation as laid down by the above judgment of the Supreme Court, then the workman have certainly established that the nature of work was of a permanent nature and they were entitled to be employed directly by the Company.

14. The next employment which is required to be considered is Carpentry in the workshop of the Company. One Panchal was appointed as a contractor by Hindustan Lever. The Industrial Court has come to the conclusion that four workers were employed by Panchal. The Industrial Court has come to the conclusion that since 1971, Panchal was doing the work of Carpentry and that he was not in employment of the Company. According to the Industrial Court, one Kulkarni, the Engineer of Hindustan Lever used to give all Carpentry work of Panchal, who in turn used to take work from his employees. According to the Industrial Court, Panchal used to appoint his own Assistants or Helpers and whenever they went on leave it was granted by Panchal. The Industrial Court also relied upon the Wage Register showing the wages paid by Panchal to his assistants or helpers and in circumstances the Industrial Court came to the conclusion that there was a genuine contract between Hindustan Lever and Panchal with regard to Carpentry. In the present case, once against the Industrial Court has not taken into account the nature of the duties performed by the Workmen. Carpentry, in the present case, was done as per the instructions

given to Panchal by Kulkarni, the Engineer employed by Hindustan Lever. There is no evidence whatsoever to show that Panchal was called only when the work arose in the Company. There is no evidence to show what was the nature of work which Panchal used to instruct his assistants or helpers of nature of work was that of Carpentry. One fails to understand how Carpentry cannot be said to be the work of perennial nature of work of a regular nature. One fails to understand how Carpentry cannot be said to be the work connected with the part of organisation. The evidence of Sawant on behalf of the workmen as also the evidence of Panchal, the Contractor clearly indicates that Carpentry was carried out in the workshop department of the Company and, therefore, the Industrial Court has failed to take account the important fact regarding the nature of work. If Carpentry is done in the workshop of the Company, then one fails to understand how the said work cannot be treated as connected with the part of the organisation. In the above circumstances, none of the above test have been taken into account by the Industrial Court. This has forced this Court to intervene in this matter. The Industrial Court's order has not at all considered the nature of duties; the factor as to whether the work was of a perennial nature or whether the work was of a temporary nature. Merely because there are written letters or wage registers, etc., it does not mean that Panchal was an independent Contractor. There is nothing to indicate that Panchal was a Contractor for other establishments also. On the other hand, the evidence clearly established that Panchal was exclusively working for Hindustan Lever. The evidence clearly establishes that all the said workmen have worked over the years only in Hindustan Lever and in the above circumstances, the contract between Hindustan Lever and Panchal was a sham and a bogus contract and the workers were in fact employed by Hindustan Lever. The evidence of Kulkarni, the Officer of Hindustan Lever, also indicates that he exercised supervision and control over the said Carpenters. As stated hereinabove, merely because a Mukadam is appointed by the Company, it does not mean that an independent Contractor was appointed. The carpenters have worked in the workshop of the Company. The Carpenters have worked for the Company. In the above circumstances, it cannot be said that the said work was not connected mainly or incidental to the work of Hindustan Lever. In the above circumstances, I hold that the work was done over the years by each of the carpenters for the Company and they were certainly entitled to the benefits of permanency. The relationship of employer and employee is, therefore, proved.

15. In the present case, with regard to each of the activities, the principal contention advanced both on behalf of the Company by Mr. Rele and by Mr. Cama on behalf of the Contractors is that the nature of work is not an important criteria, particularly in the dispute falling under item 9 of Schedule IV to the ULP Act. Mr. Rele submitted that the Industrial Court in the present case was not required to go into the question of abolition of contract which squarely falls within the exclusive purview of the Competent Authority under Contract Labour Act. He submitted that once there is a contract on the record, then the

Industrial Court under Item 9 of Schedule IV to the ULP Act cannot go behind the contract and come to the conclusion that there exists an employer and employee relationship. He submitted that the Industrial Court has no jurisdiction to go behind the Contract. He submitted that the nature of work is the circumstances for revoking the contract or abolishing the contract. He further submitted that the Industrial Court has a limited jurisdiction. Mr. Cama, the learned counsel submitted that the jurisdiction of the industrial Court u/s 28 of the PULP Act read with Item 9 of Schedule IV to the said Act, 1971, is in the nature of execution proceedings and not in the nature of adjudication. In the above circumstances, it was contended that the relationship of an employer and employee relationship cannot be proved in a case covered under Item 9 of Schedule IV to the ULP Act, 1971. Both the learned counsel also submitted that in the present case if one goes through the complaint, one would find that the same is sketchy; no adjudication was sought on the question of permanency; no proper reliefs are sought and, therefore, the Court below rightly rejected the Complaint. I do not find merit in the above contentions. Firstly, in the present case in the concluding paragraph of its judgment, the Industrial Court, after considering the evidence on record, has come to the conclusions that the presumption of relationship of employer and employee has not been proved and, therefore, the Complaint stood dismissed. The Industrial Court has not gone on the basis that the nature of duties carried out by the workmen cannot be examined by the Industrial Court u/s 28 read with Item 9 of Schedule IV to the ULP Act. Secondly, as mentioned hereinabove and as laid down by the judgments of the Supreme Court right from the case of Standard Vacuum Refining Company AIR 1980 SC 948 if the Industrial Court finds that the contract between the principal employer and the contractor is a sham, bogus and mala fide contract, then the Industrial Court is not powerless. It can always lift the veil and find out as to whether the arrangements were a genuine arrangement between the Company and the Contractor or whether it was only on paper. It is for the Industrial Court to examine that aspect of the case. If the Industrial Court comes to the conclusion that the arrangement was a sham and bogus, then certainly the Industrial Court is not powerless. Lastly, in view of the judgment of the Division Bench of this Court in the case of *Dattatraya v. Executive Engineer*, 1994 1 CLR 1022, the word "agreement" which finds place in item 9 of Schedule IV to the ULP Act, 1971 must not be read as mere contract under the Contract Act. It has a very wide concept. It is a part of collective bargaining which is a very important part of industrial adjudication. If that be the case, then it is clear that if there is a relationship of employer and employee which it is sought to be defeated by a subterfuge then the Industrial Court will certainly be entitled to go behind the sham or bogus contract and ascertain as to whether the relationship of employer and employee was there or not. In this connection, it may also be mentioned that the ULP Act, 1971 takes into account the definition of the word "workmen" u/s 2(s) of the Industrial Disputes Act and the "Industrial dispute" as defined under the provisions of the Industrial Disputes Act. The word "workman" u/s 2(s) of the Industrial Disputes Act refers to employment in the industry and if that test is

fulfilled, then the relationship of employer and employee is proved. The word "agreement" in item 9 of Schedule IV to the ULP Act would, therefore, include such employment. Further, it may be clarified at this stage that the Contract Labour Act applies in a different set of circumstances. Where there is a genuine contract and an independent contract and the workman seeks remedy of abolition or regulation or regulation of a contract system, in such an event the Advisory Board shall consider as to whether the genuine existing contract or the contract system should continue to prevail in an establishment or an industry or whether it should be abolished. This is not the case with the present matter. The present matter has nothing to do with a genuine contract and its abolition. It is a case where the employees have proved that it is a bogus contract; that it is subterfuge; that it is entered into by the Company to defeat their rights and, therefore, the inquiry contemplated by item 9 of Schedule IV to the ULP Act, 1971 is quite distinct and separate from the inquiry contemplated by Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970. The Industrial Court has got very wide power. It has a right to ascertain as to whether the contract is genuine or bogus. If the contract is found to be bogus, the Industrial Court has a right to declare that there was relationship of employer and employee at all material times and the workmen were denied the benefit of award or settlement which normally takes place between the Company and the permanent employees. If that be the case, then merely because there is an agreement existing between the principal company and the Contractor it will not prevent the Industrial Court from lifting the veil and ascertain as to whether such a relationship existed or not. In the above circumstances, there is not merit in the contention that the nature of work cannot be gone into by the Industrial Court for coming to the conclusion as to whether the contract was a genuine or a bogus contract. It is one of the circumstances which the Industrial Court has to take into account. There cannot be a straight-jacket formula. As stated hereinabove, the test of supervision and control is not the only test. Totality of circumstances have got to be taken into account. In the present case, therefore, there is not merit in any of the above contention raised by the counsel appearing for the Company and the Contractors. It has been argued that the Complaint filed by the workmen was defective; that it was sketchy; that it did not contain all the relevant particulars and that there is no direct claim of employer and employee. It is too late in the day to take up the said contention. The evidence on record read as a whole clearly indicates that the Company as well as the Contractor clearly understood the case of the Contract Labour. There are averments indicating that each of the workmen qua respective activities have sought permanency. Annexure "A" to the Complaint gives particulars of the contracts; the number of years the workmen have worked and the evidence on record shows that for small amounts the employees have been working over the years and they have carried out the work which has a direct nexus to the organisation. In the above circumstances, there is no merit in any of the contentions raised by the learned counsel appearing on behalf of the Company as well as of the Contractors. Reliance has been placed on the judgment of the Division Bench of

this Court (to which I was a party) in the case of *Krantikari Suraksha Rakshak Sanghatana v. S. V. Naik*, reported in 1993 1 CLR 1003 to show that under item 9 of Schedule IV to the said ULP Act, 1971 the relationship of employer and employee cannot be gone into by the Industrial Court. It was submitted that in view of the said judgment, the Industrial Court was right in dismissing the above compliant. I do not find any merit in the said contention. In the case of *Krantikari Suraksha Rakshak Sanghatana v. S. V. Naik* 1993 1 CLR 1003 (*supra*), the industrial Court, after considering the evidence on record, came to the conclusion that the relationship of employer and employee was not established. It was sought to be urged before this Court by the Union that since the Contractor had not obtained a licence under the Contract Labour (Regulation and Abolition) Act, 1971, the employees of the Contractor should be accepted as direct employees of the principal Company. It was in this light that the Division Bench came to the conclusion that there was no presumption of employer and employee relationship. The said presumption is required to be proved by way of adjudication. The judgment makes it very clear that the complaint in that case proceeded on the footing that since the Contractor had not obtained the licence under the Contract Labour Act and their security guards automatically became the workmen of the principal Company. In the present case, the presumption of the relationship has been proved. In the present case, the compliant is that Hindustan Lever has entered into bogus contracts with so called contractors. In the circumstances, the judgment of the Division Bench of this Court in the case of *Krantikari Suraksha Rakshak Sanghatana* (*supra*) has no application to the facts of the present case.

16. Now coming to the last Contractor viz., the case of Export Services, it may be mentioned that as regards the security guards, the Industrial Court has come to the conclusion, after appreciation of evidence, that Export Services were the Contractors providing security; that they have been in business for the last several years; that it is a Private Limited Company and that Export Services supplied guards to forty-two companies apart from Hindustan Lever. In the circumstances, the Industrial Court, after taking into account the above facts, came to the conclusion that the relationship of employer and employee between the security guards and the main company was not established. The Industrial Court considered the evidence of one Mishra, a Security Guard, and has come to the conclusion that as regards Export Services, it was an independent agency and there is nothing to indicate that the said agency did not work for other establishments. I fully agree with the view of the Industrial Court. Firstly, the nature of contract and the work done by the said Contractor shows that the Contractor was an independent agency. It was not under the control of the Company. Secondly, by 1981 the Security Guards Act had come into force and under that the Act the guards are required to be registered with the Security Guards Board. Details of the workers has not been given in the evidence as to whether they are employed with the Board. If so, from what date. Lastly, in view of the express provisions of the said Security Guards Act, I am not inclined to

interfere with the finding of fact recorded by the Industrial Court. In the above circumstances, I hold that the complaint to the extent of the Security Guards was rightly dismissed by the Industrial Court.

17. Mr. Rele, learned counsel for the Company, tendered an affidavit of one Shri. A. J. Cazi dated 22nd June 1994, to show that in most of the cases, the workmen had left the service and that the contracts were not in existence. Mr. Singhvi, learned counsel for the Union, has opposed the said application, firstly, because it was tendered in the midst of the hearing. However, I am proceeding on the basis of the denial of the said affidavit it. The said affidavit clearly indicates that letters have been obtained on the same day from the workmen stating that they would like to resign from the Company. The said letters are resignation bearing signatures of the officers of Hindustan Lever, which also indicates supervision and control over the workmen by Hindustan Lever. In the above circumstances, the affidavit of Shri. A. J. Cazi supports fully the contentions of the workmen that supervision and control vested in Hindustan Lever and the Contractors (Except Export Services) were purely bogus Contractors : they were name-lenders and the entire subterfuge was resorted to deny permanency to the workmen.

18. In the circumstances, Rule is made absolute in terms of prayers (a), (b) and (c) with regards to all the workmen employed through the Contractors by Hindustan Lever (save and except the Security Guards employed by Export Services) with not order as to costs.

19. Mr. Talsania, learned counsel appearing on behalf of Hindustan Lever seeks stay of operation of this order for a period of eight weeks. Mr. Singhvi, learned counsel on behalf of the Union, opposes the application. Application for stay rejected.

20. Issuance of certified copy expedited.