
(2009) 06 BOM CK 0093
In the Bombay High Court
Case No : Writ Petition No. 1740 of 2005

Hindustan Lever Ltd.

APPELLANT

Vs

Contract Laghu Udyog Kamgar Union and Others

RESPONDENT

Date of Decision : 17-06-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Contract Act, 1872 — Section 23
Contract Labour (Regulation and Abolition) Act, 1970 — Section 10, 10(2), 12, 2, 21
Evidence Act, 1872 — Section 114
Factories Act, 1948 — Section 4, 46
Maharashtra Contract Labours (Regulation and Abolition) Rules, 1971 — Rule 27(1), 27(2), 54, 59, 59(2)
Maharashtra Factories Rules, 1963 — Rule 75, 79, 79(1)
Payment of Bonus Act, 1965 — Section 1(3), 32

Citation : (2009) 06 BOM CK 0093

Hon'ble Judges : S.J. Vazifdar, J

Bench : Single Bench

Advocate : P.K. Rele and Piyush Shah, in Writ Petition No. 1740 of 2005 and C.U. Singh, R.N. Shah and Mahesh Londhe, instructed by Sanjay Udeshi and Co. in W.P. Nos. 1777/05 and 1778/05, for the Appellant; Sanjay Singhvi, Jane Cox and Bennet D'Costa for Respondent No. 1, Kiran Bapat, in Writ Petition Nos. 1740, 1777 and 1778/05, C.U. Singh, R.N. Shah and Mahesh Londhe, instructed by Sanjay Udeshi and Co. for Respondent Nos. 5 and 7 in Writ Petition No. 1740 of 2005 and P.K. Rele and Piyush Shah, in W.P. Nos. 1777/05 and 1778/05, for the Respondent

Final Decision : Dismissed

Judgement

S.J. Vazifdar, J.—The Petitioners have challenged an award of the Industrial Tribunal dated 21.3.2005 made in Reference (IT) No. 64 of 2003. The Petitioners in Writ Petition Nos. 1777 of 2005 and 1778 of 2005 are Respondent Nos. 5 and 7 in Writ Petition No. 1740 of 2005 and have challenged the award in so far as it relates to them. I will therefore refer to the parties as they are arrayed in Writ Petition No. 1740 of 2005.

2. Respondent No. 2 -The Hindustan Lever Research Centre Employees" Union is another registered union. According to the Petitioner, Respondent Nos. 3 to 9 were/are contractors through whom services in certain non-core activities, which I will refer to later, had been sourced from time to time by the Petitioner. According to the said Unions and the workers however, the workers were employed by the Petitioner and not the said contractors and the contracts between the Petitioner and each of Respondent Nos. 3 to 9 are sham and bogus. The said award declares the workmen, allegedly engaged by these contractors, to be the Petitioner's employees and that they are entitled to all permanency benefits including wages and other allowances since the inception of their services.

3. At the outset, I must state that Mr. P.K. Rele, the learned senior counsel appearing on behalf of the Petitioner and Mr. C.U. Singh, the learned Senior counsel appearing on behalf of Respondent Nos. 5 and 7 contended that the said award has not considered the material on record as well as certain issues of vital importance. They submitted therefore that the award ought to be set aside and that the matter be remanded to the Industrial Tribunal for a fresh hearing and adjudication.

4. I will presume that the award does not deal with certain important aspects of the matter pertaining to facts as well as of law. Despite the same, I decided not to remit the matter but to hear the parties on merits which I did at considerable length. I have done so as I found that in the facts and circumstances of this case, to remand the matter would work enormous prejudice to the interest of both the parties in every respect in view of the present matter having already been argued five times over a period of almost twenty five years. The arduous course of this litigation is apparent from the following brief facts:

(a). Initially, an application had been made to the Contract Labour Board on 26.12.1985 for abolition of contract labour in respect of each of the alleged contracts.

(b)(i). On 30.12.1985 Respondent No. 1 filed Complaint (ULP) No. 1086 of 1985 before the Industrial Court against the Petitioner and Respondent Nos. 3 to 9 inter-alia for an order directing the Respondents therein to cease to engage in unfair labour practices, not to terminate the services of the workmen or to punish them or to terminate, transfer or in any other way, adversely affect the service conditions of the said workmen. Respondent No. 1 also sought an order directing the Petitioner to classify the said workmen as permanent, with retrospective effect and to grant them wages, status and privileges of other permanent employees together with the arrears.

(ii). An ad-interim order directing the parties to maintain status-quo, was passed on the same day i.e. 30.12.1985. By an order dated 11.6.1986, the ad-interim order was vacated and the application for interim reliefs taken out by Respondent No. 1 was rejected.

(iii). Respondent No. 1 challenged this order by filing Writ Petition No. 1535 of 1986. The Writ Petition was admitted by an order dated 1.7.1986.

(iv). Alleging that certain security guards who were a part of the concerned workmen, had been informed that the contractor had been changed and that their services were terminated Respondent No. 1 filed an application in Writ Petition No. 1394 of 1986 for interim reliefs. By an order dated 23.7.1986 this Court directed the concerned Respondents to maintain status-quo till the disposal of the Complaint and for one month thereafter.

(v). On 4.12.1986 the first Respondent filed another application for interim reliefs in the said Complaint (ULP) No. 1086 of 1985, inter-alia for an order directing the Respondents to reinstate the security watchmen and/or to pay them wages.

(vi). By an order dated 31.8.1989 this application for interim reliefs was rejected.

(vii) By an order dated 31.8.1989 the said Complaint (ULP) No. 1086 of 1985 was itself also rejected.

(c) (i). Respondent No. 1 filed Writ Petition No. 2916 of 1990 inter-alia challenging the order dated 31.8.1989 rejecting the said Complaint.

(ii). By an order and judgment dated 23.6.1994, (Contract Laghu Udyog Kamgar Union v. K.K. Desai and Ors. (1994) II CLRA 537) the Writ Petition except in respect of the security guards was allowed.

(d) (i). The Petitioner filed Appeal No. 537 of 1994 challenging the said order and judgment dated 23.6.1994 in Writ Petition No. 2916 of 1990. Respondent No. 1 filed cross-objections in respect of the security guards.

(ii). A Division Bench of this Court by an order and judgment dated 6.3.2009 relying upon the judgments of the Supreme Court in Vividh Kamgar Sangh v. Kalyani Steels Ltd. and Anr. (2001) 1 CLRA, 532 and Cipla Ltd. v. Maharashtra General Kamgar Union and Ors. (2001) 1 CLRA 752 held that the Complaint filed by Respondent No. 1 was not maintainable and therefore set aside the order of the learned Single Judge dated 23.6.1994. The Division Bench however, in the light of the said judgments of the Apex Court, directed the State Government to refer the disputes raised by Respondent No. 1 to the Industrial Court for adjudication within eight weeks. The Division Bench recorded that the parties had agreed that the Complaint filed by Respondent No. 1 shall be treated as the statement of claim and the written statement to the Complaint shall be treated as the affidavit in reply/written statement to the statement of claim. The Division Bench also recorded that the parties had agreed that the evidence led by them in the Complaint shall be read as evidence in the reference and that it would be open for the parties to lead further evidence. All the contentions of the parties were kept open before the Industrial Tribunal. The State Government was also directed to decide the application filed by Respondent No. 1 for abolition of contract labour within six months.

(iii). By an order dated 27.9.2004 Civil Appeal No. 6365 of 2004 (from SLP No. 15723 of 2004) filed by the Petitioner against the order dated 6.3.2003 was dismissed.

(e). In the meantime on 2.7.2003 the order of reference as directed by the order of the Division Bench dated 6.3.2003 was made.

(f). Thereafter, the parties led extensive further evidence in the reference.

(g). The impugned award was passed on 23.3.2005.

5. The parties have obviously spent enormous time, energy and resources, monetary and otherwise, in prosecuting this litigation for almost twenty five years. It would be unfair and unreasonable in the extreme to prolong this litigation any more than necessary which is precisely what an order of remand will do. I believe therefore that it is not only fair and just but essential that this Court ought to hear and decide the matter on merits though it is not bound to in exercise of its Writ jurisdiction.

6. I will deal with each of the contracts separately. However, as certain submissions raised on behalf of the parties apply to all the contracts, I will deal with them first, before dealing with each of the contracts separately.

7. Relying upon the judgment of the Supreme Court in the case of Workmen of Nilgiri Coop. Mkt. Society Ltd. Vs. State of Tamil Nadu and Others, . Mr. Rele and Mr. C.U. Singh submitted that the burden of proving the existence of an employer-employee relationship is on the employer.

8. I have proceeded on this basis. I must clarify however that the burden does not depend upon either the employer or the employee in every case. It would depend upon the party who seeks to establish the relationship. In the present case, it is the Union and the workmen who seek to establish that it is the Petitioner and not the respective contractors who is their employer. In the circumstances, the burden in the present case is on the workmen/union to establish the existence of an employer- employee relationship between the Petitioner and the workmen.

9. Having said so, it is important to note two things. Firstly once the parties have produced their evidence the question on whom the onus initially lay ceases to be of importance. In such cases the Court would be entitled to draw such inference on the basis of the evidence both oral and documentary adduced by the parties.

10(A). In Moran Mar Basselios Catholicos v. Thukalan Paulo Avira AIR 1959 SC 31, it was contended on behalf of the Defendant - Appellant that even if the Plaintiffs may in their individual capacity as members of the community maintain the suit with a view to dislodge the Defendants from their office as trustees, the onus was on the Plaintiff and not on the Defendant who had not come to Court for a declaration of title to prove that the Defendants have no title as trustees. The Constitution Bench of the Supreme Court rejecting the contention held:

The question of burden of proof at the end of the case when both the parties have adduced their evidence is not of very great importance and the Court has to come to a decision on a consideration of all the materials.

(B). In *Raghunathi and another Vs. Raju Ramappa Shetty*, , the Supreme Court held that once the parties have been permitted to produce evidence in support of their respective cases and it is not their grievance that any evidence was shut out, the question of burden of proof loses significance and remains only academic.

(C). In *Kalwa Devadattam and Others Vs. The Union of India (UOI) and Others*, , the Supreme Court held as under:

11. About the title of the plaintiffs to Items 46 to 51 in the schedule annexed to the plaint, the High Court disagreed with the trial court. These properties were purchased in the names of two of the three plaintiffs by the sale deed Est. A-230 dated March 15, 1944. The consideration of the sale deed was Rs. 23,500 of which Rs 5019 had been paid in advance in four installments before March 15, 1944, and the balance of Rs 18, 481 was paid before the Sub-Registrar to the vendors who conveyed the properties to Devadattam and Devarayulu two of the three plaintiffs acting by their mother Narayanamma as their guardian. The properties having been purchased in the names of the two plaintiffs the burden prima facie lay upon the Taxing authorities to establish that the sale deed was taken and on behalf of the joint family or with the aid of joint family funds. Evidence was led by both the sides to support their respective versions. The trial court held that the plaintiffs' case that their grandmother Seshamma provided the consideration was not proved, but there was also no evidence to show that the consideration was provided by the joint family, and as the burden of proof lay upon the Union, their case must fail the High Court however held that the burden which lay upon the Union to prove that the properties were purchased out of the joint family funds was duly discharged. The question of onus probandi is certainly important in the early stages of a case. It may also assume importance where no evidence at all is led on the question in dispute by either side; in such a contingency the party on whom the onus lies to prove a certain fact must fail. Where however evidence has been led by the contesting parties on the question in issue; abstract considerations of onus are out of place; truth or otherwise of the case must always be adjudged on the evidence led by the parties.

(emphasis supplied)

(D). It is only if the Tribunal or the Court feels it cannot make up its mind as to which of the version is true, it will be held that the party on whom the burden lies has not discharged the burden, (See AIR 1949 278 (Privy Council) .)

11. This being a civil litigation, the inference would naturally be on the basis of the balance of probability.

12. Secondly, considering the manner in which this matter has proceeded and

the failure if not refusal especially on the part of the Petitioner and the contractors to produce the evidence which was in their custody and to their knowledge, it is important to note the following observations of the Supreme Court in *Firm Mukand Lal Veer Kumar and Another Vs. Purushottam Singh and Others*, :

5 ...In the course of his evidence the appellant admitted that he was enjoying the income of Plot No. 134 but he did not produce any accounts to substantiate his contention. He also admitted that "he had got record of the Dargah income and that account was kept separately". But the appellant has not produced either his own accounts or the account of the Dargah to show as to how the income from Plot No. 134 was dealt with. Mr. Gokhale, however, argued that it was no part of the appellant's duty to produce the accounts unless he was called upon to do so and the onus was upon the respondents to prove the case and to show that the Dargah was the owner of Plot No. 134. We are unable to accept this argument as correct. Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof. In *Murugesam Pillai v. Manickavasaka Pandara* Lord Shaw observed as follows:

A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough - they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in Their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition.

This passage was cited with approval by this Court in a recent decision-*Biltu Ram v. Jainandan Prasad*. In that case, reliance was placed on behalf of the defendants upon the following passage from the decision of the Judicial Committee in *Bilas Kunwar v. Desraj Ranjit Singh*:

But it is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for an affidavit of documents and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents." But Shah, J., speaking for the Court, stated: "The observations of the Judicial Committee do not support the proposition that unless a party is called upon expressly to make an affidavit of documents and inspection and production of documents is demanded, the Court

cannot raise an adverse inference against a party withholding evidence in his possession. Such a rule is inconsistent with Illustration (g) of Section 114 of the Evidence Act, and also an impressive body of authority.

13. Mr. Rele and Mr. C.U. Singh submitted that there was no pleading to the effect that the contracts between the Petitioner and each of the contractors was sham and bogus. They submitted that the only case pleaded in the Complaint and in the reference was that the work in each case was of a perennial nature and on that count alone, there existed a employer-employee relationship between the Petitioner and the workmen.

Mr. Rele relied upon paragraphs 32 and 33 of the judgment of the Supreme Court in *Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd. and Another*, , which read as under:

32. If such be the duties and functions of the Industrial Tribunal or the Labour Court, any party appearing before it must make a claim or demur the claim of the other side and when there is a burden upon it to prove or establish the fact so as to invite a decision in its favour, it has to lead evidence. The quasi-judicial tribunal is not required to advise the party either about its rights or what it should do or omit to do. Obligation to lead evidence to establish an allegation made by a party is on the party making the allegation. The test would be who would fail if no evidence is led. It must seek an opportunity to lead evidence and lead evidence. A contention to substantiate which evidence is necessary has to be pleaded. If there is no pleading raising a contention there is no question of substantiating such a non-existing contention by evidence. It is well-settled that allegation which is not pleaded, even if there is evidence in support of it, cannot be examined because the other side has no notice of it and if entertained it would be tantamount to granting an unfair advantage to the first mentioned party. We are not unmindful of the fact that pleadings before such bodies have not to be read strictly, but it is equally true that the pleadings must be such as to give sufficient notice to the other party of the case it is called upon to meet. This view expressed in *Tin Printers (Private) Ltd. Vs. Industrial Tribunal and Another*, , commends to us. The rules of fair play demand that where a party seeks to establish a contention which if proved would be sufficient to deny relief to the opposite side, such a contention has to be specifically pleaded and then proved. But if there is no pleading there is no question of proving something which is not pleaded. This is very elementary.

33. Can it for a moment be suggested that this elementary principle does not inform industrial adjudication? The answer must be an emphatic "no".

(emphasis supplied)

14. The submission is not well founded. The judgment of the Supreme Court does not apply to the facts of the present case. The error lies in referring to stray sentences in the Complaint/reference instead of reading it as a whole.

15. It is important to note firstly that the Supreme Court has held that in such cases the pleadings are not to be read strictly. It is sufficient if the pleadings are such as to give sufficient notice to the other party of the case it is called upon to meet. In the present case, the pleadings meet this test.

16. Mr. Rele relied upon the averments in paragraph 3(c) of the Complaint that the work done by the workmen is incidental to and necessary for the work ; that it is carried out by the Petitioner undertaking as a whole and that it is of a perennial nature.

17. The Complaint however must be read as a whole. The Complaint read as a whole, certainly pleads the case that each of the contracts is sham and bogus and that the workmen were in fact the Petitioners employees.

(a). Throughout the Complaint, it is averred that the contractors were only "alleged contractors and in-between men in order to deprive some 70 employees of Respondent No. 1 (Petitioner) of the wages, benefits, status and privileges of the remaining employees". It is also averred that in order to so deprive the workmen, Respondent No. 1 (Petitioner) had maneuvered and contrived to induct Respondent Nos. 2 to 8 therein i.e. Respondent Nos. 3 to 9 herein "in the guise of contractors".

(b). In paragraph 3(p) of the Complaint, the contents of the letter dated 26.12.1985 to the Contract Labour Board were incorporated by stating that the same be treated as a part of the Complaint. This letter dated 26.12.1985, in turn, expressly refers to the workmen as "so called contract workers". It further states:

According to us, all the workmen are actually permanent and regular employees of HLRC (Petitioner)....

The averments in the Complaint clearly plead a case that the contracts were sham and bogus and that the workmen were in fact the employees of the Petitioner and not of the respective contractors.

(c). There is nothing in the Complaint which indicates that the basis of the entire case was that the workmen were the employees of the Petitioner only because the work done by them was of a perennial nature.

18. Further considering the manner in which this matter has progressed, especially the oral evidence led and the documentary evidence produced, leaves no room for doubt that the parties were conscious that the case of the union throughout was that the contracts were sham and bogus. This will be clear when I refer to the evidence, both oral and documentary, while dealing with each of the contractors. Suffice it to state that the effort of the Petitioner as is evident from the examination-in-chief of its witnesses, the cross-examination on behalf of the Petitioner of the witnesses of the union and the documentary evidence produced by the Petitioner, indicates without a shadow of doubt, that the Petitioner itself was not only aware of, but proceeded on the basis that the case

of the union was that the contracts were sham and bogus. It was to meet this case that the Petitioner lead oral and produced documentary evidence and cross-examined the witnesses produced by the union.

19. Faced with this, Mr. Rele and Mr. C.U. Singh submitted that the ingredients necessary for establishing that the workmen were employees of the Petitioner, were not pleaded.

20. It was not necessary to do so. Once it is found that the plea that constituted the cause of action to establish an employer-employee relationship was there, inter-alia on the basis that the contracts were merely sham and bogus, the ingredients to establish the same would constitute evidence. It is not necessary to plead evidence.

21. Mr. Rele submitted that the Complaint made by the union dated 26.12.1985 to the Contract Labour Regulation and Abolition Board, is an admission that there were in fact in existence, genuine contracts between the respective contractors and the Petitioner and that therefore the said workmen were the employees of the contractors and not the Petitioner. Mr. C.U. Singh however, did not contend that the said Complaint constituted an admission. He submitted that it was not open to the union to file the Complaint or to pursue the present reference as well as to seek the abolition of contract labour. According to him, if they were convinced that they were regular workers of the Petitioner, they ought not to have made an application to the Contract Labour Board, which was contrary to the denial of their relationship as employees of the contractor.

22. I find both the submissions to be not well founded. It is quite obvious that the application to the Contract Labour Board was made out of abundant caution. The entire tenor of the Complaint dated 26.12.1985 makes this clear. I have earlier referred to the averments in the Complaint to the effect that according to the union all the workmen are actually permanent and regular employees of the Petitioner but that the Petitioner had connived with the contractors to deprive the workmen of the benefits of regular workmen. The very first sentence of the Complaint also refers to the workmen as "so called contract workers". It is further stated therein that the management and the contractors would play a trick on the workmen by pretending to terminate the "so called" contract between the company and the contractors. These averments are far from admissions by the Union and the workers that the contracts were genuine. In fact, even the existence of the contracts has been denied in the said Complaint.

23. The doubt, if any, in this regard is removed by the fact that the application to the Contract Labour Board and the Complaint were filed contemporaneously. This itself establishes that there was no admission on the part of the union or the workmen that the contracts between the contractors and the Petitioner were genuine. Nor is there anything in law that prevented the union or the workers from making the application as well as filing the Complaint as was suggested by Mr. C.U. Singh.

24. Mr. C.U. Singh submitted that the entire matter must be considered as a whole and that I ought not to consider the case of each contractor independently. Thus, he submitted that an admission by a witness with respect to a contract must be considered relevant to the other contracts as well. For instance he submitted that the evidence of one Janabai in the case of the gardening contract between Respondent No. 8 and the Petitioner contained an admission of the existence of the contract. This admission, he submitted, should be used in all the other cases as well.

25. The approach does not commend itself to me. The Petitioner and each of Respondent Nos. 3 to 9 allege that there was a contract between them, pursuant to which the said workers were deployed for carrying out the Petitioner's work, but as employees of the contractors. It is not necessary that the conclusion in respect of one contract would apply to all the other contracts. The decision in respect of each contract would depend upon the merits thereof. The alleged contracts and the alleged contractors were different in each case. The workmen were different in each case. The evidence was different in each case. There is no reason why the conclusion in respect of one contract ought to apply to the other contracts.

26. The admission of one witness in respect of the contract with which that witness was concerned, cannot possibly be used to the detriment of the workmen under the other contracts. There is no justification for the same. Nor do I see any logical basis to support this contention. It could equally be argued then on the other hand, that if one contract is established to be sham and bogus, that conclusion ought to follow in respect of the other contracts. An admission or any other evidence which militates against a genuine contract in one case, could then, even in the absence of anything else, establish that there was no genuine contract in other cases as well. cannot see any reason why, absent anything else, the evidence in respect of one contract should be treated as evidence in respect of another contract.

27. It is possible that the workers or the union or the Petitioner may have either inadvertently or otherwise not adduced all the necessary and available evidence in respect of one contract. It would be unfair then to visit the adverse effect thereof on workmen under all the other contracts.

28. It is true that the evidence of some of the witnesses was not confined to merely one contract. Indeed, if any part of the evidence, oral or documentary, reflects upon more than one contract, it must be considered while dealing with such other contracts. For instance, it is possible that the evidence of one witness, even though led for one contract, may reflect upon another contract or contracts. In that event, such evidence must be considered while deciding the nature of the other contracts. That however would not support the wider proposition that the conclusion regarding one contract would apply to the other contracts. There can always be a sham contract in respect of one contractor and a genuine contract in respect of another contractor.

29. Mr. Rele submitted that the case of the workmen whose services were terminated by the alleged contractor and are not in service today, cannot be decided. This submission was especially in respect of certain security guards who failed to obtain any interim reliefs as stated earlier.

30. The failure to obtain interim reliefs would not prevent a party from obtaining reliefs at the final hearing of the proceeding. The question whether a workman was employed by the Petitioner or by the relevant contractor, must be decided on the basis of their rights as on the date on which the proceedings were filed. Their rights and indeed the rights of any party are not determined on the basis of decisions in the interlocutory proceedings. In certain cases the final relief may be moulded keeping in mind the developments during the pendency of the litigation but with that I am not concerned in this case. In other words, merely because such security guards may have got themselves registered with the Board would not affect their rights in the proceedings. Having failed to obtain interim reliefs, it is but natural that they would seek employment elsewhere. That however would not constitute an abandonment of their rights, if any.

31. Mr. Singh submitted that the question whether there exists a master-servant relationship between the Petitioner and the concerned workmen must be decided on the basis of the provisions of the Contract Labour (Regulation & Abolition) Act, 1970 (hereinafter referred to as the "CLRA Act") Mr. Singh based this submission on Sections 2(b), (c), (e), (g)(ii), 7, 10, 12, 21, 29 and 30 of the CLRA Act, which read as under:

2. Definitions.-(1) In this Act, unless the context otherwise requires,:

(b) a workman shall be deemed to be employed as "contract labour" in or in connection with the work of an establishment when he is hired in or in connection with such work by or through a contractor, with or without the knowledge of the principal employer;

(c) "contractor", in relation to an establishment, means a person who undertakes to produce a given result for the establishment, other than a mere supply of goods or articles of manufacture to such establishment, through contract labour or who supplies contract labour for any work of the establishment and includes a subcontractor;

(e) "establishment" means:

(i) any office or department of the Government or a local authority, or

(ii) any place where any industry, trade, business, manufacture or occupation is carried on;

(g) "principal employer" means:

(i) in relation to any office or department of the Government or a local authority, the head of that office or department or such other officer as the Government or the local authority, as the case may be, may specify in this behalf,

(ii) in a factory, the owner or occupier of the factory and where a person has been named as the manager of the factory under the Factories Act, 1948 (63 of 1948), the person so named.

7. Registration of certain establishments.-(1) Every principal employer of an establishment to which this Act applies shall, within such period as the appropriate Government may, by notification in the Official Gazette, fix in this behalf with respect to establishments generally or with respect to any class of them, make an application to the registering officer in the prescribed manner for registration of the establishment:

Provided that the registering officer may entertain any such application for registration after expiry of the period fixed in this behalf, if the registering officer is satisfied that the applicant was prevented by sufficient cause from making the application in time.

(2) If the application for registration is complete in all respects, the registering officer shall register the establishment and issue to the principal employer of the establishment a certificate of registration containing such particulars as may be prescribed.

10. Prohibition of employment of contract labour.-(1) Notwithstanding anything contained in this Act, the appropriate Government may, after consultation with the Central Board or, as the case may be, a State Board, prohibit, by notification in the Official Gazette, employment of contract labour in any process, operation or other work in any establishment.

(2) Before issuing any notification under Sub-section (1) in relation to an establishment, the appropriate Government shall have regard to the conditions of work and benefits provided for the contract labour in that establishment and other relevant factors, such as- (a) whether the process, operation or other work is incidental to, or necessary for the industry, trade, business, manufacture or occupation that is carried on in the establishment; (b) whether it is of perennial nature, that is to say, it is of sufficient duration having regard to the nature of industry, trade, business, manufacture or occupation carried on in that establishment;

(c) whether it is done ordinarily through regular workmen in that establishment or an establishment similar thereto;

(d) whether it is sufficient to employ considerable number of whole-time workmen.

Explanation.-If a question arises whether any process or operation or other work is of perennial nature, the decision of the appropriate Government thereon shall be final.

12. Licensing of contractors.-(1) With effect from such date as the appropriate Government may, by notification in the Official Gazette, appoint no contractor to

whom this Act applies, shall undertake or execute any work through contract labour except under and in accordance with a licence issued in that behalf by the licensing officer.

(2) Subject to the provisions of this Act, a licence under Sub-section (1) may contain such conditions including, in particular, conditions as to hours of work, fixation of wages and other essential amenities in respect of contract labour as the appropriate Government may deem fit to impose in accordance with the rules, if any, made u/s 35 and shall be issued on payment of such fees and on the deposit of such sum, if any, as security for the due performance of the conditions as may be prescribed.

21. Responsibility for payment of wages.-(1) A contractor shall be responsible for payment of wages to each worker employed by him as contract labour and such wages shall be paid before the expiry of such period as may be prescribed.

(2) Every principal employer shall nominate a representative duly authorised by him to be present at the time of disbursement of wages by the contractor and it shall be the duty of such representative to certify the amounts paid as wages in such manner as may be prescribed.

(3) It shall be the duty of the contractor to ensure the disbursement of wages in the presence of the authorised representative of the principal employer.

(4) In case the contractor fails to make payment of wages within the prescribed period or makes short payment, then the principal employer shall be liable to make payment of wages in full or the unpaid balance due, as the case may be, to the contract labour employed by the contractor and recover the amount so paid from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor.

29. Registers and other records to be maintained.-(1) Every principal employer and every contractor shall maintain such registers and records giving such particulars of contract labour employed, the nature of work performed by the contract labour, the rates of wages paid to the contract labour and such other particulars in such form as may be prescribed.

(2) Every principal employer and every contractor shall keep exhibited in such manner as may be prescribed within the premises of the establishment where the contract labour is employed, notices in the prescribed form containing particulars about the hours of work, nature of duty and such other information as may be prescribed.

30. Effect of laws and agreements inconsistent with this Act.-(1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law or in the terms of any agreement or contract of service, or in any standing orders applicable to the establishment whether made before or after the commencement of the Act: Provided that where under any such agreement, contract of service or standing orders the contract labour

employed in the establishment are entitled to benefits in respect of any matter which are more favourable to them than those to which they would be entitled under this Act, the contract labour shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that they received benefits in respect of other matters under this Act.

(2) Nothing contained in this Act shall be construed as precluding any such contract labour from entering into an agreement with the principal employer or the contractor, as the case may be, for granting them rights or privileges in respect of any matter which are more favourable to them than those to which they would be entitled under this Act.

32. There is nothing in the CLRA Act in general and the above provisions in particular, that supports Mr. Singh's submission. The CLRA Act does not deal with the question at all. In other words, the provisions of the CLRA Act do not deal with the question about the circumstances or conditions on which an employer-employee relationship can be said to exist. The CLRA Act does not define an employer-employee relationship vis-avis the question as to whether a contract, such as the present contracts, is sham and bogus. It is not concerned with the same. The CLRA Act posits the existence of a genuine contract between the principal employer and the contractor.

33. The mere implementation of the provisions of the CLRA Act which require the principal employer or the contractor to do certain things or foist any liability upon them are not of any assistance in determining the existence of a contract of employment between the principal employer and the workmen. This is for the obvious reason that any such liability foisted on the party and any act done by them pursuant to the provisions of the CLRA Act, would be a consequence of or pursuant to a statutory mandate and not an act of volition on their part in furtherance of a contractual obligation.

34. The CLRA Act, as stated in the preamble, regulates the employment of contract labour in certain establishments and provides for its abolition in certain circumstances and for the matters connected therewith. The Act contains provisions to be complied with by the principal employer and the contractor. The implementation of the provisions in normal circumstances and de-hors the Act may, evidence factors in support of or militating against, an employer-employee relationship between the principal employer or a contractor on the one hand and the worker on the other. However, if the provisions are implemented merely by virtue of the provisions of the CLRA Act, absent anything else, they would not be relevant factors in determining an employer-employee relationship.

35. Thus, for instance, the liability of the principal employer u/s 21(4) of the CLRA Act to make payment to the worker on the failure of the contractor to do so, would not by itself bring about a contract of employment between the worker and the principal employer. Nor would such payment by the principal employer even be a factor to be considered in determining the existence of a contract of

employment between the worker and the principal employer.

36. If Mr. Singh's submission is to be accepted, upon the failure of a contractor to make payment, the liability of the principal employer by itself, would be a factor to be considered against the principal employer. This was not even the purpose of the CLRA Act, which is not concerned with the determination of the genuineness or otherwise of the contract between the contractor and the principal employer.

37. The strong reliance upon Section 2(b) is not well founded either. The provision clearly proceeds on the basis that the workman is employed as a contract labour in connection with the work of the establishment under a genuine contract and not under one that is sham and bogus.

38. Section 10 of the CLRA Act also does not deal with the question presently under consideration. It confers power on the Government to prohibit employment of contract labour. If the contract itself is sham and bogus, there is no question of prohibiting the same. There is nothing in the section which even remotely suggests that the legislature conferred a power upon the Government to prohibit sham contracts. Such contracts are not required to be prohibited by law. A declaration by a Court of competent jurisdiction is sufficient and with it follow the necessary consequences.

39. Mr. Singh further submitted that once a person is, even on paper, hired through a contractor, the question whether the agreement is sham and bogus or not, not only does not arise but cannot arise. In such a case, he submitted, the person must be considered/taken to be the contractor's employee.

40. There is nothing in the CLRA Act which supports this submission. Nor do I find any principal of law which supports the same. I have already held that the CLRA Act posits the existence of a genuine contract and that, in any event, it does not deal with the question as to whether a given contract of labour is sham and bogus or not. If this conclusion is correct, it negates the present submission as well.

41. Mr. Singh sought to support this submission on the basis of the judgment of the Supreme Court in the case of Steel Authority of India Ltd. v. Union of India (2006) 12 Scc 233 where, it was held in paragraph 20 that the CLRA Act is a complete code by itself and that it not only provides for regulation of contract labour, but also, the abolition thereof. The Supreme Court also held that the relationship of employer and employee is purely a question of fact, the determination of which would depend upon a large number of factors and that accordingly the Writ Court does not go into such a question.

42. The judgment does not support the submission that once there is even a sham contract under which a contractor purportedly supplies the workmen to the principal employer, the Court is precluded from considering whether the contract is sham or not and that the question does not and cannot even arise and that the

employees would be deemed to be the contractor's employees. The CLRA Act being a complete code in itself, does not lead to this conclusion. It only means that in respect of the provisions covered by the CLRA Act, the Act is a complete code in itself. The question presently under consideration, as has already been held, is not covered by the CLRA Act.

43. Mr. Singh also relied upon paragraphs 7, 8 and 9 of the judgment of the Supreme Court in the case of N.T.P.C. and Others Vs. Badri Singh Thakur and Others, , to contend that the Act being a special Act and a later enactment, it overrides the Industrial Disputes Act. I do not see how it follows from this that the CLRA Act precludes the determination of the question as to whether a given contract is sham and bogus or not.

44. It is necessary to note however that the factors mentioned in the CLRA Act and, in particular, Section 10(2), may be considered while determining the question as to whether or not a contract is sham or bogus. Indeed, the factors mentioned therein are relevant while considering whether or not a contract is sham or bogus. These factors are not limited to contracts of the nature stipulated in the CLRA Act.

45. The Supreme Court in Gujarat Electricity Board, Thermal Power Station, Ukai Vs. Hind Mazdoor Sabha and Others, held as under:

59. It is also not correct to say that to arrive at the finding as to whether the labour contracts are genuine or not, the court or the industrial adjudicator cannot investigate the factors mentioned in Clauses (a) to (d) of Section 10(2) of the Act. The Explanation to Section 10(2) makes the decision of the appropriate Government final only on the question whether the process or operation or the work in question is of a perennial nature or not, and that too when a dispute arises with regard to the same. If no such question arises, the finding recorded by the Court or the Tribunal in that behalf is not ineffective or invalid. Further, in all such cases, the Tribunal is called upon to record a finding on the factors in question not for abolishing the contract but to find out whether the contract is a sham or otherwise. The contract may be genuine even where all the said factors are present. What is prohibited by Section 10 is the abolition of the contract except by the appropriate Government, after taking into consideration the said factors, and not the recording of the finding on the basis of the said factors, that the contract is a sham or bogus." That the factors mentioned in Section 10(2) of the CLRA Act may be considered while deciding whether a labour contract is genuine or not does not imply that the determination of the question as to whether a contract is sham and bogus or not is limited to or circumscribed by the factors mentioned in the Act.

46. In fact, Mr. Rele's and Mr. Singh's earlier submissions regarding the maintainability of the reference are negated by the further observations of the Supreme Court, which read as under:

60. The next contention of the learned Counsel that the reference with regard to

the abolition of the contract labour was not maintainable after the coming into force of the Act has been sufficiently answered by us earlier while discussing and recording our conclusions on the position of law in that behalf. Even on facts, we have pointed out that the present reference was not for the abolition of contract labour but for a declaration that the workmen were in law the employees of the appellant-Board. The industrial adjudicator has undoubtedly no jurisdiction to abolish a genuine labour contract in view of the provisions of Section 10 of the Act. However, it is not correct to say that the reference for the abolition of the contract, itself stands barred. It is the terms of the reference which will determine the jurisdiction of the industrial adjudicator to entertain and decide the reference. The dispute as to whether the labour contract is genuine or not can be agitated by the workmen and the industrial adjudicator has jurisdiction to examine the controversy. If the contract is held to be genuine, the dispute, if it is espoused by the direct workmen of the principal employer can be kept pending by the industrial adjudicator and the workmen may be referred by him to the appropriate Government for the abolition of the contract. If the appropriate Government abolishes the contract, the industrial adjudicator can thereafter grant further relief, if claimed, viz., of the absorption of the workmen of the erstwhile contractor in the principal establishment. If, however, the appropriate Government does not abolish the contract, the industrial adjudicator may reject the reference, as stated earlier. It is not, therefore, correct to say that the reference of an industrial dispute seeking to abolish the contract is per se barred, as contended by the learned Counsel.

(emphasis supplied).

61. It was also contended by him that the Industrial Tribunal cannot make recruitment and create contract against third parties, and for this purpose, reliance was placed by him on the decisions reported in *India General Navigation and Rly. Co. Ltd. v. Workmen* (1966) 1 LLJ, 735; *Krishna Kurup Vs. General Manager, Gujarat Refinery, Baroda*, and *Gurmail Singh and Others Vs. State of Punjab and Others*, .

After considering these judgments and distinguishing the same, the Supreme Court held as under:

66. Thus, it would be seen that these three decisions have not in any way diluted the propositions of law laid down by this Court in *Workmen of Dimakuchi Tea Estate Vs. The Management of Dimakuchi Tea Estate*, and *The Standard-vacuum Refining Co. of India Ltd. Vs. Its Workmen and Others*, , where the Court has approved of the jurisdiction of the Tribunal to direct the principal employer to absorb the workmen of the erstwhile contractor as his direct employees depending upon the satisfaction of the factors laid down therein and on terms that the Tribunal on the basis of the material before it, may deem fit to fix in the circumstances of the case.

67. It is also not correct to say that the Act is a complete Code by itself and,

therefore, the Industrial Tribunal has no jurisdiction to give a direction to the principal employer to absorb the workmen in question. We have already pointed out that the Act is silent on the question of the status of the workmen of the erstwhile contractor once the contract is abolished by the appropriate Government. Hence, as far as the question of determination of the status of the workmen is concerned, it remains open for decision by the industrial adjudicator. There is nothing in the Act which can be construed to have deprived the industrial adjudicator of the jurisdiction to determine the same. So long as, therefore, the said jurisdiction has not been taken away from the industrial adjudicator by any express provision of the Act or of any other statute, it will have to be held that the said jurisdiction which, as pointed out above, has been recognised even by the decisions in *Workmen of Dimakuchi Tea Estate Vs. The Management of Dimakuchi Tea Estate*, , and *The Standard-vacuum Refining Co. of India Ltd. Vs. Its Workmen and Others*, , cases continues to exist. In the exercise of the said jurisdiction, the industrial adjudicator can certainly make a contract between the workmen of the ex-contractor and the principal employer and direct the principal employer to absorb such of them and on such terms as the adjudicator may determine in the facts of each case. We find nothing in the decisions relied upon on behalf of the appellant which goes counter to this proposition of law. The decisions in *India General Navigation and Rly. Co. Ltd.*, (1966) 1 LLJ 735, *Krishna Kurup Vs. General Manager, Gujarat Refinery, Baroda*, and *Gurmail Singh and Others Vs. State of Punjab and Others*, , on which reliance is placed on behalf of the appellant for the purpose, have already been discussed by us above. The only additional decision which is pressed into service in this behalf is *Sanghvi Jeevraj Ghewar Chand and Others Vs. Secretary, Madras Chillies, Grains and Kirana Merchants Workers Union and Another*, . By a common decision in this case, two appeals were decided by this Court. In one appeal, the establishment employed less than 20 employees and it was not a factory; in the other appeal, the establishment was in the public sector. By reason of exclusion u/s 1(3) of the Payment of Bonus Act, 1965, the establishment in the first appeal was excluded from the application of that Act whereas by reason of exemption u/s 32(x), the establishment in the other appeal stood exempted from the operation of the said Act. On these facts, the question was whether the employees of the two establishments could claim bonus dehors the Payment of Bonus Act and the Court held, considering the history of the legislation, the background and the circumstances in which the Bonus Act was enacted, and the object of the Act and its scheme, that the Act was an exhaustive Act, dealing comprehensively with the subject-matter of bonus in all its aspects, and Parliament had not left it open to those to whom the Act did not apply, by reason of its provisions either as to exclusion or exemption, to raise a dispute with regard to bonus through industrial adjudication under the ID Act or other corresponding law. The ID Act itself did not provide for a statutory right for payment of bonus although it had provided substantial rights for workmen with regard to lay off, retrenchment compensation etc. It will thus be clear that the right to bonus which was spelt out by the judicial decisions was expressly denied

by the Bonus Act to the workmen in the establishment concerned in that case, and yet the workmen claimed the bonus on the basis of the alleged provisions of the ID Act. In the present case, there is nothing in the Act, as pointed out earlier, which has either expressly or impliedly taken away the raising of an industrial dispute to absorb the excontractor's workmen in the principal establishment when the dispute has been espoused by the direct workmen or the jurisdiction of the Tribunal to give a direction for the purpose, of course, on such terms as it deems fit in the circumstances of each case.

68. For all these reasons, we are unable to accept the contention that the industrial adjudicator cannot direct the principal employer to engage ex-contractors' workmen as direct employees.

47. It is not necessary therefore to deal with the judgment of a Division Bench of the Gujarat High Court in the case of Gujarat Mazdoor Panchayat v. State of Gujarat and Ors. (1992) I CLR 194 relied upon by Mr. Singhvi.

48. The reference was maintainable and it was within the jurisdiction of the Industrial Tribunal to determine the question as to whether each of the contracts was genuine or not.

49. The next question is the approach to be adopted and the factors which require to be considered while determining whether each of the contracts is genuine or any of them were sham and bogus.

50. The principles for determining whether a relationship is one of a contract of service or a contract for service, are clear and well established. It is of vital importance to keep in mind throughout what may appear to be obvious. There is no dispute that the concerned workmen were not working under a contract for service.

It is nobody's case that each of the workmen worked on their own account, under a contract for service with either the principal employer or the contractor. It is common ground that they were employed under a contract of service.

The question that falls for consideration in the present case is whether the said workmen worked under the contract of service with the principal employer i.e. the Petitioner or the contractors i.e. Respondent Nos. 3 to 9. What is important in the present case is to determine whether the factors relevant to a contract of service existed between the workers and the Petitioner or between the concerned workers and the relevant contractors.

51. Except as indicated in this judgment, there was no real dispute between the counsel regarding the relevant factors and the general principles applicable while determining whether an engagement is a contract of service or a contract for service. The question has been considered in a plethora of cases. It is not necessary to refer to all of them. It would suffice for the present case to note only a few aspects in this regard.

52. It is true that the Supreme Court has on several occasions rejected the control test as an exclusive test to determine whether a relationship is one of a contract of service or a contract for service. Control however remains an important factor. The work with which we are concerned did not involve any high degree of technical skill or professional ability. Over the years, other tests, such as the organization test, the economic test and the integration test have also been applied. None of these tests have been held to be applicable exclusively. I had occasion to consider this question albeit in a copyright action in the case of Zee Entertainment Enterprises Ltd. Vs. Mr. Gajendra Singh and Others, . Further the dispute there was whether Defendant No. 1 worked with the Plaintiff under a contract of service or a contract for service. After referring to various authorities I observed as under:

21. Courts have in the course of time applied other tests, such as the organization test, the economic test and the integration test. With the change in the nature of professions, commerce, business and industry over the decades Courts felt compelled to apply different tests as well as to apply existing tests differently. Even these tests have been held not to be decisive in all cases. There is no absolute, straight jacket formula. A broader, more complicated flexible and multiple or pragmatic approach is to be adopted by a Court while determining the question. A great deal of flexibility in the judicial approach is thus imperative keeping in mind the facts and the nature of each case. 24. The judgments refer to various factors which are important and relevant depending upon the facts of a case. It is neither necessary nor possible to enumerate exhaustively the factors. The relevance and importance of a given factor would depend upon the nature of the case. A factor may be relevant in one case but not in the other. A factor may be relevant with different degrees of importance in one case as compared to another.

25. It is thus necessary for the Court in each case to consider the various tests and apply them depending upon their relevance to the case and to give each of them the weightage warranted by the nature of the engagement. In other words, it is necessary while deciding a case not only to apply the appropriate test and the relevant factors but to accord to each test and each factor its due weightage depending upon the nature of the business and the nature of the engagement/employment.

26. For instance, while applying the control test, the factors cannot be applied blindly but, in the context of the business and the nature of the relationship.

53. It was contended by Mr. Singhvi that the work carried out by the workmen allegedly engaged by the seven contractors was perennial in nature. This, Mr. Singhvi submitted, was an important indication to establish that the contracts were sham and bogus. He relied upon the judgment of the Supreme Court in Gujarat Electricity Board, Thermal Power Station, Ukai Vs. Hind Mazdoor Sabha and Others, .

54. That the work is of a perennial nature is but a factor to be considered with all the other factors while deciding whether a contract is genuine or not or whether there exists an employer - employee relationship. By itself it is of little significance or importance. The reason is obvious. There is nothing in law including the CLRA Act that prohibits the principal employer availing the services of contract labour through a contractor even if the work is of a perennial nature. If that be so, I do not see how the fact that a particular work is of a perennial nature, establishes by itself that the contract is sham and bogus. This view is not contrary to the judgment in Gujarat Electricity Board. In fact while dealing with the judgment in The Standard-vacuum Refining Co. of India Ltd. Vs. Its Workmen and Others, , the Supreme Court in Gujarat Electricity Board held:

34. ...The Court further held that the work in question was incidental to the manufacturing process and was necessary for it and was of a perennial nature which must be done every day. Such work is generally done by workmen in the regular employment of the employer and there should be no difficulty in having direct workmen for that kind of work. The matter would be different if the work was of intermittent or temporary nature or was so little that it would not be possible to employ full-time workmen for the purpose. While dealing with the contention that the Tribunal should not have interfered with the Management's manner of having its work done in the most economical and convenient way that it thought proper, and that the case in question was not one where the contract system was a camouflage and the workmen of the contractors were really the workmen of the Company, the Court held that it may be accepted that the contractor in that case was an independent person and the system was genuine and there was no question of the Company carrying on the work itself and camouflaging it as if it was done through contractors in order to pay less to the workmen. But the fact that the contract in the case was a bona fide one would not necessarily mean that it should not be touched by the Industrial Tribunals. If the contract had been mala fide and a cloak for suppressing the fact that the workmen were really the workmen of the Company, the Tribunal would have been justified in ordering the Company to take over the entire body of workmen and treat it as its own workmen. But because the contract in the case was bona fide, the Tribunal had not ordered the Company to take over the entire body of workmen. It had left to the Company to decide for itself how many workmen it should employ and on what terms, and had merely directed that when selection is being made, preference be given to the workmen employed by the contractor. The Court also held that the only question for decision was whether the work which was perennial and must go on from day to day and which was incidental and necessary for the work of the refinery and was sufficient to employ a considerable number of whole-time workmen and which was being done in most concerns through direct workmen, should be allowed to be done by contractors. Considering the nature of the work done and the conditions of service in the case, the Court opined that the Tribunal's decision was right and no interference was called for.

(emphasis supplied)

The observations clearly indicate that even where a contract is of a perennial nature there can be a genuine agreement for contract labour. Thus, whether there exists a genuine contract or not and whether there exists an employer-employee relationship would depend upon a consideration of all the facts and circumstances of the case even where the work is of a perennial nature.

55. By 24.12.1985, the Petitioners and obviously therefore the contractors were aware that the Union and the workers intended adopting proceedings to enforce their rights including contending that the workers were actually employed directly by the Petitioner and not the respective contractors. This is clear from the application dated 26.12.1985 to the Contract Labour Board. The process for the formation of the Union itself started in November, 1985. It would be reasonable to presume that even prior thereto, the Petitioner and the contractors would have been aware of the same as matters such as these do not develop overnight.

56. The conduct of the parties therefore prior to November, 1985 is important while determining the issues. In any event, the conduct of the parties prior to November, 1985 would be of greater significance and entitled to greater weightage than the conduct after the disputes arose. This is for the obvious reason that once disputes arise and the parties are put to notice thereof, it is always possible for them to conduct themselves in a manner that would support their case.

57. I have, therefore, granted greater weightage to the conduct of the parties prior to November, 1985 than to their conduct subsequent thereto while examining and weighing the evidence.

58. The mere presence of the representatives of the Petitioner at the time of making payment or its acknowledgment of the workers having received payment in the records of the contractors is not a relevant factor in considering whether the wages were paid by the Petitioner or the respective contractors, if the same is done pursuant to or in accordance with the provisions of the CLRA Act and the Maharashtra Contract Labour (Regulation & Abolition) Rules, 1971. Rule 54 of the said Rules reads as under:

54. Entries regarding payment of wages, etc. to be made in Register. -(1) Entries denoting the time and place of payment of wages and the payments actually made shall be made in the register of wages simultaneously as the payments are made.

(2) The authorised representative of the principal employer shall affix his initials against each entry and further record a certificate at the end of the entries in the following form:

Certified that the amount shown in column No. has been paid to the workman concerned in my presence.

59. Thus the Petitioner as the principal employer would be bound to affix its initials. When the signature of the principal employer is so affixed it is only in discharge of its duties under the CLRA Act and the said Rules. Further it is merely a record of the payment of wages having been made to the workers. Indeed if the payment is so acknowledged, it would prima-facie establish the existence of contract labour.

60. Mr. Singhvi relied upon a chart (Union Vol. I, page 116) which inter-alia furnished the dates on which the workmen joined service. These dates have been furnished on the basis of the provident fund slips, prepared by the Petitioner. It is true that the provident fund slips were prepared pursuant to the said order and judgment dated 23.6.1994 in Writ Petition No. 2916 of 1990. The judgment however did not stipulate the date of joining. The Petitioner furnished the same on its own. In any event, there was nothing on record that indicated that the said workmen had joined on any other date. I have therefore proceeded on the basis that the particulars in this regard are correct.

61. It is necessary to clarify however that they would constitute admissions by the Petitioner and not the workers or the union as they were made by the Petitioner unilaterally. This would be relevant in the case of Respondent No. 4.

62. This brings me to a consideration of each of the contracts.

RESPONDENT No. 3 - PANDU MERCHANDE

63. Respondent No. 3 is alleged by the Petitioner to be the contractor for the work of cleaning carried out by nine of the concerned workers. The work included cleaning floors, testing office furniture, washing glass tumblers and flasks, cleaning nallas, fittings, windows, dust-bins/waste paper baskets etc. and sweeping the roads, cleaning the drains and removing rubbish from the premises.

64. The Industrial Tribunal held the contract to be a mere paper arrangement between the Petitioner with Respondent No. 3. The Industrial Tribunal held, "that the company maintained the supervision" and controlled the "matter of wages, attendance register"; that the contractor had not filed any written statement nor examined himself and, therefore, even the solitary affidavit filed by him had no evidentiary value and that unless evidence of the signatory to the contract is available, it would not throw any light upon the exact arrangement between the Petitioner and Respondent No. 3. It was further held that the witness examined by the union viz. one Parvat Gambre (U.W.3) had deposed that the attendance register was maintained by one Dilip Sawaikar, the Petitioner's manager and on some occasions by three of the Petitioner's foremen viz. one Godbole, one Bhende and one Naik; that the tools required for doing the said work were supplied by the Petitioner and that the worker's wages were paid by one Aspi Elavia, an employee of the Petitioner. It was noted that Respondent No. 3 himself was also working with the Petitioner. The Industrial Tribunal further noted that some of these nine workmen had been doing the said work since the years 1977, 1978 but that the company had obtained the registration under the CLRA Act

only on 8.12.1986 and that no licence was obtained by the contractor as required under the said Act. Further, the contract relied upon by the Petitioner was from 1.9.1984 to 31.8.1985.

In view of these facts, the Industrial Tribunal came to the conclusion that even the alleged contract was only a paper arrangement between the Petitioner and Respondent No. 3.

65. Subject to the questions of law decided in this judgment, I am in respectful agreement with the conclusion arrived at by the Industrial Tribunal. I do however agree with Mr. Rele that the Industrial Tribunal ought to have considered the matter in greater detail. For instance, the evidence of Elavia (Petitioner's witness) has been dealt with in but one sentence by the Industrial Tribunal. There is more to his evidence than just that. The Industrial Tribunal has failed to consider certain important aspects of the evidence and the law. therefore intend, both amplifying and supplementing the reasons furnished by the Industrial Tribunal. A more detailed consideration of the matter only strengthens the case of the union and the workers.

66. Parvat Gambre, the union witness deposed that the workers had maintained a notebook indicating their attendance even for the years prior to 1985. The notebook produced in evidence, was for the year from November, 1985. Against the names of the workers, the Petitioner's manager Dilip Sawaikar, had placed his initials acknowledging their attendance. On some occasions, one of the said three foremen viz. Godbole, Bhende and Naik had similarly placed their initials. He further stated that the earlier notebooks were with the company.

67. The cross-examination did not affect this evidence. What is even more important is that the Petitioner's witness S.V. Subramaniam (CW-3) in his cross examination stated that he did not recollect that the said Sawaikar, Godbole, Bhende and Naik were the supervisors working in the Fine Chemicals Unit at the relevant time and that the initials appearing in the notebook were theirs.

68. It is difficult to accept that S.V. Subramaniam, did not recollect these aspects. In his examination-in-chief he admitted that he had been working with the Petitioner since about the middle of 1981 and till 1986. There appears to have been a reluctance on the part of the Petitioner in acknowledging the involvement of its manager and foremen in the working out of the alleged contractor. It is important that he does not deny that the said Sawaikar, Godbole, Bhende and Naik were supervisors and had placed their initials in the notebook. He merely stated in cross-examination that he did not recollect these aspects. It is difficult to believe that he did not recollect the same.

69. Added to this, is the fact that neither Respondent No. 3, the alleged contractor, nor the said manager and three foremen were examined by the Petitioner. Their evidence would have been of vital importance. An adverse inference against the Petitioner for the same is justified. The adverse inference being that had they been examined, it would have been established that the

Petitioner supervised the worker of and had the control over the workers. I hasten to add that this by itself would not establish the case of the union and the workmen. It is a factor, an important factor, to be considered while deciding the issue.

70. Mr. Rele submitted that one Shankar had been engaged by Respondent No. 3 as a supervisor to supervise the work of the said nine workmen. However, neither Respondent No. 3 nor the said Shankar had been examined. Nor was there anything else on record which established the same.

71. The failure to examine the contractor, in the facts and circumstances of this case, is of vital importance. It is not the Petitioner's case that there was any animosity between Respondent No. 3 and itself. It is not the Petitioner's case that Respondent No. 3 was unable to give evidence. There is no explanation from the Petitioner as to why Respondent No. 3 was not examined. The question as to whether a contract is genuine or not, is essentially one of the fact. Only one contract valid for only about a year between 1.4.1984 to 31.12.1985 was produced. Some of the clauses thereof can be interpreted either way viz. to support the case of the Petitioner and the contractors on the one hand as well as to support the case of the union and the workmen on the other. The parties to the contract were only the Petitioner and the contractors. Absent anything else, the fact that the contractor was not examined, must be weighed in the balance, against the Petitioner and the contractor.

72. The union witness Gambre further stated that the Petitioner's foremen used to supervise their work, make entries about their attendance and that while proceeding on leave they used to take permission from the foreman. As noted earlier, the foremen were not examined. This evidence therefore was not effectively challenged.

73. Four of the workmen had joined the Petitioner on 1.9.1978. The remaining four workmen had joined the Petitioner on 28.1.1981, 1.4.1982, 1.5.1984 and 15.5.1984. The only contract between Respondent No. 3, produced in evidence was dated 1.9.1984. There is nothing on record which establishes any contract prior thereto.

74. There is no explanation by the Petitioner as to the basis and arrangement on which the workers were employed/engaged prior to 1.9.1984. They have been working between two and seven years prior to the contract relied upon by the Petitioner. It is not the Petitioner's case that the workers worked in its premises under another contractor earlier. Nor is it the Petitioner's case that the workers were employed by it earlier in any capacity, permanent or temporary and that they subsequently left the Petitioner's services and joined the contractor. The case of the union and the workers is that these workers were from inception employed by the Petitioner directly. The Petitioner would obviously have knowledge of and be in possession of the particulars and the record pertaining to their employment prior to the date of the alleged contract. It was for the

Petitioner to have disclosed the same. It chose not to. This is therefore a strong indication that the workers were in fact employed directly by the Petitioner.

75. Elavia did state in his examination-in-chief that the Petitioner did not provide the workers the material except soda ash which was required to be provided as per the said contract of 1.9.1984. The union witness Gambre however stated that the foremen of the company used to supply all the other articles as well. The union witness Gambre further stated that the Petitioner's foremen used to supervise their work, make entries about their attendance and that while proceeding on leave they used to take permission from the foreman.

76. It is also important to note that the contractor and the said foremen and manager had not been examined in the complaint. The Petitioner and Respondent No. 3 had yet another opportunity to lead evidence in the reference when the matter was remanded by the Division Bench. Even thereafter they had not been examined. The case for an adverse inference is therefore enhanced.

77. Elavia deposed to the effect that the worker's wages had been paid by Respondent No. 3. Godbole on the other hand, contended that the wages were paid by Elavia. The mere proof of the physical act of payment of wages in a case such as this, by the principal employer or the contractor, would not be conclusive of the issue. It would always be possible to structure the payments contrary to the real agreement.

78. Mr. Rele relied upon two factors which he stated were important. Firstly, he submitted that the payments had been made by the Petitioner as evidenced by the wage register. The pay register was for the period 1985. It does not appear to have been marked in evidence. I will however presume that the register was maintained.

79. However, the register has been signed only by the Petitioner's representatives. It has not even been signed by the contractor. Under Rule 59 of the Maharashtra Contract Labour (Regulation & Abolition) Rules, 1971, the muster roll and register of wages are required to be maintained by the Petitioner. Rule 59(2)(c) reads as under:

59. Muster Roll, Wages, Registers, Deduction Register and Overtime Register.

(1) ...

(2) In respect of establishments not covered under Sub-rule (1) the following provisions shall apply, namely:

(a) ...

(b) ...

(c) Signature or thumb-impression of every worker on the register of wages or wages-cum-muster roll as the case may be, shall be obtained and entries therein, shall be authenticated by the initials of the contractor or his

representative, and duly certified by the authorised representative of the principal employer as required by Rule 54;

There is no explanation why this procedure has not been followed. Had Respondent No. 3 been examined, it may well have been established that he did not consider himself being concerned with the same as the workers were, in fact, the direct employees of the Petitioner and not his.

The muster-cum-wage-register is not even on the formal letter-head of Respondent No. 3 and his name has been not written. Further, the address is c/o. the Petitioner. In the contract, the address of Respondent No. 3 is shown at Khar, Mumbai. Respondent No. 3 not having been examined, it would be unfair to give any weightage to this evidence, against the union.

80. Mr. Rele then relied upon the attendance card. Firstly, the attendance card has not been signed by the workers. More important however, is the fact that the attendance card produced by the Petitioner, pertains to the period 1986 i.e. after the disputes. I am therefore not inclined to accord to it any great weightage.

81. The result of the evidence is that the Union has proved that the workers were supervised and controlled by the Petitioner and that the Petitioner supplied the material to do the work. The Petitioner failed to explain on what basis the workers worked at its premises prior to the alleged written contract. The Petitioner failed to produce relevant evidence and witnesses inviting adverse inferences as to supervision and control, the supply of material and even payment of wages at least prior to the alleged written contract. The alleged registers and attendance card were not even signed by the contractor and the workers. The evidence for the relevant period was not produced though the same would be in the Petitioner's custody if there was a genuine contract. 82. The balance of probability therefore is strongly against the existence of a genuine contract. In the circumstances, it must be held that the said nine workers were the direct employees of the Petitioner and the alleged agreement between Respondent No. 3 and the Petitioner was a mere subterfuge.

RESPONDENT No. 4 - A. J. MENDONCA

83. Eleven workmen were stated in the complaint to have been engaged in respect of the agricultural laboratory work.

84. Exhibit "A" to the complaint indicated that the said eleven workmen had been working for the Petitioner for about two years. This was not denied in the written statement. The deposition in the examination-in-chief of the union witness Rane that he had been serving for the last one-and-half years, was in respect of the department viz. Automonoly Department of the Petitioner and not to his employment in general. In fact, in the cross- examination also, there is no suggestion that he had not been working for the period stated in the complaint. Thus, the dates furnished in the provident fund slips by the Petitioner, do not support the contention that they were engaged only thereafter. I have noted

earlier the entries in the provident fund slips having been made unilaterally by the Petitioner albeit pursuant to the judgment of this Court dated 23.6.1994, are binding only on the Petitioner and cannot be construed as admissions of the workers or the union.

85. There was considerable confusion regarding the identity of the alleged contractor in this case.

(a). The complaint referred to Respondent No. 4 viz. A.J. Mendonca. Even the allegations in the complaint are directed against A.J. Mendonca, who was Respondent No. 3 therein. It was alleged in the complaint that Respondent No. 4 gives a break to the workmen every three months; keeps them in rotation, in a state of perpetual uncertainty and informed them that on account of the formation of the union, he would voluntarily relinquish the contract from December, 1985 and dismiss all the workers and restart the contract with other workers and that Respondent No. 4 on 18.12.1985 thereafter removed some of the workmen mentioned in the annexure to the complaint since he heard about the formation of the union.

(b). In the written statement/reply to the counterclaim, neither the Petitioner nor Respondent No. 4 stated that Respondent No. 4 was not the contractor who had engaged these eleven workers. In fact, the averment in the written statement is that the workmen mentioned in the complaint are employed by the respective contractors.

(c)(i). Further, one Rahalkar filed an affidavit dated 7.2.1986 on behalf of the Petitioner in the complaint. The affidavit was filed in an application filed by the union before the Industrial Court for inspection. This application for inspection, in turn, was occasioned by reason of a letter dated 25.1.1986 addressed by the union to the company, stating that one Philip J. Almeda had filed an application in the Industrial Court stating that the workmen in the complaint were not employed by Respondent No. 4 and therefore requested the company to furnish details as to who had actually engaged the said eleven workmen. The application for inspection was the subject matter of further orders and it was apparently finally not allowed.

(ii). What is important to note however is that after all this, the said Rahalkar, in his affidavit dated 7.2.1986 not only did not clarify the position as to who the contractor was, but, in fact, proceeded on the basis that Respondent No. 4 was the contractor who had employed them. In fact the affidavit and, in particular, paragraphs 7 and 11 thereof, proceed on the basis and, in any event, gives the impression that it was Respondent No. 4 who had employed them. Nowhere in this affidavit does he state that it was actually someone else who had engaged these eleven workers mentioned in the complaint.

(d). Further still, the case put to the union witness one Narayan Rane, in cross-examination, was that the said workmen were working under Respondent No. 4 and that their wages were paid by him only. The relevant part of the evidence/

cross-examination reads as under:

I do not agree with the suggestion that we are working under Mr. Mendonca and that we are paid our wages by Mr. Mendonca only.

(e). A.J. Mendonca filed a written statement stating only that the said workers were not employed by him. He did not clarify who had employed the workers. Thus till the trial commenced all the parties proceeded on the basis that Respondent No. 4 was the contractor. This changed in the evidence.

86(i). One Dennis A. Mendonca was examined on behalf of Respondent No. 4 on 3.4.1987. In his examination-in-chief, he stated that the said eleven workers mentioned in Annexure "A" to the complaint as working for Respondent No. 4, were in fact not working with Respondent No. 4. He stated that he was working as a supervisor with Respondent No. 4, who was his father. Respondent No. 4, he stated, had been granted an engineering contract by the Petitioner, which involved the work of repairing and fitting pipelines, fabrication of plants etc., since 1981. He stated that for this contract Respondent No. 4 had engaged about three to four workers who were paid their wages by Respondent No. 4 and they had nothing to do with the Petitioner.

(ii). What is important to note is that he did not in his examination-in-chief, clarify anything further regarding the identity of the contractor who had allegedly engaged/employed the said eleven workers. This was despite the fact that if it were so he would definitely have been aware of the same, as I will now demonstrate.

(iii). In his cross-examination, Dennis Mendonca stated that he also worked as a supervisor with his father-in-law one Domnic Misquita, who was the labour contractor for agriculture with the Petitioner. The case of the Petitioner and Respondent No. 4 now, therefore, appears to be that Respondent No. 4 A.J. Mendonca had been awarded another contract by the Petitioner, with which the said eleven workers were not concerned and that the said eleven workers were in fact engaged by the said Domnic Misquita. The witness Dennis Mendonca is the son of Respondent No. 4 and the son-in-law of the said Domnic Misquita.

87. That the confusion could have been avoided by the Petitioner and Respondent No. 4, clarifying the position at the outset, is one thing. I will presume that there was no attempt on the part of the Petitioner or Respondent No. 4 to confuse the Industrial Court or the Industrial Tribunal in this regard. That, in fact, only strengthens the case of the union and the workers. It indicates that there was no genuine contract of employment between any contractor, Respondent No. 4 or Domnic Misquita, and the concerned workmen. If indeed, the concerned workmen had been engaged by any contractor and there was a genuine contract between the Petitioner and the said contractor, the same would have been clear in the records of the Petitioner and would have been disclosed. The confusion only indicates that there was no genuine contract between the Petitioner and any contractor for having the work done through the said

workmen and it is for this reason that the same was not clarified. That the work was done for the Petitioner by the said workmen is not denied. This therefore is a strong indication that the said eleven workers were employed by the Petitioner directly and not by any contractor.

88. Dennis Mendonca in his cross-examination admitted that Domnic Misquita who had allegedly employed the said workmen, never visited the Research Centre. The witness stated that he was the supervisor for Domnic Misquita although he was also working with the engineering workers. He does not state when he worked as the supervisor on behalf of Domnic Misquita. I am not inclined to accept his evidence that the workers were supervised by the contractor.

89. That it was the Petitioner and its workers who supervised the work, is in fact established by a series of documents relied upon by Mr. Singhvi and the evidence of Elavia. In his cross-examination (paragraph 20) Elavia admitted the said documents.

(A). It is necessary to refer to only a few of them. These documents were exhibited as Exhibit "U-47". These documents are addressed by the officers of the Petitioner to other officers of the Petitioner. They direct the concerned officers of the Petitioner to allow the workmen to carry out the said work. They also specify the names of the other officers of the company who had been instructed to supervise such workmen. It is expressly stated that the work of these workmen would be supervised by the officers of the Petitioner. There are over twenty such documents. As rightly pointed out by Mr. Singhvi, it is not the case of the Petitioner or Respondent No. 4 that the workers/labourers referred to in these documents, were not those referred to in the complaint.

(B)(i). Mr. Rele's only explanation was that the terms, "supervised" and "supervision" in these documents, ought not to be given importance as they merely indicate that the officers of the company would remain present. (ii). That may well be so. However, it was for the Petitioner and the concerned alleged contractor to furnish this explanation by entering the witness box or by examining the proper witnesses. Nor is there any other material on record either by way of oral evidence or documents, which supports this submission across the bar.

90. Dennis Mendonca's evidence not only does not support the Petitioner or Respondent No. 4 but in fact supports the case of the union and the workmen for more than one reason. Mr. Singhvi relied upon a part of the cross-examination of Dennis Mendonca at pages 274 and 275 of the Writ Petition. This however appears to be in respect of the other contract and not in respect of the work done by the said eleven workmen. However, paragraph 7 of the cross-examination of Dennis Mendonca is important and reads as under:

7. My father in law Mr. Miskita has no written contract with the Co. During 1985 there were 25 workers working under Mr. Miskita, Mr. Miskita has no license as a

contractor. Co. used to give me the cheque for the wages of Miskita's workers and I used to distribute their wages in the presence of the officers of the Co. I knew the permanent workers Mr. Varma and Mr. Patil working in the Agr. Deptt. where they work under the instructions of Mr. Varma and Mr. Patil.

My workers Mr. Rane and Mr. Naik are working in Microbiology I just send them to the job and Mr. Patil supervise the work they do in the Lab. It is true that Co. gave me about Rs. 30,000/-and I distributed it to our workers as the arrears of minimum wages from 1985/-It is not true to say that I have falsely stated that A.J. Mendonza and Co. and Domnic Miskita are the contractors of the Co.

91. This cross-examination establishes both supervision and payment of wages by the Petitioner.

(A). That the alleged contractor never supervised the work. In fact it was the representatives of the company who supervised the work and issued instructions to the workmen.

(B). There was admittedly no contract in writing between the Petitioner and Respondent No. 4 or even any other contractor including the said Domnic Misquita. There is nothing on record which establishes even an oral contract, much less, a genuine contract. The terms and conditions of any contract have not been established. Even the payment terms have not been established. In fact the cross-examination indicates that it was the Petitioner who made the payment through the witness, who does not say that the amount was in fact payable to the contractor. All he says is that he distributed the amounts paid by the Petitioner to the workers. He does not say that the amounts were paid as per any agreement to the contractor.

92. Respondent No. 4 did not examine himself. Even the said Domnic Misquita was not examined. Thus even the alleged contractor did not depose to the terms of any alleged agreement.

93. The Petitioner examined one Kulkarni. He stated in his examination-in-chief that he had been working with the Petitioner since 1962 and that for the past 22 years he had been the Section Manager at the Petitioner's Research Centre. He stated that he was concerned only with Respondent Nos. 4 and 9. What is important to note is that he does not depose anything regarding the said eleven workers and the said Domnic Misquita, who is supposed to be their contractor. What is even more important is that in his cross-examination, he states that he is unable to even recognise or describe Respondent No. 4 or the said Misquita. He admitted that he had never even seen them. This witness clearly supports the case of the union and the workers.

94. The union's witness Rane stated that the material required for the work done by them was supplied by the company from its stores. He further stated that the same are requisitioned by the workers and that entries in respect thereof are recorded in a requisition book. Mr. Singhvi invited my attention to some of the

requisition slips. It is important to note that these requisition slips have been signed by various persons including the store-keeper and the authorised signatory of the Petitioner. There is no cross-examination in this regard.

95. In his re-joinder before me, Mr. Rele did not meet any of these arguments advanced by Mr. Singhvi.

96. In the result, while it is clearly established that the work had been done by the said workers, for the Petitioner, there is not even an iota of evidence as to who the alleged contractor was, and the details of the relationship between the Petitioner and such alleged contractor. Further all the factors relevant to a contract of service which have been disclosed are shown to exist between the workers and the Petitioner and not between the workers and the contractor.

97. In the facts of this case, the reference to the workers as "casual workers" in Exhibit "A" to the complaint, is of little importance. No case to this effect had been put to any of the union witnesses. According to them, as pointed out by Mr. Singhvi, this was merely a nomenclature borrowed from the Petitioner. In a memorandum dated 10.6.1981, addressed by one G. Srinivasan, these workers were referred to as "casual labourer". Moreover, the application for abolition of contract labour dated 26.12.1985 and the complaint itself, clearly indicate that the mere reference to the workers as casual workers, was not an admission. In any event, the question presently under consideration is whether these workers were directly engaged by the Petitioner.

98. The union and the workmen have therefore clearly discharged the burden. The burden shifted upon the Petitioner which it failed to discharge. The petition therefore fails with regard to this contract.

RESPONDENT No. 5 - NEETA CATERERS

99. As the name of Respondent No. 5 suggests, the alleged contract was for catering services. Before dealing with the dispute on merits, I will deal with certain legal contentions raised by Mr. Singhvi. While I have decided these issues against him I have held in his favour on merits.

100. Mr. Singhvi submitted that in a statutory canteen, the employer is bound to employ only its own workers and is not permitted to engage contract workers. In the event of the employer violating this rule, the workers are deemed to be the employees of the principal employer and not the contract.

101. It is not necessary for me to decide this question in this case. Even assuming that the submission is well founded, it will not apply in the present case. The notification under Rule 75 of the Maharashtra Factories Rules, 1963 in respect of the Petitioner was issued only on 22.2.1995. At this stage, the concerned workmen were protected by virtue of the interim orders granted by the Industrial Court in the complaint and which were continued thereafter. Thus, in the event of the Court coming to the conclusion that the contract between Respondent No. 5 and the Petitioner was genuine, the concerned workers who

were there prior to the date of the notification viz. 22.2.1995, would not be entitled to protection merely by virtue of their having continued to work after the date of the notification which was only by reason of the interim order. They cannot take advantage of the same.

102. Mr. Singhvi then submitted that as there are more than 250 workers employed by the Petitioner, it was bound to provide a canteen as specified by the provisions of The Factories Act, 1948 read with the Maharashtra Factories Rules, 1963 and, in particular, Rule 79 thereof. Thus, in any event, he submitted, the canteen established by the Petitioner albeit through a contractor, must be deemed to have always been a statutory canteen. Sections 4 and 46 of The Factories Act and Rule 79(1) read as under:

4. Power to declare different departments to be separate factories or two or more factories to be a single factory

[4. Power to declare different departments to be separate factories or two or more factories to be a single factory.-The State Government may, [on its own or] on an application made in this behalf by an occupier, direct, by an order in writing, [and subject to such conditions as it may deem fit], that for all or any of the purposes of this Act, different departments or branches of a factory of the occupier specified in the application shall be treated as separate factories or that two or more factories of the occupier specified in the application shall be treated as a single factory:]

[Provided that no order under this section shall be made by the State Government on its own motion unless an opportunity of being heard is given to the occupier.]

46. Canteens.-(1) The State Government may make rules requiring that in any specified factory wherein more than two hundred and fifty workers are ordinarily employed, a canteen or canteens shall be provided and maintained by the occupier for the use of the workers.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for

(a) the date by which such canteen shall be provided;

(b) the standards in respect of construction, accommodation, furniture and other equipment of the canteen;

(c) the foodstuffs to be served therein and the charges which may be made therefor;

(d) the constitution of a managing committee for the canteen and representation of the workers in the management of the canteen;

[(dd) the items of expenditure in the running of the canteen which are not to be taken into account in fixing the cost of foodstuffs and which shall be borne by the

employer;]

(e) the delegation to the Chief Inspector, subject to such conditions as may be prescribed, of the power to make rules under Clause (c).

79. Canteens.-(1) The occupier of every factory wherein more than 250 workers are ordinarily employed and which is specified by the State Government by a notification in this behalf shall provide, in or near the factory, an adequate canteen according to the standards prescribed in the Rules. The canteen shall be available for the use of the workers, within six months from the date of such notification.

Provided that the State Government may for sufficient reasons, from time to time by an order in writing, extend the said period in respect of any specified factory.

The remaining sub-rules of Rule 79 deal with the mode of establishing the canteen and the requirements in respect thereof and are therefore not relevant while considering Mr. Singhvi's submission.

103. Mr. Singhvi submitted that even in the absence of a factory being specified, as provided in Section 46 and Rule 79, where the establishment employs more than 250 workers, it is bound to provide a canteen. In other words, according to him, even in the absence of a factory being specified, as provided in Section 46 and Rule 79, if it is an establishment in respect of which a notification could have been issued in view of Section 46, it is bound to provide and maintain a canteen and where such a canteen is in fact provided even by a factory, which is not specified u/s 46 and Rule 79, such a canteen must be deemed to be a statutory canteen.

104. I am unable to agree with these submissions. To accept these submissions would require re-writing Section 46 and Rule 79. A plain reading of Section 46 indicates that the State Government may make rules requiring that "in any specified factory" wherein more than 250 workers are ordinarily employed, a canteen shall be provided and maintained by the employer for the use of the workers. The section entitles the State Government to make such rules only in respect of factories where there are more than 250 workers. The section further expressly states that such rules may be made only in respect of "any specified factory". If Mr. Singhvi's submission is accepted, it would render the words "any specified factory" otious.

105. Faced with this, Mr. Singhvi submitted that the word "may" be read as shall the word "specified" be ignored as otherwise Section 46 would be violative of Article 14 as conferring an arbitrary power to specify or not to specify a factory.

106. Even assuming that Section 46 is violative of Article 14, it would not support Mr. Singhvi's submission regarding the interpretation thereof. A statutory provision being violative of Article 14 cannot alter its interpretation. In certain cases an interpretation that saves a provision from being violative of

Article 14, may be preferred. I do not see how that can be done in the case of Section 46. That being the case, even assuming that Section 46 is violative of Article 14, the only consequence is that if challenged, it would be set aside. In the present case, Section 46 has not been challenged.

107. Mr. Singhvi further submitted that I must read the term "specified" in Section 46 to mean any factory that employs more than 250 workers and nothing more.

108. I am unable to agree with this submission either. This submission too would render the words "any specified factory" an unnecessary surplusage, otiose. In that event, the legislature would merely have enabled the State Government to make rules regarding the provision of a canteen in any factory wherein more than 250 workers are ordinarily employed and not in any "specified factory" where more than 250 workers are ordinarily employed.

109. This becomes clearer from Rule 79 which provides: "the employer of every factory wherein more than 250 workers are ordinarily employed and which is specified by the State Government by a notification in this behalf shall provide...a canteen."

The rule leaves no room for doubt that two factors must be satisfied before a factory is bound to provide and maintain a canteen viz. that it should employ more than 250 workers and, it must be specified by the State Government by a notification. In the present case, the notification was issued only on 22.2.1995 in respect of the concerned union of the Petitioner. Thus till then at least it was not necessary for the Petitioner to provide a canteen under the said provisions.

110. Section 4 of the Factories Act is of no assistance to Mr. Singhvi. It does not pertain to canteens alone. The power conferred by Section 4 is for a variety of purposes. The power may be exercised even to enable the State Government to require a factory or factories to provide a statutory canteen. For instance, two factories run by the same organisation may have less than 250 workers each. Section 4 would enable the two factories to be considered as a single factory. In that event, if the aggregate number of workers in the two factories are 250 or more, it would entitle the State Government to issue a notification specifying the factory and requiring it to provide and maintain a canteen. This however, does not support Mr. Singhvi's submission.

111. Faced with this, Mr. Singhvi submitted that the term "specified factory" in Section 46 must be read as specified u/s 4 or a factory merely having more than 250 workers.

112. I am afraid, this is not possible. It requires a substantial re-writing of Section 46 and Rule 79, contrary to their meaning on a plain reading. There is no warrant to do so either.

113. Mr. Singhvi relied upon the judgment of a learned single Judge of the Andhra Pradesh High Court in *Ferro Alloys Corporation Ltd. v. Govt. of A.P.*

(2000) IV LLN 99. The Petitioners therein challenged the validity of a Government Order u/s 10 of CLRA Act abolishing the employment of contract labour in the canteens in all the factories and establishments in which the canteens were required to be provided and maintained under the Factories Act, 1948, with an appeal to the principal employer of such factories to absorb the canteen workers hitherto employed by the contractor on the factory rolls. It was contended on behalf of the Petitioner that its establishments were not factories notified u/s 46 of the Factories Act read with Rule 65 of the Andhra Pradesh Factories Rules, 1950. I will presume, as stated by Mr. Singhvi that these rules contained a rule similar to Rule 79 under the Maharashtra Factories Rules. It was not disputed that in the Petitioners' establishments/factories more than 250 workers were ordinarily employed. It is pertinent to note that there was no pleading in the Petition contending that the Petitioners' factories were not notified under Rule 65 of A.P. Factories Rules. This was obviously necessary as there it was the Petitioner/principal employer who had filed the Petition challenging the Government Order and the onus was therefore on it to establish its case. More important it must be noted that the Court came to a finding that the Petitioners' factories were as a matter of fact notified under Rule 65 of the A.P. Factories Rules. Mr. Singhvi relied upon the following observations in paragraph 4 of the judgment which reads as under:

At any rate, u/s 46 of the Factories Act, in establishments/factories wherein more than 250 workers are ordinary employed, a canteen or canteens shall be necessarily provided and maintained by the occupier for the use of the workers and in recognition of such a statutory requirement, if the establishments/factories maintains canteen or canteens, naturally such canteens would be those statutorily maintained u/s 46 of the Factories Act. The notification contemplated under Rule 65 of the Andhra Pradesh Factories rules is only to remind a particular factory in which more than 250 workers are employed, directing them to maintain a canteen. Therefore, issuing a notification in terms of Rule 65 would be only a directory and even in cases, where notification is not issued, it is the statutory duty of the establishments/factories to maintain a canteen or canteens in terms of Section 46 of the Factories Act. In this view of the matter, the first contention of the learned Counsel for the petitioners that petitioners' establishment/factories are not notified, therefore, the canteens maintained by them would not be statutory canteens is not acceptable.

I am with respect unable to persuade myself that the provisions of Section 46 of the Factories Act or Rule 79 are only "to remind" a particular factory to discharge its statutory duties. For the reasons stated above, I am unable to agree with these observations.

114. This brings me to a consideration on merits as to whether the said workers allegedly employed by Respondent No. 5 were actually the employees of the Petitioner and whether the alleged contract between the Petitioner and Respondent No. 5 was sham and bogus or not.

115. According to the Petitioner and Respondent No. 5, there was originally a contract between one Geeta Caterers and the Petitioner for catering in the canteen in the Petitioner's establishment till 1984. Thereafter, the contract was terminated, the workers were discharged and a fresh agreement was entered into between the Petitioner and Respondent No. 5 for catering services.

116. The Union contends that there are 13 workers who are directly employed by the Petitioner and that the alleged contract between the Petitioner and Respondent No. 5 is sham and bogus. Thirteen workers joined the Petitioner on various dates between 18.1.1982 and 11.7.1986. Three workers joined in the year 1984, two workers joined in the year 1985 and the last worker joined on 11.7.1986.

117. The Industrial Tribunal has not considered the facts relating to this contract adequately. The Industrial Tribunal has merely noted that there were more than 250 employees in the concerned unit of the Petitioner and concluded that there was therefore a need for a statutory canteen. The learned Member has not considered the provisions of law while coming to this conclusion. For the reasons I have already stated, this conclusion of law is set aside.

118. The Industrial Tribunal noted that the contract appearing at Exhibit "28(10)" is about the initial contract but that there was no contract on record for the year 1984 to 1988. The effect of the alleged initial contract is itself not considered. This was necessary. I however agree with the observation that the alleged contract dated 1.7.1988 by itself is of little importance as it was after the dispute. Moreover, the witnesses examined on behalf of the Petitioner and Respondent No. 5 had little knowledge or familiarity with the same. The Petitioner's witness, Subramaniam, in his cross-examination, admitted that he had no personal knowledge. The contract was signed on behalf of the Petitioner by one Kauli, who was not examined. In the circumstances, the Industrial Tribunal was justified in not placing importance on the contracts from 1.7.1988 onwards.

I also agree that the fact that the Petitioner provided almost all the material necessary for running the canteen, including utensils, fuel and furniture, is, in the facts of this case, and viewed with the other circumstances I will shortly refer to, an important indication in favour of the union and the workers that the contract is a mere subterfuge.

The Industrial Tribunal while coming to the conclusion that the agreement was a subterfuge, also relied upon the fact that the contractor had not led any evidence to establish the consideration paid. I agree. However, this aspect requires to be amplified, which I will do shortly.

119. One of the workers, Vasant Amin was examined on behalf of the union. He stated that he had been working continuously since the date of his appointment ; that one Chandresh Bhandari, the proprietor of Respondent No. 5 visited the company only two or three times in a month; that according to the Petitioner,

one Bhujang Bhandari was the proprietor of the earlier alleged contractor - Geeta Caterers; that Chandresh Bhandari is the son of Bhujang Bhandari and Bhujang Bhandari also worked in the canteen alongwith the workers as a waiter. He alleged that the workers were told by the said Bhujang Bhandari and the officers of the company, one S.V. Mani and Elavia that they would be discharged by the company as they had joined the union. He produced various documents viz. slips for the supply of articles from the Petitioner's stores to the canteen. These slips were signed by the Petitioner's officers authorising the supply from the stores.

120. In cross-examination this witness admitted that all the thirteen workers had signed a letter dated 16.6.1986 addressed to the contractor asking for pay in lieu of leave. The letter states that the workers would not proceed on leave and wanted only leave wages. Despite the letter, the witness maintained that it was Elavia and not the contractor who granted the leave. He stated that the letter was written at the instance of Elavia although he admitted that he had not stated so anywhere earlier.

121. This cross-examination does not establish the Petitioner's contention. Firstly, the letter dated 16.6.1986, is after the disputes started. Further, I see the force in Mr. Singhvi's submission that there is a high degree of probability that the workers would have had to sign such a letter failing which they would not have been paid as requested therein.

122. The witness deposed that one Jaya Swarna worked as a manager in the canteen who also noted down the tea supplied as well as did other work as did the rest of the workers. He did not agree with the suggestion that Swarna was appointed by the contractor. The witness also contended that the workers were employed by the Petitioner and not by the contractor.

123. Bhujang Bhandari, the father of the proprietor of Respondent No. 5 Chandresh Bhandari, was examined on behalf of Respondent No. 5. Bhujang Bhandari was the proprietor of the earlier alleged contractor - Geeta Caterers. He alleged that in June, 1984 he left the Petitioner as he had obtained another contract with Wyth Laboratories and was unable to concentrate on both the contracts. He was unable to run both the canteens. He stated that he discharged his canteen workers after settling their dues. Geeta Caterers, he stated, maintained the Petitioner's canteen during the year 1983-84. He stated that Geeta Caterers also maintained the canteen of another organization Hind Rectify. The witness stated that after August, 1984 his son Chandresh Bhandari maintained the canteen. He produced correspondence between Chandresh Bhandari, the proprietor of Respondent No. 5, which according to Mr. Rele and Mr. C.U. Singh, supported the existence of a genuine contract.

124. This correspondence was addressed by Respondent No. 5 requesting an increase in the contractual rates. By a letter dated 31.12.1985, Respondent No. 5 stated that failing an increment he would have to give up the contract for running the canteen.

125. These letters are of little assistance to the Petitioner and Respondent No. 5 as they are addressed after, or at least contemporaneously with the formation of the union and the disputes.

126. The witness's deposition regarding the consideration for the contract is of crucial importance and I will deal with it after referring to certain other aspects regarding the evidence.

127. The witness referred to the canteen committee set up by the Petitioner. The existence of the canteen committee and the constitution thereof was relied upon strongly by Mr. Singhvi. However, I am not inclined to place great weightage upon the same specially in view of the judgment of the Supreme Court in the case of Employers in relation to the Management of Reserve Bank of India Vs. Their Workmen, .

128. The witness stated that he started running the canteen as per the conditions contained in a letter dated 15.6.1982. He stated that thereafter by a letter dated 9.7.1984 he informed the company that his son Chandresh, the proprietor of Respondent No. 5 would run the canteen and that his son had also deposited a sum of Rs. 5000/- as security deposit with the Petitioner.

129. In his cross-examination, he admitted that his son Chandresh had passed his B.Sc. in 1986 and was undergoing a course in computers for which he spent an hour or two every evening. He further stated that his son Chandresh was also then pursuing a course in B.Sc. (Mathematics). He admitted that the workers who worked with him were continued in the canteen run by Respondent No. 5 after they were allegedly discharged by him. He also admitted that the canteen functions throughout the year.

130. In his cross-examination, the witness admitted that Respondent No. 5 had no register, no printed letterheads and only a rubber stamp. He admitted that the Petitioner provides free of charge the room, furniture and utensils and that the workers were staying in the canteen at night.

131. This witness, Bhujang Bhandari, examined himself again in the reference. He admitted that his son Chandresh was working in the USA and that he had given him a power of attorney to run the business of Respondent No. 5. In paragraph 7 of his cross-examination, he stated that it was true that the power of attorney was only in respect of the bank account. He further stated that his son went to the USA in 1995 and visited India only once a year for about one month each time. He also stated that his son was a software consultant and had not studied catering but added that he had experience in catering.

132. It is clear therefore that neither proprietor supervised the work of these workmen. The proprietor of Respondent No. 5 certainly did not, as for a substantial period he was not even in India. Nor is there anything to indicate that he had any control over them. The evidence does not even indicate any effective authorization by him to his father, the witness, to run the business. Indeed, it

could not be as the witness admitted in his examination-in-chief itself that he discontinued the contract with the Petitioner as he was unable to manage the contract as well as the other contract he had obtained with Wyth Laboratories. That in fact was the reason as stated by him to have discontinued his contract with the Petitioner in June, 1984.

133. However, the witness stated that one Jaya Swarna and Bhaskar Bhangera were supervisors engaged by him and Respondent No. 5. He stated that the said supervisors supervised the cooking and other activities of the workers.

134. There is considerable cross-examination of Respondent No. 5 in respect of the alleged contract for the years 2000 onwards. The evidence really is of little importance as far as the Petitioner's case is concerned, as it pertains to the period after the dispute.

135. Elavia in his examination-in-chief referred to the alleged contract with Geeta Caterers and the contract with Respondent No. 5. He produced the alleged contract Exhibit "C-28/7" dated 15.6.1982. He also produced the letter Exhibit "C-28/8" addressed by Bhujang Bhandari stating that henceforth his son, the proprietor of Respondent No. 5, would be running the canteen. He also produced a letter dated 15.6.1986 addressed by Respondent No. 5 terminating the contract. He supported the evidence of the contractor that Jaya Swarna and Sanjeeva were employed by Respondent No. 5 but described them as "sort of managers".

136. The evidence of S.V. Subramaniam pertains essentially to the question of the alleged threat to terminate the workers in view of their having joined the union as well as regarding the licences of the contractors. Neither party placed any significant reliance upon the same.

137. The Petitioner also examined one G. Balasubramaniam, the Manager - Administration of the Petitioner in respect of the contract with Respondent Nos. 5, 7 and 8. His evidence is of little, if any value in respect of any of these contracts.

138. He stated that he had examined the record of the case as regards the services pertaining to canteen, house keeping and landscaping and maintenance of gardens and indoor plants of the Petitioner. He states;

I find that contracts have been entered into from time to time with the service providers viz. M/s. Neeta caterers (respondent No. 5) M/s. Perpetual Industrial Service (respondent No. 7) and Mr. V.D. Thakre (respondent No. 8) and these contracts provided for a lump sum for the service rendered by the said service provider on a monthly basis.

Thus, it is only on the basis of the record that he states that he finds that the contracts had been entered into. He produced alongwith his deposition, three contracts pertaining to the said contracts. The contracts with Respondent Nos. 5, 7 and 8 were for the years 1982, 1983 and 1976 respectively. These contracts do

not all provide for a lump sum payment at all. In fact the evidence of the witnesses as for instance in the case of Respondent No. 5, is entirely different.

139. He also stated that he "traced out some bills submitted by the service providers from time to time" and annexed the same. He stated that he also certified some bills. He further purported to give evidence regarding the manner in which the contracts were performed. He, for instance, stated:

We have a clear understanding with the service provider that they would provide at site or a person available at short notice, to take instruction from us as regards the quality, timeliness and efficiency of services provided.

He also stated that the Petitioner had constantly followed the policy that it would not engage directly with the persons employed by these service providers or give them any instructions unless they were very emergent.

140. It is difficult to accept the evidence as having been established by this witness. He has made vague allegations even regarding the particulars of the contracts, without providing any details thereof.

141. In paragraph 9 of his examination-in-chief which was relied upon strongly by the Petitioner, he stated that for the house-keeping contract it was agreed that the entire establishment would be kept neat and clean and that it was the responsibility of Respondent No. 7 to do so with as many workers and in such manner as Respondent No. 7 desires. In paragraph 8 of his examination-in-chief he stated that all the service providers were paid a lump sum rate.

142. It is important to note certain aspects of his evidence. Firstly, he does not give any details as to what the lump sum payment was. He does not state how the contracts were entered into. For instance, if the contracts were entered into only orally, he does not furnish even the names of the persons who entered into the same. He does not give the details of the contracts regarding the provision of stalls, equipments etc.

143. Secondly, he does not state on what basis the workers were employed by the Petitioner prior to the alleged contracts produced by him.

144. Thirdly, this witness joined the Petitioner in November, 1976. Between November, 1976 and January, 1991 he was a stenographer. Between January, 1991 and prior to January 2000 he was the private secretary to a Director of the Petitioner.

145. Though he denied the suggestion that his testimony is based on knowledge acquired from January, 2000, it is important to note that he subsequently admitted that upto January, 2000 he was not directly authorised to deal with the subject matter of this dispute. He volunteered that he had "some interaction with the concerned...of this dispute". He further volunteered that he had such interaction from January, 1991 and prior to that also he had occasion to know of the activities of the service provider. There is however nothing whatsoever on

record which even remotely suggests how as a stenographer and as a private secretary he was concerned with the said contracts or derived knowledge of the details thereof.

146. His further cross-examination establishes that he had no personal knowledge. He did not appear to be familiar with the actual working of the said contract. In respect of Respondent No. 7, it is pertinent to note that he did not even know the signature of the proprietor. He admitted that when the alleged contract with Respondent No. 7 for the year 1983 was executed, he had no personal or direct knowledge about the same. He admitted that he had not even seen the proprietor, with respect to Respondent No. 7. He admitted that he had no knowledge whether the workers listed in the annexure to the agreement were not concerned with the reference.

147. He was cross-examined about the signatures on the alleged agreements. Apart from denying the suggestion, there is nothing in his evidence which establishes the same.

148. From the evidence thus far, the balance of probability indicates that the supervision was by the company and not by the contractor. The proprietor of Respondent No. 5 did not examine himself. There is nothing to indicate that he was unable to do so. This is despite the fact that he was in the USA. It is not the case of Respondent No. 5 that an application to accommodate him in any manner, was made, but was rejected by the Industrial Court or by the Industrial Tribunal. The alleged "supervisors" were not examined. I have already held that the evidence by Bhujal Bhandari indicates the absence of any control over the workers who even slept in the Petitioner's premises. These facts when considered alongwith the finding of the wages being paid only by the Petitioner, assume greater significance than when considered by themselves.

149. I will ignore for the moment Mr. Singhvi's reliance upon the fact that all the material for running the canteen was supplied by the Petitioner, as a fact by itself in support of the contention raised by the union and the workers.

150. If the contract with Geeta Caterers which preceded the alleged contract with Respondent No. 5 is proved to be genuine, I would ignore any lack of formal documentation or evidence in respect of the contract between the Petitioner and Respondent No. 5. Further, I do not find any substance in Mr. Singhvi's contention based on the mere fact that the same workers engaged by Geeta Caterers were continued by Respondent No. 5. This may have been important had there been no connection between Geeta Caterers and Respondent No. 5. However, in the present case Neeta Caterers is the proprietary concern of Chandresh, who is the son of the proprietor of the previous contractor - Geeta Caterers. It is understandable therefore that Chandresh would continue with the workers engaged by his father. There would be nothing significant about the same. In this regard, it is also pertinent to note the following observations of the Supreme Court in Hari Shankar Sharma and Others Vs. Artificial Limbs

Manufacturing Corporation and Others, :

10. ...Even if the agreement 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.

151. There is one crucial aspect which decidedly tips the scales in favour of the union and against the contract being genuine. Mr. Singhvi established in, if I may say with respect, a well analyzed argument that neither Geeta Caterers nor Respondent No. 5, Neeta Caterers were to receive any profit under the alleged contracts. I must emphasize that what is relevant is not that the contractors did not make a profit but that they were not to make a profit. The mere fact that a contractor does not make a profit, is not relevant. He may not make a profit under a genuine contract. If a contractor is not to receive a profit at all it, to say the very least, militates against the contract being genuine.

152. Paragraphs 10 and 11 of the agreement with Geeta Caterers dated 15.6.1982 read as under:

10. Current price-list and the items to be served for the staff canteen will be as in Annexure I. Any revision in this regard will be made in consultation with the Administration department and only after express agreement by the concerned manager to that effect. The quantity and measures pertaining to various items served presently have been seen by you and you have agreed to provide the same quantity, measures and weight in respect to the items specified as per annexure.

11. You shall remit as security, cash deposit with our Accounts Department a sum of Rs. 5000/- (Rupees five thousand only) which is refundable on termination of this agreement by either party.

The agreement with Geeta Caterers contained in the letter dated 15.6.1982 provides that all the equipment necessary for running the canteen would be provided by the Petitioner (paragraphs 1 and 3). Paragraph 8 of the letter provides that the staff of Respondent No. 5 will not remain in the premises beyond 7.00 p.m. That the contractor however admitted that his helpers spent the night in the Petitioner's premises is another matter.

153. According to the Petitioner and Respondent No. 5, by a letter dated 9.7.1984 addressed by Geeta Caterers and Respondent No. 5 to the Petitioner, it was stated "the name of the canteen" is changed to M/s. Neeta Caterers. It is further stated that the canteen would be run under the proprietorship of Chandresh Bhandari. As contended on behalf of the Petitioner and Respondent No. 5, this was nothing but a continuation of the earlier agreement. I will presume that to be so.

154. In his examination-in-chief, Bhujang Bhandari, stated that he started running the canteen in terms of the conditions laid down in the letter dated 15.6.1982. In paragraph 3 of his examination-in-chief, he stated as under:

3. The Co. used to supply coupons to their workers against cash payments. Those workers after taking their eatables of lunch would submit the coupons to us. At the end of the month, we deposit all such coupons with the Co. In the beginning of the month round about the 3rd week the Co. used to give us the cheque of the value of the coupons collected from workers against the coupons, when we submit the coupons collected in the canteen by the end of the month, in the 1st or 2nd week of the next month. We used to get from the co. the amount equal to the amount of coupons collected by us, and equal amount from the Co. by way of subsidy minus the amount of advance given to us earlier. All the materials required by us for running our canteen were purchased by us without any assistance or interference or supervision of the Co.

155. The effect of the alleged contract and the evidence thus far therefore is that, according to the Petitioner and Respondent No. 5, the consideration received by the contractors was the amounts received from the sales of items at the prices stated in the annexure to the agreement dated 15.6.1982 as well as a further amount equal to this sum from the company by way of subsidiary. As I will now demonstrate, these amounts merely account for the cost of the material.

156. Mr. Singhvi rightly relied upon the minutes of the meeting held on 23.11.1998 between the management of the Petitioner's Research Centre and the Hindustan Lever Research Centre Employees Union, Andheri, to demonstrate that the entire wages of the labour engaged in the canteen were paid by the Petitioner and not by the contractor.

Paragraphs 1, 2, 3(a) and 3(b) of the minutes of meeting indicate that the meeting was held in order to resolve certain disputes and for reconstituting the Canteen Management Committee and reorganising the working to ensure cost and quality control. Paragraph 3(c) is important and reads as under:

3(a) ...

(b) ...

(c) The costing jointly done by members of the Canteen Management Committee revealed that as of date of costing, the rate of subsidy borne by the Company considering only consumables was 50%. It is mutually agreed that based on the findings of the costing the said ratio of sharing cost of consumables will be frozen. Any increase in per unit cost of consumables hereafter will be divided between the employees and the Company in the same ratio. For the purpose of costing, only the cost of consumables has been considered. Consumables is defined as the cost of material/ingredients used for preparation and it excludes costs of labour, fuel, depreciation on fixed assets etc. Management shall bear the cost of all non-consumables.

157. Paragraph 10 of the agreement dated 15.6.1982 establishes that almost the entire cost of running the canteen is born by the Petitioner by providing all the facilities. Paragraph 3(c) establishes that 50% of the cost of the consumables

only is paid by the Petitioner.

158. There is nothing in the agreement or in the minutes of the meeting which remotely indicates that the contractors recovered the cost of labour from the Petitioner. Indeed, the last sentence in paragraph 3(c) expressly states that the Petitioner shall bear the cost of "all non-consumables". There is no exclusion of the cost of labour which is clearly a non-consumable component. It follows logically therefore that the cost of labour was paid entirely by the Petitioner. Thus, the agreement, the minutes of the meeting and the evidence of the Petitioner and Respondent No. 5 establish that the contractors received no profits whatsoever.

159. Neither Mr. Rele nor Mr. C.U. Singh offered any explanation for the same. Mr. Rele merely stated that that is a matter between the Petitioner and the contractors and that merely because the contractor does not make a profit, it would not indicate that the contract is sham and bogus.

160. I am unable to agree. This would be contrary to the natural conduct of such parties. There is no reason to believe or even presume that a contractor would work for a principle employer without any return whatsoever. There is nothing to suggest that there was any special or other relationship between the contractors and the Petitioner which would either establish or justify or even explain such conduct.

161. This is not a case where the contractor has sustained a loss. At the cost of repetition, what is important is that the arrangement between the Petitioner and the contractors was such that the contractors were not to receive any profit.

162. It is possible that the witness examined on behalf of Respondent No. 5 realised the above infirmity in the case. The following extract from his cross-examination is important:

6. ...

It is not correct to say that neither - myself nor my son had any concern with this Canteen and it is the canteen of the co. only. Apart from the payments mentioned in my Exam in chief we get certain amount from the Co. for wastage of eatables etc. caused by the workers. Not during my time, but during last about 8 months my son is getting about Rs. 4,500/-p.m. over and above double the amount of coupons collected by him. The D.A. and other allowances of the workers are revised every 6 months. It is not correct to say that the co. gives the said amount of Rs. 4,500/- p.m. to compensate us for the additional D.A. etc. we are required to pay to or workers. But it is true to say about Rs. 1,000/-p.m. out of the said amount goes for additional D.A. etc. to be given to our workers.

163. There is nothing on record to indicate the payment of this additional amount of Rs. 4500/-or any agreement requiring the Petitioner to do so. Further, this was not even stated in the examination-in-chief. More over, what is important is to note that the witness expressly stated that no such payment was made during

his time i.e. under the contract dated 15.6.1982. Thus, it is not even the case of Respondent No. 5 or of Geeta Caterers that any consideration other than what is stipulated in the alleged contract was paid to Geeta Caterers.

164. It is important in this regard to note another fact. As I noted earlier, the union had initially filed a complaint. The Industrial Court held against the union. The union challenged this decision by filing Writ Petition No. 2916 of 1990 in this Court. The Petition was disposed of by the order and judgment of S.H. Kapadia, J. (1994) 2 CLR, 537. In respect of the catering contract, the learned Judge held that it was either for the Petitioners or for the contractors to produce records to show that a fixed amount was payable by the Petitioner as consideration to the contractor and that wages were paid by the contractors from that fixed amount or from the income of the contractors. The learned Judge further observed that no such evidence had been produced. It is obviously to get over this observation that when the said witness Bhujang Bhandari led evidence afresh in the reference pursuant to the liberty granted by the Division Bench of this Court, he stated as under:

10. I say that I get a fixed rate for the catering services agreed to be provided for the month and this sum includes the outgoings, levies and expenses that I bear in the normal course for conducting my catering business such as professional tax, income tax, cost of material, cost of consumables, and wages of my employees, etc. The total billing varies as per the meals, etc. consumed.

165. This is contrary to his examination-in-chief and his cross-examination in the complaint, which I have referred to earlier. There is nothing which establishes this averment especially regarding Geeta Caterers. The position therefore remains the same viz. that the Petitioner and the contractor have failed to show that any profit was even to be received by the contractors. It logically follows therefore that the contractor did not pay the cost of labour. It would be stretching creditability too far to believe that a contractor who does not receive any profit, pays the cost of labour, thereby not only not making any profit but, in fact, incurring a loss.

166. It is impossible to believe that in a genuine contract, there would be no element of profit whatsoever. The fact that Respondent No. 5 and Geeta Caterers were not to receive any profits, militates against the existence of a genuine contract. This, to my mind, is an important factor which tips the scale decisively in the union's favour.

167. In the circumstances, the finding of the Industrial Tribunal that the contract with Respondent No. 5 is sham and bogus, is upheld.

RESPONDENT No. 6

168. I will deal with the case of Respondent No. 6 after dealing with the case relating to Respondent Nos. 7 to 9 as I have found this contract to be the only genuine contract.

RESPONDENT No. 7 - PERPECTUAL INDUSTRIAL SERVICES

169. The Petitioner alleges that Respondent No. 7 is the contractor engaged by it in respect of services relating to house keeping. The Industrial Tribunal has held the contract to be sham and bogus for reasons which cannot be said to be perverse or incorrect. The Industrial Tribunal held that the work was connected with that of the Petitioner. The Industrial Tribunal also considered the case of the contractor, Respondent No. 7, and the Petitioner, which I will also refer to while dealing with this contract. The Industrial Tribunal found that the tools and equipments were supplied by the Petitioner; that the alleged contracts were produced only for the period 1.9.1983 to 30.8.1985, 1.1.1988 to 31.12.2000 and 1.7.2002 to 3.12.2005. Certain discrepancies regarding the mode and manner of execution of the contract were also noted. The role of the alleged supervisor one Ganapati, was also considered.

170. Though I do not find any infirmity with the basis on which the Industrial Tribunal held against the Petitioner, it is necessary to amplify as well as supplement the same.

171. The union examined one Sidharth S. Dhotre, who is one of the fifteen workmen concerned with the alleged contract for house keeping. Some of these fifteen workmen have been working in the Petitioner's organisation for several years even before the alleged contract between Respondent No. 7 and the Petitioner. They commenced working on various dates between 29.9.1981 and 4.12.1985.

172. The said Dhotre (UW-7) stated that he has been working since 1982 at the Petitioner's Research Centre; that the Petitioner was their employer; that after the formation of the union the Petitioner claimed that they were the employees of the contractor; that he did not know the name of the contractor and had never seen him or his office. He further stated that after the union was formed, Elavia called him to the office and threatened to have him discharged if he continued with the union. He also stated that one Ganapati was one of the workers who reported to Elavia; that Ganapati was also paid his wages by the Petitioner through Elavia; that Elavia supervised their work in all respects as well as supplied articles necessary for carrying out the work. The articles were supplied from the stores for which they were given slips by Elavia, which were handed over in the stores for obtaining the same. He stated that Elavia signed their leave applications and paid their wages but admitted that they were not supplied pay-slips by the Petitioner nor given any attendance cards, though the attendance was recorded in the office by Elavia. He also deposed to the manner in which one of the workers was discharged.

173. It is necessary at this stage to refer to the relevant part of the cross-examination, which according to Mr. Rele, supports the Petitioner's case. Dhotre admitted that a voucher dated 6.4.1984 bears his signature. The same pertained to an advance having been paid to him by Respondent No. 7. He however

contended that the advance of Rs. 300/- was paid by Elavia but that he had signed voucher as per his instructions. The witness also admitted that he had signed certain other documents dated 18.2.1985 and 26.8.1986 which were leave applications addressed to Respondent No. 7. These however were after the disputes arose between the parties and are therefore not of any significant importance. The witness in cross-examination stated that as and when he wanted leave he had signed the said vouchers at the instance of the said Elavia. The documents dated 9.9.1985 and 11.9.1985 signed by the witness in token of having received uniforms, also pertain to the period after the disputes.

174. It is also pertinent to note that the witness had only studied upto the IVth standard and that the said documents are in English and the witness does not know English. I am not inclined therefore to place substantial importance or significance to the fact that the witness had signed these documents.

175. There is however one inconsistency in his evidence. On the one hand, he stated that he met Elavia before joining the job when he requested him for the job. Later, in the cross-examination, he stated that he met Elavia after he started working. I however see no reason to reject his evidence on the basis of this one inconsistency especially in view of the other evidence.

176. This brings me to the evidence on behalf of the Petitioner and the contractor.

177. Respondent No. 7 examined one Joseph A. Martin. This witness Joseph Martin, examined himself in the complaint. He thereafter examined himself again, in the reference.

178. The evidence of this witness does not support the Petitioner's case in any manner and to any extent. Nor does it affect the case of the union. Apart from anything else, the witness has no knowledge of what transpired at the relevant time and the material witness was not examined. This is clear from his own evidence. Firstly, it is important to note that he was not the contractor at the relevant time. In his examination-in-chief in the complaint and in the reference, he admitted that he is the son-in-law of one E. Alexander. He stated that he was the proprietor of Respondent No. 7 since the year 2000 and that prior thereto his father-in-law E. Alexander was the proprietor of Respondent No. 7. Between the period 1986 and till he took over as the proprietor, he stated that he was the manager of Respondent No. 7.

179. Thus, prior to 1986 this witness had nothing to do with Respondent No. 7. It is the period prior to 1986 which is most important. A substantial part of his evidence in the complaint, pertained to the manner in which he was conducting the business. That part of the evidence is of little relevance or value as it admittedly pertained to the period after the disputes.

180. He alleges that he pays the charges for washing the uniforms. But, in his cross-examination, he stated that he has no knowledge that the uniforms of his alleged workers were sent for washing along with the uniforms of other workers

of the Petitioner. Although, under Clause 7 of the alleged contract the contractor has to supply the material, he admits in his cross-examination that the material for carrying out the work is supplied by the Petitioner and that the same is evidenced in the Petitioner's registers.

181. The entire deposition of this witness is in praesenti In his examination-in-chief, in the complaint, he used the expressions "we have got 18 workers..."; "I appoint those workers without any interference from respondent No. 1 Company"; "my supervisor grants the leave asked by my workers and the company has no concern with it"; "I pay wages to my workers". He stated that he supplies uniforms to his workers. He does not produce any evidence about the uniforms having been supplied by Respondent No. 7 earlier. He did not furnish any details regarding the period prior to 1986.

182. He alleged that Respondent No. 7 had been doing the work of house-keeping since September, 1983. He referred to the alleged agreement dated 1.9.1983 and stated that the contract was renewed every year. It is pertinent to note however that in cross-examination he admitted that prior to 1986 he was in service in one of the Gulf countries. He thus has no knowledge of these facts and his evidence in this regard must be regarded as purely hear-say.

183. In his cross-examination, in the reference, he admitted that he was not even aware whether contracts had been awarded by the Petitioner to Respondent No. 7 from 1983 till date. He volunteered that from 1983 to 2000 he was not the proprietor of Respondent No. 7. The rest of his evidence is regarding his position qua Respondent No. 7 at the time of giving evidence. This is clear from the repeated reference in his examination-in-chief as to how he managed the business at that time. E. Alexander himself was not examined in the complaint. In the reference, he could not have been examined as he had, by then, expired. There is no explanation however as to why Alexander was not examined in the complaint. He was an important witness for this contract.

184. His evidence in the reference, pertains to the period after he allegedly took over as the proprietor of Respondent No. 7.

185. What is also important to note is that he does not give any evidence of the terms and conditions on which the workers were engaged prior to the date of the alleged contract entered into between his father-in-law E. Alexander and the Petitioner.

186(i). In the reference, this witness attempted to prove certain documents by purporting to identify the signature of one Ganapati. However, when confronted with a document in cross-examination in the reference, he stated that he was not familiar with the signature of the said Ganapati. He however stated that the said Ganapati was the supervisor.

(ii). Ganapati, who is stated to be a supervisor, also does the work of cleaning, himself. This supports the case of the union that Ganapati, the alleged

supervisor, was also one of the workers. He is not impleaded in the complaint because thereafter he was also admittedly employed directly by the Petitioner.

(iii). This witness has in paragraph 6 of his cross- examination in the complaint, admitted that Ganapati also did the work of cleaning.

(iv). Elavia admitted a document addressed by an officer of the company complaining that certain sinks in the laboratory were choked. The company's officer Kulkarni has made the following endorsement at the foot of the letter:

Mr. S.G. Nayak (an officer of the Petitioner) please get a drain cleaner - Ganapati or other outsider and get it cleaned.

This admission establishes the case of the union that Ganapati was also one of the workers. It is always possible that a worker can also be a supervisor qua the other workers.

Thus, the fact that Ganapati may have supervised the work of the other workers does not even establish supervision by the contractor, by any stretch of imagination.

187. The company examined Elavia and one G. Balasubramaniam. Elavia stated that the said workers were the employees of Respondent No. 7; referred to an agreement dated 1.9.1986 i.e. after the disputes between the Petitioner and Respondent No. 7; referred to a letter dated 3.3.1986 from the Petitioner to Respondent No. 7 revising the compensation, which is also after the disputes and denied that he had threatened to discharge Dhotre if he continued with the union activities. Elavia also denied that the company granted leave to the said workers or recorded their attendance. He stated that the wages were paid by the contractor. He also denied the evidence of Dhotre, that I have already referred to.

188. In his cross-examination however, Elavia denied that he was responsible for the house-keeping work. His evidence qua this contract therefore does not advance the Petitioner's case. His cross-examination on the other hand, supports the case of the union.

189. Elavia alleged that material had been supplied by Respondent No. 7 to the workers. This, however, as we have seen earlier, is incorrect. The contractor's witness Martin admitted to the contrary. He was not cross- examined on behalf of the Petitioner in this regard.

190. He admitted the execution of various documents which as in the case of other contractors, would indicate that it is the officers of the Petitioner who supervised the work of the said workers, doing the work of house-keeping as well. These are documents addressed by officers of the Petitioner to the other departments of the Petitioner, naming the persons who had been directed to supervise the work of the said workers. I have already dealt with and rejected Mr. Rele's submission that the word "supervised" in these documents must be read only to mean that the Petitioner's officers would remain present.

191. The evidence of Elavia therefore does not establish the existence of a genuine contract. In fact, his evidence supports the case of the union and the workers at least on the points of supervision and control.

192. As far as the evidence of G. Balasubramaniam is concerned, for the reasons I have furnished while dealing with the contract of Respondent No. 5, I am not inclined to accord to it any importance. The evidence of this witness is of no value to the Petitioner in respect of the concerned contractors viz. Respondent Nos. 5, 7 and 8.

193. In the result, the Petitioner failed to examine the necessary witnesses. The witnesses who had been examined, had no knowledge about the contract at least, sufficient to establish the terms and conditions and the working thereof. It failed to establish the basis on which the workers had been doing the work for the Petitioner prior to the alleged contract. The material for doing the work has been supplied by the Petitioner. The contractor who was examined, furnished no details as to the basis on which the workers had been engaged prior to his involvement with the contract. The Petitioner supervised and controlled the workers.

194. In the circumstances, it must be held that the said workers were employed directly by the Petitioner and the alleged contracts were merely a camouflage.

RESPONDENT No. 8 NANA D. THAKRE

195. There is utter confusion in this case as in the case of Respondent No. 4, as to the identity of the contractor. The complaint proceeded on the basis that Respondent No. 8, Nana D. Thakre, was the contractor, who had employed the seven workmen mentioned in Annexure 'A' to the complaint for the alleged gardening contract with the Petitioner. These seven workers were employed in the year 1967, 10.8.1976, 15.2.1978, 22.6.1981, 25.1.1982, 16.8.1984 and 14.5.1985. One of them Janabai was examined by the union.

196. The Petitioner is totally confused about the entire arrangement regarding the gardening contract. I would preface a consideration of the facts with the comment that the same strongly not only militates against the existence of a genuine contract, but in fact, supports the case of the union and the workers that the contract, if any, between any contractor and the Petitioner, was a mere camouflage. As I will demonstrate, there is, for the better part of the material period, not even a paper arrangement.

197. While considering this contract, it would be convenient to first refer to the evidence of the Petitioner's witness and the evidence of Respondent No. 8, who examined himself. The evidence of these two witnesses is wholly inconsistent, adding to the confusion. I will, as in the case of respondent No. 4, presume that this confusion was not created deliberately and that the Petitioner itself was not aware of the correct position. This fact however itself militates against the existence of a genuine contract.

198. Elavia stated in his evidence that Respondent No. 8 was the painting contractor and had nothing to do with the gardening contract, for which the said seven workers were engaged. He stated that one Vijay D. Thakre was the contractor for providing gardening service to the Petitioner's research centre. He further stated that a contract dated 12.8.1976 was entered into between Vijay D. Thakre and the Petitioner. He further stated that by a letter dated 13.3.1986 addressed to the said Vijay D. Thakre the Petitioner had increased the amount payable under the contract.

The further evidence of Elavia proceeds on the basis that throughout, it was Vjay D. Thakre, who was the contractor and that Respondent No. 8 worked as his manager and supervised the work of the said workmen. He also stated that Vijay D. Thakre provides "the equipment necessary for carrying out the work". He does not in his evidence even remotely suggests that during this entire period from 1976 onwards there was any other contractor in the place of Vijay D. Thakre.

199. This entire evidence of Elavia, is established to be incorrect. Vijay D. Thakre had expired in the year 1978. Respondent No. 8 in his examination-in-chief, stated that the said Vijay D. Thakre was his brother and that he had died in the year 1978. He further stated that thus the contract between the company and Vijay D. Thakre came to an end on account of his death in the year 1978.

200. Respondent No. 8 in his examination-in-chief alleged that between 1978 and upto 1984-85 the said contract was continued by the widow of his brother Vijay D. Thakre and that he acted as her manager. Thereafter, according to him, his son Bhaskar had taken the said contract which continued even at the time of his evidence.

201. This part of the examination-in-chief does not form even a part of the written statement filed by the Petitioner. The written statement in this case, as in the case of Respondent No. 4, proceeded on the basis that Respondent No. 8 was the contractor.

In his said affidavit, Rahalkar also did not state what is sated in the examination-in-chief of Respondent No. 8.

The wife of Vijay D. Thakre, who it is alleged, had continued the contract between 1978 and 1984 was not examined. Neither the Petitioner nor Respondent No. 8 have produced any contracts between the Petitioner and the widow of Vijay D. Thakre. Bhaskar, the son of Respondent No. 8, who it is contended, had taken the said contract subsequently, was not examined. He has not even filed any affidavit in the present case.

202. The copy of the contract relied upon by the Petitioner of 12.8.1976 was not even signed by Vijay D. Thakre. The signatory on behalf of the Petitioner, one Bhupeshwarkar, was not examined. Though he is stated to have left the company in the year 1980, there is nothing to indicate that he was not available to give evidence in the matter.

203. Surely, if there were genuine contracts between the Petitioner on the one hand and the said Vijay Thakre, the widow of Vijay D. Thakre and thereafter the son of Respondent No. 8 Bhaskar, the same would have been documented from time to time. The absence of the same indicates, at the very least, that even assuming that there was any intermediary contract or intermediary contractor, the same was merely an arrangement to detract from the fact that the said workers were actually directly employed by the Petitioner. As it is, atleast on the basis of the record, the Petitioner was not even aware of the identity of the contractor it was dealing with.

204. There is on record a contract dated 1.1.1999 (Exhibit "C-28N"). The union contends that the same is fabricated. The contract was allegedly entered into between the Petitioner and M/s. Vijay D. Thakre & Co. It is alleged to be signed by Bhaskar B. Thakre, as the proprietor of Vijay D. Thakre & Co. I do not intend considering Mr. Singhvi's submissions in this regard as it is, in any event, much after the disputes.

205. In the facts of this case, the failure to examine Bhaskar B. Thakre is of crucial importance. This entire case of the contract having been taken over first by the widow of Vijay D. Thakre and thereafter by the son of Respondent No. 8, was not even pleaded in the written statement. It was not even deposed to by the Plaintiff's witnesses Elavia and G. Balasubramanium. In fact, the Petitioner's witness G. Balasubramanium has referred to various other documents signed by the said Bhaskar Thakre on behalf of M/s. V.D. Thakre & Co. He merely identified the signature.

206. As far as the evidence of G. Balasubramanium is concerned, for the reasons I have furnished while dealing with the contract of Respondent No. 5, I am not inclined to accord to it any importance.

207. In this case too, atleast one of the workers was working with the Petitioner even prior to the contract, with Vijay D. Thakre. There is no explanation from the Petitioner as to on what basis the workers had been employed by the Petitioner. My observation in this regard with respect to the other contracts apply equally to this contract.

208. Thus, for a period of 20 years there is not a scrap of paper which indicates any contractual relationship between the Petitioner and any contractor for the said gardening work.

209. Though not by itself, but, added to the above, there is force in Mr. Singhvi's submission that even the dealings between the Petitioner and the alleged contractors, were contrary to the terms of the alleged contract dated 12.8.1976 in that whenever there was an increase in the wages as per the Government circulars, the Petitioner paid the said amount.

210. Mr. Singhvi relied upon a memo dated 6.6.2001. However, as that letter was after the disputes arose, I will not take the same into account.

211. The witness examined by the union, Janabai, had been employed by the Petitioner since the year 1967. She stated that Respondent No. 8 only visited the premises occasionally and that too, only for making payment of wages. She further stated that the Petitioner supplied all the material. She also stated that the said Elavia gave the workers directions about the work and informed them about the holidays.

212. In her cross-examination, she stated that Respondent No. 8 was paid wages and he, in turn, paid the same over to the workers. She stated that the manure was also provided by the company. This in fact, is admitted even by the company's witness G. Balasubramaniam. She denied that either Respondent No. 8 or Bhaskar supervised their work. She expressly stated that Bhaskar visited the premises only occasionally. She fairly admitted however that Respondent No. 8 and Bhaskar also gave instructions for the work in the garden, on some occasions.

213. As regards the supervision of the workers, Elavia admitted the existence of several documents. These documents are addressed by the officers of the Petitioner to the Petitioner's security, stating that the persons mentioned therein including the said workers would be working on Sundays and that the named officers of the Petitioner would be supervising them, as in the case of Respondent No. 4. Mr. Rele's submission that the word "supervision" ought not to be construed strictly and that all that was meant was that the Petitioner's officers would remain present, is rejected for reasons already stated with respect to the other contracts.

214. It is true that there are sentences in Janabai's evidence which are in favour of the Petitioner. For instance, she has stated that the work of gardening was then the contract of Vijay D. Thakare. However, considering that Vijay D. Thakre expired in the year 1978 and, considering the other facts, this by itself, does not carry the Petitioner's case further.

215. I am therefore of the opinion that the facts overwhelmingly indicate that the workers were directly employed by the Petitioner and that there was no genuine contract between the Petitioner and any other person for the supply of contract labour.

216. I am however not inclined to accept Mr. Singhvi's submission that the failure to pay minimum wages by a contractor ipso-facto renders even a contract otherwise genuine, void, u/s 23 of the Indian Contract Act.

217. Any violation of the law by the contractor, cannot have an adverse effect on the principal employer who has played no part in the same. Take for instance, a genuine contract between the principal employer and the contractor. Assuming that there is no allegation against the Petitioner for any violation of law, regarding the payment of minimum wages, and that there is also no allegation that the Petitioner facilitated the same or connived in the same with the contractor, the only consequence upon the principal employer in the event of the

contractor failing to comply with the statutory duty to pay minimum wages is that the principal employer would have to pay the same under the provisions of the CLRA Act. There is nothing under the CLRA Act or under the Indian Contract Act or under any other law, which would render a genuine contract between the principal employer and the contractor void, on account of any violation of the law by the contractor in this regard.

218. Indeed, to accept this proposition would leave the doors wide open to a fraud being committed between a contractor and the workers. If Mr. Singhvi's submissions is to be accepted, by reason thereof, the workers would become the direct employees of the principal employer. In such cases, a contractor could avoid payment of the minimum wages deliberately enabling the workers to be employed by the principal employer for no fault of the principal employer.

RESPONDENT No. 9 - PANCHAL

219. Respondent No. 8 is alleged to be a contractor for the carpentry work.

220. The tribunal has considered the evidence while coming to the conclusion that the alleged contract between Respondent No. 9 and the Petitioner was nothing but sham and bogus and with a view to deprive the workmen the benefits. I am unable to say that the conclusion is perverse and unsustainable. To say the least, it is a probable view. In the circumstances, the finding does not warrant any interference in exercise of jurisdiction under Article 226.

221. The four workers alleged by the Petitioner to be the employees of Respondent No. 8 have admittedly been working for the Petitioner from 3.9.1976, 24.10.1978, 1.4.1980 and 1.7.1980. The Petitioner however obtained the necessary registration under the CLRA Act in 1983. Respondent No. 8 had never obtained a licence under the CLRA Act. There admittedly is no written contract between the Petitioner and Respondent No. 8.

222. Elavia in his examination-in-chief merely stated that the said workers were employees of Respondent No. 9; that Respondent No. 9 paid their wages in the presence of the representatives of the Petitioner and that the payments were made on the basis of piece-rate, after the work was done.

223. It is important to note that that this witness produced at Exhibit "C-28/16" a photostat copy of the job contract dated 31.3.1986 given to Respondent No. 9 by the Petitioner. This however was after the disputes started. What is important to note is that he produced nothing which indicated that the work was allotted to Respondent No. 9 on a piece rate basis, prior thereto. This is despite the fact that Respondent No. 9 has admittedly been working with the Petitioner since the year 1972.

224. In his cross-examination, Elavia admitted various documents which indicate supervision by the Petitioner of the work carried out by the said workmen. These are a series of documents addressed by the officers of the Petitioner to various other departments of the Petitioner, stating inter-alia that the said workmen

would be working on holidays and that the persons mentioned therein who were all employees of the Petitioner, would be supervising them. As in the previous cases, Mr. Rele submitted that the term "supervising" ought not to be construed strictly and only indicated that the representatives of the Petitioner would be present when the work was being done. For the reasons stated in the earlier cases, I am not inclined to accept this submission.

225. The Petitioner also examined one Ashok H. Kulkarni, who had been in the Petitioner's employment since the year 1962. He stated that he allotted work to Respondent No. 9 by issuing work orders or work requests; that after he finished the work, Respondent No. 9 submitted, his bills which were checked by him and forwarded to the accounts department. He further stated that the rates for most of the jobs were settled but that on non-routine or completed jobs the estimates or value was made by him. He further stated that there were other contractors who did the same job and that normally, quotations were called for the job and that the lowest tenders were selected. He stated that the Petitioner supplied the raw-materials. He denied that Vijay Sawant was called to his chamber and threatened or that he had given any directions to Respondent No. 9 not to employ him as he was involved with the union activities. He stated that Respondent No. 9 brought his own equipment and that the Petitioners did not supervise the work.

226. The said Kulkarni also did not produce any documents to establish the Petitioner's case that Respondent No. 9 was awarded work on a piece-rate basis.

227. The said Vijay Sawant was examined by the union. He alleged that Kulkarni relieved him from his job after he joined the union.

It is pertinent to note that Respondent No. 9 in his cross-examination admitted that Kulkarni had called him and Vijay Sawant to his chamber and stated that as Vijay Sawant was collecting contributions for the union, he should be removed from service. There was no cross-examination in this regard on behalf of the Petitioner. There is no reason therefore to disbelieve the evidence of Vijay Sawant, which is corroborated by the cross-examination of Respondent No. 9 himself in this regard.

228. The Industrial Tribunal has also rightly relied upon the fact that one Dattu Chalkar was an employee of the Petitioner and that he had retired the previous year. The said Dattu Chalkar, it was contended by the union, did the same work as Respondent No. 9. The Petitioners denied this fact. However, the documents produced in the cross-examination of Respondent No. 9 indicate that Respondent No. 9 did the same work as the said Dattu Chalkar. The work involved, for instance, repairing tables, providing locks to cabinets and shutters, erecting plywood structure etc.

229. Added to this, is the cross-examination of Respondent No. 9, which clearly supports the case of the union and the workers. Respondent No. 9 admitted that the workers and he "do work for full time i.e. from 8.00 a.m. To 5.00 p.m.". He

further stated that the workmen were also paid double wages for over-time. He admitted that after the work was over, the representatives of the company checked it and that the said Kulkarni gave them directions about carrying out the work. In paragraph 6, he stated:

It is true to say that Babhine Castelino, S.G. Nayak and Harden do supervised the carpentry works done by himself and my carpenters.

(The word "not" at page 242 of the Writ Petition was corrected by both the parties by substituting it with the word "true" after comparing it with the original. I have therefore proceeded on that basis).

230. He also admitted that the Petitioner paid him Rs. 70/-per day and the other workers Rs. 50/-per day. The details were prepared by one Castelino, an officer of the Petitioner.

231. There is no evidence to show that Respondent No. 9 worked for any other party. In fact, he stated that from 1979 the work was going on for the company continuously. As a matter of fact, it was from 1972.

232. If indeed, there was a genuine contract between the Petitioner and Respondent No. 9 on the basis alleged by them, there would have been some documentation to establish the same. There is none. Considering the same, and considering the above factors, which indicate a contract of service between the Petitioner and the concerned workmen, I am of the view that the balance of probability is in favour of the union and the workmen.

233. Mr. Rele relied upon a muster-roll, wage register. He submitted that it contained entries from January, 1985 to December, 1985 in respect of each of the workers and the payments made to them as well as their signatures and stamp.

234. However, as rightly pointed out by Mr. Singhvi, the same is not relevant in the facts and circumstances of the present case. The muster-roll pertains to be of January, 1985. In fact, the entries therein were clearly not made during that period but subsequently. Normally, the amounts paid would be entered under the column "Net wages paid". However, in this document, the amounts entered are the sum of the amounts under two other columns "Leave with wages" and "Date of payment of wages". The column "Leave with wages" is further divided into two columns viz. "Previous Balance Accumulated" and "further enjoyed and/or refused". It appears that the reason why these columns were used is that the minimum wages were not being paid. The Government Labour Officer and M.N. Inspector, by a letter dated 14.1.1986 addressed to the contractor, stated so and called upon the contractor to pay the difference in arrears of wages.

Thus, under the column "Leave with wages", in pencil, is the word "difference". It was therefore obviously prepared later i.e. after 14.1.1986. The contractor allegedly reported compliance thereafter by his letter dated 21.5.1986 stating that the arrears from January to December, 1985 had been paid to four persons.

Thus, this document does not by itself, clarify that during the relevant time and prior to the disputes, the original amounts were in fact paid by the contractor.

235. Mr. Rele also relied upon the attendance-cardcum-wage-slips. These however are of the year 1986 i.e. after the disputes arose.

236. It is significant that the muster-roll-cum-wage register and the attendance-card-cum-wage-slips maintained under Rule 27(1) and 27(2) of the Maharashtra Contract Labour Rules, for the period prior to 1985, were not produced by Respondent No. 9. The Petitioner has thus failed to produce the relevant evidence which is in its custody.

237. I see no reason therefore to discard Sawant's evidence on behalf of the union and the said workers. Am therefore of the view that the alleged contract between Respondent No. 9 and the Petitioner is sham and bogus and that the said workers are the Petitioner's employees.

RESPONDENT No. 6 - EXPERT SERVICES BUREAU PVT. LTD.

238. The Petitioner had entered into a contract with Respondent No. 6 Expert Services Bureau Pvt. Ltd., to provide security services to it. According to the union, the fifteen workers mentioned in Exhibit "A" to the plaint were engaged to provide services, not by Respondent No. 6, but by the Petitioner directly.

239. The union examined one Harikant J. Mishra, who stated that he had been working for six years as a security guard at the Petitioner's Research Centre; that his job was continued; that there were twenty security guards who had been working for various periods ranging from 8 to 12 years with the Petitioner. He stated that Elavia and Phartare, the employees of the Petitioner supervised their work, paid their wages, granted them leave and supplied articles such as torches, cells, umbrellas and gumboots.

240. The witness further deposed that the said Elavia and Phartare trained them in fire fighting. This part of the evidence, which is obviously important, is totally unsubstantiated and if, I may add, unreliable, as far as Elavia is concerned. The deposition is merely to support the case of these workers. There is nothing that establishes that Elavia had any training in fire fighting himself. No details of the alleged training have been furnished. If the allegation was correct, it was an important factor in favour of the workers. As such, it is not established.

241. He also stated that the officers of the Petitioner threatened the workers to resign from the union failing which they would be discharged from their work. In his examination-in-chief, the witness refers to the amounts received by the workers before and after the formation of the union and to the employment by the Petitioner of security guards at other locations. There is no sequitur to the same in favour of the workers or the union.

242. The examination-in-chief of this witness far from discharges the initial burden which is on the workmen to establish a contract of service with the

Petitioner. As I have indicated earlier, in respect of a material particular, the evidence is unreliable. There is nothing which even remotely suggests that it was the Petitioner's officers/employees who supervised the work of the security guards. Nor is there anything which indicates that it is the Petitioner who paid their wages.

243. Thus, the union and the workers had failed to establish the case.

244. The cross-examination of this witness effectively destroyed the case of the union and the workers specially when considered with the other evidence adduced by the Petitioner in respect of this contract, which I will refer to later.

245. In the cross-examination, this witness admitted that he worked with two organisation viz. Hickson Dadaji & Sons and Synthofine in Mumbai for about four months and about one year respectively. He however denied the case put to him that these organisations also engaged Respondent No. 6 to provide security guards and that he had been sent to these organisations through Respondent No. 6. Respondent No. 6 in fact supplied security guards to several other organisations as well.

246. Considering the overall nature of this witnesses' evidence, I am not inclined to place any reliance upon the denial to the above suggestion.

247. In his cross-examination, the witness admitted that the workers were working under the supervision of the said Pathare, who was a security officer. He however denied the suggestion that Pathare was from Respondent No. 6 and was being paid by Respondent No. 6. He also denied that they received their wages from Pathare.

248. Considering the facts of this case, I am inclined to place considerable reliance upon the admission in paragraph 3(m) of the complaint filed by the union:

The supervisor of Respondent No. 4 (i.e. Respondent No. 6 in this petition) Mr. Padtare....

249. Thus, it is admitted by the union that Pathare was their supervisor. That he was the supervisor is admitted even in cross-examination. The witness only denied that Pathare was an employee of Respondent No. 6. The union however produced no evidence to establish that Pathare was the employee of the Petitioner. Thus, the union and the workers have failed to establish that the supervision over them was by the Petitioner. In fact, the evidence indicates quite clearly that they were supervised by Respondent No. 6.

250. The witness was cross-examined regarding the supply of articles for their work. He denied that the same had been provided by Respondent No. 6 and maintained, that they were provided by the Petitioner.

251. Elavia, in his examination-in-chief, stated that Respondent No. 6 had been rendering security service to the Petitioner for more than twenty years. He stated

that since 6.7.1986 their services had been terminated. He stated that the fifteen employees mentioned in Exhibit "A", were not employed by the Petitioner but were employed by Respondent No. 6. He produced a copy of an agreement dated 15.10.1971 between the Petitioner and Respondent No. 6 as well as the letter of termination dated 4.7.1986. The letter of termination expressly stated that the agreement dated 15.10.1971 which was initially for a period of three years, had been renewed from time to time. After 6.7.1986 the Petitioner engaged another contractor M/s. Security and Personal Services Pvt. Ltd. He stated that the said workers were not supervised by the Petitioner.

252. As regards supervision, I have already observed that the evidence produced by the union itself, cannot be accepted. I am inclined to accept Elavia's evidence that there was one security officer and three assistant security officers for supervising the work of the security guards. The said security officers and assistant security officers were employed by Respondent No. 6.

253. It is important to note in this regard that even the union witness viz. Mishra, in his cross-examination, agreed that there were one security officer and three assistant security officers and that in each shift there was one assistant security officer who used to attend and that the security officer was in overall charge of supervision. Thus, Elavia's evidence in this regard must be accepted. What is important is that there is nothing which indicates that either the security officer or the assistant security officers had been engaged by the Petitioner. The union had not even called for any documents which would indicate the same.

254. Reverting to the agreement dated 15.1.1971, it must be stated that the same on a plain reading, does not indicate anything unusual. It does not contain anything which would indicate that it is sham or bogus.

255. Indeed, Mr. Singhvi admitted that the agreement may well have started out as a genuine contract between the Petitioner and Respondent No. 6. He however suggested that in the course of time the workers became the employees of the Petitioner. He based this on the fact that after this agreement no other agreement had been produced.

256. I am not inclined to agree. There is nothing on record which indicates that the workers who were initially appointed under a genuine contract between the Petitioner and Respondent No. 6, were subsequently employed by the Petitioner. No particulars in this regard were furnished. I am not inclined to accept the case of the union merely on surmise and conjuncture.

257. The letter terminating the agreement with Respondent No. 6 states that the letter dated 15.1.1971 had been renewed from time to time. There is no reason to disbelieve the same. In these circumstances, the fact that Respondent No. 6 did not give any evidence cannot be held against the Petitioner.

258. That the contract was renewed from time to time and was terminated is established by another fact. The Petitioner produced documents including the

certificate of registration inter-alia in respect of Respondent No. 6. For instance, a certificate of registration dated 11.8.1975 was renewed even in 1983 inter-alia in respect of Respondent No. 6. This itself supports strongly the Petitioner's case that the contract dated 15.10.1971 was renewed from time to time. The registration certificate dated 3.12.1986 on the other hand, does not contain the name of Respondent No. 6. Thus, the continuity and termination in respect of the contract is clearly established.

259. Mr. Rele also rightly placed emphasis on the fact that Respondent No. 6 had entered into contracts with over forty companies apart from the Petitioner.

260. Mr. Singhvi however relied upon paragraphs 6 and 14 of the judgment of this Court in *Hindustan Lever Ltd. v. Hindustan Lever Employees Union and Anr.* (2001) 1 CLR, 387.

261. This judgment was confirmed in Appeal No. 174 of 2001. The judgment is of no assistance in this regard. Merely because a contract may have been held to be sham in one case, it does not follow that all the contracts are sham and bogus. Moreover, in that case, it was observed in paragraph 6 that the company had not produced a copy of the agreement. In the present case, it has.

262. Mr. Singhvi relied upon Elavia's cross-examination, to indicate that Elavia did not have any knowledge regarding this contract and was not competent to depose to the same. Even assuming that this submission is well founded, it in fact, militates against the evidence of the union witness, who alleged that Elavia supervised their work and trained them in fire fighting as well as paid their wages and granted them leave. On the basis of this submission itself, the evidence of the union witness, must be discarded.

263. Mr. Singhvi stated that the letter of termination had not been proved. The copy merely states that the same had been received. I see no reason to disbelieve the fact that the contract was terminated. There is no evidence to suggest that Respondent No. 6 continued after 4.7.1986.

264. The company examined one Srinivasan Ganapathy, who stated that the contract with Respondent No. 6 had been terminated as the company had found the services to be unsatisfactory for about a year prior to the termination. The evidence is supported by the above facts.

265. The Industrial Tribunal was impressed by the fact that in his cross-examination Elavia admitted that the Petitioner supplied torches and battery cells. The supply of such material by itself, though not required under the contract, is not sufficient to establish a contract of service between the Petitioner and the workers. There would be nothing unusual in supplying such small items by the Petitioner even if it was not required to do so.

266. The Industrial Tribunal also observed that subsequent contract with Security and Personal Services Pvt. Ltd. was not produced and that there was no reason as to why a long standing contract with Respondent No. 6 came to be terminate.

267. With respect, I am unable to see the relevance of these factors to the question that falls for consideration. Even if the Petitioner terminated the agreement with Respondent No. 6, without a valid reason, it could not establish the case of the union. The Industrial Tribunal has in this regard placed reliance upon entirely irrelevant facts.

268. In the circumstances, the award as regards Respondent No. 6, is set aside.

ORDER

269. In the circumstances, the Writ Petition No. 1740 of 2005 is made absolute in terms of prayer (a) only in respect of the workers engaged by Respondent No. 6. The Writ Petition as regards the workers pertaining to Respondent Nos. 3, 4, 5, 7, 8 and 9 is dismissed. Writ Petition Nos. 1777 of 2005 and 1778 of 2005 are dismissed. There shall be no order as to costs.

270. All the parties have requested for a stay of the order to enable them to challenge the same. Considering the questions that arise in this petition both of law and of fact, the request is justified. The operation of this order is stayed till 30.9.2009 and the orders presently in force, shall continue till then.