

(2003) 12 GUJ CK 0022

In the Gujarat High Court

Case No : Special Civil Application No. 2235 of 1986 with Civil Application No's. 354, 3855 and 5331 of 2003

Harish C. Brahmhatt

APPELLANT

Vs

Oil and Natural Gas Commission

RESPONDENT

Date of Decision : 24-12-2003

Acts Referred:

Factories Act, 1946 — Section 46
Industrial Disputes Act, 1947 — Section 10

Citation : (2003) 12 GUJ CK 0022

Hon'ble Judges : P.B. Majmudar, J

Bench : Single Bench

Advocate : S.K. Jhaveri, for Petitioner Nos. 1-31, for the Appellant; S.B. Vakil, Senior Advocate, K.B. Naik, for Trivedi and Gupta for Respondent No. 1, Asim J. Pandya and Sood, Assistant, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

P.B. Majmudar, J.—By filing this petition, the petitioners have prayed that this Court may issue suitable writ, in the nature of mandamus or any other appropriate writ or order under Article 226 of the Constitution of India, restraining respondent No. 2 from terminating the services of the petitioners as Security Guards at the Cambay Project of the Oil and Natural Gas Commission ("ONGC", for short) and directing the ONGC to continue the petitioners in the service as Security Guards, treating them as in continuous service with effect from their initial employment in respect of each of the petitioners, respectively. It is also prayed that necessary direction be given to respondents 1 and 2 to pay to the petitioners the same salary, pay and allowances as are being paid to the regular and permanent Security Guards, with the ONGC, with effect from the respective dates of employment of the petitioners, with the organization. It is also prayed that ONGC may be directed to regularize the services of the petitioners as Security Guards in its Cambay Project and absorb them as Security Guards in the regular vacancies. The petitioners have also prayed for interim

relief to the effect that during the pendency of this petition, respondent No. 2 may be restrained from terminating the services of the petitioners and directing them to continue the petitioners as Security Guards by way of interim order.

2. The petition is admitted by this Court long back and at the time of admitting this petition, interim relief was also granted to the effect that the services of the petitioners may not be terminated by respondent No. 2. Accordingly, by virtue of the interim order, the petitioners are continued as Security Guards in the organization. During the pendency of this petition, the petitioners filed Civil Application No. 7111 of 2000 for getting minimum wages. A learned single Judge (Coram : D.H. Waghela, J.) directed the respondents to pay to the petitioners the wages and arrears of wages with effect from 1.10.1999 at the rate of Rs.150/- and, accordingly, by virtue of the said interim order, which was passed on 20.12.2000, the petitioners are getting minimum wages at the rate of Rs.150/- per day. As pointed out earlier, the main prayer in the petition is in connection with regular absorption as well as in connection with getting regular salaries prescribed for the post.

3. At this stage, some factual aspects of the case are required to be dealt with.

At the relevant time, the present petitioners were the members of the Home Guards. Somewhere in the year 1981, the respondent-Commission requested the Home Guards Department to send certain number of Home Guards for the purpose of performing the duty in connection with the security work of the ONGC. As per the averments made in the petition, and more particularly, as per the averments made in paragraph 3 of the petition, respondent No. 1, for its Project at Kansari in Khambhat, required services of security guards and for that purpose, request was made by the ONGC to respondent No. 3 to send trained and experienced Home Guards for employment as Security Guards for their Cambay Project. It is further averred in paragraph 3 that respondent No. 3, thereafter, consulted the Home Guards Department at Cambay through the Officer Commanding, Home Guards, at Cambay, and sent the names of the petitioners from time to time for the purpose of employment as Security Guards with the ONGC at its Cambay Project. It is the case of the petitioners in the petition that the Home Guards Department sent their names to the ONGC and, ultimately, the ONGC selected them and they are discharging all the duties of Security Guards of ONGC at Cambay Project. It is also their case that they have been paid Rs.18/- per day and on a given day, if they are required to work overtime, by way of working in the second shift, they were also paid additional sum of Rs.18/- for the same.

In paragraph 4 of the petition, it is averred that the regularly employed security guards of the ONGC are placed in the regular pay scale and they are entitled to dearness allowance and other allowances, such as washing allowance, house rent allowance, drilling allowance, etc. In paragraph 6 of the petition, it is averred that the petitioners are rendering their services regularly and satisfactorily as Security Guards since 1981 and that, since their employment from the respective

dates, they are discharging their duties satisfactorily and vigilantly. In paragraph 7, it is averred that they are serving since last more than one year and that it is not open for respondents 1 and 2 to terminate their services as it will even amount to "retrenchment", as per the Industrial Disputes Act. In paragraph 8 of the petition, there is an averment regarding alleged act of terminating the services of the petitioners, with a view to appointing persons from other States on the said post.

On the basis of the aforesaid averments, prayer, as stated earlier, is made in the petition, and this Court, at the time of admitting the petition, has protected the petitioners by way of interim injunction, restraining the respondents from terminating the services of the petitioners, and, as indicated above, subsequently, in the year 2000, Civil Application No. 7111 of 2000 was allowed and, ultimately, the respondents were directed to pay to the petitioners Rs.150/- towards minimum wages per day by way of interim order of this Court.

4. On behalf of the petitioners, Mr. S.K. Jhaveri, learned Senior Advocate, vehemently argued that the petitioners are regularly recruited by the ONGC, as, after calling the names from the Home Guards Department, the Commission, after interviewing the concerned candidates, ultimately, employed them as Security Guards. It is submitted by Mr. Jhaveri that, as the petitioners are regularly selected Security Guards, it is not open for the Commission either to terminate their services or to deny the regular pay scale meant for the post in question. It is also argued by Mr. Jhaveri that since the petitioners are performing similar duties which other regularly selected Security Guards of ONGC are performing, there is no reason why the petitioners should not be given regular pay scale prescribed for the post in question. It is also the say of the petitioners that considering the facts and circumstances of the case, this Court may direct the respondent-Commission to regularize the services of the petitioners and the Department may be directed to pay regular salary and regular scale from the respective dates of their original appointment. It is argued by Mr. Jhaveri that since the ONGC wanted Security Guards for the purpose of their regular security work, a request was made to the Home Guards Department of the State to send the names of the eligible Security Guards for the purpose of recruitment in the ONGC and, ultimately, the names of those Home Guards, who were not gainfully employed anywhere, were sent by the Home Guards Department to the ONGC and on scrutiny, ultimately, the petitioners were recruited for discharging the duties as Security Guards. Under the circumstances, it is prayed that the Court may, ultimately, hold that the petitioners are regularly recruited employees of ONGC as Security Guards and that, therefore, they are entitled to continue, as such, on the said post, with regular emoluments for the post in question and that the ONGC may be directed to regularize their services on the aforesaid post.

Along with the petition, the petitioners have produced Annexure "A", giving particulars of each of the petitioners regarding their date of joining and as per

the same, the petitioners are performing their duties with effect from different dates, viz., 1.6.1981, 5.11.1982, 12.1.1985, etc. As per the date of joining mentioned in the said table at Annexure "A", it is clear that the petitioners are performing their duties from the respective dates, as mentioned in the said table at Annexure "A".

5. Mr. Jhaveri has also relied upon certain documentary evidence produced by the petitioners, such as, affidavits of some of the Officers of the Home Guards Department as well as affidavit of an ex-employee of the ONGC itself. He has also relied upon some documents, to which I will refer later on in this order. By referring to those documents, it is submitted by Mr. Jhaveri that it can safely be presumed by the Court that the petitioners are regularly selected and appointed by the ONGC for the purpose of discharging their duties as Security Guards. It is also argued by Mr. Jhaveri that the petitioners are doing full time regular work of Security Guards of the ONGC and, therefore, if it is found that they are discharging the regular duty of the ONGC, the Court should presume that they are regularly recruited as per the procedure and necessary reliefs are accordingly required to be granted.

During the course of the arguments, Mr. Jhaveri also submitted that even though it cannot be said that, initially, the petitioners were directly recruited in the ONGC and even though it can be said that, initially, they were sent on temporary basis, in view of the subsequent development and in view of the subsequent conduct of the Commission, later on, they have become direct employees of the Commission. It is also argued by Mr. Jhaveri that, calling names through Home Guards Department is one of the modes of recruitment, and, under these circumstances, the petitioners can be said to have been regularly recruited, as, ultimately, the ONGC has selected the present petitioners for the job in question. It is also submitted by Mr. Jhaveri that, simply because they were paid Rs.18/- is not indicative of the fact for coming to the conclusion that they are not the employees of the ONGC. Mr. Jhaveri also submitted that it cannot be said that the petitioners have been deployed u/s 4 of the Home Guards Act, as the Home Guards Department has no power to deploy any such Home Guard person in the Corporation. It is also argued by Mr. Jhaveri that, all throughout, the petitioners are serving under the control of the Officers of the ONGC and they were required to serve under the orders of the Officers of the ONGC. He also submitted that they are not discharging any duties like assisting the Police as per the provisions of the Home Guards Act.

6. The petition is resisted by the ONGC by filing affidavit-in-reply. Mr. S.B. Vakil, learned Senior Counsel appearing for the ONGC, has vehemently submitted that the petitioners have not come with clean hands, as there is suppression by not pointing out in the petition that the petitioners were deployed as per the provisions of the Home Guards Act and that they were never recruited by the ONGC. Mr. Vakil submitted that the petitioners have not submitted in their petition the fact that by order dated 16.6.1981, the petitioners were deployed in

the respondent-Commission. It is submitted by Mr. Vakil that the letter dated 16.6.1981, at page 32, Annexure-3 to the affidavit-in-reply, clearly indicates that the petitioners were sent by deployment, and the said fact is not mentioned by the petitioners at all and, according to him, therefore, the aforesaid aspect about deployment is suppressed by the petitioners in the petition. It is also argued by Mr. Vakil that even though the petitioners have relied upon some certificates produced in the compilation from page 115 upto 126, the petitioners have not produced the certificate itself. It is next argued by Mr. Vakil that there is no master and servant relationship between the petitioners and the ONGC, as the petitioners have never been appointed by the ONGC in any manner, but they were deployed u/s 4 of the Home Guards Act, for which the petitioners were paid Rs.18/-, as per the Rules. Mr. Vakil relied upon the documentary evidence produced by the Commission in order to substantiate his say that the petitioners were never employed by the ONGC and, all throughout, they were under the control of the Home Guards Department. Mr. Vakil also submitted that the petitioners are not entitled to claim any regularisation as they have not been appointed in the ONGC and when there is no appointment, there is no question of regularising their services at all. Mr. Vakil also submitted that the petitioners were serving by way of their deployment and since they were sent by the Home Guards Department for temporary period, they have no right to continue in the ONGC in any manner and they were paid Rs.18/- as per the order of the District Commandant of Home Guards and that the petitioners are not entitled to any regular scale of pay which is required to be paid to the regular employees of the Commission. Mr. Vakil also further submitted that, in view of the facts and circumstances of the case, the Court cannot direct the Commission either to give regularisation of the services of the petitioners or to pay regular pay scale, treating them as part and parcel with the other employees of the ONGC. It is argued by Mr. Vakil that the petitioners had worked on the aforesaid basis by way of deployment for few years, but, subsequently, they were required to be continued by virtue of the interim order passed by this Court as back as in the year 1986. Mr. Vakil further submitted that since by interim order of this Court in C.A. No. 7111 of 2000, this Court directed the Commission to pay to the petitioners Rs.150/- per day, the Commission is paying the said amount, by virtue of the order of this Court, but, since the petitioners have no case worth the name, the petition requires to be dismissed. He further submitted that, in case the Court ultimately dismisses the petition, consequential order of refund of the amount is also required to be passed in favour of the Commission, for which he has relied upon certain judgments. He submitted that along with the petition, no Annexures are produced by the petitioners and that it is not a case of mere omission, but the suppression is with purpose and that the petitioners have tried to make out a show as if they have been regularly recruited by the ONGC.

It is further argued by Mr. Vakil that the petitioners were never recruited as per the Recruitment Rules of the Commission and they were asked to perform their duty only by way of stop gap arrangement. It is also argued by Mr. Vakil that no

appointment order was given to any of the petitioners, appointing them in the Commission.

It is also argued by Mr. Vakil that the petitioners are not even prevented from serving elsewhere during their so-called deployment with ONGC and that even as per the Annexure with the main petition, i.e. Annexure "A", the petitioners are not even appointed simultaneously, but they were appointed on different dates. He submitted that it is not even possible to come to the conclusion that the very petitioners were continued for all time to come. It is also argued by Mr. Vakil that this court cannot adjudicate such disputed questions of fact and find out whether the petitioners were regularly recruited by the ONGC. It is also argued by Mr. Vakil that the ONGC has framed their own Rules for recruitment and the petitioners were never recruited as per the Oil and Natural Gas Corporation Limited Recruitment & Promotion Regulations, 1980 and under the circumstances, the petition is without any substance and the same requires to be dismissed and consequential order of refund of the amount, paid by the ONGC by virtue of the order of this Court in C.A. No. 7111 of 2000, is also required to be passed in favour of the Commission.

So far as the affidavits filed by some Home Guards Officers as well as ex-employee of the Commission are concerned, it is submitted by Mr. Vakil that the said affidavits are contrary to record and contrary to documentary evidence and no reliance can be placed on such affidavits. It is submitted by Mr. Vakil that, in view of the overwhelming documentary evidence as well as even the affidavit filed by the Commandant, it is clear that the petitioners were never recruited in the Commission. It is submitted by Mr. Vakil that these affidavits are subsequently got up, as the same is filed after the reply of the Commission was placed on record.

7. I have heard learned Advocates of both the sides in great detail and I have gone through each and every document, which is part and parcel of the present proceeding. I have also gone through the affidavit-in-reply and further affidavits which are forming part of the record. I have also considered various case law cited by both the sides.

8. The controversy involved in the petition centres round the question whether the present petitioners were appointed in the regular employment of the Commission at any point of time, i.e. either at the stage when their names were sent by the Home Guards Department to the ONGC, or even at a later point of time. Ultimately, if it is found that the petitioners are the regular employees of the Commission, then, naturally, the subsequent question about regularizing their services or payment of regular pay scale is required to be considered. Since it is argued by Mr. Jhaveri that even though originally, the names of the petitioners were not sent for regular recruitment, by way of subsequent conduct and action of the Management, it should be presumed by this Court that they are in the employment of the Commission. It is required to be noted that this aspect of the case is never pleaded by the petitioners in their petition. Mr. Vakil has also

submitted that the argument, which is made at the time of hearing of this petition, to the effect that, even though the petitioners' initial appointment may not be a regular appointment; yet, in view of the subsequent conduct of the Management, it can be presumed that they were subsequently taken on regular establishment, is never taken as a contention in the petition at all.

9. Since Mr. Vakil has taken a preliminary contention to the effect that the petition is required to be dismissed without going into the merits in view of the suppression of facts, the said point is required to be decided first. It is, no doubt, true that the petitioners have not stated anything as to in which manner they were sent by the Home Guards Department to the ONGC. In the original petition, there is an averment that the names of the petitioners were sent from time to time for employment as security guards with the ONGC at its Cambay Project. This fact is clearly stated in paragraph 3 of the petition. By reading the petition, one may get an impression that the names of the petitioners were sent by the Home Guards Department for the purpose of regular recruitment in the ONGC and that there is no mention about the fact that they were deployed or sent by way of deputation in the Commission. In the affidavit-in-reply, which is filed on 6th August, 1986 by one Mr. S.N. Sinha, Project Manager, Cambay Project, which is at page 16 in the compilation, it is stated as under in paragraphs 4, 6 and 7 :-

"

4. I say that the petitioners have given a distorted version of their working under the Discipline of the Bombay Home Guards Act, 1947 and the rules framed thereunder. The petitioners have also suppressed material facts and have made false and misleading statements. For this reason alone the petition deserves to be dismissed in limine.

xxx xxx xxx

6. I say that the Commission has got its own set up of security staff functioning under the Directorate of Security and Vigilance. For safeguarding the ONGC wells and other installations within the Cambay Project also, the Commission has employed regular staff for security guards and other supervisory personnel. Around March 1981, certain posts of security guards were lying vacant. Pending regular recruitment which was to take place to fill up those vacancies, with the approval of the Directorate of Security & Vigilance, deployment of home guards was secured after discussion with the Commandant General, Home Guards at Ahmedabad. This was purely a stop-gap and a temporary arrangement terminable on giving 24 hours notice. On account of certain developments mentioned hereunder, the recruitment of security guards had to be abandoned and the stop-gap arrangement of deploying Home Guards had to be continued for the time being.

7. I say that in August 1981 the Commission took a decision to induct Central Industrial Security Force (hereinafter referred to as "CISF") as constituted and maintained by the Central Govt. under the Central Industrial Security Force Act,

1968 (hereinafter referred to as "CISF Act") on selective basis in the most vital installations and vulnerable points in the Western Region, BOP, KGP, Eastern Region and at Dehradun (IDT, KDMIPE). In view of this decision the deployment of Home Guards was continued pending induction of CISF in the Cambay Project.

... .."

It is also averred in paragraph 8 of the reply that, subsequently, 112 posts of CISF personnel were sanctioned by the Government of India for deployment at vital and vulnerable points at Cambay Project of the ONGC.

At this stage, reference is required to be made to the averments made in paragraph 11 of the affidavit-in-reply, which reads as under :-

"

11. I say that while the construction of the accommodation was nearing completion, the Deputy General Manager, Baroda, on review of the situation arising from declining production of crude oil in Cambay Project, wrote to Director of Personnel, to have a second look and consider whether CISF should be inducted in low priority project like Cambay or should be deployed elsewhere. The Chief of Security & Vigilance, O.N.G.C. by his wireless message dated 26th December 1985, informed the Group General Manager, Baroda, that the Chairman has taken a final decision to induct CISF personnel at Cambay and CISF was ready for deployment in the project. In view of the decision of the Chairman, accelerated action for the purchase of furniture, fixtures and other items, as also for making purchase of vehicles etc. was taken in March 1986 to comply with pre-induction formalities. After completing all the formalities, CISF unit was inducted for the Cambay Project on 20th April, 1986. Because of the induction of the CISF in Cambay Project, it has become necessary for the Commission to discontinue the deployment of the Home Guards and that is why action in the matter is taken. In the context of the situation explained as above, the deployment of the Home Guards during the intervening period does not confer any right on them to claim status of the employees of the Commission or absorption in the cadre of security guards.

... .."

At this stage, reference is required to be made to the letter written to the District Commandant by the Administrative Officer of ONGC dated 16.6.1981. The subject stated in the said letter is : "Deputation of 10 Home Guards for Cambay Project". The contents of the said letter are as under :-

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I am in receipt of your above referred letter dated 10th inst. and have noted the contents thereof.

As regards mode of payment & the terms and conditions of deployment of Home Guards, the payment to the Home Guards @ Rs.18/- per day may be paid

directly to the Home Guards on duty at the end of every month.

Further, I would also like to bring to your notice that before deployment of above Home Guards, I had a meeting in the office of Commandant General, Home Guards, at Ahmedabad when your officers of Boards were also present. During this meeting it was specifically given to understand that the Home Guards will be deployed on duty only to assist in normal course and not as replacement of your employees during strike or any other such type of agitation.

The above arrangement is only temporary on the above undertaking and the Home Guards deployed on duty shall be withdrawn after short notice of 24 hours when their services are required to meet with the law and order situation in the district.

... .."

Relying upon the aforesaid communication, Mr. Vakil argued that the petitioners have suppressed the fact that they were deployed only as a temporary arrangement by the Home Guards Department in view of the request made by the ONGC.

Mr. Jhaveri, however, submitted that the petitioners were not aware about any such correspondence and since they were continued and discharging the regular work of the Commission, they have asserted their right for being absorbed as regular employees of the Commission. Mr. Jhaveri further submitted that by the said letter, it cannot be said that the said letter is in connection with the present petitioners as some other security guards might have been deployed by virtue of the said letter, but, it cannot be presumed that the present petitioners were sent by way of deployment by the aforesaid letter. He submitted that there is no question of any suppression on their part, as they have filed the petition since they were serving in the Commission and that they were not supposed to know the letter on which Mr. Vakil has relied, as the petitioners were not supposed to have any knowledge about the said letter.

So far as the suppression part is concerned, since there is nothing to show that any of the petitioners was having personal knowledge about the fact that they have been sent by way of deployment or any such specific order, it is not possible for this Court to come to the conclusion that by not mentioning the said fact, the petitioners have wilfully suppressed the said fact from this Court. It is, no doubt, true that, by virtue of the aforesaid letter dated 16.6.1981, some Home Guards were sent either by way of Deployment, or, as stated in the subject, by way of deputation, in the ONGC, but since the list of the petitioners is not attached with the said letter or since there is nothing to show that the petitioners were having personal knowledge that they were sent to the ONGC in a particular manner, it cannot be presumed that there is suppression on the part of the petitioners about the said aspect. It is, no doubt, true that, in the petition, except one Annexure, in which the names of the petitioners and the particulars about the date from which the petitioners are serving, are given, no other material is

produced at all along with the main petition.

It is also equally true that as per the letter, referred to above, some of the Home Guards were sent to the Commission in connection with the security duty of the Commission. Not specifying the aforesaid aspect in the petition cannot be treated as a suppression on the part of the petitioners, or it cannot be said that they have not come out with clean hands, as, there is nothing to suggest that the petitioners were having knowledge about the said aspect and yet, they have suppressed the same, though, I feel that the petitioners should have given better particulars in the petition and specific case should have been pleaded by giving more particulars about the facts of the case, but, in any case, I would not like to throw away the petition on the ground of so-called suppression on the part of the petitioners, especially when the petition is pending before this Court since 1986.

Mr. Vakil, at this stage, relied upon the following two decisions of this Court in connection with suppression on the part of the petitioners :

(i) N.D. Patel & Company v. Manubhai Karsanbhai Parmar and anr. (1) GLR 386; and

(ii) Vijay J. Gadhvi v. State of Gujarat & Ors. 31 GLR 902.

In N.D. Patel & Company v. Manubhai Karsanbhai Parmar and anr. 25 GLR 386 (supra), notice was given by the Workers' Union, regarding application filed in the Labour Court, to the employer. The petitioner-employer was also informed of the date, but the petitioner-employer contended that, as the notice was not in the prescribed form, he did not appear before the Court. It was held that since the petitioner-employer suppressed material facts from the Court, the Court is not inclined to interfere with the Award passed by the Court in such a case under Article 227 of the Constitution of India.

In Vijay J. Gadhvi v. State of Gujarat & Ors., XXIX (2) GLR 902, it is held as under :-

"

6. The aforesaid answers given by the learned Counsel for the petitioner clearly indicates that the petitioner as well as the learned Counsel for the petitioner both very well knew that the appointment of the petitioner was on purely ad hoc and on a temporary post. Moreover they also know that the services of the petitioner were continued as he was appointed on leave vacancies from time to time. Despite this knowledge, these facts have not been stated in the petition deliberately. This is the only inference possible from the reply given by the learned Counsel for the petitioner. Once there is a deliberate, intentional suppression of facts from the Court, a petition under Art. 226 of the Constitution of India is liable to be rejected on this short ground alone. In the instant case, it is not a case of accidental and or inadvertent omission of mentioning of certain facts. The nature of appointment and continuation of service on leave vacancy posts are facts which are very material and suppression of the same when found

to be intentional and deliberate, cannot be ignored lightly. To indulge in such suppression of facts is not a matter of super-special drafting skill. Such drafting is no advocacy. It is, to say the least, jugglery, which has no place in the art of advocacy. The very basis of writ jurisdiction rests on disclosure of true and complete facts before the Court. If the facts are suppressed and or distorted the writ jurisdiction cannot be exercised at all by the High Court. The very functioning of the High Court for exercise of writ jurisdiction would become impossible.

... .."

By relying upon the aforeaid decisions, it is argued by Mr. Vakil that if the material facts are suppressed from the Court, the petition is required to be dismissed without even examining the merits of the case. I fully agree with the submission of Mr. Vakil that if petitioners suppress material fact and if the petition is filed by suppressing the said fact, the matter is not required to be examined on merits and the petition is required to be thrown out. However, as stated earlier, since it is not possible to come to the conclusion that, deliberately, the petitioners have suppressed the fact regarding their deployment with ONGC, instead of rejecting the petition on the aforesaid so-called suppression, in my view, the matter is required to be examined on its own merits. Similarly, it cannot be said that by producing certain certificates, the petitioners have suppressed the fact by not producing the original certificates.

10. Mr. Vakil lastly argued that since the petitioners have not made demand to the respondents in connection with their prayer in the petition, no mandamus can be issued, as it is not a case of demand and refusal. However, I do not find any substance in the argument of Mr. Vakil that simply because there is no demand from the petitioners and since there is no refusal on the part of the respondent-Commission, this Court may not entertain the petition. Since the petition is pending before this Court since last more than 15 years and when both the sides have addressed the Court on merits at length, the petition is not required to be thrown out on the aforesaid ground.

11. The next question which requires consideration is whether the petitioners are in a position to make out their case as pleaded and argued. In this connection, as pointed out earlier, the first letter dated 16.6.1981 can be said to be a starting point regarding deployment or sending some of the Home Guards to the ONGC. I have already referred to the said letter earlier. The said letter clearly mentions that, before deployment of Home Guards, i.e. 10 in number, at that time, as stated in the Subject, the District Commandant had a meeting in the office of the Commandant General, Home Guards, at Ahmedabad, with the Officers of the ONGC and that it was specifically understood that the Home Guards will be deployed on duty only to assist in normal course and not as replacement of the employees of the Commission during strike or any other such type of agitation. It is also clearly stated that the Home Guards deployed on duty shall be withdrawn after a short notice of 24 hours when their services are required to meet with law

and order situation in the District. It is required to be noted that there is no specific order issued by the ONGC, appointing any of the petitioners in their establishment.

At this stage, I will make reference to certain documents, which are on record.

By letter dated 27.1.1983, which is at page 33 in the compilation, the Officer Commanding, Home Guards, Khambhat, wrote a letter to the Administrative Officer of the ONGC that for the amount payable to the Home Guards, who are on duty, a draft may be sent in the name of Officer Commanding, Home Guards, Khambhat, so that the amount can be deposited in the accounts of such Home Guards, directly. In the said letter, it is clearly mentioned that the members of the Home Guards are also doing other employment elsewhere and, they are required to visit the office at Kansari, during the office hours, for which they are required to take Casual Leave. By the said letter, it was requested that from January, 1983 onwards, the draft of such amount be sent directly in the name of the Officer Commanding, Home Guards, Khambhat so that the members can withdraw the amount directly from the bank.

There is a letter dated 3.6.1981, which is at page 63 in the compilation, which is addressed by the Commandant, Home Guards, District Kheda at Nadiad, in which it is stated that certain members of the Unit, 7 of Khambhat and 3 of Khatana, were sent by way of deployment at ONGC Project, Khambhat, Khatana. The said order is as back as of 3.6.1981, i.e. much prior to the filing of the present petition.

There is another letter dated 7.1.1986, by which the Officer Commanding, Home Guards, sent a bill to the Deputy Director of ONGC, asking him to sanction the said bill. At page 66 in the compilation, there is a chart maintained by the Home Guards Department, wherein particulars about the number of days" duty performed by the petitioners are mentioned.

On behalf of the ONGC, further affidavit is filed by one B. Sivaprasad, Security Officer, ONGC, Cambay. In the said affidavit, it is mentioned as under in paragraphs 4, 5 and 6 :-

"

4. I also produce herewith marked as Annexure VI to this Affidavit sample copy of statement of Payments acknowledging receipts obtained from Home Guards for the period from June 1981 to September 1982 deployed during the period in which direct payment was made by ONGC.

5. I say that since February 1983, the payment for the deployment of Home Guards are made to the Commandant, Home Guards, Cambay, as per the instructions received, vide letter dated 27.1.1983, a copy whereof is annexed hereto and marked as Annexure VII to this affidavit.

6. I say that the petitioners have sought information about relieving of the Home

Guards. In this connection, I state that in view of the interim relief granted by this Hon"ble Court, ONGC has not made any order terminating the Home Guards in Cambay area. In this behalf, I annex herewith marked as Annexure VIII to this affidavit a copy of the communication dated 19.6.1986 made by the ONGC to the Commanding Officer, Home Guards, Nadiad. I, may, however, clarify that some of the Home Guards have not been turning up for duty for quite some (sic) as pointed out in the additional affidavit filed by me on 8th April, 1996.

... .."

Along with the said affidavit, documents have been annexed as Annexures, one of which is of July, 1986, which is at page 81/2 in the compilation, wherein there is a reference about deputation of Home Guards at ONGC. There is also a letter from the District Commandant, Home Guards, to the ONGC dated 10th September, 1982, which is at page 81/4, where there is a mention about deployment of Home Guards not exceeding 20 for a specific period.

There are so many letters produced with the said affidavit, from pages 81/6, 81/7, 81/8, to 81/55.

There are some documents, such as one at page 126, by which the Assistant Security Officer of the ONGC has certified that one S.K.Thakor (member of Home-guard, Cambay) is working as Security Guard at ONGC, Cambay Project since 1981 and that he is getting Rs.18/- as daily wages and that he is punctual, sincere and obedient to his duties.

Considering the overwhelming documentary evidence, it is not possible for this Court to accept the say of Mr. Jhaveri that the petitioners were recruited by the Commission in order to discharge their regular work of Security Guards. Mr. Jhaveri, however, has strongly relied upon the affidavit filed by one Mr. Jagdish Himatlal Raval, which is at page 53 in the compilation. It is stated in the said affidavit that the deponent is a Part-time Assistant to the Officer Commanding, Home Guards, at Khambhat. In his affidavit, he has stated that the ONGC was in need of employing security guards as there were many vacancies and at the suggestion of the District Commandant, Home Guards at Nadiad, the office of the Officer Commanding, Home Guards, sent up the names of the petitioners and others for employment as Security Guards with the ONGC at Cambay Project after ascertaining their willingness and the petitioners came to be selected from amongst them and were employed. In the affidavit, it is stated that the petitioners were directly employed with the ONGC and it was distinctly understood that such individual petitioners would be paid directly the daily wages by the ONGC. In the affidavit, he has further stated that it was not a deployment under the Home Guards Act, but a regular employment in the ONGC.

Mr. Jhaveri has also relied upon the affidavit filed by one Vinodbhai Someshwar Raval, which is at page 57 in the compilation. The deponent of the said affidavit was serving with the ONGC as Security Supervisor for many years. In his affidavit, he has stated that the petitioners were selected and appointed as

Security Guards with the ONGC from amongst the persons sent by the Home Guards Commandant, Khambhat, as per the order of the District Commandant, Home Guards at Nadiad.

Mr. Jhaveri has also relied upon the affidavit filed by one Somabhai Motibhai Parmar, Officer Commanding, Home Guards, Khambhat, which is at page 50 in the compilation. In his affidavit, he has stated that there were many vacancies available in the ONGC for appointment to the post of security guards and that, it was not a deployment by the Home Guards organisation, but a regular employment with the ONGC. He has stated in the affidavit that Home Guards serving in any concern, private or public or Government Body, may be called upon on duty u/s 4 to meet with the law and order situation. He has also stated in the petition that the petitioners are employed by the ONGC as Security Guards and not under the control of the Home Guards Unit, but were under the control of ONGC, when functioning as Security Guards under the ONGC.

Mr. Vakil, however, argued that even as per the provisions of the Act, such deployment is possible even for protecting the property and there is nothing wrong if the present petitioners were deputed or deployed in order to protect the property of the Commission as Security Guards.

The said affidavits are controverted by the affidavit-in-sur-rejoinder filed by one C.B. Patel, Deputy Director (P&A), ONGC, Cambay. In paragraph 4, which is at page 61, the said deponent has stated as under :-

"

4. I further say that apropos instructions given by the Home Guards Commandant vide his letter dated 27th January, 1983, every month bills for deployment of Home Guards are submitted to the Commission as is evident from a copy of the specimen letter dated 7th January 1986 of the Commanding Officer, Cambay addressed to the Deputy Director (P&A), Cambay of the Commission forwarding the bill for the month of December 1985 and requesting the Commission to remit payment for the said Bill. Copies of the said letter along with the bill are annexed hereto and marked as Annexure-II to this affidavit.

... .."

The affidavits, on which Mr. Jhaveri has relied on, no doubt, support his case. However, the question which is required to be considered is whether this Court can give any positive finding to the effect that the petitioners are regularly selected by the ONGC solely relying upon such affidavits, as, there are affidavits and counter affidavits in this behalf.

Mr. Jhaveri submitted that the affidavit filed by the District Commandant, Home Guards, at a later point of time is a procured affidavit. At page 76, an affidavit is filed by one Kartikumar Parshottamdas Mehta, District Commandant, Home Guards, Kheda District, i.e. respondent No. 3 herein. In paragraph 4 of the reply, he has stated that after receiving the request from respondent No. 2 for

deployment of certain Home Guards, in order to meet urgent requirement of the respondents, for guarding well installation and other security points, vide letter dated 16.6.1981, the Administrative Officer of respondent No. 2 was informed by respondent No. 3 about the terms and conditions of deployment of Home Guards. In the affidavit, it is also specifically stated that the deployment of the Home Guards was only to assist in the normal course and they would not be replacement of the Corporation's employees during strike or any such type of agitation. The deponent has further stated that the Corporation was asked to make the payment at the rate of Rs.18/- per day directly to the Home Guards so deputed at the end of the month. He has further stated that this was an arrangement purely on temporary basis subject to understanding that these Home Guards could be withdrawn after short notice of 24 hours in order to meet the law and order situation. He has further stated that the petitioners are deployed with respondent No. 2 at different stages. Mr. Jhaveri, however, argued that this is a procured affidavit, as the same is produced by the Advocate of the Commission. It is not possible to accept this argument, as the facts the deponent has stated about the letter of 1981 are already finding place in the earlier affidavit filed by one Mr. S.N. Sinha, as Project Manager of the Commission, which was filed as back as in August, 1986, wherein there is also a reference about the letter dated 16.6.1981, which can be said to be the starting point of the subject matter.

Considering the overwhelming evidence on record, it is not possible to accept the contention of Mr. Jhaveri that in view of some affidavits, on which he has relied, the Court should presume that the petitioners were regularly recruited by the ONGC.

It is hazardous for the Court to give a positive finding to the effect that the petitioners are the regular employees of the Commission on the basis of such affidavits, ignoring the other documents and evidence on record. This Court, while deciding a petition under Article 226 of the Constitution, is not expected to make such a rigorous enquiry for deciding such hotly disputed questions of fact. The material on record, as discussed above, did not indicate, in any manner, that the petitioners were regularly recruited at any point of time by the ONGC. I agree with the submission of Mr. Vakil to the effect that the petitioners have not even pleaded their case to the effect that even though they were not regularly recruited by the ONGC, by the subsequent action of the Management, they have become direct employees of the ONGC. Apart from the fact that no such case is pleaded in the original petition, even there is nothing on record to substantiate the say of Mr. Jhaveri in this behalf, except the averments in the few affidavits, which I have referred above.

At this stage, reference is required to be made to a particular document, which is at page 81/35. It is a letter addressed by the Commandant, Home Guards, to the Officer Commanding, Home Guards, Khambhat. The same is dated 26.9.1983. In the said letter also, there is a reference about some letter written by ONGC. In

the said letter, the Commandant has permitted the Officer Commanding, Home Guards, to send 15 Home Guards for a particular period at ONGC. Looking to the correspondence at page 81/32 onwards, it seems that from time to time, various Home Guards were sent either by way of deployment or otherwise, for the purpose of discharging their duty as Security Guards in the ONGC.

At this stage, reference is also required to be made to one of the documents, which is at page 81/31, which seems to be a letter dated 7.6.1983. The document is not legible, but it is pointed out that the same is written by the Officer Commanding of Home Guards to the Security Officer of ONGC. In the said letter, it is mentioned that some security guards are required to serve even in the second shift against their wish, as they are not recruited regularly and they are required to report for duty in the second shift. Since the said aspect is very serious, it is recommended that, therefore, except those Security Guards, who are willing to perform their duty in the second shift, rest of them may be relieved so that such members may not be required to suffer in their employment, and, if they are required to serve in the second shift, they will have to remain absent from their regular employment. The said letter is suggestive of the fact that even in the categories of employees, to which we are concerned, some of them were even in the regular employment elsewhere. Naturally, they cannot survive with such a meagre amount of Rs.18/- per day and, perhaps, those who were not employed elsewhere were willing to perform second shift so that they can get additional Rs.18/-. Relying upon the said letter, it is argued by Mr. Vakil that the present petitioners were not even prevented from taking employment elsewhere over and above performing their duty, for which they were sent by the Home Guards Department to the ONGC.

Mr. Jhaveri, however, submitted that it cannot be said that the above letter is in connection with the present petitioners only. However, this letter is required to be considered and appreciated with other piece of evidence on record. Even though the petitioners were performing their duty with the ONGC, they were required to accept their salary through the Home Guards Department. Not only that, even as per the document at page 65, their presence etc., in the Register was maintained by the Home Guards Department. Simply because they were assigned the work by the ONGC Officers and simply because they might be performing regular nature of work of the ONGC, it is not possible to presume that they were regularly selected by the ONGC for the post in question. When they were deployed or even sent to the ONGC from the Home Guards Department, naturally, they are required to obey the orders of the Officers of the ONGC for day to day working, as for that purpose, ONGC is not expected to take orders from the Home Guards Department for regular monitoring of the work. Wherever such personnel are sent, they are required to act as per the instructions given by such Officers, with whom they are placed for discharging their duties. On the basis of the material on record, it is not possible for me to accept the submission of Mr. Jhaveri that, if not initially, at least, in view of the subsequent act of the Management, the petitioners have become employees of the Commission. Even if

the Officers of ONGC have given some certificates about good work of any such Security Guards, one cannot jump to the conclusion that the petitioners have become part and parcel of the regular establishment of the ONGC. No satisfactory material is relied on by Mr. Jhaveri, except few affidavits, to which I have referred to earlier, to substantiate his say that after their so-called deployment, they have become part and parcel of the ONGC establishment.

At this stage, reference is also required to be made to one of the letters written by ONGC to the In-charge of Home Guards, Khambhat, dated 26th August, 1983. It is mentioned in the said letter that as per the discussions which took place on 19.8.1983 between the signatory of the said letter with the In-charge of Home Guards, the Kits and Liveries issued to Home Guards by ONGC will be refunded to the Assistant Security Officer, when they are discharged.

It is an admitted fact that no appointment order is ever given to any of the petitioners. There is nothing to show that, at any point of time, ONGC has given any regular scale to any of the petitioners. If any such eventuality is there, the Court can still presume that the Commission has, impliedly, accepted the petitioners in their regular employment.

Mr. Jhaveri, however, submitted that if the petitioners were really deployed u/s 4 of the Home Guards Act, then, the petitioners were to be given Rs.8/- or Rs.15/-, as per the prevailing rates, but, since Rs.18/- per day is given, the same is suggestive of the fact that they were not so deployed. I am afraid, I cannot agree with the submission of Mr. Jhaveri that simply because Rs.18/- was paid, the Court should presume that they have become employees of the Commission. The documentary evidence produced, to which I have made reference, suggests otherwise, as, all throughout, the Home Guards Department has retained its control. It is required to be noted that as per the other documents on record, viz., documents at page 82 onwards, it is clear that from time to time, the Home Guards personnel were sent to the ONGC for discharging their duties. Even the letter, which I have referred earlier, i.e. at page 81/31, is clearly suggestive of the fact that the petitioners were not even prevented from serving elsewhere by way of regular employment. The Home Guards Department has retained its control over the petitioners and, subsequently, even the stipend was paid by the Home Guards Department. Under the circumstances, the say of the respondent as well as the official version of the Home Guards Department, to the effect that the petitioners were merely sent to the ONGC by way of temporary / stop-gap arrangement for the purpose of discharging their duty for a fixed sum of Rs.18/-, is more probable and the same is required to be accepted. Even the learned AGP, who is appearing for the Home Guards Department has also clearly supported the stand taken by the Home Guards Department in its reply and has also clearly stated that the petitioners were never prevented from getting employment elsewhere while performing the duty at the rate of Rs.18/- per day.

12. Mr. Jhaveri, at this stage, strenuously argued that this Court can certainly decide disputed questions of fact if the evidence on record is sufficient. It is, no

doubt, true that, in a given case, even this Court, while exercising the jurisdiction under Article 226 of the Constitution of India, can, certainly, decide disputed questions of fact and if the material on record is clear, this court can pronounce upon such disputed questions of fact. However, in my view, it is not possible for this Court to accept the say of the petitioners that they were recruited by the ONGC, either initially or subsequently. On the contrary, the documentary evidence on record is suggestive of the fact that the petitioners were not recruited either initially or even at a subsequent stage with the ONGC and, in fact, it can be said that they were never in the employment of the ONGC by way of regular employment, as, their entry to ONGC is in view of their so-called deployment from the Home Guards Department and, all throughout, the Home Guards Department has retained its control. If, really, the petitioners were absorbed in the ONGC or have become employees of the ONGC, at any point of time, there is no question of they being paid their so-called remuneration by the Home Guards Department and there is nothing to show that at any point of time, ONGC has paid any salary or any remuneration to the present petitioners, directly. All throughout, the Home Guards Department, as stated earlier, remains in the picture. Therefore, it cannot be said that even subsequently, by any conduct of the Commission, the petitioners can be said to have become regular employees of the Commission in any manner.

13. Mr. Jhaveri, however, vehemently argued that the deployment as per Section 4 of the Act cannot be said to be legal or valid and as per the scheme of the Home Guards Act, no home guard can be sent in a private company or organisation. However, as per the documentary evidence, discussed above, it is clear that the starting point, by which the petitioners or some of the Home Guards were sent to the ONGC, is as per the letter dated 16.6.1981, wherein the word "deployment" is specifically used and in the subject referred to in the letter, word "deputation" is also used. I have already discussed the said letter, which is at page 32, dated 16.6.1981. Even if the argument of Mr. Jhaveri is accepted for the time being, that the petitioners could not have been sent by deployment or even by deputation, the petitioners got berth only by virtue of the aforesaid order, as there is nothing on record to show that they were sent in any other manner, like the one which is suggested by Mr. Jhaveri. It is also equally not possible for this Court to come to the conclusion that the names were invited for the purpose of regular appointment on the post of Security Guard, in the ONGC and after receiving the names, the ONGC, after selecting the petitioners, gave them appointment. Except the oral argument in this behalf, there is nothing on record to substantiate this say. The Home Guards Department was not expected to work as an employment exchange for sending names for regular recruitment in any organisation. The petitioners were sent from time to time between 1981 and 1986 and as per the chart annexed with the petition at Annexure "A", some were sent even within a period of one or two years and, ultimately, the petition was filed in 1986 and, it remained pending for such a long time. By virtue of the interim order, the petitioners have continued as security guards with the ONGC

since 1986 onwards. Hence, the question which is required to be considered is whether, is there anything on the record to suggest that at the time when the petition was filed, the petitioners were in regular employment of the ONGC. Even as per the documentary evidence on record, it is not possible for me to accept the say of Mr. Jhaveri that the petitioners were treated to be the regular employees of the Commission. At the cost of repetition, it is stated that simply because the petitioners were given duty as per the order, it is not possible for this Court to presume that the petitioners are the employees of the ONGC. Similarly, simply because some affidavits are filed by some of the Home Guard Commandants or an Ex-ONGC Officer, it is not possible for this Court to pronounce that the petitioners have become the employees of the ONGC, especially when there is voluminous evidence available on the record suggesting otherwise.

Mr. Vakil, at this stage, submitted that the Commission has framed recruitment rules, viz., Oil and Natural Gas Corporation Limited Recruitment and Promotion Regulations, 1980. The same was also shown to Mr. Jhaveri. As per the same, recruitment and procedure is prescribed by the Commission. In Clause 6 of the said Recruitment Regulations, the procedure is prescribed for filling up of vacancies by way of direct recruitment. The said Clause 6 provides as under :-

"

6. Filling up of Vacancies by direct recruitment : (1) The Commission shall cause all vacancies to be filled by direct recruitment to be notified to the Employment Exchange in accordance with the provisions of the Employment Exchange (Compulsory Notification of Vacancies) Act, 1959 (31 of 1959) or to be advertised in daily newspapers having circulation in major parts of the country and in such daily newspapers in the regional language as the Commission may consider suitable.

(2) All particulars of the candidates received in response to the notification of the vacancies to the Employment Exchange or of the advertisement shall be registered by the appointing authority.

(3) All applications for direct recruitment shall be scrutinised by the appointing authority who shall reject such applications of the candidates as do not fulfil the criteria laid down in Schedule I and Schedule II appended to these regulations and submit the list of applications of the candidates who fulfil the said criteria for consideration for direct recruitment by a Selection Committee constituted by the Commission in this behalf and such selection Committee shall consist of not less (sic) three members :

Provided that where the vacancies to be filled by direct recruitment are limited and the number of candidates who apply and fulfil the said criteria are more, the Selection Committee shall decide the number of candidates to be considered for such vacancies.

Provided further that the number of candidates to be considered for such vacancies shall be five times the number of vacancies to be filled and where the number of such candidates are less than five times the vacancies to be filled, all the eligible candidates shall be considered by the Selection Committee.

(4) Where a candidate who fulfils the said criteria is not considered by the Selection Committee, it shall record in writing the reasons for not considering such candidate.

(5) The Selection Committee shall adjudge the suitability of a candidate on the basis of written examination, practical test or interview or any combination of these.

(6) The Selection Committee shall submit to the appointing authority a list recommending the names of the candidates found suitable for appointment in the order of merit.

(7) The appointing authority shall consider the recommendation of the Selection Committee and pass such orders as it thinks fit:

Provided that where the appointing authority does not accept any recommendation of the Selection Committee, it shall record the reasons therefore in writing.

(8) The appointing authority shall make appointments in the order of merit as given in the said list.

(9) After issue of appointment letters according to availability of vacancies, the names of the remaining candidates shall be kept in the said list for further use to fill up vacancies which may arise in future.

Provided that the period of validity of the said list shall be six months from the date of its approval by the appointing authority.

Provided further that the said period may be extended to a further period of six months by the appointing authority for reasons to be recorded in writing.

... .."

For the post of Security Guards, qualification is prescribed. The post of Security Guards is mentioned at Entry No. 12, in the book, which is at page 495 and as per the same, a person who has passed 8th standard, with certain physical standard is eligible for such appointment. It is not in dispute that the names of the petitioners were never called for from the Employment Exchange.

Section 2(f) of the Oil and Natural Gas Commission (Terms and Conditions of Appointment and Service) Regulations, 1975, defines the expression "Employee" as under :-

""

2. Definitions :

In these regulations, unless the context otherwise requires :

xxx xxx xxx

(f) "Employee" means a person who holds a post under the Commission and includes any such person whose services are temporarily placed at the disposal of State Government or the Central Government or any Government Industrial Undertaking;

... .."

It is even not the case of the petitioners that their employment was in consonance with the Recruitment and Promotion Regulations, 1980, framed by the ONGC.

Considering the aforesaid aspects of the matter, it is not possible for this Court to accept the say of the petitioners that either by way of their initial so-called deployment with the ONGC or even at a subsequent stage, they have become direct employees of the ONGC. It is also not possible for me, for want of appropriate material, to accept the say of Mr. Jhaveri that the names of the petitioners were called for from the Home Guards Department only for the purpose of their regular recruitment and after selecting them, they were so appointed as Security Officers.

14. Considering the rival submissions of the parties as well as considering the documents, forming part of this petition, as well as considering the averments in the petition, the following points are, as such, not in dispute :-

(i) No regular appointment order is given to the petitioners, appointing them as Security Guards in the ONGC;

(ii) Appointment of the petitioners has not been made as prescribed by the Recruitment Rules of the ONGC:

(iii) The Commission has never paid any regular scale to the petitioners, by treating them as their regular employees;

A n d

(iv) Between 1981 and 1986 and even thereafter, the Home Guards Department has always retained its control qua those employees, like the petitioners, who were discharging their duties as Security Guards in the ONGC.

Considering the aforesaid aspects of the matter, the prayer of the petitioners that they have become permanent employees of the Commission or that they are required to be regularised by the Commission cannot be accepted. It is also not possible to believe that the same set of employees have continued, all throughout, because there are some orders, by which it can be said that the Home Guards Department used to send different categories from time to time to

the ONGC for the purpose of discharging duties as Security Guards.

15. At this stage, reference is required to be made to certain judgments cited by Mr. Jhaveri as well as Mr. Vakil on the above points.

24th December, 2003

Mr. Jhaveri has relied upon the decision in Bhagwan Dass and Others Vs. State of Haryana and Others, . The Supreme Court, after considering the facts of the case, found that the petitioners in the said case were required to work full time and that they were full-time functionaries and not part-time functionaries. The Supreme Court has also found that equal pay cannot be denied on the ground that the mode of recruitment was different or that such appointment was under a temporary scheme. In my view, this judgment cannot come to the rescue of the petitioners for the simple reason that it is not a case, wherein it can be said that the petitioners were appointed by the ONGC, and, thereafter, the ONGC gave discriminatory treatment either in the matter of pay scale or in the matter of service conditions.

Mr. Jhaveri has also relied upon the decision of the Apex Court in the case of Daily Rated Casual Labour employees under P & T Department through Bhartiya Dak Tar Mazdoor Manch v. Union of India and others, AIR 1987 SC 2342. It has been observed in paragraph 6 that as per the admitted facts, the petitioners in that case were paid less than minimum wages payable under the pay scale applicable to the regular employees belonging to the corresponding cadres. The Department of that case denied the minimum wages payable to them under the pay scales on the ground that the petitioners belonged to the category of casual labourers and were not regularly appointed and for that, they were not entitled to the same scale, which the regular employees enjoyed. The Supreme Court, after negating the said contention of the Department, upheld the contention of the petitioner. The Supreme Court also directed that the respondents should prepare a scheme on a rational basis for absorbing as far as possible the casual labourers, who have been continuously working for more than one year in the Posts & Telegraphs Department. If the ONGC has continued these employees as temporary employees for a long time, naturally, the question of giving them appropriate pay scale or question about regularising their services may arise, but, here, as indicated at the time of dealing with the facts of the case, it is already observed as to in which manner the petitioners were sent to the ONGC by the Home Guards Department.

Mr. Jhaveri has, thereafter, referred to the decision of the Apex Court in Government of India and Others Vs. Court Liquidator's Employees Assn. and Others, . In paragraphs 20, 21 and 22, it has been observed by the Supreme Court as under :-

"

20. We have already set out at more than one place about the findings of the

Calcutta High Court and the Kerala High Court, rejecting the contentions put forward on behalf of the Union of India that the company paid staff were only appointed as per the order of the concerned Company Judge and the salaries were fixed by the Company Judge, that their appointments were purely on temporary basis and solely for the purpose of the work of liquidation proceedings under the charge of the Official Liquidator and, that, therefore, they cannot be absorbed as regular Government servants. Both the High Courts have found that the company paid staff had been discharging the duties years together without any break identical to that of the government paid staff in the same Liquidator's Office. It was also found that the company paid staff working both under the Court Liquidator and the Official Liquidator were grossly under-paid and they have no retiral benefits even after working for 10-25 years.

21. In view of the peculiar facts of these cases and the positive findings of the High Courts with which we concur, we are unable to agree with the contention of the learned senior counsel for the appellants that the company paid staff cannot be absorbed / regularized as they were not employed by the Government in accordance with the rules; that they knew their appointments were only temporary and that their pay was not from the consolidated fund.

22. Undoubtedly, counsel on both sides cited numerous authorities of this Court on earlier occasions sustaining the orders of absorption and setting aside the orders of absorption. We do not consider it necessary to refer to those decisions inasmuch as the facts presented before us and the findings rendered by the High Courts speak for themselves. As a matter of fact, the Government had considered as one of the options to absorb the company paid staff as was done through the 1978 Scheme of Department of Company Affairs.

... .."

Since the facts in the present case are entirely different and, as pointed out earlier, the petitioners have been sent by the Home Guards Department, for discharging duties as Security Guards in the ONGC, and, in fact, as per the material on record, there was no ban even for taking other regular employment while doing such type of work with the ONGC, it is not possible to hold that they are required to be paid same salary, which is paid to the regular Security Guards of the ONGC.

Mr. Jhaveri thereafter relied on the decision of the Supreme Court in *Rajakamal Transport and Another Vs. Employees' State Insurance Corporation*, Hyderabad, . In the aforesaid case, the fact finding authority, i.e. the Insurance Court, after elaborate consideration, found that the Hamalis used to do regular work of the appellants in the matter of loading and unloading of the goods. In paragraph 7, it is observed by the Supreme Court as under :-

""

7. It is seen that the Insurance Court after elaborate consideration, found as a

fact, that the appellants have the control over loading and unloading of the goods entrusted to the appellants. The appellants' regular business is transportation of the goods entrusted to them as carriers. When the goods are brought to the warehouse of the appellants, necessarily the appellants have to get the goods loaded or unloaded through the hamalis and they control the activities of loading and unloading. It is true as found by the Insurance Court that instead of the appellants directly paying the charges from their pocket, they collect it as a part of the consideration for transportation of the goods from the customers and pay the amount to the hamalis. The test of payment of salary or wages in the facts of this case is not relevant consideration. What is important is that they work in connection with the work of the establishment. The loading and unloading of the work is done at their directions and control.

... .."

In the said case, the Insurance Court, after appreciating the evidence on record, and after considering the facts of the case, gave the said finding of fact, as indicated above.

Mr. Jhaveri has also relied upon the decision of the Apex Court in *State of West Bengal and Others Vs. Pantha Chatterjee and Others*, . In the aforesaid case, the part-time Border Wing Home Guards (BWHG) preferred various petitions before the Calcutta High Court, complaining that they were being discriminated vis-a-vis other regular Border Wing Home Guards of West Bengal and the Border Security Force personnel, as they were discharging similar duties and performing same responsibilities. A learned single Judge of the Calcutta High Court, after considering the material on record, came to the conclusion that there is a relationship of master and servant between the writ petitioners and the State of West Bengal, who was found to be the appointing authority, as well. The Government of West Bengal had also recommended for making the part-time Border Wing Home Guards as permanent. The learned single Judge of the Calcutta High Court found that the petitioners could not be treated as volunteers engaged in casual nature of work so as to be termed as "part-time staff" of the Government of West Bengal. The learned single Judge, ultimately, held that the writ petitioners were entitled to the same benefits as admissible to the permanent Border Wing Home Guards. The learned single Judge of the Calcutta High Court issued various directions on the basis of the same in favour of the part-time Border Wing Home Guards. The said finding was upheld by the Division Bench and the matter, ultimately, went before the Supreme Court. It has been found as under in paragraphs 10, 11, and 12 of the said judgment :-

""

10. What emerges from the two documents referred to above, on the basis of which Border Wing Home Guards were raised, is that they were required, amongst others, for the purposes of patrolling the border as well as with a view to check infiltration from across the border. They have to help and assist and to

do the patrolling etc. along with and under the supervision and direction of the Border Security Force authorities. One thing which deserves to be noticed is that duties of the permanent Border Wing Home Guards and part-time Border Wing Home Guards are the same, and performed under the same situation and circumstances but there has been disparity in their emoluments and other facilities, necessities for performing their duties, details of which are not necessary to be indicated here. Yet another thing which is clear is that the Scheme under which Border Wing Home Guards Battalion was raised is the scheme of the Central Government which in substance is being implemented through the machinery of the State Government with a condition that pay and salary etc. of the full-time and part-time Border Wing Home Guards is to be borne by the Central Government. They have to assist and work always with Border Security Force personnel along the borders of the country. So far as the engagement for a period of three months is concerned, it has been stated in the counter-affidavit filed in this Court on 4.5.1998 sworn by Lt. Col. O.C. Mehta, Assistant Director General, Home Guards, Ministry of Home Affairs, in para 16 as follows :

" In terms of the instruction of the Government of India, Government of West Bengal raised one battalion consisting of eight companies of BWHG volunteers. Since inception, all the eight companies of BWHG volunteers in West Bengal were being utilized by the DG, BSF on the Indo-Bangladesh border. For this purpose, the Ministry of Home Affairs vide its Letter No. III-14011/679-DGCD(HG) dated 7.6.1979 issued suitable instructions for utilisation of BWHG volunteers by BSF authorities. Under these instructions, DG, BSF concerned are to send requisition for home guards of the concerned number of BWHG volunteers to the Comdt. General, Home Guards of the concerned number of BWHG. It has also been stipulated in the said instructions of this Ministry, that deployment of BWHG volunteers will not be for prolonged periods. On the basis of these instructions, DG, BSF had been approving deployment of BWHG volunteers to assist BSF initially for a period of 3 months each time, which had been extended continually after every three months since 1978-79. Although the deployment of BWHG volunteers would not be prolonged, a stipulation vide sub-para (vi) of MHA Letter No. III-14011/6/79-DGCD (HG) dated 7.6.1979 but in actual practice since 1978-79, the same members of BWHG in West Bengal had been under continuous deployment with BSF on account of extension of deployment period by DG, BSF on the basis of the authority given to DG, BSF. As a result, all the part-time members of eight coys of BWHG had been serving in aid of BSF since 1978-79 without break in service."

11. From the above averment, it is clear that BWHG have been continuously deployed since 1978-79. It is also to be found that such a long and continued deployment, which was initially envisaged only for a period of three months, was contrary to the Scheme taking away the voluntary nature of the Scheme. It appears that it was after their continued deployment for over 10 years that in 1989 the petitioners approached the High Court for same emoluments and

conditions of service as applicable to the permanent staff of BWHG. The Scheme envisaged that on being released, after a period of three months, the Volunteer home guards could go back and resume their vocations and may earn their livelihood and may be called as and when needed again for a short period whereafter again they could pursue their vocations. The step which seems to have been taken to disengage them and withdrawal of the power to recruit because of the number of cases filed in court, is only to be ignored as extraneous. It is said to have been done in the year 1992. By that time, they had already put in nearly about 14 years of service. After working for such a long period, patrolling the borders in all weathers without any facilities, as provided to other permanent staff of BWHG and performing same duties, it is too much to say that their deployment was of a casual and voluntary nature and the Central Government will not be concerned with them and that it would be the responsibility of the State Government alone. The problem of infiltration continues. It is not over. To say that they are being disengaged since they volunteered to be BWHG and they are free to resume their previous vocations, is simply arbitrary, unreasonable and legally unacceptable. Once they were made to work for ten to fifteen years or so without break, there hardly remained any chance or scope for them to resume their old vocations. The attitude of the Central Government, the least to say, is surprisingly strange. It would not be expected of them to cling to the technicalities of forms rather than to see the substance and realities of existing facts and prevailing situation which is of their own making. It is simply unfair on their part to keep on quibbling with the questions that there existed no relationship of master and servant, or that BWHG were simply volunteers under a Scheme having acquired no rights, it is immaterial, whatever be the circumstances. Once the decision was taken to disengage them, the Central Government under the guise of the Scheme wanted to wash off its hands of these people who have been guarding the borders of the country for years together under all conditions and circumstances, at its instance. Now to tell them that it is only the State Government which concerns them and the Central Government has nothing to do with it at all, is totally unfair and unreasonable.

12. There is no dispute about the fact that there has been disparity in emoluments and other working conditions, between the part-time BWHG and the BWHG on the permanent staff although both have been deployed for performing the same nature of duties and have been working for the same duration in the same conditions but one of them with and the other without the necessities of the job, facilities and benefits of the service. It is true and rightly held that BWHG could not compare themselves with BSF personnel but the difference between the permanent staff and the part-time staff which had been made in the Scheme was obliterated and rendered ineffective. There is no real distinction between the two, namely, the permanent BWHG and the part-time BWHG in absence of non-release of the latter after three months of the appointment, as per the Scheme. It has not been indicated by the appellants or the union of India

that the petitioners were ever disengaged of their assignment temporarily or the State Government had availed of their services after due and prior permission of the Central Government, or they were ever freed to resume their old vocational pursuits. It is in the affidavit of the authorities that BWHG are under operational command of BSF authorities, when deployed for patrolling along the Indo-Bangladesh border. In the background of what has been indicated above, in our view the findings arrived at by the High Court cannot be faulted with.

... .."

In the instant case, looking to the material on record, as discussed earlier, it is not possible for me to come to the conclusion that the petitioners were appointed and were discharging duties as employees of the ONGC and, in fact, there is nothing to show that identical duty was performed by these petitioners at par with other regularly recruited ONGC employees. In fact, there are some documents, from which it is clear that, from time to time, the Home Guards Department used to send Home Guards to the ONGC.

Mr. Jhaveri has also relied upon the decision of the Apex Court in *Workmen of The Food Corporation of India Vs. Food Corporation of India*, As per the facts of that case, the Food Corporation of India adopted different methods at different places for employing labour for handling foodgrains through contractor. In the aforesaid decision, the Supreme Court found that the concerned 464 workmen became the direct workmen of the Corporation and they were entitled to all rights, liabilities, obligations and duties as prescribed for the workmen by the Corporation. Considering the facts of the case, the Supreme Court found that there was a direct relationship of master and servant between the Food Corporation of India and its workmen and the Corporation had even introduced direct payment system. It was found that, subsequent cancelation of the direct payment system would amount to illegal change.

Mr. Jhaveri has also relied upon the decision of a Division Bench of the Patna High Court in *Chandrabali Vs. Chief Mining Engineer, Tata Iron and Steel Co. Ltd. and Others*, . In the said case, the petitioner therein was employed as a Loader in the colliery belonging to Messrs. Tata Iron and Steel Company Limited. The petitioner was recruited through the agency of the Coalfield Recruiting Organisation for employment under the Management of the Colliery as a Coal Loader. The petitioner therein proceeded on leave for a fortnight after the leave was granted by the Unit Supervisor of the Coalfield Recruiting Organisation.

While at home, the petitioner sought leave for a further period of three weeks. Thereafter, the petitioner again applied for leave of two weeks, enclosing medical certificate. Subsequently, he was not permitted to join when the petitioner returned for work. On behalf of the petitioner, Colliery Mazdoor Sangh wrote to the Colliery Manager, stating that, in violation of the Standing Orders of the Company, the petitioner was unfairly treated.

The Government of India referred the Industrial Dispute to the Central

Government Industrial Tribunal u/s 10 of the Industrial Disputes Act when the Conciliation Officer could not settle the matter amicably.

In the Reference, following two issues were raised :-

- (i) Whether the discharge of the petitioner was justified; and
- (i) If not, what relief he is entitled to and with effect from which date.

The Central Government Industrial Tribunal passed an Award, stating that the discharge of the petitioner before the Patna High Court was justified.

The petition filed by the petitioner challenging the Award of the Tribunal was admitted by the Patna High Court. The petitioner submitted that the Tribunal was erroneous as a matter of law, in holding that the petitioner was not a "workman", within the meaning of the Industrial Disputes Act and that there was no nexus or relationship of master and servant between the petitioner and the Management of the Colliery.

The Coalfield Recruiting Agency resisted the petition, raising the contention that the Recruiting Agency was the employer of the petitioner. The same stand was taken by the Manager of the Colliery.

The Division Bench of the Patna High Court allowed the petition, and remanded the matter to the Tribunal for deciding the matter afresh and for giving an Award in accordance with law. The Patna High Court held that the employee was under the dual control of the Coalfield Recruiting Organisation and the employing Colliery and that there was an implied contract of service between the employee and the employing Colliery and, therefore, the employee was a "workman", employed in the Colliery, within the meaning of the Industrial Disputes Act. The High Court held that the test uniformly employed in order to determine the relationship was the existence of the right of control over the manner in which the work was to be done.

In the instant case, this Court has considered the evidence on record, by which it is not possible, as stated earlier, to give any positive finding of fact to the effect that the petitioners were employed or under the control of ONGC and that the Home Guards Department had not retained any control worth the name.

The petitioners were appointed between 1981 and 1985, as per the Chart given along with the petition at Annexure "A". The Commission is able to demonstrate as to how they were asked to perform their duty as purely stop gap arrangement, awaiting regular recruitment of Security Guards and when, in 1986, the Commission was to make alternative arrangement for the aforesaid post in question, the petitioners filed this petition and, subsequently, they are discharging their duties as Security Guards by virtue of the interim order which is given in the year 1986.

16. Mr. S.B. Vakil, learned Senior Counsel, on the other hand, has relied upon the following decisions :-

- (i) State of Haryana and Another Vs. Haryana Civil Secretariat Personal Staff Association, ;
- (ii) Secretary to Govt. and Others Vs. C. Muthu, ;
- (iii) State Bank of India and Another Vs. M.R. Ganesh Babu and Others, ;
- (iv) Government of Andhra Pradesh and Another Vs. P. Hari Hara Prasad and Others, ;
- (v) State of Bihar and Others Vs. Secretariat Press Ministerial Staff Union and Others, ;
- (vi) Utkal University and Another Vs. Jyotirmayee Nayak and Others, ; and
- (vii) Orissa University of Agriculture and Technology and Another Vs. Manoj K. Mohanty, .

All the aforesaid seven authorities are in connection with the principle of "equal pay for equal work".

In State of Haryana and Another Vs. Haryana Civil Secretariat Personal Staff Association, , the Personal Assistants working in Haryana State Civil Secretariat sought parity in pay scale with the Personal Assistants working in the Central Secretariat. Their claim for parity as claimed in the petition was upheld by the High Court. The Honourable Supreme Court allowed the appeal filed by the State of Haryana and while dealing with the question as to how and by whom fixation of pay scale and claim to parity in pay is to be determined, the Honourable Supreme Court held that the fixation of pay and determination of parity in duties is the function of the Executive. It was also held that parity in employment and equal pay for equal work is not a fundamental right of the employee, although it is a constitutional goal.

In Secretary to Govt. and Others Vs. C. Muthu, , Chemists in Inspectorate of Factories claimed scale of pay as granted to Chemists in the Department of Industries. Their claim for parity in employment and equal pay for equal work was granted by the Tamil Nadu Administrative Tribunal, despite the qualifications meant for the posts and the nature of job as well as mode of recruitment to the said posts being different. Setting aside the Tribunal's order, it was held by the Honourable Supreme Court that while applying the principle of "equal pay for equal work", the Court or Tribunal should be very circumspect and until and unless it is established that the two posts are almost similar in all aspects, the Court or Tribunal should not venture to grant the relief sought for.

In State Bank of India and Another Vs. M.R. Ganesh Babu and Others, , Specialist Officers in the State Bank of India made a grievance that the benefit of additional increments be extended to them, as it had been done in the case of Probationary Officers / Trainee Officers. A learned single Judge of the Karnataka High Court allowed the petition and the appeals preferred against the judgment of the learned single Judge were dismissed by a Division Bench. While allowing

the appeals of the State Bank of India, the Honourable Supreme Court held that, where, after considering the nature of duties and responsibilities of various categories of its Officers, the State Bank of India, by a reasoned order, reached a bona fide conclusion that the degree of reliability and responsibility of its Probationary Officers / Trainee Officers on the one hand and that of its Specialist Officers on the other hand was not the same and that, therefore, on appointment, the latter were not entitled to parity in salary fitment with the former, the said conclusion is neither unreasonable nor discriminatory and did not warrant judicial interference.

In *Government of Andhra Pradesh and Another Vs. P. Hari Hara Prasad and Others*, , the High Court of Andhra Pradesh granted the employees of subordinate courts in Andhra Pradesh parity of pay scales with the employees of the Andhra Pradesh Secretariat Service on the assumption of identity of the posts and nature of duties. The Honourable Supreme Court termed the action of the High Court as "improper" and held that the said two sets of employees are governed by different rules and further held that the High Court cannot, in exercise of its jurisdiction under Article 226 of the Constitution of India, examine the nature of duties of employees in two different services and grant parity of pay between them on that basis.

In *State of Bihar and Others Vs. Secretariat Press Ministerial Staff Union and Others*, , the respondent Union filed a petition before the Patna High Court, for treating the ministerial staff of the Bihar Government Presses as employees of the offices attached to the Secretariat and, therefore, entitled to parity in pay scale with the employees of attached offices. The State of Bihar opposed the claim and pointed out that the service conditions of the ministerial staff of the Government Presses and those of the Secretariat Staff were different and that the former were governed by the Factories Act and were entitled to overtime wages by overtime work. Challenging the decision of the High Court, allowing the petition of the Union, the State of Bihar approached the Honourable Supreme Court. Allowing the appeal, the Honourable Supreme Court held that the questions regarding equivalence of posts, nature of duties and responsibilities attached to the relevant post, permissibility or otherwise of a different pay scale for the employees of an office, which, though under the administrative control of the Secretariat, is governed by the Factories Act, were not taken into consideration by the High Court.

In *Utkal University and Another Vs. Jyotirmayee Nayak and Others*, , Library Assistants and Library Attendants in the Seminar Library of the Utkal University, who were appointed on a consolidated salary, filed writ petitions, seeking directions to the appellants before the Supreme Court, to treat them as regular employees and to pay them salary at par with the similarly placed employees working in the University on regular basis. The High Court, while rejecting the contention of the respondents before the Supreme Court, for regularisation of their services, gave direction to the appellants to pay salary to the respondents

as admissible to similar employees of the University. The Honourable Supreme Court set aside the direction given by the High Court to the effect that the respondents are entitled to salary as admissible to the similarly placed employees of the University, and held that in absence of any appointment orders, appointing them on regular pay scale, the respondents cannot claim pay scales or regular salary as was admissible to the similarly placed employees.

In *Orissa University of Agriculture and Technology and Another Vs. Manoj K. Mohanty*, , the Respondent before the Supreme Court was appointed as a typist against the vacancy of Junior Assistant on a consolidated salary temporarily until further orders. It was the case of the respondent that though in the appointment order, his post was mentioned as "Typist", he was working as Junior Assistant, and that even though he had been serving for more than five years, his services were not regularised; instead, some of his juniors had been absorbed by the appellants. The High Court directed the appellants before the Supreme Court to take appropriate decision to consider the question of appointing the respondent on regular basis and also to pay the respondent regular pay scale admissible to the Junior Assistant. Allowing the appeal of the Orissa University, the Honourable Supreme Court held that the High Court did not examine the pleadings and facts of the case in order to appreciate whether the respondent satisfied the relevant requirements, such as, the nature of work done by him as compared to the nature of work done by the regularly appointed Junior Assistants, qualifications, responsibilities, etc.

17. Mr. S.B. Vakil, learned Senior Counsel, has also relied upon the following decisions :-

(i) *Union of India v. S.N. Panikar*, (2001) 10 SCC 520 ;

(ii) *Subedar Singh and others v. District Judge, Mirzapur and another* (2001) 1 SCC 37;

(iii) *Hari Shankar Sharma and Others Vs. Artificial Limbs Manufacturing Corporation and Others*, ; and

(iv) *Municipal Corporation of Greater Bombay Vs. K.V. Shramik Sangh and Others*, .

All the aforesaid four authorities relate to either regularisation or absorption in service.

In *Union of India v. S.N. Panikar*, (2001) 10 SCC 520 , the respondent before the Supreme Court was sent on deputation as Deputy Director (Development). The said post could be filled up only by direct recruitment. The respondent was sent on deputation to the aforesaid post of Deputy Director (Development) after consultation with the Union Public Service Commission, for a limited period. After the expiry of the said period, the UPSC did not agree to give extension thereof. The respondent approached the Central Administrative Tribunal, which directed the Union Government to absorb the respondent in the post of Deputy Director

(Development). Allowing the appeal of the Union of India, the Honourable Supreme Court held in the facts of the said case that the respondent therein had neither any right to the said post nor could he claim absorption therein on permanent basis.

In *Subedar Singh and others v. District Judge, Mirzapur and another* (2001) 1 SCC 37 (supra), ad hoc appointment to the post of Copyists was made by the District Judge in non-compliance with the statutory rules governing such appointments and then such appointees were deputed to do other jobs and in their place, some others were engaged as Copyists, in purported exercise of power under Rule 269 of the General Rules (Civil). The Allahabad High Court, on the administrative side, issued certain directions in the matter, as the procedure adopted by the District Judge, on the face of it, was illegal, and, consequently, the District Judge passed an order that the appointments of the extra Copyists would cease. Challenging the said order, the Copyists appointed on ad hoc basis, approached the High Court, which dismissed the writ petition of the Copyists. Dismissing the appeal of the Copyists, the Honourable Supreme Court held as under :-

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3. Having examined the contention raised, and having applied our mind to the facts and circumstances of the present case, we are not persuaded to accept any of the submissions made by the learned counsel, appearing for the appellants. The High Court in the impugned judgment has indicated the gross irregularities and illegalities committed by the District Judge in making the appointments in favour of the appellants. Such illegal / irregular appointees are not entitled to invoke the discretionary jurisdiction of the Court under Article 226 of the Constitution. The anxiety and agony of the Inspecting Judge is apparent from his inspection report and the direction to the District Judge. When the appointments to the posts in question is governed by a set of statutory rules, it is unthinkable that the District Judge would adopt this extra-constitutional method of appointment and that also, by manoeuvring and by deputing the Copyists to do some other job and replace them by fresh recruits. The so-called Regularisation Rules, in our opinion, does not intend to regularize the services of the illegal and irregular recruits like the appellants. We have carefully scrutinised the aforesaid Regularisation Rules and we do not find any substance in the arguments of the learned counsel of the appellants that their services ought to have been regularised under the aforesaid Regularisation Rules. The High Court has examined all the contentions by a detailed discussion of the relevant provisions of the Rules and we do not find any infirmities with the reasoning and conclusions of the High Court in the impugned judgment. No rule, law or regulation, nor even any administrative order had been shown to us on the basis of which the appellants could claim the right of regularization. In the aforeaid premises, we do not find any merits in any of these appeals, which accordingly stand dismissed, but in the circumstances, there will be no order as to costs.

... .."

In Hari Shankar Sharma and Others Vs. Artificial Limbs Manufacturing Corporation and Others, , the appellants before the Supreme Court contended that they were employed by several of the Contractors and had been serving in the canteen for several years. During the pendency of the contract with the respondent No. 1 therein, the appellants raised an industrial dispute, claiming to be regular workmen of respondent No. 1, viz. M/s. Artificial Limbs Manufacturing Corporation. After considering the oral and documentary evidence, the Labour Court came to the conclusion that appellants were not the employees of respondent No. 1, but were employees of respondent No. 2. The High Court dismissed the writ petition on the ground that the appellants' claim was primarily for abolition of contract labour in canteens and consequent absorption of the contract labourers as employees of the principal employer. Dismissing the appeal filed by the aggrieved employees of the Contractor, the Honourable Supreme Court held as under :-

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Merely because the canteen has been set up pursuant to a statutory obligation u/s 46 of the Factories Act, it cannot be said that employees in the canteen were the employees of Govt. of India undertaking. Even assuming that S.46 of the Factories Act was applicable to the Govt. of India undertaking, it cannot be said as an absolute proposition of law that whenever in discharge of a statutory mandate, a canteen is set up or other facility provided by an establishment, the employees of the canteen or such other facility become the employees of that establishment. It would depend on how the obligation is discharged by the establishment. It may be carried out wholly or substantially by the establishment itself or the burden may be delegated to an independent contractor. There is nothing in S.46 of the Factories Act nor has any provision of any other statute been pointed out to court by the workmen, which provides for the mode in which the specified establishment must set up a canteen. where it is left to the discretion of the concerned establishment to discharge its obligation of setting up a canteen either by way of direct recruitment or by employment of a contractor, it cannot be postulated that in the latter event, the persons working in the canteen would be the employees of the establishment. Therefore, even assuming that the Govt. of India undertaking is a specified industry within the meaning of S.46 of the Factories act, 1946 this by itself would not lead to the inevitable conclusion that the employees in the canteen are the employees of Govt. of India undertaking.

xxx xxx xxx

From a scrutiny of the agreement, it is clear that although the Govt. of India undertaking had agreed to provide the contractor with the basic infrastructure, the actual running of the canteen was the responsibility of the contractor alone. The contractor was obliged to provide all the facilities available to the workers

under various labour laws applicable to the Govt. of India undertaking. The Contractor was also required to abide by all the provisions of labour laws as applicable from time to time and was liable for financial obligation under various labour laws as amended from time to time. In case the contractor contravened any provisions of those laws and the Govt. of India undertaking suffered any damage, loss or harm due to any act of commission or omission of the contractor, the contractor was bound to indemnify the Govt. of India undertaking. Similarly, agreements also provided "The Contractor shall be responsible for discharge of legal liabilities towards his employees and also for observing all laws and Government Rules relating to Labour viz. EPF Act, ESI Act, Payment of Wages Act, Minimum Wages Act and health in so far as they relate to the canteen". The contractor was given the discretion to employ the workers already working in the canteen (like the appellants) but it was made clear that the contractor could take action against the canteen workers. It is noteworthy that the Govt. of India undertaking had no say as to who should be employed by the contractor nor the method of recruitment to be followed by the contractor. There was no obligation on the contractor to employ the persons who had served under earlier contractors. Even if the agreements had contained a condition that the contractor must retain the old employees, it would not necessarily mean that those employees were the employees of the establishment. The workmen are therefore, employees of contractor and cannot claim to be workmen of Govt. of India undertaking.

... .."

In *Municipal Corporation of Greater Bombay Vs. K.V. Shramik Sangh and Others*, , the Municipal Corporation of Greater Mumbai carried on the work of lifting, transporting and dumping the debris, garbage, silt, house gully material, etc., at the various dumping ground of the Municipal Corporation through the system of contract labour. The Union of workmen doing work of handling solid waste, filed a writ petition for direction to the Corporation to abolish contract labour system and for regularisation of services of the workers. The Union claimed that the contract entered into by the Corporation with the Contractor is a sham arrangement. The workmen concerned with the writ petition are in law and in fact employees of the Corporation, particularly so when the task of sweeping and cleaning roads, gullies and removal of debris and garbage, etc., are the statutory duties to be performed by the Corporation under the Municipal Corporations Act.

The claim that the contract was sham was specifically denied by the Corporation.

The Mumbai High Court did not go into the question and did not record a finding that the Labour Contract in the said case was sham or a camouflage, considering the material on record, which otherwise it could not have done under Article 226 of the Constitution, but proceeded to conclude that the Labour contract was not genuine and the workers of the Union were the employees of the Corporation, because the Corporation and the Contractors did not comply with the provisions

of the Contract Labour (Regulation and Abolition) Act. The High Court also gave a further direction to absorb all the workmen as direct employees of the Corporation. Setting aside the judgment of the Mumbai High Court, the Honourable Supreme Court held as under :-

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20. Now, we proceed to consider the validity and correctness of the impugned judgment and order in the light of judgment of the Constitution Bench in SAIL case (supra). The High Court held that the work entrusted to the members of the Union continued to be basically the work of the Corporation itself of perennial nature; the Corporation has chosen to carry out the work under so-called system of labour contract without complying with the provisions of the CLRA Act and as such, the labour contract was a camouflage. We must state here itself that the Union in the writ petition alleged that the labour contract was sham and the Corporation specifically denied it in its counter affidavit but the High Court did not go into this question and did not record a finding that the labour contract in the present case was sham or a camouflage considering the material on record; even otherwise this being a serious and disputed fact in terms of the Constitution Bench judgment aforementioned, the High Court could not have appropriately adjudicated on the issue exercising jurisdiction under Article 226 of the Constitution. It appears to us that the High Court proceeded to conclude that the labour contract was not genuine and the workers of the Union were employees of the Corporation because the Corporation and the contractors did not comply with the provisions of the CLRA Act. Conclusion that the contract was sham or it was only camouflage cannot be arrived at as a matter of law for non-compliance of the provisions of the CLRA Act but a finding must be recorded based on evidence particularly when disputed by an industrial adjudicator as laid down in various decisions of this Court including the Constitution Bench judgment in SAIL. The cases on which the High Court placed reliance were the cases where finding of fact was recorded by the labour courts on evidence. In para 34 of the impugned judgment, it is stated :-

"This court is hardly competent to record evidence or appreciate it in exercise of its powers under Article 226 of the Constitution. This Court as well as the Supreme Court have always taken the view that writ jurisdiction should not be permitted to be invoked if disputed questions of facts are involved, is the submission of the learned counsel. The submissions are wholly unexceptionable. If the facts were not clear, we would have hardly allowed our writ jurisdiction to be invoked. The material which we have referred to at several places hereinbefore, is more than adequate, in our view to come to the conclusion we have arrived at."

21. The material referred to relates to the complaints of the Union, recommendations of the Labour Commissioner, Labour Minister and the Labour Contract advisory Board in regard to abolition of contract labour u/s 10 of CLRA Act but the material could not be a foundation or basis to say that the labour

contract was sham, camouflage or a device to deny the statutory benefits to the workers. From the judgment under challenge, it is clear that Air India case (supra) weighed with the High Court which judgment now stands overruled as already stated above. The High Court rejected the contention that jurisdiction to abolish the contract labour system vested with the appropriate Government u/s 10 of CLRA Act and that power could be exercised after obtaining advice of the Contract Labour Advisory Board which in turn had to keep several factors enumerated in clausus (a) to (d) of Section 10(2) of CLRA Act stating that in the present case in almost 15 years, there was no registration of principal employer; none of the contractors ever held a licence under the Act; the work that was being carried on fell within the parameters of clauses (a) to (d) of Section 10(2) of the Act and having regard to what was said by the Chairman, Standing Committee of the Corporation and the contractors and the recommendation of the Labour Commissioner to abolish the contract labour system. Further the Minister for Labour of Govt. of Maharashtra went on to record in clear terms that the Government had taken a decision to abolish system of contract labour in the Solid Waste Management Department of the corporation, the High Court thought that there was sufficient material for abolishing the contract labour system. The High Court drew an inference that the State admitted that all the requirements were satisfied for acting u/s 10(2) but because of the election code of conduct it was unable to act and passed order for absorption of workers saying that it had no impediment to do so in view of its conclusions. Referring to Air India case (supra), the High Court observed that the said judgment suggested that a contract labour system can be said to be genuine only if it is carried in compliance with the provisions of the CLRA Act and anything contrary thereto would lead to the presumption that the purported contract labour system was merely a device and sham. In our view, the conclusion of the High Court that the contract labour system in the present case was sham cannot be sustained in the light of what is stated above and particularly when the disputed questions of fact arose for consideration in the light of rival contentions raised by the parties. We have detailed them above to say so.

... .."

18. Since I have already dealt with the factual aspects of the case earlier, naturally, there cannot be any question of giving any direction to the ONGC to regularise the services of the petitioners. As stated earlier, it cannot be said that, after their so-called deployment in the ONGC, by subsequent conduct of ONGC, they have become direct employees of the ONGC, as argued by Mr. Jhaveri at the time of hearing of this petition.

19. Mr. Vakil thereafter vehemently submitted that by interim order of the learned single Judge of this Court in C.A. No. 7111 of 2000, the respondent-Commission was required to pay Rs.150/- per day to the petitioners. He submitted that even as per the Scheme in which they were sent, there was no prohibition for them to take regular employment elsewhere and under these

circumstances, in addition to the amount which they were otherwise entitled as a part of the Home Guards, i.e. by way of Rs.18/- as daily allowance, the petitioners were not entitled to any other additional amount and since they were not in the employment of the ONGC, there was no question of paying any minimum wages. Mr. Vakil submitted that it is not that in view of some Notification of the State Government, such minimum wages were given to the petitioners, but since the same was required to be paid by the ONGC in view of the interim order of this Court, and, ultimately, if the petition is dismissed, such amount is required to be refunded to the respondent-Commission. Mr. Vakil submitted that the interim order is always subject to the final outcome of the petition, and, ultimately, if it is found that the petitioners have no case, naturally, the Commission is not required to suffer, as they have to pay considerable amount in all since last about four years. Mr. Vakil has seriously argued that this Court may pass appropriate order, directing the petitioners to refund the amount in question which is paid to the petitioners in view of the interim order of this Court. In this connection, Mr. Vakil has relied upon the following decisions of the Apex Court :-

(i) Commissioner of Income Tax v. Vinod Kumar Didwania AIR 1987 SC 1260;

(ii) Mahanadi Coalfields Ltd. v. Orient Paper and Industries Ltd. ; and

(iii) Kanoria Chemicals and Industries Ltd. and Others Vs. U.P. State Electricity Board and Others, .

In Commissioner of Income Tax v. Vinod Kumar Didwania AIR 1987 SC 1260 (supra), prohibitory orders were issued to the assessee with respect to his goods in three godowns. Questioning the validity of the prohibitory orders, the assessee filed a writ petition and obtained ex parte interim injunction, prohibiting the Tax Authorities from giving effect to the orders. In the meanwhile, the assessee removed the goods from the Godowns on the strength of the ex parte injunction and, thereafter, withdrew the petition. In the said circumstances, the Honourable Supreme Court held that the strategy used by the assessee for removal of goods from the Godowns is an abuse of process of law and, hence, the assessee cannot be allowed to retain the undeserved advantage gained.

In Mahanadi Coalfields Ltd. v. Orient Paper and Industries Ltd. , the Honourable Supreme Court, dealing with the purpose and object of interim / interlocutory orders, held that while the purpose of interlocutory order pending writ petition is to preserve rights of parties in status quo during pendency of litigation, the Court is also required to protect the interest of the respondent if the writ petition ultimately fails. In the said decision, the Apex Court held as under :-

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These petitions arise out of interlocutory orders dated August 12, 1993 and September 15, 1993 made by the High Court of Orissa in a batch of writ petitions in which the constitutional validity of the "Orissa Rural Employment, Education

and Production Act, 1992" had come to be challenged. In pursuance of the taxation burdens placed on the appellant - a public sector undertaking appellant sought to add the additional liability in this behalf to the controlled price of coal. This has been interdicted by interlocutory orders of the High Court. The High Court has directed the supply of coal without any additional burden.

While the purpose of an interlocutory order is to preserve in status quo the rights of the parties during the pendency of the litigation, the Court is also required to put into the scales the need to protect the interest of the appellant if the writ petitions ultimately fail and the uncertainty as to their results is resolved in appellant's favour. It would appear that if the dispensation ordered by the High Court prevails, the appellant, even in the event of its success, would be faced with a fait accompli and it would be well-nigh impossible for the appellant to gather the dues from the innumerable purchasers of coal. The interim orders passed by the High Court, in our opinion, do not protect appellant's interests adequately if the final result goes in its favour. We, accordingly, set aside the order under appeal. So far as the liability for this additional payment on the purchasers from February 1, 1993 till December 31, 1993 is concerned, we think it may be a hardship on the respondents to be called upon to pay the difference in cash. Interests of justice would be met if they are asked to furnish bank guarantees for the amounts in respect of the difference to the satisfaction of the appellant. Such bank guarantee shall be furnished within two months from today.

So far as the liability for the difference on purchases made from January 1, 1994 onwards is concerned, the purchasers shall pay the additional demands. The additional amounts so recovered, representing the difference, shall not be used by appellant but kept in a separate bank account in interest earning deposits.

If the respondents succeed in the writ petitions the amount shall be refunded to them together with the accrued interest.

... .."

In *Kanoria Chemicals and Industries Ltd. and Others Vs. U.P. State Electricity Board and Others*, , the Apex Court was dealing with the effect of interim / interlocutory order of injunction and the duty of the Court, on dismissal of the main petition / appeal. It was held by the Apex Court that in the case of grant of interim stay of Government order / Notification by the Court in a petition / appeal, and the subsequent dismissal of the petition / appeal, the interim order only rendered the Government Order / Notification inoperative from the date of passing of the stay order and did not wipe out the Government order / Notification and on the dismissal of the petition / appeal, it is the duty of the Court to maintain status quo ante. In the said decision, the Apex Court held as under :-

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11. The learned counsel for the appellants in the appeals before us rely upon the

portions underlined in the above passage as a decision supporting their contention that where the operation of government order is stayed, no surcharge can be demanded upon the amount withheld. We find it difficult to agree. In our respectful opinion, the underlined portions do not constitute the decision of the court. They merely refer to the fact that the Board itself did not make a demand for surcharge amount in respect of the period covered by the stay under its own understanding of the effect of the stay order granted by the High Court and that it was justified in its opinion. The demand was, the Court pointed out, in respect of the period covered by the order of injunction granted by this Court. This Court held expressly that the grant of an injunction does not relieve the consumers of their obligation to pay the charges at the enhanced rates and, therefore, the demand for surcharge / interest for such period is not illegal. The portions underlined cannot be understood as laying down the proposition that in respect of the period covered by the stay, no demand can be made. No such proposition can be deducted from the said passage for the reason that the liability for the said (sic period) was not at all in issue in the said decision. Unless put in issue and pronounced upon, it cannot be said that there was a decision on the said issue. There was no lis between the parties with respect to the period covered by the stay order of the High Court. If so, it cannot be said that any decision was rendered by this Court on the said issue or aspect, as it may be called. We, therefore, agree with the High Court that Adoni Ginning cannot be read as laying down the proposition that the grant of stay of a notification revising the electricity charges had the effect of relieving the consumers / petitioners of their obligation to pay late payment surcharge / interest on the amount withheld by them even when their writ petitions are dismissed ultimately. Holding otherwise would mean that even though the Electricity Board, who was the respondent in the writ petitions succeeded therein, is yet deprived of the late payment surcharge which is due to it under the tariff rules / regulations. It would be a case where the Board suffers prejudice on account of the orders of the court and for no fault of its. It succeeds in the writ petition and yet loses. The consumer files the writ petition, obtains stay of operation of the notification revising the rates and fails in his attack upon the validity of the notification and yet he is relieved of the obligation to pay the late payment surcharge for the period of stay, which he is liable to pay according to the statutory terms and conditions of supply - which terms and conditions indeed form part of the contract of supply entered into by him with the Board. We do not think that any such unfair and inequitable proposition can be sustained in law. No such proposition flows from Adoni Ginning. It is a matter of common knowledge that several petitioners (their counsel) word the stay petition differently. One petitioner may ask for injunction, another may ask for stay of demand notice, the third one may ask for stay of collection of the amount demanded and the fourth one may ask for the stay of the very notification. Such distinctions are bound to occur where a large number of writ petitions are filed challenging the same notification. The interim orders made by the Court may also vary in their phraseology in such a situation. Take this very case : While the consumers had asked for stay of operation of the

government order revising the rates, those very consumers asked for an injunction when they came to the Supreme Court. Furthermore, as pointed out rightly by the High Court, the orders of stay granted by the High Court in writ petitions questioning the validity of the Notification dated 21.4.1990 were not uniform. In the case of writ petition filed by the Eastern U.P. Chamber of Commerce and Industry, Allahabad, the operation of the notification was stayed while in the case of the writ petition filed by the Employees' Association of Northern India, it was directed that "effect shall not be given to the Notification dated 21st April, 1990 as against the petitioner", while clarifying at the same time that "in the event of failure of the writ petition, the petitioner shall deposit with the relevant authority within a period of one month from the date of dismissal of the writ petition the difference between the amount of electricity dues to be paid hereinafter by the petitioners under our orders and the sum which may be calculated on the basis of the impugned notification". The words "sum which may be calculated on the basis of the impugned notification" in the later order clearly mean and include the late payment surcharge as well. The acceptance of the appellants' argument would thus bring about a discrimination between a petitioner and a petitioner just because of the variation of the language employed by the court while granting the interim order though in substance and in all relevant aspects, they are similarly situated. It is equally well settled that an order of stay granted pending disposal of a writ petition / suit or other proceeding, comes to an end with the dismissal of the substantive proceeding and that it is the duty of the court in such a case to put the parties in the same position they would have been but for the interim orders of the court. Any other view would result in the act or order of the court prejudicing a party (Board in this case) for no fault of its and would also mean rewarding a writ petitioner in spite of his failure. We do not think that any such unjust consequence can be countenanced by the courts. As a matter of fact, the contention of the consumers herein, extended logically should mean that even the enhanced rates are also not payable for the period covered by the order of stay because the operation of the very notification revising / enhancing the tariff rates was stayed. Mercifully, no such argument was urged by the appellants. It is understandable how the enhanced rates can be said to be payable but not the late payment surcharge thereon, when both the enhancement and the late payment surcharge are provided by the same notification - the operation of which was stayed.

... .."

It is, no doubt, true that the interim order is always subject to the final outcome of the petition and, therefore, whatever benefit which is given to the petitioners by way of interim order can always be treated as tentative, subject to the final outcome of the petition and, under the ordinary circumstances, consequential order for such refund is required to be passed in case the petition is ultimately dismissed. However, in the instant case, this Court is not inclined to pass the said order for refund. The learned single Judge (Coram : D.H. Waghela, J.) has

observed in paragraph 2 of the order dated 12.9.2002, as under :-

"

However, it is fairly conceded in the affidavit-in-reply of the respondent that it is ready and willing to pay the wages to the applicants at the minimum rates which are fixed by the State Government and which are applicable to casual / unskilled labourers in accordance with the provisions of the Minimum Wages Act.

... .."

Mr. Vakil, however, argued that the concession was only for interim order, which is, ultimately, dependent upon the final outcome of this petition. Even if that be so, the fact remains that the Commission itself has conceded at the relevant time before the learned single Judge, as observed by the learned single Judge in paragraph 2 of the said order that it is willing to pay minimum wages fixed by the State Government to the applicants of C.A.No. 7111 of 2000, viz., the petitioners herein. Subsequently, it is not in dispute that, may be, by way of interim order of this Court, the petitioners have worked with the organisation for a considerable time and even subsequently, all the petitioners have resigned from Home Guards in October, 1992, and in view of such resignation, since 1992, they no longer remained as members of the Home Guards. Of course, this resignation has nothing to do with the controversy in the main matter, as the said resignation is given after considerable time from the filing of the petition and the Court is more or less required to consider the position at the time when the petition was filed in order to find out the nature of their employment. However, in view of the aforesaid circumstances, as indicated above, the Court would not like the petitioners to refund the amount, which is paid to them by the Commission by virtue of the interim order of this Court. Under the circumstances, the prayer on the part of the respondent that the Court may direct the petitioners to refund the said amount, which they have received by virtue of the interim order of this Court, is not required to be accepted and no order of refund of such amount is required to be passed. However, this decision is given in view of the peculiar facts and circumstances of the case, as indicated above.

Considering the fact that the present petitioners have resigned from the Home Guards since 1992 and considering the fact that they are discharging their duties with the ONGC since considerable time, may be even by virtue of the interim order of this Court, it is recommended that as and when the question of making regular recruitment to the said post arises, the claim of the present petitioners may be considered appropriately and if the petitioners apply for such recruitment, the ONGC may consider their case appropriately and, at that time, the fact that they have put in number of years" service with the Commission also may be taken into account and if any relaxation is permissible under the Rules, the same also may be taken into account.

20. In view of what is stated above, the petition is required to be dismissed and it is accordingly dismissed. Rule is discharged. Interim relief shall stand vacated.

No costs.

In view of the dismissal of the main petition, Civil Application Nos. 354, 3855 and 5331 of 2003 are also disposed of. Rule is discharged. Interim relief shall stand vacated. No costs.

21. At this stage, Mr. Jhaveri submitted that the interim relief granted by this Court at the time of admitting the petition as well as subsequently, even in the Civil Applications may be continued for a period of one month in order to enable the petitioners to file appeal against the present order. Mr. Vakil, however, strongly objected the same on the ground that the petitioners have continued as Security Guards in service by virtue of the interim order of this Court since 1986 and by virtue of the interim order, the Commission is required to pay the amount, which, according to him, the petitioners are not entitled. He submitted that under the circumstances, it is not a case in which the interim relief is required to be extended any more. However, considering the fact that the matter is pending before this Court since 1986 and since 1986, the petitioners have been continued in service by virtue of the interim order of this Court as well as they were paid Rs.150/- per day since the order of the learned single Judge in Civil Application No. 7111 of 2000, in my view, the interim reliefs granted earlier are required to be continued for the purpose of enabling the petitioners to take appropriate recourse to law. In the facts and circumstances of the case, the interim reliefs, which are granted earlier, are ordered to be continued upto 16th January, 2004.