

(2010) 03 BOM CK 0187

In the Bombay High Court

Case No : Writ Petition No. 4814 of 2009

The General Manager (P and A) Hindustan Petroleum
Corporation Ltd.

APPELLANT

Vs

The General Secretary, General Employees Association, List
of Workmen (1-16) and Shri. A.A. Lad, Presiding Officer,
(CGIT) No. 2

RESPONDENT

Date of Decision : 04-03-2010

Acts Referred:

Constitution of India, 1950 — Article 12, 226
Contract Labour (Regulation and Abolition) Act, 1970 — Section 10, 10(1)
Industrial Disputes Act, 1947 — Section 10(1), 2

Citation : (2010) 2 BomCR 877 : (2010) 112 BOMLR 1379 : (2010) 4 LLJ 865

Hon'ble Judges : V.K. Tahilramani, J

Bench : Single Bench

Advocate : J.P. Cama assisted with M.D. Siodia, instructed by Rustamji and
Ginwala, for the Appellant; R.J. Todankar for Respondent No. 1, R.D. Bhat and
G.S. Bhaj, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Tahilramani, J.—Heard the learned Counsel for the Petitioner and Respondent Nos. 1 and 2. None appears for Respondent No. 3 though served.

2. Respondent No. 1 - Union filed Writ Petition No. 767 of 2007 in this Court for regularization of the service of 37 contract workmen. The Court disposed of the said Petition with an order directing the appropriate government to refer the matter to the Central Tribunal for adjudication. The Tribunal passed an award directing the Petitioners to treat the said contract employees as their permanent workmen. Hence, this Petition.

3. The Petitioner is engaged in Refining activities of crude oil and marketing of the Petroleum Products and runs its own Refinery and various Plants/Terminals including administrative offices at various places. Besides permanent employees,

the Petitioners have also employed contract workers in various processes, jobs and works including the job of housekeeping and valve operators.

4. This matter pertains to 37 persons who are engaged in the work of sweeping, cleaning and dusting of the buildings and plant in the Refinery which is owned and occupied by the Petitioners or they have been working there as valve operators and helpers for 15 to 20 years.

5. The workmen involved in this petition are employed on contract basis by the Petitioners - Management through various contractors and they have been working there for more than 15 to 20 years continuously.

6. The Government of India issued a notification dated 9th December, 1976 u/s 10 of the Contract Labour (Abolition & Regulation) Act, 1970, thereby prohibiting the employment on Contract basis in the process of cleaning, sweeping, dusting etc. of the building owned and occupied by the establishment for which the appropriate Government is the Central Government. It is not in dispute that, the present workmen are working in the premises owned and occupied by the Petitioners and the appropriate Government in respect of the Petitioners is the Central Government.

7. According to the Respondents - Unions the Notification dated 9.12.1976 was applicable to the Petitioners and it ought not to have employed contract labour for attending the job of sweeping, cleaning, dusting and valve operating.

8. Thereafter, another Notification dated 30th January, 1996 came to be issued prohibiting the employment of Contract Labour in the works mentioned in Schedule annexed thereto with effect from 1st March, 1996. The Respondent - Union submitted that, the employment of contract labour for the job of housekeeping, valve operators and helpers is prohibited under the said Notification dated 30th January, 1996 and that, both the Notifications dated 9th December, 1976 and 30th January, 1996 are applicable to the 37 workers.

9. The Respondent Union contended that the jobs which these workmen perform and attend to is squarely covered under the said notifications and therefore the Petitioner is not supposed to employ contract labour in their establishment for the work of sweeping, cleaning, maintenance, i.e. housekeeping and valve maintenance. The work carried out at said Refinery is of permanent and perennial nature. Services of the concerned workmen are very much required by the the Management to run their Refinery therefore the workers involved in the reference be regularized. The case of the Unions is that by virtue of the said Notifications workmen involved in the Reference became the regular and direct employees of the Petitioners and they are entitled to get the status of the regular workers with all consequential benefits and privileges.

10. Pursuant to the Notification dated 30th January, 1996 issued by the Union Government u/s 10(1) of the Industrial Disputes Act, 1947 the Union filed Writ Petition No. 367 of 1996 in High Court on behalf of many contract workers

working in the establishment of the Petitioner and who were covered by the said Notification dated 30th January, 1996 for a declaration that, the said workmen were the regular employees of the Petitioner.

11. The Learned Single Judge of this Court vide order dated 10th July, 1996 directed the Petitioners to abolish the contract labour system in respect of the jobs covered by the said Notification dated 9th December, 1976 and 30th January, 1996 and absorb the said workers in their employment.

12. The learned Counsel for the Respondents - Unions submitted that, inadvertently the names of the 37 workers involved in the present case remained to be included in the Exhibit "A" to Writ Petition No. 367 of 1996 and as they have been working continuously with the Petitioners for more than 15-20 years without any break, they should also be absorbed.

13. The case of the Respondents - Unions is that the work is perennial in nature and the Petitioner has its own direct and regular employees who do the same and similar nature of work as that done by the present workers. However, these workers are paid less wages than the wages paid to the direct workers doing similar nature of work. These workmen are entitled to get same or similar wages and service conditions as paid to direct workers. However, the concerned workmen are subjected to exploitation by giving them service conditions which are inferior to the service conditions of the direct workmen of the Petitioner and their rights and benefits to which they are entitled under various social and labour welfare legislation have been denied. The Petitioners are in the habit of changing the contractors periodically without disturbing the workers. The said procedure was adopted by the Petitioners in order to ensure that these workers should not claim regularization. It is further their case that the work of these workmen is supervised, controlled and administered by the Petitioners - Management and therefore in all respects the workmen involved in the reference are the employees of the Petitioners. The contractors used by the Petitioner are the dummy and sham Contractors and these contractors have no role to play at all. The contract between the Petitioner and the so called contractors are sham and bogus and those are a mere camouflage to deprive the concerned employees of the benefits available to permanent workmen in the same category of the Petitioner - Management. The only object of employing these workers on contract basis is to deny them their legitimate salary and other benefits as are being paid to regular employees of the Petitioners though the concerned workmen are serving with the Petitioner for a large number of years. It is the case of the Unions that on lifting the veil and looking at the conspectus of factors governing employment, the real employer of the workmen concerning the present dispute is the Petitioner.

14. Thus, by the Union, it was prayed that the workmen involved in the reference are entitled to be declared as permanent workmen of the Petitioners - Management right from the date of their joining service and they are entitled to the wages and consequential benefits attached to the posts of permanent

workmen employed in the same category employed by the Petitioners. As stated earlier, the Tribunal passed an award in favour of the workers.

15. Mr. Cama, the learned Counsel for the Petitioner-Management claims that these employees were not engaged by them but they were engaged by the respective contractors who are licenced contractors under the provisions of Contract Labour (Regulation & Abolition) Act, 1970 and the choice of persons recruited is at the discretion of the contractors and the employer herein had no say or any supervision or control on the employees employed by the contractors. The contractors have been engaged for specific jobs and the Petitioner has no say in the choice of persons engaged by the contractor and it is entirely the decision of the contractor.

16. Mr. Cama contended that, in the performance of its functions, the refinery has to engage apart from regular workmen, a number of contractors for specific jobs and accordingly certain number of contractors are always engaged for certain projects and other jobs which are not performed by the regular workmen. He denied that the jobs done by these workmen are perennial in nature. He submitted that all regular jobs are carried out by its regular workmen. He further submitted that the required manpower is around 550 workmen only as per national and international standards, however against such norm, the Refinery at Mumbai engages around 1770 employees with surplus of manpower. One of the causative factor of surplus manpower in any public sector undertaking are the number of project affected persons and the undertaking given by the Government while acquiring the property for the purpose of putting up its industry. He submitted that the petitioner is obliged to award certain job contracts to the contractors through tender system for execution of project jobs such as housekeeping, horticulture, grass cutting, repair and cleaning of drainage, repair and cleaning of roads, maintenance of flower plants, loading and transportation of crude from refinery, construction of building, repairing of compound walls, roads, pavements etc.

17. It is submitted that since the area occupied by the Refinery is about 350 acres of land it becomes necessary to engage contractors for performance of jobs not connected with the regular and continuous work in the refinery. The activities of the petitioner are so spread out and enormous that it becomes necessary to entrust certain jobs which have no nexus with the manufacturing activities and to give those jobs on contract so that the petitioner is only concerned about the end achievement of the jobs entrusted to the Contractors and do not have to monitor jobs thus diverting their attention from the manufacturing activities.

18. The learned Counsel for the petitioner contended that, the contractors engaged by it are not dubious contractors. The contractor has to obtain necessary licence as required under the provisions of the Contract Labour (Regulation & Abolition) Act, 1970. The petitioners for non-perennial/core job floated tender enquiries for contracts to carry out the same. After scrutinizing the tender enquiries, as per the purchase procedure the petitioners placed purchase

order on the contract to the lowest bidder on a year to year contract basis. The Contractors who are having valid Labour Licence as per Contract Labour (Regulation & Abolition) Act, 1970 are authorized through Annual Purchase Orders to carry out the jobs entrusted to them. The contractor is paid a lump sum amount and he has to bring his workman and his tools and equipments. He brings number of workers as the work demands and the workers work under his supervision and control.

19. It is contended that, the concerned workmen are not regular workmen, the Petitioner has no relationship of master and servant with the workers. The concerned workmen were not employed by it directly for wages or otherwise but they were engaged by their respective Contractors who are licenced contractors under the provisions of the Contract Labour (Regulation & Abolition) Act, 1970. The petitioner invites public tenders to carry out its certain time bound project jobs as per its contracts and purchase procedure. The eligible licenced contractors apply as per terms and conditions specified in the job schedule and submit their applications for open bidding and as per Contract Committee's recommendations, the job is awarded to the lowest bidding party to carry out the specified jobs. Mr. Cama submitted that the number and choice of the workmen to be engaged is entirely the discretion and decision of the contractors. The Petitioner has no say in the matter. The supervision or control on the contract workmen employed by the contractor is totally that of the contractor. The petitioner neither control nor supervise the contractor's workmen. The service conditions, fixation of pay scales, dearness allowance, conveyance, washing allowance, leave etc. are the terms and conditions of employment between the contractors and their workmen. The petitioner is not concerned with the same.

20. It is submitted that the petitioner has not engaged the services of any of these workmen. The workers are employed by the Contractor and they have not been engaged by the Contractor on the advice or direction of the petitioner. In fact the petitioner entrusted the job contracts to the Contractors and the petitioner has no say in the selection and recruitment of the persons employed by the Contractor. and it is left to the discretion and judgment of the Contractor to chose the person whom he wants to recruit.

21. Mr. Cama submitted that the petitioner does not intervene with the contract workmen in any supervisory capacity and the concerned workers are not directly reporting to the petitioner nor engaged by it. The contractors have to pay the workers engaged by them directly and the Contractors are not obliged to pay the same wages and benefits payable to direct workers . Mr. Cama, submitted that however, the Petitioner being the principal employer, the employer monitors the contractors to see that, the workmen engaged by the Contractor were not paid less than prescribed minimum wages and other statutory benefits. The Petitioner is disabled from recruiting any employee whoever applies for a job. The petitioner has to follow recruitment rules, reservation policy etc. in selection of any employee. It is stated that, it is possible that, these workmen have been

working continuously with the respective Contractors but that is the discretion of the Contractor and it has nothing to do with the Petitioner.

22. It is further submitted that, the Petitioner has its own direct and regular employees who are designated to carry out the work entrusted to them and the work performed by the regular employees is in no way connected with the work performed by the Contractors' employees nor the Contractors' employees were engaged to supplement the work of the direct employees nor the work performed by the contractors employees overlap with the work of the regular employees. The regular employees and the Contractors' employees do not perform the work together complementing each other. He contended that the jobs are not perennial in nature. As far as the long period of employment is concerned, he submitted that the workers are continuing only because of status quo order passed by the Court.

23. It is submitted by Mr. Cama that, it is incorrect to allege that, the Petitioner at any time supervise or control the services of the employees engaged by the Contractor as the Petitioner is only interested in seeing that the job entrusted to the Contractor is fulfilled by the Contractor in time as required by the principal employer. It is denied that, the Contractor engaged by the Petitioner - Employer has been sham or dummy Contractor as alleged or at all. Lastly, Mr. Cama contended that the workmen who are involved in the present petition not being the direct employees nor belonging to temporary, casual or badli categories they are not entitled for permanency and regularization of their employment with the petitioner.

24. The learned Counsel for the petitioner submitted that the Notification dated 09.12.1976 of the Government of India, relied upon by the Respondents has been struck down and hence it is not applicable to the petitioner. In support of his contention that the notification dated 9th December, 1976 has been quashed, Mr. Cama placed reliance on the decision in case of Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc. etc., .

Mr. Cama further submitted that the Contract Labour (Regulation and Abolition) Act, 1970 does not imply the concept of automatic absorption of the contract labour by the principal employer on issuance of abolition notification. Thus, he submitted that if the contract labour is engaged in connection with the work entrusted to the contract labour by the principal employer, it does not culminate in any master servant relationship between the principal employer and the contract labour.

25. Mr. Cama submitted that so far as the direct labour is concerned, it is now governed by the decision of Constitution Bench of the Supreme Court in the matter of Steel Authority of India Ltd. and Ors. (Supra) and hence, all proceedings will have to be dealt with only in accordance with the directions laid down in the said judgment. Claiming employment by back door entry with the

Petitioner is against the rules, procedures and policy. The Petitioner being a Public Sector Corporation is bound to follow the rules and policy in its recruitment.

26. Mr. Cama submitted that in SAIL (supra) the Apex Court has held that, unless the Appropriate Government abolishes the contract labour u/s 10 of Contract Labour (Regulation & Abolition) Act, the workman engaged by contractor cannot seek reference to the Tribunal for adjudication. He submitted that, in the instant case the contract labour has not been abolished u/s 10 of the Contract Labour (Regulation & Abolition) Act, and direct reference made by the Central Government to the Tribunal is wholly erroneous and is opposed to the law laid down in SAIL. Hence, the Reference ought to have been rejected.

27. Mr. Cama, stated that the Petitioner is a Government Company. He submitted that when the Respondents have not been appointed by following necessary procedure i.e they were appointed without any advertisement being issued, interview being conducted etc., in such cases, the Respondents cannot claim regularization merely on the ground that they had been working for a long time. In support of this contention, he placed reliance on the decision in case of National Fertilizers Ltd. and Others Vs. Somvir Singh, .

28. Mr. Cama, also placed reliance on the decision in the case of A. Umarani v. Registrar, Co-operative Societies and Ors. 2004 III CLR 85 in support of his contention that when the appointment is made in deviation of the procedure laid down in the Statutory Rules, such appointees cannot claim regularization. The appointment made in violation of the mandatory provisions of the statute and other essential qualifications would be wholly illegal and this illegality cannot be cured by taking recourse to regularization. In support of his contention that the employees who have been employed dehors the procedure cannot claim any right, reliance was placed on the decision in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, .

In Umadevi's case, the Court was not concerned with the provisions of the Contract Labour (Regulation and Abolition) Act and the power of the industrial adjudicator to grant appropriate relief in a reference under the Industrial Dispute Act in such cases. The case does not even deal with the judgment in the Steel Authority of India's case. Both the decisions operate in different fields. So also in Umarani and National Fertilizers Ltd (Supra), the facts were different, hence, they would not be applicable.

29. Mr. Cama, submitted that of late a trend amongst the contract labourers is discernible that after having worked for some years, they make a claim that they should be absorbed by the principal employer and be treated as the employees of the principal employer especially when the principal employer is the central government or the State Government or an authority which can be held to be State within the meaning of Article 12 of the Constitution, although no right flows from the provisions of the Act for the contract labours to be absorbed or to

become the employees of the principal employer. The act has provided for its abolition by the Central Government in appropriate cases u/s 10 of the Act. He further submitted that neither the Act nor the Rules framed by the central government or by any appropriate government provide that upon abolition of the contract labour, the labourers would be directly absorbed by the principal employer. In support of this contention, he placed reliance on R.K. Panda and Others Vs. Steel Authority of India and Others, .However, in the very next para of this judgment, it is observed that whether the contract labourers have become the employees of the principal employer in course of time and whether the engagement and employment of labourers through a contractor is a mere camouflage and a smokescreen, is a question of fact and has to be established by the contract labourers on the basis of the requisite material. Hence, it would be necessary to advert to the evidence which I shall do shortly.

30. Mr. Cama submitted that "Control" is no longer the sole test though it does remain a factor and perhaps, in some cases, a decisive one. According to him, the factors which are usually of importance are as follows - the power to select and dismiss, the direct payment of some form of remuneration, deduction of pay, the supply of tools and materials (though there can still be a labour -only sub-contract) and he placed reliance on the decision in case of Workmen of Nilgiri Co-op Marketing Society Ltd v. State of Tamilnadu 2004 LS(SC) 142 wherein it is observed as under:

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

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

Mr. Cama also relied on this decision in support of his contention that the burden that there was existence of relationship of employer and employee would be on the Respondents and not on the Petitioner. He submitted that the Industrial Court has wrongly put the onus on the Management whereas it ought to have been placed on the Unions.

31. Mr. Cama, further submitted that multi prong approach has to be taken while deciding whether the master employee relationship exists and to find out whether the contract is genuine or a sham contract. In support of this contention, he placed reliance on Ram Singh and Others Vs. Union Territory,

Chandigarh and Others, . He submitted that the factors to be considered inter alia are (i) "control", (ii) "integration" i.e. whether the employee has been fully integrated in the employer's concern or is independent of it, (iii) power of appointment and dismissal, (iv) liability to pay remuneration and deduct insurance contributions, (v) liability to organize the work and supply tools be determined on the basis of the features of the relationship, the written terms of employment, if any, and the actual nature of the employment. He submitted that the actual nature of relationship concerning a particular employment being essentially a question of fact, it has to be raised and proved before an industrial adjudicator.

32. Lastly, Mr. Cama submitted that the allegations of the Respondents that the Petitioner's contractors were sham and dummy contractors cannot be considered by the High Court in Writ Jurisdiction under Article 226 of the Constitution of India and the appropriate forum would be the Industrial Tribunal. In support of his contention, he placed reliance on the decision in case of *Rashtriya Chemical and Fertilizers Ltd. and Another Vs. General Employees Association and Others*,

However, in the present case, the High Court by order dated 5th April, 2002 in Writ Petition No. 767 of 2001 directed the appropriate government i.e the central government to make a reference to the Industrial Tribunal on two demands i.e whether the contract between the petitioner and the existing contractor is sham and bogus one and to deprive the concerned employees of the benefits available to the permanent workmen of the Petitioner - HPCL and whether the workmen employed by the HPCL through the contractor should be declared as permanent workmen of HPCL?. Thereafter, Reference No. CJIT 2/48 of 2002 came to be made before the Central Government Industrial Tribunal II, Bombay. After evidence was led, the award came to be passed and it is this award which has been challenged before this Court. Thus, I find no merit in this submission.

33. The learned Counsel for the Respondents - Unions submitted that, the workmen involved in the reference are workmen of the Petitioner within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 as the contract arrangement between the Management and the contractor is sham and bogus and hence the concerned workmen are entitled to the reliefs as prayed.

Respondent No. 2 - Bharatiya Kamgar Karamchari Mahasangh (hereinafter referred to as "BKKM") made an application at Exhibit 44 before the Industrial Court for impleading it as a party in the Reference, stating and contending that, as many as 18 workmen concerned with the reference have become the members of its Union by resigning from the membership of General Employees Association i.e Respondent No. 1.

34. After hearing the concerned parties, by order dated 21.02.2007, application was disposed off with observations that, Applicant-Union (BKKM) cannot be necessary party but only it can represent its workers involved in the reference and may file Statement of Claim on behalf of workers and attend on the date

given for further stage. As per the order passed on the above Application of the Applicant-Union i.e. BKKM, filed Statement of Claim, at Exhibit 48, in respect of the workers, as per Annexure "A" annexed to it. Therefore, award came to be passed in respect of all 37 workmen.

35. It is contended by Respondents Unions that, the concerned workmen are in the employment of HPCL since last about 15 to 20 years and that, they have been assigned permanent and perennial nature of work in HPCL Refinery by the managerial personnel of the petitioner. It is stated that, they are obeying all their directions and performing their work accordingly as assigned to them from time to time by officers of the Petitioner.

36 It is further submitted by the Respondents Unions that, though all these concerned workmen are performing permanent and perennial nature of work along-with the permanent employees of the petitioner there are vast differences in the terms and conditions of service vis-a- vis salary of these concerned workmen and that of the permanent workers. These concerned workmen are not given any kind of statutory benefits and there is also a vast difference in the salary structure and allowances in between the two.

37. It is submitted by the Respondents - Unions that, the documents executed between petitioner and the Contractors are bogus, sham, concocted, fraudulent and inadmissible in evidence. The same have been prepared to avoid the statutory liability to give permanency benefits to these workmen and to deprive them of their legitimate rights of equal work equal pay at par with the permanent employees of the petitioner. They submitted that, many alleged contractors have come and gone in last 20 years but the concerned workmen involved in the Reference have been continued in service. Had these concerned workmen been the employees of somebody else, their services would have been terminated at the time of changing the contractor and or terminating the earlier alleged contracts with the contractors.

38. The learned Counsel for the Unions contended that though the notification dated 9th December, 1976 may have been abolished, however the notification dated 30th January, 1996 is very much in existence. The said notification is in respect of the Petitioner - Company. The said notification covers the workers in this petition who are working in the establishment of the Petitioner. Though, the members of the Respondents are covered by the notification dated 30th January, 1996, however, in breach of this notification, the petitioner continues to employ contract labour including the workmen concerned with this petition. Out of the 37 employees, 21 are working as a valve operator, 13 are working in house keeping in plant area and 3 are working as helpers (Maintenance), all of which as per the 1996 notification are prohibited jobs. The employment of contract labour in specified jobs was prohibited as per the notification w.e.f 01st March, 1996, yet the Petitioner continues to treat the workmen concerned as contract labour. The learned Counsel for the Respondents submitted that nowhere in the evidence, the petitioner has denied that the workmen concerned are not squarely covered

by the notification dt. 30th January, 1996.

39. The learned Counsel for the Respondents - Unions reiterated that even though the notification dated 09th December, 1976 may have been quashed, the notification dated 30th January, 1996 is very much in existence. They relied upon Notification dated 30.01.1996 which prohibits employment of contract labour in certain jobs i.e the work specified in the schedule annexed thereto in some establishments of the petitioner w.e.f. 01.03.1996. It is submitted that, accordingly the jobs of cleaning, sweeping and dusting, valve operators, welders, fitters turners, helpers etc. have been included in the schedule where the Petitioner has been prohibited to employ contract labour. The workers numbering 37 who are concerned with this Petition are covered by the notification dated 30th January, 1996 as they are doing the work and in the areas specified in the notification dated 30th January, 1996. However, in breach of the said notification, the Petitioner continues to employ contract labour including 37 workmen concerned with this petition.

40. The learned Counsel for the Respondents submitted that it cannot be justified in any manner whatsoever that, the workmen working for 15-20 years should be deprived of permanency benefits, they should not be given statutory leave and or they should be paid a meagre amount of Rs. 3,000/- to Rs. 4,000/- per month after 20 years of service and that too, for the same nature of work which is performed by the regular workmen who are receiving Rs. 20,000/- to Rs. 30,000/- per month with all other facilities.

41. It is their case that, there is no difference between the work given to permanent employees of the Petitioner of the cadre of Sweeping, cleaning plants, dusting of the premises and building area, flooring, toilets etc. in the building of the Petitioner and the workers involved in this case. In spite of this fact, the employees involved in this petition are getting much less salary than the regular employees who are doing same type of work.

42. The learned Counsel for the Respondents - Unions placed reliance on the evidence of D.N. Vidhate, General Secretary of General Employees Association, who filed affidavit (Exhibit 35) in lieu of examination-in-chief inter alia stating that, the workmen who are involved in the Reference are discharging the same duties as that of permanent employees. Mr. Vidhate, in his examination in chief has clearly stated that the work of the workmen is supervised, controlled and administered by the Petitioner - Management. Therefore, in all respects, these workers are the employees of the management . Mr. Vidhate has not been contradicted on behalf of the Petitioner - Management.

43. Petitioner Management examined its witness Aravind Manekar by filing his affidavit in lieu of examination-in-chief at Exhibit 63. He states that, no appointment letter was given by HPCL to the workers and they are not engaged for the purpose of depriving the workers benefits of permanency. He stated that, all Contractors have their own statutory records in relation to their workers e.g.

attendance registers, wages registers, leave registers, Provident Fund Registers, and ESI Registers etc. He stated that, officers of the Petitioner are not having control over the employees of these two unions. He stated that members of these two unions and permanent employees did not work in one team.

44. In his cross examination, the petitioner's witness has stated that he has no idea whether contractor through whom these workers are working have contract licence under the Contract Labour (Regulation and Abolition) Act. Hereinafter called the "C.L.R.A." Act. He stated that, 1000 contract labours are working with HPCL. He states that, Identity Card is issued by the Petitioner to the workers. The Management witness admitted that, the contractors are changed but the same group of workers are working with the different contractors continuously. He admits that, he cannot name any of the supervisors of the contractor who supervise the work of these workers in the Petitioner's premises. He also stated that, he did not remember the name of the supervisor of the contractor. He also admits that, he has no evidence to show that Contractors are frequently visiting the work place and entering the Company's premises for the contract work to supervise the work of the workers who are working under them. He states that, he has not seen the contractor visiting the site. However, he named one V. Kumar, as being a Contractor. He admits that, he did not know whether the work of the Valve Operator is skilled job. He admits that, Management has to decide the location of the work. He admits that, after completion of the work by the contract workers, certificate to that effect is issued by the managerial person of the Petitioner. He admits that, he has no knowledge of the procedure followed in processing the contract and accepting it. He admits that, it is duty of the Management to see that, the payment is made to the workers, for that a person is deputed by the Management. The evidence of this witness clearly shows that there was no supervision and control of the workers by the contractors but the supervision and control on the workers was exercised by the petitioner.

45. The learned Counsel for the Respondents rightly submitted that, taking into consideration the above factors and various attending circumstances such as (i) These workmen are in service of the petitioner since a large number of years (ii) they are performing permanent, perennial nature of work, (iii) the work is continuously available. Thus, it is clear that the petitioner is in need of additional man force in a regular manner on its roll because in last 10-20 years these workmen are associated though as alleged contract labour, it means it has to employ considerable number of regular workmen on its own, hence the workers concerned in this Petition can be said to be the workers of the Petitioner.

46. The Tribunal while dealing with the evidence of the Management has correctly observed that, they have no evidence to show and prove that contractors or supervisors of the contractors are visiting the site to supervise the work of these workmen.

47. The Tribunal observed that a person can be called a "workman" i] when he works for more than 240 days in a calendar year and when they attend

permanent and perennial nature of work and ii) when they work on the premises of the employer and iii) when he is paid by the actual/principal employer All these three observations are squarely applicable to workers in this Petition. On the basis of the above observations it was held that, the workers involved in the Reference are falling under the definition of Section 2(s) of the Industrial Disputes Act, 1947.

48. The Tribunal on these three points held that, there is "employee" and "employer" relationship between the concerned workmen and the Petitioner and that, the said relationship is proved by both the sections in respect of workers. The evidence on record bears out the conclusion reached by the Tribunal.

49. Determination of the vexed questions as to whether a contract is a contract of service or not a contract for service and whether the concerned employees are employees of the contractors or the principal employer has never been an easy task. No decision has laid down any hard and fast rule nor is it possible to do so. The question in each case has to be answered having regard to the facts involved therein. No single test - be it control test, or any other test - has been held to be the determinative factor for determining the jural relationship of employer and employee.

50. In spite of the obvious importance of the distinction between an employee and an independent contractor, the tests to be applied are vague and may, in a borderline case, be difficult to apply. Historically, the solution lay in applying the "control" test, i.e., could the employer control not just what the person was to do, but also the manner of his doing it i.e. " how "- if so, that person was his employee. In the context in which it mainly arose in the nineteenth century, of domestic, agricultural and manual workers, this test had much to commend it, but with the increased sophistication of industrial processes and the greater numbers of professional and skilled people being in salaried employment, it soon became obvious that the test was insufficient (for example in the case of a doctor, architect, skilled engineer, pilot, etc.) and so, despite certain attempts to modernize it, it is now accepted that in itself " control " is no longer the sole test, though it does remain a factor and perhaps, in some cases, a decisive one.

51. In the search for a substitute test, ideas have been put forward of an " integration " test, i.e. whether the person was fully integrated into the employer's concern. In the present case, looking to the fact that the workers have been working for such a long time in the establishment of the Petitioner, it can be said that they are fully integrated in the Petitioners' establishment.

Once again, integration is not now viewed as a sufficient test in itself, but rather as a potential factor which may be useful in allowing a Court to take a wider and more realistic view. The modern approach has been to abandon the search for a single test, and instead to take a multiple or "pragmatic" approach, weighing all the factors for and against a contract of employment and determining on which side the scales eventually settle.

52. The control test and the integration tests, therefore, are not only factors which can be said to be decisive. With a view to elicit the answer, the Court is required to consider several factors which would have a bearing on the result including (a) who is appointing authority i.e. contractor or principal employer (b) who is the pay master; (c) the extent of control and supervision; (d) who directs "how" the job is to be done; (e) nature of establishment. Thus, many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed, have to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject. However, amongst the many tests suggested I think that one of the most satisfactory, by which to ascertain who is the employer at any particular time is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. In the present case, the evidence on record shows that it was the officers of the Petitioner who told the workers what work is to be done and how it is to be done.

53. It needs to be highlighted that post abolition tests to be applied are laid down in para 12 5(5) of the judgment of the Constitution Bench of the Supreme Court in the case of Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc. etc., . In the said decision, it is observed that on issuance of prohibition notification u/s 10(1) of the CLRA Act prohibiting employment of contract labour or otherwise, in an industrial dispute brought before it by any contract labour in regard to conditions of service, the industrial adjudicator will have to consider the question whether the contractor has been interposed either on the ground of having undertaken to produce any given result for the establishment or for supply of contract labour for work of the establishment under a genuine contract or is a mere ruse / camouflage to evade compliance with various beneficial legislations so as to deprive the workers of the benefit thereunder. If the contract is found to be not genuine but a mere camouflage, the so-called contract labour will have to be treated as employees of the principal employer who shall be directed to regularize the services of the contract labour in the establishment concerned subject to the conditions as may be specified by it for that purpose. If the contract is found to be genuine and prohibition notification u/s 10(1) of the CLRA Act in respect of the establishment concerned has been issued by the appropriate Government, prohibiting employment of contract labour in any process, operation or other work of any establishment and where in such process, operation or other work of the establishment the principal employer intends to employ regular workmen, he shall give preference to the erstwhile contract labour, if otherwise found suitable and, if necessary, by relaxing the condition. In the present case, from the evidence I find that all the tests which are required to be applied as per law declared by the Supreme Court are fulfilled and the Tribunal has rightly directed these workers be regularized.

54. The learned Counsel for the Respondent relied upon the decision in Indian Oil Corporation Ltd. v. Union of India and Ors. 2009 I CLR 659, wherein it is

observed as under:

In the light of the decision in Umadevi's case, the earlier decision in Steel Authority of India's case would be confined only to private sector and contract workers in State or public sector undertaking will not be entitled to claim regularization even if the contract was sham and bogus and as such the order of reference ought to be set aside. In Umadevi's case the Court was not concerned with the provisions of the Contract Labour (Regulation and Abolition) Act and the power of the industrial adjudicator to grant appropriate relief in a reference under the Industrial Disputes Act. The case does not even deal with the judgment in the Steel Authority of India's case. Both operate in different fields and the decision in Umadevi's case does not deal with the question of reference and forum where rights will have to be adjudicated. Umadevi's case is concerned with relief and the industrial adjudicator is required to examine the said question. The respondent workmen cannot be denied reference at this stage. As to what relief will be granted is uncertain and depends upon the number of facts. This position is also clear from at least three judgments, i.e i. Mineral Exploration Corporation Employees Union v. Mineral Exploration Corporation Limited and Anr. 2006 III CLR 956 SC, ii. Oil and Natural Gas Corpn. Ltd. Vs. Engineering Mazdoor Sangh, and iii. Madhya Pradesh Administration Vs. Tribhuban, .

In para 17 of this decision, it is observed as under:

It is thus clear that it is for the industrial adjudicator to decide whether the relief of regularization can be granted to the workmen and if not, what other relief can be granted to the workmen.

In the present case, the Tribunal has considered all aspects and thereafter, granted relief and in my opinion rightly so.

55. Though, Mr. Cama has submitted that the Tribunal has wrongly put the onus of proof on the Petitioner in respect of issues Nos. 1 and 2 whereas it ought to have been put on the Union and in support of his contention he has placed reliance on the decision in case of Workmen of Nilgiri (Supra). However, in my opinion, the Tribunal has rightly put the burden of proof on the Petitioner in respect of issue Nos. 1 and 2 as those issues arise out of preliminary objections raised by the Petitioner in its written statement. Hence, the contention of the Petitioner that onus was wrongly put on it has no substance. In fact, as the Petitioner had raised the preliminary objection, the onus was rightly put on the petitioner.

56. In the case of Workmen of Nilgiri Co-op Marketing Society Ltd (Supra), it is observed that while considering the relevant factors for reaching the conclusion that the contract is a sham and bogus contract, the principle which emerges is that the prima facie test for the determination is the right in the master to supervise and control the work done by the servant not only in the matter of directing work the servant is to do but also the manner in which he shall do his work.... The proper test is whether or not the hirer had authority to control the

manner of execution of the act in question. Further it is observed that, the correct method of approach, therefore, would be to consider whether having regard to the nature of the work there was due control and supervision by the employer. In the present case, it is clear from the evidence on record that the concerned workmen are working under the supervision and control of the management personnel. The alleged contractor did not give any directions about the work to be carried out by the workmen, neither the contractor nor his representative remained present to give any instructions to these workmen actually working at various locations. The very terms and conditions of the agreement between the Petitioner and the contractors show that all the jobs / services will be required to be carried out as required / advised by the Petitioner's supervisor. It also provides that the payment to the workmen in a month shall be made in the presence of HPCL representative.

57. The evidence of Arvind Mane kar also shows that even though the contractors changed from time to time, the workmen were continuously working in the establishment of the petitioner. In his evidence Mr. Manekar has admitted that it is true that though the contractors changed, the same workers are engaged by the different contractors continuously on their work. The rates to be paid to the workers, bonus payable to the workers as well as leave pay and other factors were also decided by the Petitioner and it was not left to the contractors. Thus, it is seen that the contractors had no role to play as far as the workmen are concerned and everything was supervised and controlled by the Petitioner - Management. Mr. Manekar also admitted that the documents relating to the workers are signed by the supervisor under whom the workers were attending the work and which supervisors are regular and permanent employees of the company. On going through the evidence of this witness, it is seen that there is no material to show that the contractors were frequently visiting the work place and entering in the company's premises to supervise the contract work and that the workers were working under them. This witness has also admitted that after completion of the work of workers, certificate to that effect is issued by the managerial person of the company. From the evidence, it is seen that i] the management controls and supervises the work of the workmen, ii] the workers have been working for a very long period in the establishment of the petitioner; it can be said that they are integrated in the establishment of the petitioner, iii] though the responsibility is cast upon the contractors to make payment of wages, provident fund contribution etc, the entire payments were overseen by the Petitioner - Management, Thus, even though the certain amounts were paid by the contractor, in the real sense, ultimately, it is the Petitioner - Management which pays the amount; iv] in spite of change of contractors, neither the workmen were replaced nor fresh appointments were made. All these facts show that the contract was sham and bogus and a mere camouflage. On lifting the veil and looking to the conspectus of factors governing employment, the conclusion is that the real employer of the workers in the present petition is the petitioner.

58. The evidence also shows that when these employees started working with

the petitioner, the contractors did not have the necessary licences under the Act and the licenses came to be applied for or obtained by the contractors much later on. In Secretary, H.S.E.B Vs. Suresh and Others etc. etc., . It is observed that once the so called contractor was not a licensed contractor under the Act, the inevitable conclusion that had to be reached was to the effect that so called contract system was a mere camouflage, smoke screen and disguised in almost a transparent veil which could easily be pierced and the real contractual relationship between the principal employer, on the one hand, and the employees, on the other, could be clearly visualized. In the present case, this is one added factor which shows that the contract is sham and bogus as in the present case, the evidence on record shows that none of the contractors had a licence at the relevant time.

59. In Steel Authority of India Ltd (Supra), which is a decision by the Constitution Bench of the Supreme Court, it has been held that on issuance of prohibition under notification u/s 10(1) of the C.L.R.A. Act which prohibits employment of contract labour. If the contract is found to be not genuine but mere a camouflage, so called contract labour will have to be treated as employees of the principal employer who shall be directed to regularize the services of the contract labour in the establishment concerned and if necessary by relaxing the condition.

60. It is not the case of the Petitioner that, they are not concerned at all with the employees involved in the reference. The stand of the Petitioner is that, they are contract workers and since they are not on the establishment of the Petitioner, they cannot be its "workmen". However, the evidence on record shows to the contrary.

61. Mr. Cama also placed reliance on para 22 of the decision in the case of Indian Petrochemicals Corpn. Ltd. and Another Vs. Shramik Sena and Others, . However, this decision has been considered in the case of Hindalco Industries Ltd. In Hindalco Industries Ltd, the Supreme Court has also considered the fact that the workers who were in employment for a long period of time due to the order made by the Industrial Court and that the continuous employment of the workmen was not voluntary. It was observed that, as (a) the workmen have been employed for long years and despite a change of contractors the workers continued to be employed in the canteen, (b) evidence on record established the ultimate control of management on the canteen employees. In such case, the Court would be entitled to pierce the veil and arrive at a finding that the justification relating to appointment of a contractor is sham or nominal and in effect and substance there exists a direct relationship of employer and employee between the principal and the workmen. In the present case also, both these aspects are found very much present. The material on record clearly shows that the activities of the workmen are ultimately controlled by the Company. Thus, considering all the mentioned factors cumulatively, it can safely be said that the Respondents - Workmen are in fact the workmen of the Petitioners -

Management. In these circumstances, the Tribunal was perfectly right in arriving at the conclusion that the contract is nothing but a paper agreement and granting relief.

62. The Tribunal has carefully considered the evidence and material on record. The award is based on the evidence and the material on record and hence, it does not call for any interference. Writ Petition is dismissed. No order as to costs.

At this stage, the learned Counsel for the Petitioner made an oral prayer for stay of the present order. As from the beginning, no stay was granted to the award, at this stage, I am not inclined to grant any stay. Prayer rejected.