

Sequeira

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION***

WRIT PETITION NO. 109 OF 2009

Airports Authority of India
Chhatrapati Shivaji International Airport,
Vile Parle (East),
Mumbai-400 099

.. Petitioner

Versus.

1. Indian Airport Employees' Union,
CPWD Worker's Colony,
Sahargaon, Mumbai – 400 099.
2. Union of India,
Ministry of Labour,
Through its Secretary,
Shram Bhavan, New Delhi
Through its Department of Law,
Aaykar Bhavan,
New Marine Lines,
Mumbai – 400 020.
3. The Central Government
Industrial Tribunal No.2.
Shram Raksha Bhavan,
Second Floor, Shiv Srushti Road,
Sion, Mumbai – 400 022.

.. Respondents

Mr.Sudhir Talsania, senior advocate a/w Mr.Ashutosh Thipsay,
Mr.Sagar Seth, Ms. Kavita Anchan-Poojari i/b M/s.M.V.Kini & Co.,
for the Petitioner.

Ms. Jane Cox a/w Mr.R.A.Amonkar & Mr.M.A.Amonkar, for
Respondent No.1.

Mr.M.S.Bhardwaj a/w Ms.S.I.Shah, for Respondent No.2.

***CORAM: N.M. JAMDAR, J.
Wednesday, 17 February 2016.***

Oral Judgment :

The Petitioner, Airports Authority of India has filed this Writ Petition challenging the Award of the Presiding Officer, Central Government Industrial Tribunal dated 26 May 2008.

2. The Tribunal, by the impugned Award, has directed the Petitioner to treat the workers involved in the Reference as permanent employees of the Petitioner, and to pay them wages and consequential benefits at par with other permanent employees, from the date of Reference, that is 7 March 2003.

3. The Petitioner is a statutory body, constituted under the Airports Authority of India Act, 1994. The Respondent No.1, Indian Airports Employees Union (the Union) is a trade union, which seeks to espouse the cause of the workers involved in the Reference. The Petitioner carries out its activities at various places in India in around 120 airports in the country, including the airport at Mumbai, the Chhatrapati Shivaji International Airport. For discharging its duties, the Petitioner engages permanent employees, casual workers and contract workers. The dispute in the present petition relates to the workers employed on contract basis at the airport in Mumbai.

4. The workers involved in the Reference can be grouped

in three categories. The group A: the twenty workers engaged as Loaders in Cargo Complex. The group B: twelve workers initially engaged for baggage conveyor belt operation and subsequently working on maintenance of electrical installation. Group C: Nine workers engaged for maintenance of conveyor belt system.

5. This litigation dates back to the year 1989. The Union approached this Court on 18 May 1989 by way of Writ Petition No.1494 of 1989. In this petition the Petitioner and the contractors through whom workforce was engaged, were made respondents. The Union alleged that the contractors are mere intermediaries used by the Petitioner to employ the workers. It was contended that the workers had worked continuously for a period ranging from three to five years but were given less wages. It was contended that contract labour can be employed only in accordance with the provisions of Contract Labour (Regulation & Abolition) Act, 1970 (CLRA Act) which mandates that the contractor and the principal employer must have valid licenses and registrations issued under the Act. Union asserted that the Petitioner and the contractors had no such registrations and licenses. Union asserted that all the ingredients for abolishing the contract labour system in the Petitioners establishment, were present. Accordingly, a direction was sought that the Petitioner should immediately absorb all the workers mentioned in the petition and to reinstate the workers whose services were dispensed with. Rule was issued in the petition on 27 June 1989. The Division bench, on 5 September 1989, directed that the workers be continued to be employed, as *prima facie* names of the

Petitioners were not mentioned in the registration certificate and the contractors did not have a license required under the Act.

6. A Notice of Motion No.3404 of 1990 was taken out which came up before the Division bench. This notice of motion concerned various set of employees, including the ones in the present petition. The notice of motion was disposed of by order dated 3 May 1991. As regards the workers concerned in the present petition, the Division bench observed that a contractor, respondent no.7 therein, initially undertook the contract. Thereafter by a respondent no.6 therein, and at that point of time, it was being undertaken by one M/s JAC Enterprises whose contract was valid until 31 January 1991. The Division bench directed the Central Advisory Contract Labour Board (the Board) constituted under the CLRA Act to investigate the demands of the Union for prohibiting employment of contract labour for various works carried out by the Petitioner under Section 10 of CLRA Act. The Board was directed to make a report to the Central Government on or before 30 July 1991. The Petitioner was directed to ensure that all contract workers are paid the minimum wage. The Division bench directed the Petitioner to continue the existing contract system subject to the result of the inquiry under Section 10 of the CLRA Act and subject to further orders. It was directed that the Petitioner shall enter into a contract listed in the registration certificate, and in case no contractor is available or forthcoming, the Petitioner shall do the work departmentally by engaging the concerned workers. The Division bench clarified that mere fact that the workers are continued to be employed for the

works carried out departmentally by virtue of the order will not enable them to claim as of right that they have become direct employees of the Petitioner. The question whether the workers would become direct employees of the Petitioner in case the Central Government ultimately prohibited the employment of contract labour, was left open to be decided.

7. Since in spite of this order passed in Notice of Motion No.3404 of 1999 no steps were taken by the Union of India. The Division bench, by order dated 23 March 1992 directed the Union Government to form a committee and take decision in respect of abolition of the contract system.

8. In the meanwhile, another Writ Petition bearing No.2641 of 1992 was filed by workers in group B. These workers were working through the contractors on the conveyor belt system. The Petition was filed seeking regularisation of services. On 20 January 1993, rule was issued in Writ Petition No.2641 of 1992 and interim orders were passed protecting the services of this category of workers on same terms as the group A.

9. The Board constituted a committee under Section 5 of the CLRA Act. The committee was known as 'Sudarshan Committee'. This Committee submitted its report to the Board on 15 December 1992. The Board considered the report and recommended that eight categories of works for which the Petitioner entered into contracts, should be abolished and in respect of 18 categories, no recommendation was given. On 14

January 1993, the Government took a decision to abolish contract system only for the work of telephone operator. From 1 January 1993, onwards the Petitioner continued the workers under group A and B departmentally as no contractor came forth to engage their services. Sometime around November 1994, the workers who were working on Conveyor Belt system and Terminal II were shifted to electrical maintenance department of the Petitioner. The Writ Petition No.1494 of 1989 and Writ Petition No.2641 of 1992 and other batch of petitions came up for hearing. The Union, by amending the petitions, challenged the decision of the Central Government wherein the Central Government had decided not to abolish the contract in respect of categories other than of the telephone operator. This decision of the Central Government dated 14 January 1993 was quashed and set aside by this Court and the Central Government was directed to take a fresh decision.

10. On 3 July 1996, group C workers approached this Court by way of Writ Petition No.1256 of 1996 and by interim order dated 6 August 1996; their services were protected similar to that of services of group A and group B workers. This group continued under contractors.

11. The Union filed a Special Leave Petition against the order by this Court dated 27 March 1996 wherein, this Court had quashed and set aside the decision of the Central Government. The Supreme Court directed the Board to examine the issue and take appropriate decision under Section 10 of CLRA Act.

12. On 16 November 1999, Central Government issued a notification prohibiting and abolishing contract labour in respect of loading and conveyor belt system in the Petitioner's establishment. The Union then filed Writ Petition No.279 of 2000 in this Court on behalf of all three categories seeking absorption in view of the abolition of contract in respect of loading and unloading and conveyor belt system and electrical maintenance.

13. In the meanwhile, the Petitioner filed a writ petition in the Delhi High Court challenging the notification 16 November 1999. The learned Single Judge of the Delhi High Court quashed and set aside the Notification, by order dated 22 November 2001. The Division bench of the Delhi High Court on 24 July 2002 dismissed the appeal filed against the decision of the learned Single Judge. The Apex Court dismissed the Special Leave Petition filed against this decision by the order dated 31 January 2003.

14. In the meanwhile, a group of petitions, including the Writ Petition No.279 of 2000 filed by the Union on behalf the present workmen seeking absorption, came up for consideration before Division bench of this Court. By that time the Constitution bench in the case of *Steel Authority of India Ltd. v. National Union Water Front Workers-¹ (SAIL-I)* had settled the position of law governing the contract labour. The Division bench disposed of all these petitions in light of judgment of the Constitution Bench in *(SAIL-I)¹*. The Division bench directed the Central Government to make a Reference to the Industrial Tribunal for adjudication of

¹ - 2001 AIR SCW 3574

following three items :

- '(i) *Whether the contract between Airport Authority of India and the respondents contractors, is a sham and bogus and is a camouflage to deprive the workers concerned in the petition of benefits available to permanent workmen of Airport Authority of India?*
- (ii) *Whether the workers concerned in the petition should be declared as permanent workers of Airport Authority of India?*
- (iii) *What are the wages and consequential benefits to be paid to the workers concerned in the petition?*

The Writ petitions were accordingly disposed of. Pursuant to the order of the Division bench in Writ Petition No.279 of 2000, the Ministry of Labour passed an order on 7 March 2003 referring the dispute to the Central Government Industrial Tribunal, Mumbai. The schedule of reference was as under -

- (i) *Whether the contract between Airport Authority of India and the respondents contractors, is a sham and bogus and is a camouflage to deprive the workers concerned in the petition of benefits available to permanent workers of Airport Authority of India?*
- (ii) *Whether the workers concerned in the petition should be declared as permanent workers of Airport Authority of India?*
- (iii) *What are the wages and consequential benefits to be paid to the workers concerned in the petition?*

15. The Union filed a Statement of Claim. For the sake of convenience, the case, as it appears in the claim, is reproduced in short as under -

i) The domestic terminal building at Mumbai has two terminals that are known as Terminal IA and Terminal IB. Concerned Workmen are working in the Cargo Complex & Import Warehouse, Conveyor Belt, and Electrical Maintenance. Out of these workmen 20 workmen are doing the work of loading and unloading of Cargo, who are called as Casual Loaders and the remaining workmen of which the first nine are employed as Conveyor Belt Operation and Maintenance workers at Terminal IA and the rest of 12 are employed at Terminal II-B and they are doing the work in connection with electrical maintenance at Division I & II. At present Division II only is in existence, which is an integral part of the regular, permanent, and perennial activities of the Petitioner. The duties carried out by the concerned workers are not severable from the main activities carried out by the Petitioner at various airports in India.

ii) There is no contract since 1 January 1993 for 20 workers employed at Cargo Complex and Import Warehouse. These workmen are treated as Departmental Casual Loaders and they are being paid wages departmentally from 1st January, 1993 irrespective their dates of appointments in terms of the orders passed by the Division Bench.

iii) At the Import Warehouse the Petitioner has employed 20 workers as loaders who are directly employed under the Petitioner, employer, as permanent workers apart from managerial, supervisory, and clerical staff. The concerned workers, called contract workers, used to perform the same, similar, and identical

duties, side by side along with the permanent loaders and the nature of work performed by both these sets of workers was absolutely the same.

iv) The work of loading was carried out by around 120 workers i.e. permanent loaders of Air India. 20 permanent loaders and 21 so-called contract loaders of the Petitioner carried out further handling to the import house work. 20 permanent loaders directly employed by the Petitioner initially performed the work of handling 10-day-old light cargo. Due to increase in volume of cargo and the resultant increase in the work of loading and related handling work, the Petitioner commissioned appointment of 16 extra loaders, however, instead of appointing permanent loaders the Petitioner appointed 26 contract workers to work along with the regular loaders in the operations. From 1 November 2002, Petitioner took over the ground handling work of 22 Airlines from Air India. The Petitioner has a heavy cargo shed and light cargo Shed in the Cargo Complex for ground handling cargo of these 22 Airlines. However, the work of import light cargo that was carried out by 120 permanent workmen/loaders of Air India was contracted out. As a result, thereof 40 loaders employed by the Petitioner for shifting and further handling at the import warehouse were artificially displaced from their work. The Petitioner with malafide intentions and with a view to create mere paper records against the concerned workers created this artificial situation.

v) The nature of duties carried out by concerned workers is

essential and the work of loading and unloading carried out by these workers is an integral part of the day-to-day activities of the Petitioner. Petitioner provides trolleys and such other equipment that are required for carrying out the duties by the concerned workmen, their attendance is marked by the Petitioner and the muster-rolls, which are printed in the name of the Petitioner. The Petitioner supervises the work and control the concerned workers and in the matter of leave or leaving early they report to the said Assistant Cargo Manager.

vi) Petitioner also issues entry passes to the said concerned workers that are valid for one year. Petitioner has been deducting the provident fund contributions of the concerned workers and there is no contractor at all in respect of loading and unloading activities carried out by the 20 workers concerned in the present reference. The permanent workers are also doing the work of loading and unloading like the 20 workers concerned in the present reference. They are getting wages much more than the concerned workers.

vii) There is no contractor and the concerned workmen are directly working as Loaders under the 'departmental loaders' and they are entitled to the benefits of permanency from the date they completed continuous employment of 240 days and the action of the Petitioner in not giving the status, benefits and privileges of permanent workmen to the concerned workmen clearly amount to unfair labour practices under Item 9, 10 and 13 of Fifth Schedule,

read with Section 2(ra) of the Industrial Disputes Act, 1947.

viii) Based on the provisions of Article 39 of the Constitution of India, as well as based on the doctrine of 'equal pay for equal work' the workmen concerned are entitled to receive any the benefits, privileges, advantages and other items and conditions of employment, at par with the permanent workmen working with the Petitioner. Mandatory provisions of Industrial Employment (Standing Orders) Act, 1946 defines the term 'employer' under Section 2(d) as also it provides for permanency of workmen under Standing Order Nos.4(B) as also it provides for permanency of workmen under Standing Order Nos.4(B) and 4(C) of the Model Standing Orders.

ix) Other concerned workers, 9 workers have been employed for the work of operation and maintenance of Baggage Conveyor System at Terminal IA at Santacruz, whose details have been given at Annexure I. These concerned workmen perform the duties of attending break down of conveyor Belt; doing electrical maintenance of conveyor belt, doing mechanical maintenance of conveyor belt, attending panel board, cleaning and oiling the conveyor belt, removing and fitting Gear Box, checking/repairing/maintaining weighing scaled and doing over all maintenance work of conveyor belt including over oiling thereof at terminal IA. The designations of these workers are Mechanics, Electricians, and Helpers/Khalasi and they are working there continuously for many years.

x) The Junior Engineer and the Manager – Engineering supervise and control the activities of the concerned workers. All the tools/equipment such as ring sets, spanners, grease guns, wires, bulbs, welding machines, conductor, relay panels, etc. are provided by the Petitioner. Petitioner has introduced as intermediate contractors viz. M/s.Gannon Dunkerley & Co., More Marketing Pvt. Ltd., and now M/s.Delite.

xi) There are six Belts where nine contract workers are employed to carry out the work in 3 eight hours shifts, at Terminal IB there are eight Belts and eight permanent workers are employed there to carry out this work. These workers work in three shifts and even some times are required to perform these duties beyond their normal duty hours but they are not paid any overtime wages for the same.

xii) There exists direct employer/employee relationship between the Petitioner and the concerned workmen since the day-to-day instructions regarding mode and manner of work are given by the officials of the Petitioner, the premises on which the said work is carried out belong to the Petitioner, the tools, apparatus and equipment are provided to the concerned workmen by the Petitioner, permanent workmen employed by the Petitioner are performing the same, similar and identical duties along with the concerned workmen and there is no difference of whatsoever nature in their duties and the concerned workmen work in 3 shifts

without any break, the work in respect of maintenance and operation of Baggage Conveyor System of Terminal IA at Santacruz is of permanent, regular, perennial nature and of vital importance, the so-called contractors are mere name-lenders and they are never present on the premises where these activities are carried out by the concerned workmen.

xiii) During February, 2000 to November, 2000 the nine concerned workers worked without there being any intermediate contractor. Their muster roll was certified and signed by Junior Engineer. They were paid directly during the said period and the muster rolls were carrying the name of "IAD" i.e. International Airports Division) and that they were issued passes for the Petitioner that were valid for one year.

xiv) So far the concerned workers employed by the Petitioner at Terminal IIB, there were 12 such workers who are designated as wiremen, mechanics, and Khalasi whose details have been given in Annexure I to the Statement of Claim. These 12 concerned workers employed at Terminal II B perform the same, similar, and identical duties like previously mentioned nine workers, except that these 12 concerned workers are performing their duties at Terminal II B whereas nine concerned workers are performing their duties at Terminal IA.

xv) Prior to November 1994, these 12 workers were employed through intermediate contractor by name M/s.Delite Engineering.

However, from 1.11.1994 they have been departmentalized in Petitioner. Their designations have been as Wireman EMD-1, Mechanic EMD-I, Khalasi EMD-I, Wireman EMD-II, Mechanic EMD-II, Khalasi EMD-II etc. and these workmen are continuously working departmentally for last more than 8 years or so under direct supervision, control and management of officials of the Authority and are performing the same, similar and identical duties like other permanent workmen working with the Authority.

xvi) Since there is no difference of whatsoever nature between the duties carried out by the permanent workmen and the so-called contract labours, there is no justification or any rational reason for treating the 9 concerned workmen concerned workmen as contract labours especially when for last so many years they are working directly as departmental workmen and the entire action of the Petitioner refusing to give the status, benefits and privileges of permanent workmen to the concerned workmen, is nothing but a subterfuge and a camouflage.

xvii) The substantial part of the responsibility of the Airport Managerial Personnel is the supervision and control of the work being performed by the so-called contract workers and the Operation Department has issued Job Description, Duties and Responsibilities of the Airport Managers which include to keep a record of the shift personnel on duty, their attendance and leave record, inspect the terminal building for cleanliness and check all passenger amenities like lounge furniture, toilets, drinking water

facilities, P.A. System, CCTV, Flight information Boards, lift escalator, conveyor belts etc.

xviii) In the year 2000 and 2001, the Petitioner called for details regarding employment of all the concerned 41 workmen and these workmen were asked to furnish details regarding their dates of birth, qualification, date of departmentalization etc. and their last photograph and the same were furnished by the concerned workmen. These workers have not been made permanent.

xix) The engagement of the workmen on large scale under the label of contract labours is nothing but their exploitation which is resorted to with malafide intentions by the Petitioner with a view to deprive these workmen of fair conditions of employment and with the ulterior motive of denying them the status, benefits and privileges of permanent workmen.

xx) In view of the orders dated 16th December, 2002 in Writ Petition No.279 of 2000, protection granted to the concerned workmen be continued since the same will not prejudice the Petitioner in any manner whatsoever.

xxi) It is therefore necessary to hold that the contracts between the Petitioner and the respective contractors are sham, bogus and camouflage to deprive the concerned workmen to the benefits available to the permanent workmen employed by the Petitioner; and declare that, the concerned workmen are direct employees of the Petitioner, to direct the Petitioner to give status, benefits and

privileges of permanent workmen, to all the concerned workmen from the date/day each one of them has completed continuous service of 240 days, at par with the permanent workmen and to pay them the arrears arising therefrom with 18% compound interest; direct the Petitioner to pay wages and consequential benefits to all the concerned workmen at the same rates as applicable to their permanent workmen and also to pay the consequential arrears to these workmen with 18% compound interest thereon; to direct the 1st Party to give equal pay for equal work to the concerned workmen and also prayed for interim and ad-interim reliefs in terms of their above prayers during the pendency of the present reference.

16. The Petitioner filed its Written Statement and the defense of the Petitioner, for the sake of convenience, is reproduced from Written Statement in short as under-

- i) Reference is without jurisdiction.
- ii) The reference has been made by the Central Government without forming an independent opinion by it in respect of the existence of the industrial dispute, as required under Section 10(1) of the Industrial Disputes Act, 1947.
- iii) The persons referred to in the order of reference are not 'workmen' within the meaning of Section 2(s) of the Industrial Disputes Act, 1947; hence, the order of reference is bad in law.

iv) In Writ Petition No.279 of 2000, filed by the Union, there was no prayer to declare that the contract was sham and bogus and a camouflage and the allegations made in this regard by the Union in the statement of claim are nothing but an after-thought.

v) 18 contract loaders are deployed at Import Warehouse and air cargo complex; nine contract laborers are deployed for carriage conveyor system at Terminal I-A and 12 contract laborers are deployed at different sections of Terminal 2. It is denied that the workmen concerned in the present reference i.e. 20+9+12 were working respectively in the cargo complex & Import Ware-House, Conveyor Belt and Electrical Maintenance and that out of those workmen, 20 workmen doing the work of loading and unloading of cargo were called as casual loaders and that the remaining workmen of which the first nine are employed as conveyor belt operation and maintenance workers at Terminal I-A and rest 12 were employed at Terminal 2B and they were doing the work in connection with electrical maintenance Division I & II.

vi) The work, which the said persons are carrying out, is not connected with the main function of the Authority. The duties carried out by them are not essential but incidental to cargo handling activities.

vii) The Ministry of Labour, Government of India, New Delhi issued a notification dated 16.11.1999 under Section 10 of the Contract Labour Act abolishing the contract labour system inter-

alia in the jobs of cargo handling and conveyor systems and the High Court of Delhi by its order dated 22.11.2001 quashed the Notification dated 16.11.1999 and Special Leave Petition (No.CC 956 of 2003) against the said judgment and the order dated 24.7.2002 in LPA No.530 of 2002 was dismissed by the Supreme Court of India by its order dated 31.1.2003.

viii) There was no contract entered into with a contractor since 1.1.1993, as the contractors were not prepared to enter into the contracts, as they had no option to engage their own employees.

ix) In view of the order of the High Court, granting protection to the contract labours from termination of their services, the new contractor was not prepared to enter into contract with the Petitioner and hence it was necessary to carry out contractual work with the concerned workmen and hence they were being paid wages by the Petitioner with effect from 1.1.1993.

x) The question whether the contract labourers have been performing the same, similar and identical duties at par with the permanent workmen of the Authority and further whether the nature of work performed by both those sets of group was absolutely the same are the matters to be determined by the Deputy Chief Labour Commissioner (C) under the Central Rules and hence, this Tribunal has no jurisdiction to adjudicate the said aspects of the dispute.

xi) The concerned workers are not performing the same, similar, and identical duties, side by side along with the permanent loaders and the nature of work performed by them is not absolutely the same.

xii) The cargo is shifted through the departmental trucks under its double lock system as well as those of Customs Department. There is no specific number of manpower deployed to carry out the said shifting work and presently the cargo is shifted through the departmental trucks under its double lock system as well as those of customs and only 30 days old cargo is only shifted over there. It is, therefore, denied by those 41 loaders received the 10 days old cargo from Air India at the Import Warehouse, stacked them on racks according to location, forwarded the cargo, and gave delivery to the claimants.

xiii) The concerned workers receive their wages at a lower rate, since they are not permanent workers but are protected by the High Court, pending hearing and final disposal of the matter.

xiv) The attendance of the contract labourers is marked by the official of the Petitioner as there is no contractor since 1.1.1993, and their services are protected by the order of the High Court.

xv) The permanent workmen are appointed against the sanctioned posts which were created on the basis of the approval given by the competent authority, whereas the contract labourers

were appointed on an ad-hoc basis by the contractor, and the permanent workmen were appointed in accordance with the prescribed procedure laid down under the Recruitment and Promotion Rules, hence they get higher wages and their terms and conditions are revised after a period of decade and get all the statutory benefits such as bonus, house rent allowance, provident fund, leave facilities, revision in wages; as well as different kind of allowances whereas concerned workmen draw the wages as per the revision of law applicable to them.

xvi) The permanent workmen doing the loading and unloading work get the wages by virtue of the settlements reached between the Petitioner and the recognized Union; whereas the concerned persons/workmen have been retained by the Petitioner by virtue of the orders of the Hon'ble High Court and since the concerned workmen are not the permanent employees of the Petitioner the question of extending the benefits granted to the permanent workmen to them, does not arise.

xvii) Since 1986, the contracts were awarded from time to time to M/s.Vijay & Co., M/s.Girija Enterprises, M/s.Sakpal Bros., M/s.JAC Enterprises, etc. Concerned workers have been working as the casual loaders and not departmental loaders by virtue of the order of the High Court and hence they are not part and parcel of its establishment and entitled to the benefits of permanency; much less from the date they had completed continuous employment of 240 days.

xviii) The employees of the Petitioner are governed by its Service and Disciplinary Regulations viz. the I.A.A.I (General Conditions of Service) Regulations, 1980, which were operative till 22.5.2003 and the same were replaced by A.A.A.I (General Conditions of Service) Regulations, 2003, which came into force from 23.5.2003 and the I.A.A.I. (Conduct, Discipline and Appeal) Regulations, 1987 were operative till 8.5.2003 and the same were substituted by A.A.I(Conduct, Discipline and Appeal) Regulations, 2003, which came into force on 9.5.2003.

xix) The permanent workers are employed; in accordance with the Recruitment Rules prescribed under then Service Regulations, 1980 and there is a stringent test to which the said persons were subjected before being recruited to the posts of loaders, whereas the concerned persons were just recruited by the contractors from time to time; without following any prescribed procedure by them.

xx) The concerned workmen perform their duties as per the instructions given by their contractor, in the event of any breakdown of the conveyor system, the Engineer/Supervisor of the contractor gives the instructions to the said contract labours; depending upon the frequency/gravity of the work requirement in order to achieve serviceability of the system. When the Terminal IA was commissioned on 18.4.1992; most of the said contract labourers were appointed by M/s Gannon Dunkerley & Co., Bombay, who supplied and installed the Baggage Conveyor System

at Terminal IA at Santacruz and the contract labourers are working for last many years; as their services are protected by the order of the High Court. M/s. Gannon Dunkerley and Co., M/s.Sequera Enterprises, and M/s.Delite Engineers through the tender process. They are the specialised agencies in the field of conveyor system for the maintenance of Baggage Conveyor System. There are 13 belts at Terminal 2-A and 2-C and 33 permanent workers are maintaining the same round the clock.

xxi) The concerned workers were appointed by the said contractors and were / are paid their wages and other fringe benefits by them. There is supervision and control over their work by the Engineer/Supervisor appointed, by the contractor. Petitioner has no power to take disciplinary action against the concerned workers and it has no power to remove them. The contractor provides tools, apparatus, and equipment to the said contract labourers and not by the Petitioner. Contractor allocates three shifts to the contract labourers on a rotation basis. The services of baggage conveyor system are utilized through the specialized agency as and when required at the airport. The technical expertise lies with the specialized firms; who spend a number of years in designing of the Baggage Conveyor System hence by no stretch of imagination, the contractor can be labelled as the name-lender.

xxii) Old Conveyor System of Terminal II-B was dismantled and a new Conveyor System of Terminal II-B was installed during the

year 1994-95; its permanent workers are maintaining the new Conveyor System and hence, there is no work to the contract labourers in the Conveyor System. 13 Conveyor Systems are installed at Terminal II-A and II-C that are manned by permanent workers, round the clock.

xxiii) The High Court in order dated 3.5.1991 passed in Notice of Motion No.3404 of 1990 in Writ Petition No.1494 of 1989, has clarified that the mere fact that the workers were continued to be employed for the works, if any; carried out departmentally by virtue of that order will not enable them to claim as of right that they had become direct employees of the Petitioner.

xxiv) The contracts were entered into after calling for tenders and advertisements. There is no question of the contracts being sham and bogus. The References deserve to be dismissed.

17. A Rejoinder was filed on behalf of the Union contending that at the time of hearing of the writ petition, Petitioner had consented to the order directing the Government to refer the matter to the Hon'ble Tribunal and hence was estopped from challenging the maintainability. It was also contended that the plea of the contracts being sham and bogus had been raised before the Hon'ble High Court. The alleged contractors kept changing, none of them appeared despite being served in the Writ petition, no reply was filed by them and hence they are presumed to have admitted the case of the Petitioners and hence their non-joinder is not bad in law.

18. While the Reference was pending, an important development took place. Major part of the functioning of the Petitioner at the Chhatrapati Shivaji International Airport, Mumbai, was privatised. A joint venture company, Mumbai International Airport Private Limited, (MIAL) was registered and incorporated in March 2006. This joint venture included a consortium led by GVK group and the Petitioner. The Petitioner held 26 per cent shares in this joint venture, whereas GVK had 74 per cent shares. An agreement was entered into on 4 April 2006. The agreement is for a period of 30 years. In view of this agreement, the Petitioner made an application to the Tribunal for joining MIAL as a party. MIAL opposed impleadment and the Tribunal permitted the impleadment of MIAL. Review filed by MIAL was disposed of by order dated 28 February 2008. While disposing of the review, the Tribunal observed that in view of the agreement dated 4 April 2006, the Airport at Mumbai i.e. Chhatrapati Shivaji International Airport, Mumbai has been handed over to MIAL and MIAL has agreed to absorb 60 per cent of permanent employees of the Petitioner and therefore, it is necessary that MIAL is heard in the matter as MIAL has stepped in the shoes of the Petitioner. MIAL filed a Writ Petition No.695 of 2008 challenging this order. In this petition a specific contention was raised on behalf of MIAL that if it is held that the workmen are entitled to the benefits of permanency, they would get the benefit in the terms of the contract between MIAL and the Petitioner.

19. The learned Single Judge set aside the order of impleadment and Reference pending before the Tribunal was directed to proceed only between the Petitioner and the Respondent-Union and contractors if impleaded. The Petitioner challenged this order by way of an Appeal No.347 of 2008. The Appeal bench disposed of the Appeal holding that the statement made on behalf of MIAL would take care to protect the interest of all sides. The reference accordingly proceeded.

20. This order was challenged by the Petitioner in Special Leave Petition No.4541 of 2010. By order dated 5 February 2010, leave was granted and the Apex Court clarified that this petition will be decided uninfluenced by the pendency of the appeal.

21. In the meanwhile, the Tribunal considered the rival contentions and framed Issues as under -

1. *Whether the contract between Airport Authority of India and Respondents contractors, is sham and bogus and is camouflage,*

2. *Whether the workmen involved in the reference should be declared as permanent employees of the Airport Authority of India?, If yes since when -*

3. *Whether workmen involved in the reference are entitled to get status and benefit along with privileges as of permanent workmen as claimed, If yes since when -*

4. *Whether workmen involved in the reference are entitled to get directions from this Court to Airport Authority of India to pay them wages and other consequential benefits, If yes till what date -*

5. *Whether workmen involved in the Reference are entitled to get the wages on the basis of equal work and equal pay -*

6. *Whether workmen involved in the Reference are entitled to get benefits applicable to permanent employees, -*

7. *Whether Loader & Electrical Maintenance Workers are entitled to relief of continuation with full back wages w.e.f. 1.7.2007 -*

8. *Is reference bad in law as stated by First Party in para 1 to 4 of its Written Statement and under Section 2k of I.D.Act -*

22. The Tribunal, in short, held that the Reference was maintainable; that the contracts between the Petitioner and the Contractors were sham and bogus and a camouflage; workmen involved in the Reference are to be treated as permanent employees of the Petitioner since 7 March 2003; the concerned workers are entitled to get a status and benefits of permanent employees from 7 March 2003; Petitioner is liable to pay wages to the workers involved in the Reference from 7 March 2003; the concerned workers are entitled to get wages on the basis of the principle Equal Work and Equal Pay; the concerned workers are entitled to get benefits available to permanent employees; the loaders and electrical maintenance workers are entitled to relief of continuity with full back wages with effect from 1 July 2007. Accordingly, by the impugned order dated 26 May 2008, the Tribunal allowed the Reference.

23. Thereafter the present petition was filed. Rule was

issued in this petition on 24 February 2009. Rule on interim relief was made returnable. A Notice of motion No.517 of 2010 was taken out by the Union for grant of wages to the workers, under Section 17-B of the Industrial Disputes Act. It was contended that the direction of the Tribunal was in fact was a direction to reinstate the services of these workers and therefore, provisions of Section 17B of the I.D. Act were attracted. It was contended that on 3 April 2007, MIAL who had taken over management of the Airport at Mumbai, had cancelled the gate-passes issued to these workers and they were prohibited from entering the premises with effect from 3 April 2007. The Petitioner contested the notice of motion. It was argued that what was sought in the Reference was permanency, which claim has been granted, and for grant of wages under Section 17B there has to be a declaration as regards dismissal or discharge followed by order of reinstatement and only in those circumstances Section 17B is attracted. The learned Single Judge accepted the contentions of the Petitioner and rejected the notice of motion holding that since there was no reinstatement was ordered, Section 17B is not attracted.

24. The Union then filed Appeal bearing No.223 of 2011 in which a Notice of Motion No.1133 of 2011 was taken out. The Appeal bench by order dated 27 April 2011 directed the Petitioner to pay wages to the concerned workers in Electrical and Maintenance department against whom office note dated 3 April 2007 was issued. The Petitioner by way of Civil Appeal No.8421 / 8422 of 2014 challenged this order in the Apex Court. Leave was granted in these appeals and the contention of the Petitioner that

in the absence of order of reinstatement, no wages under Section 17-B are payable, was accepted. The Apex Court however directed the Petitioner to pay wages as revised from time to time from date of the Award till decision of the petitions holding that if the order of the Appeal Bench dated 27th April, 2011 is set aside, the consequence will be that the Petitioner will have to implement the award in absence of any stay for more than five and half years.

25. Before this, Group C workers had filed the Writ Petition No.1608 of 2012 seeking a direction to the Petitioner to comply with the impugned order passed in this petition, i.e. the Award of the Industrial Tribunal dated 26 May 2008. The Division bench disposed of the Writ Petition holding as under -

'3. We are not concerned here with the disputes between the respondents inter-se. Respondent No.1 contends that the liability on account of the said order, if any, ought to be discharged by respondent No.2. Respondent No.2 on the other hand contends that it is not liable in respect of the employees in any manner whatsoever, including paying their wages or absorbing them in service. There is no warrant for denying the petitioners the benefits of the said order of the Industrial Tribunal on account of the disputes between the respondents inter-se.

4. Respondent No.1 has filed Writ Petition No.109 of 2009 challenging the order of the Industrial Tribunal dated 26th May, 2008. Rule was issued and Rule on interim relief was made returnable. Admittedly, to date, there are no interim reliefs. There is, therefore, no justification for respondent No.1 not to comply with the order of the Industrial Tribunal.

5. This Writ Petition is disposed of by directing respondent No.1 to comply with the order of the Industrial

Tribunal dated 26th May, 2008 within eight weeks from today, subject to any orders that may be passed, including in Writ Petition No.109 of 2009. There shall be no order as to costs.

26. This order was challenged by the Petitioner by way of Special Leave Petition No.27458 of 2013 (Civil Appeal No.3198 of 2015). The Apex Court disposed of the Appeal observing as under-

'5. There is no cavil over the fact that the respondent-employees are covered by the award passed by the Central Government Industrial Tribunal. By virtue of the said award, all the employees were benefited. The Airports Authority of India challenged the award in Writ Petition No.109 of 2009 which is sub-judice before the High Court of Bombay. In the said writ petition, an application under Section 17B of the Industrial Disputes Act, 1947 was filed and the High Court has directed for payment of the benefits under Section 17B. Eventually, as is manifest, the order of the High Court came to be assailed in the earlier appeal wherein this Court opined that as there was no reinstatement as per the award, Section 17B of the Industrial Disputes Act would not be applicable. In the said case, it has been held as follows :

“In the present case as we find that there is no order of re-instatement passed by the Tribunal, we agree with the submission made by learned counsel for the appellant that in absence of any order of re-instatement the High Court wrongly observed that workmen are entitled for wages under Section 17 B of the Industrial Disputes Act, 1947. However, on that ground, if the impugned order dated 27th April, 2011 is set aside, the consequential effect will be that the appellant will have to implement the award in absence of any stay for more than 5 ½ years. In such case the Indian Airport Authority would be liable to give effect to the impugned award, treat the workmen as permanent employees and will have to pay the

salary to which regular employees are entitled from the date of the Award. For reasons aforesaid and in the facts and circumstances of the case, we set aside the impugned orders dated 27th April, 2011 and 10th June, 2011 passed by the Division Bench of High Court and direct the appellant to pay the workmen the wages which they are entitled as revised from time to time from the date of the award till the High Court decides the Writ Petition No.109 of 2009 and Writ Petition No.123 of 2009. The arrears should be paid within two months. Month to month wages be paid on or before 7th day of the subsequent month. It is open to the appellant to withdraw the amount deposited with the High Court to pay the dues to the workmen. In view of interim order as ordered above, the order dated 24th February, 2009 passed by learned Single Judge in Writ Petition No.109 of 2009 and Writ Petition No.123 of 2009, so far as it relates to Rule on interim relief and the order passed by Division Bench is modified to the extent above. The High Court is expected to decide the writ petitions on an early date preferably within six months'.

6. In our considered opinion, there is no justifiable reason not to grant the same relief to the private respondents herein who have been denied the back wages. Regard being had to the concept of parity, we direct that the Airports Authority of India, the appellant herein, shall pay the arrears of wages, as revised from time to time, commencing from the date of the award within a period of eight weeks from today and the same shall be continued be done. The High Court is requested to dispose of the writ petition by the end of August 2015. We have reiterated the request as it has come to our notice that the High Court, despite the earlier request, has not yet disposed of the writ petition.

7. As far as the transfer is concerned, they should not be transferred till the end of October 2015. We have said so as we have requested the High Court to dispose of the writ petition. We may repeat at the cost of repetition that we have protected the employees as their fate will depend upon the disposal of the writ petition.

27. Thereafter by orders passed by the Apex Court requesting expeditious hearing of this petition, and by order dated 27 January 2016 to do so within six weeks, the Petition is taken up for disposal on priority basis.

28. I have heard Mr.Sudhir Talsania, the learned Senior Advocate for the Petitioner and Ms.Jane Cox, learned advocate for the Union at length.

29. The outline of the arguments advanced by Mr.Talsania is as follows -

- i) The Reference made to the Industrial Tribunal was not maintainable.
- ii) After the agreement with MIAL, it is the liability of the MIAL to implement the impugned order and therefore, it is necessary that MIAL should have been joined. Under the agreement, since MIAL is responsible, no order be passed against the Petitioner.
- iii) The concerned workers according to their own showing have been terminated and therefore, no relief of permanency can be granted in their favour.
- iv) The Award of the Industrial Tribunal is perverse as the burden of proving the contract as sham and bogus is placed

entirely on the Petitioner, and there is no reasoning. The Tribunal has relied upon the time period when the concerned workmen admittedly were under supervision of the Petitioner due to orders of the court, for coming to a finding that the contracts being sham and bogus.

v) The contracts entered into by the Petitioner were not sham and bogus and there is no prohibition that the Petitioner-establishment should not engage contract labour.

vi) The stand taken by the Respondent Union is fluctuating and contradictory.

vii) The contractors have not been made party to the Reference and therefore, no material has come on record as regards the contracts being sham and bogus as well as none of the tests laid down for demonstrating that the contract is sham and bogus have been established.

viii) Even otherwise the Petitioner being a statutory body, even if the contract is held to be sham and bogus no direct absorption and grant of permanency is permitted in a statutory body in view of decision of the Apex Court in the case of *Secretary, State of Karnataka & others Vs Umadevi and others* ². (Umadevi-3)

ix) Non-registration of the Petitioner and no license on the part of contractors and nature of works being common as permanent workers and of perennial nature are concepts under CLRA Act and even if established they will not lead to the conclusion that the contracts are sham and bogus and that workmen are entitled to relief of permanency.

² -[(2004) 4 SCC 1]

x) The relief sought for regarding payment of equal wages can only be considered by the appropriate authority under the provisions of the CLRA Act.

30. In brief the arguments by Ms.Cox are as follows-

(i) The Reference was maintainable as it is pursuant to the order passed by this Court.

(ii) The Petitioner has not withdrawn the Petition and continues to prosecute the same and therefore the Petition will have to be decided as it is. The request of the Petitioner to join MIAL has been rejected by this Court. The arrangement between Petitioner and MIAL is the private arrangement. Even otherwise, the Petitioner manages various other airports and if the order is sustained then the concerned workers are ready to join the services wherever available.

iii) Though the members of Union have been prevented from working, by not granting them passes, in law they continued in view of the impugned Award and the pleadings made in respect of proceedings taken under Section 17B will have to be understood in that context alone and cannot be used against the Workers to deprive them of the benefit of the impugned Award. In the Affidavit filed in the Apex Court, a clear stand is taken by the Petitioner that the concerned workers are in service.

iv) Though the Industrial Court may have erred while placing the burden on the Petitioner to prove the contracts being sham and

bogus, once the entire evidence is before the Court, burden of proof loses its significance.

v) The Award is a detailed Award and if the Court finds it to be not, so this Court should undertake the exercise of deciding the matter on the basis of material available on record, instead of remanding the same to put quietus to the litigation which is a long standing one.

vi) The contracts entered into by the Petitioner are sham and bogus. There is no registration certificate placed on record by the Petitioner. One which is placed on record is incomplete and is not in respect of the work concerned. In spite of the application and in spite of the Respondent-Union calling upon the Petitioner to produce the documents, they were not so produced. The witness of the Petitioner regarding lack of licenses has given various admissions.

vii) It is an admitted position that the workers have been working since long, the permanent workers are doing the same work, their muster roll, and the Petitioner maintains attendance. The contracts entered into show that the contractors are not making a profit but in fact losses. The instructions are given in minutest detail to the contractors, which clearly show complete control and supervision of the Petitioner. The work carried out by these workers is of perennial nature. Wages paid to the permanent workers are much more than the concerned workers. The Petitioner has reimbursed the wages to the contractor.

viii) The witness examined by the Petitioner has not been able to produce books showing payments by the contractor. They have no documents to show that the contractors are specialised agencies. The witnesses have admitted that record is not checked before testifying regarding appointment and wages of workers. The Petitioner maintains duty register. No documents have been produced to show that the concerned workers were working under the control of the contractor.

ix) The contractors used to come only to pay wages and the work was supervised and controlled by the engineering department. In spite of the direction of this Court, the work was carried out through contractors without there being any registration certificate. The General Manager of Petitioner had admitted in the correspondence dated 28 February 1997 that the work carried out by the concerned workers was much needed. The work has increased in the recent years. The handling of cargo is almost round the clock.

x) All the above-mentioned facts, and the admissions of the witness of the Petitioner, clearly show that these contractors are only a paper arrangement and the Tribunal was therefore, right in coming to this conclusion.

xi) As regards the contention that even assuming the contract is sham and bogus no reinstatement in public service is permissible, it is incorrect, as the case of *Umadevi-3*² and subsequent decisions

do not deal with the issue of contract labour. Under the Service Regulations, the categories of workers are listed and when the contract is held to be sham and bogus, the employees will have to be treated as permanent employees as they will not fit in any other category.

xii) Even otherwise the case of *Umadevi-3*² has been diluted by subsequent decision in the case of *Maharashtra State Road Transport Corporation and Anr. Vs. Casteribe Rajya PKarmchari Sanghatana*³ and *Hari Nandan Prasad and Anr. Vs. Employer I/R of Management of FCI and Anr.*⁴ and if unfair labour practice is established, the Industrial Adjudicator is not powerless to grant affirmative reliefs of permanency and regularisation.

xiii) In the present case the evidence coupled with the long-standing practice of getting work done of permanent nature from the concerned workers itself is an unfair labour practice for constituting the unfair labour practice. The period for which the workers are kept temporary is of no consequence and it will depend on facts of each case.

xiv) As an alternate submission, the workers are entitled to grant of equal wages payable to permanent employees, which has been directed by the Division bench of this court in the case of *Contract Laghu Udhog Kamgar Union Vs V.G.Mohite & ors.*⁵ following the

³ - 2009 III CLR 262

⁴ - AIR 2014 SC 1848

⁵ - 2001 (II) CLR -1011

Rule 25(iv) of the concerned Rules.

xv) It is not the position of law that the contractors will have to be made party; otherwise the reference is bad in law. The dispute was between the Petitioner and the Union and the only question is whether the material shows that the contract was sham and bogus.

xvi) There is no estoppel nor it can be said that the Respondent-Union cannot take a stand that the contract is sham and bogus after having sought abolition of the contract.

xvii) In any case even while seeking abolition of the contract, Respondents indicated that the contract is sham and bogus.

31. Before the rival contentions are addressed, following are some of the basic facts upon which the dispute centers.

i. There are three groups of workers concerned in this petition. Group A is the twenty workers engaged as loaders in Cargo complex. Group B is the twelve workers engaged for maintenance of Baggage Conveyor Belt at Terminal IIB. Group C is nine workers engaged for maintenance of Conveyor Belt at Terminal IA.

ii. Group A, B and C are continued by orders passed by the Division bench of this Court on 3 May 1991, 2 December 1992 and 6 August 1996 in their respective petitions.

iii. Group A and B have continued under the supervision of the

Petitioner because of interim orders without there being any contract after 1 January 1993. Category C has continued under the interim orders of the Division bench of this Court, under contractors.

iv. The notification issued by Government of India dated 16 November 1999 abolishing system of contract labour in loading and Conveyor Belt in the Petitioner authority, was quashed by Delhi High Court and the order is confirmed by the Apex Court.

v. It is permissible for the Petitioner to engage contract labour for the works in question.

vi. From 4 April 2006 a Development Agreement between MIAL and the Petitioner has come into force and most of the work at the concerned airport is now carried out by MIAL.

vii. By issuing office notes on 3 April 2007 for category A and B and for C on 7 June 2011, MIAL has not granted duty passes required for work at the Airport.

32. Now to consider the rival contentions. On maintainability of the Reference, there was no argument at the bar. Even otherwise, in view of the direction of the Division Bench the Reference cannot be said as bad in law.

33. First argument raised by Mr.Talsania is regarding MIAL and the implications of the agreement with it. He stated that after

the MIAL had taken over management and functioning with effect from 3 May 2006, the responsibility of the Petitioner to engage the workers has ended and it is the responsibility of MIAL to continue to engage them and MIAL is not a party in the present proceeding, and be made party.

34. The Petitioner is a statutory authority for the purpose of various airports in the country. As regards the Chhatrapati Shivaji International Airport at Mumbai an Operation, Management, and Development Agreement (OMDA) has been entered into with MIAL on 4 April 2006. The limited question that needs to be determined as to whether this subsequent development has any bearing for the purpose of the present petition and that the impugned order has become infructuous as far as the Petitioner is concerned. It is only with this limited object in mind that the agreement and the position vis-a-vis MIAL is to be considered. The Petitioner is not withdrawing this Writ Petition and has continued to contest the same on merits. Ms.Cox has made the stand of Union clear. According to her, the impugned order grants the workers status of permanent employees of the Petitioner, therefore, either the Petitioner honours this direction or MIAL honors the same under their *inter se* arrangement. The Union is not averse to permanency either with MIAL or with the Petitioner, at Mumbai or elsewhere.

35. An additional affidavit dated 4 February 2016 of one Janaki Raman, Manager of the Petitioner, was tendered by

Mr.Talsania during the hearing. In this affidavit, the Manager states that MIAL has agreed under OMDA that it will take over 60% of the employees existing in the permanent roll of the Petitioner at Mumbai at the relevant time. It is stated that there are about 2311 employees, out of which 149 have opted to join MIAL, MIAL has absorbed only 149 employees out of 2311 employees, and the absorption constitutes only 6.44 per cent. It is stated that some of the workers were taken over by MIAL and their services were discontinued. Workers engaged by M/s Gannon Dunkerley & Co., continued to work until 7 June 2011, and were discontinued. It is stated that MIAL should be made party.

36. In response it is submitted by Ms.Cox that less than 10 per cent of the employees have been absorbed by MIAL. These employees have been posted either at Mumbai or at other 120 airports run by Petitioner throughout the country. It is stated that some of the permanent employees challenged OMDA and the courts initially granted injunction against enforcement of OMDA vis-a-vis the employees of the Petitioner, which was later vacated, but upon taking undertaking of the Petitioner that none of the employees would be retrenched and they would be provided work.

37. Firstly the contention of Mr.Talsania that MIAL should be joined to this petition for effective adjudication, cannot be accepted in view of the earlier orders passed. Those orders arose thus. On an application made by the Petitioner to join MIAL as a party in the reference, the Tribunal had, by order dated 5 February 2008, directed MIAL to be made party to the Reference. MIAL

filed a review, which was rejected by the Tribunal on 20 February 2008 and MIAL thereafter approached this Court by way of Writ Petitions. It was urged on behalf of MIAL that the issue that is referred for adjudication is only whether the concerned employees are working on contract or they are employees of the Petitioner and whether the contracts are sham and bogus. It was urged on behalf of MIAL that these issues do not concern MIAL at all and the matter is between the Petitioner and the concerned workmen. Reliance was placed on clauses 6.1.1 and 6.1.2 (i) and 6.1.4 of OMDA. The Petitioner opposed the prayers made by MIAL and contending that the final direction will not be effective and complete unless MIAL is before the Tribunal and MIAL is necessary for adjudication. The Union had supported the impugned order and urged that no technical ground or objection should be available to implementation and execution of the Award.

38. The learned Single Judge, after examining the provisions of Section 18 of the Industrial Disputes Act and the decisions of the Apex Court on this issue, noted the statement made on behalf of MIAL as under -

'22. *Mr.Dada has specifically contended that despite petitioners challenging the orders of joinder by CGIT, the workers covered by the reference should not have cause for concern. He submits that each of these workmen, if tomorrow held entitled to the benefits of permanency would get the benefit, in the terms of the contract between the petitioners and AAI. To be precise, they will get the benefits of clauses 5.1, 5.2, 6.1 to 6.1.4 of Chapters V & VI of the Agreement between the petitioners and AAI. Mr.Dada's submission proceeds on the basis that the workers, if held to*

be entitled to the benefits of permanency, would, in terms of the contract between petitioners and AAI, get the necessary relief provided they come within the pool of 66% of the workers stipulated in the agreement. Thus, despite the impugned orders being quashed and set aside and this Court holding that the presence of petitioners is not necessary, yet, the petitioners would not run away from their obligations nor would fail to comply with them, insofar as, protection of employees. In other words, his submission is that AAI is not wound up nor its existence wiped out. The moment employees are held to be direct and permanent employees of AAI, then, they come within the purview of the agreement between petitioners and AAI. Once, they are so covered then, their employment is continuing. In such circumstances, the Award would bind the petitioners as well.'

Accepting this statement, the learned Single Judge observed that in view thereof there was no prejudice to the workers. If they succeeded in the Reference to get benefits under the Award, there need not be any uncertainty as to who is to implement and execute the Award. Accordingly, rule was made absolute and Tribunal was directed to proceed only with the Petitioner and the concerned workers and contractors, if impleaded as parties. This order was challenged by way of an appeal. The Appeal bench disposed of the appeal observing as under -

'2. We have heard the learned counsel appearing for both the sides. In our opinion, the view taken by the learned Single Judge in his order, which is impugned in these appeals, is perfectly in accordance with law, no exception can be taken. Because of the statement made on behalf of the Company, which is referred to by the learned Single Judge in paragraph 22 of his order, in our opinion, the learned Single Judge has taken care to protect the interest of all sides. No interference in the order is called for. It was submitted on

behalf of the Union that it may be said that in the facts of this case, the order of the learned Single Judge is justified but facts of other cases which are pending before the Courts below are different and therefore, the principle on which the impugned order is based will not be applicable and the Company will have to be joined as a party in those cases. In our opinion, if the facts are different and the principle on the basis of which the order impugned in these appeals has been made is not applicable, it goes without saying that it is open to the appellants to raise that contention before the appropriate Court where the matters are pending. We do not propose to express any final opinion on that aspects of the matter. All the appeals are disposed off. Notices of motion Nos.3088 of 2008, 3077 of 2008 and 3298 of 2008 are disposed off.'

39. The order of the Appeal was challenged by way of an appeal to the Apex Court. The Apex Court by order dated 5 August 2010 passed the following order on 5 February 2010.

'Leave granted.

The appeal will be heard on the SLP Paper-Book. Additional documents, if any, may be filed by the parties.

We may, however, make it clear that the Writ Petition (Civil) No.123 of 2009, stated to have been filed by the appellant herein against the award dated 26th May, 2008 may be decided uninfluenced by the pendency of these appeals'.

40. Therefore in view of the orders passed by the learned Single Judge and the Division bench and of the Apex Court it is not possible to accede to the submissions of Mr.Talsania. The Petition will have to be heard as it is, whether MIAL is party to this petition or not. By various orders the Apex Court has expressed that the petition be taken up for disposal at the earliest and it is not

possible to defer the hearing. If the Award directing that the concerned workers be made permanent in the services of the Petitioner is sustained, the effect will have to be either given by the Petitioner or MIAL, in terms of the agreement between them.

41. Next ground urged by Mr.Talsania was that by office note dated 3 April 2007 and 7 July 2011, MIAL discontinued engagement of the concerned workmen, which amounted to their termination and no steps have been taken by them to get the termination by MIAL set aside and once they cease to be in employment there is no question of granting them permanency and regularisation. Reliance is placed by Mr.Talsania on the decision of the Apex Court in the case of *Oshiar Prasad and others Vs Employees in relation to management of Sudamdih Coal Washery of M/s Bharat Coking Coal Limited Dhanbad, Jharkhand*⁶ . On the other hand, it is the contention of Ms.Cox that there is no stay to the Award of the Tribunal and therefore, there is no discontinuation of the services of the concerned workers. It is her contention that there is no order of termination issued by the Petitioner on whom the Award is binding and therefore there is no question of any termination.

42. There was substantial debate at the bar in respect of pleadings and the observations made by the Courts in the proceedings taken out by the Union for payment of wages under Section 17B of the Industrial Disputes Act. According to the

⁶ - (2015) 4 SCC pg.71

Mr.Talsania, the pleadings would clearly show that there was a discontinuance of services of the concerned workmen. While it is the contention of Ms.Cox that these will have to be seen in context.

43. Firstly, it is necessary to analyze Section 17B of the Industrial Disputes Act. The Section reads as under -

17B. Payment of full wages to workman pending proceedings in higher courts.-

Where in any case, a Labour Court, Tribunal or National Tribunal by its award directs reinstatement of any workman and the employer prefers any proceedings against such award in a High Court or the Supreme Court, the employer shall be liable to pay such workman, during the period of pendency of such proceedings in the High Court or the Supreme Court, full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period and an affidavit by such workman had been filed to that effect in such Court: Provided that where it is proved to the satisfaction of the High Court or the Supreme Court that such workman had been employed and had been receiving adequate remuneration during any such period or part thereof, the Court shall order that no wages shall be payable under this section for such period or part, as the case may be.]

(Emphasis supplied)

44. This Section was enacted by an amendment to the I.D.Act, to protect the workmen from hardship due to delay caused in implementation of the award by its contest by the employer. Section 17B guarantees payment of wages to the workmen pending the challenge. The wages are payable when the award is challenged and no stay to the award is required. Merits of the

award cannot be examined and benefits under the section cannot be denied on the ground that the award is not tenable. The primary enquiry under Section 17B is whether the workman is gainfully employed. There is however one fundamental facet of section 17B. The award that is under challenge must direct reinstatement of the workmen. When the award directs reinstatement, then the Section 17B comes into play. If reinstatement is not directed, the right under Section 17B will not accrue.

45. With this in mind, the pleadings and the observations of the court will have to be examined. This petition came up for admission and rule was issued on 24 February 2009. Rule on interim relief was issued, making it returnable on 17 March 2009. The hearing as to interim relief was deferred and did not take place. Notice of Motion No. 517 of 2010, was taken out by the Union. The Union prayed for grant of wages under Section 17B to the concerned workers. It was contended on behalf of the Union that the office note dated 3 April 2007 issued by MIAL has led to a situation wherein the gate passes of the concerned workers were cancelled and they were prohibited from entering the airport premises. The issue framed by Tribunal as to whether loaders and electrical maintenance workers are entitled to relief of continuation, which was answered in affirmative, was highlighted. It was contended that, in fact, the Award is a direction to reinstate the Respondents, and Section 17B is attracted. The Petitioner opposed the grant of Application under Section 17B contending

that what was granted was relief of permanency and there was no reinstatement.

46. The learned Single Judge examined the Issues framed and the Award and observed as under -

'12 On a bare perusal of these issues which have been framed, upon scrutiny of the pleadings and in the backdrop of the dispute referred for adjudication, it is not possible to accept the contention of Ms. Cox that issue No.6A should be read in isolation. Issue No.6A may have been worded as above, but that must be read together with the other issues. The entire dispute was pertaining to the denial of the status as permanent employee of the Airport Authority of India-the original petitioner. That was on account of Airport Authority of India executing a contract with Mumbai International Airport Pvt Ltd for management and administration of the Airport at Mumbai, namely, Chhatrapati Shivaji International Airport. It was alleged that in the garb of this contract, the Airport Authority of India has deprived the 1st respondent and other similar situate employees their status as permanent employees although the work that they are carrying on so also the duties performed are on par with the permanent employees. Therefore, while adjudicating upon such a dispute that the ultimate finding has been rendered, namely, that the workers involved can be equated and treated at par with permanent employees of Airport Authority of India as they are carrying on identical work. Therefore, whatever is the entitlement of the permanent employees of the Airport Authority of India should be made admissible and provided even to the subject employees. It is in this context that I am of the view that in the peculiar facts of this case, section 17B of the Industrial Disputes Act, 1947 has no application. This could not be said to be a case covered by section 17-B of the Industrial Disputes Act, 1947 which reads as under:

“17-B. Payment of full wages to workman pending proceedings in higher courts.- Where in any case, a Labour

Court, Tribunal or National Tribunal by its award directs reinstatement of any workman and the employer prefers any proceedings against such award in a High Court or the Supreme Court, the employer shall be liable to pay such workman, during the period of pendency of such proceedings in the High Court or the Supreme Court, full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period and an affidavit by such workman had been filed to that effect in such Court:

Provided that where it is proved to the satisfaction of the High Court or the Supreme Court that such workman had been employed and had been receiving adequate remuneration during any such period or part thereof, the Court shall order that no wages shall be payable under this section for such period or part, as the case may be.”

This provision is made with the object of giving relief to the workman in whose favour an Award of reinstatement is passed by the Labour Court and the said Award is under challenge in the higher courts. The said relief is given with a view to relieve the hardship that would be caused to a workman on account of the delay in implementation of the Award as a result of the pendency of the proceedings in higher Court. The payment which is made by the employer to the workman is in the nature of subsistence allowance, which would not be refundable or recoverable from the workman, even if the Award is set aside by the High Court or the Supreme Court. (See paras 7 and 20 of the judgment of the Hon’ble Supreme Court in Dena Bank Vs. Kirtikumar T. Patel reported in AIR 1998 SC 514).

13 *Upon a plain reading of the provision and particularly in the backdrop of the dispute referred, the adjudication conducted and the ultimate award rendered that it is not possible to agree with Ms.Cox that the relief granted is to set aside the termination of such employees and to reinstate them in services. The entire award must be seen and not*

some issue and isolated discussion thereon. For appreciating the request and to make applicable section 17B of the Industrial Disputes Act, 1947, the adjudication must be seen as a whole and it would not be proper to look into it in bits and pieces and that too out of context.

Accordingly, the learned Single Judge rejected the Notice of Motion.

47. An Appeal was filed by the Respondent in which Notice of Motion No.1133 of 2011 was taken out. The Appeal Bench allowed the Notice of Motion by the following order -

'2 Having heard the learned counsel for the parties and having perused the office note dated 3rd April, 2007 at Page 146, the award of the Industrial Tribunal and the impugned order of the learned Single Judge, we are of the prima facie view that the petitioners are entitled to protection under Section 17B of the Industrial Disputes Act, 1947. Therefore, we direct respondent No.1 to pay the wages to the loaders/workers in Electrical Maintenance Department against whom Office Note dated 3rd April, 2007 was issued under Section 17B of the Act. The wages which were last drawn by the concerned loaders/workers in Electrical Maintenance Department prior to the date of termination i.e. Office Note dated 3rd April, 2007 and the arrears payable on the aforesaid basis for the period upto 30th April, 2011 shall be paid to the concerned workers within one month from today and thereafter they shall be continued to be paid for every month on or before 10th day of succeeding month'.

48. The order of the Appeal Bench was challenged by the Petitioner in the Apex Court. The Apex Court approved the conclusion of the learned Single Judge that there was no order of reinstatement and in absence of any order of reinstatement; there

could not have been any grant of wages under Section 17B of the Act. The Apex Court however noted that if the order of the Division bench is set aside the consequential effect would be that the Petitioner will have to implement the order in absence of any stay for five and half years. The Apex Court disposed of the Appeal, with the following observations -

'In the present case as we find that there is no order of re-instatement passed by the Tribunal, we agree with the submission made by learned counsel for the appellant that in absence of any order of re-instatement the High Court wrongly observed that workmen are entitled for wages under Section 17 B of the Industrial Disputes Act, 1947. However, on that ground, if the impugned order dated 27th April, 2011 is set aside, the consequential effect will be that the appellant will have to implement the award in absence of any stay for more than 5 ½ years. In such case the Indian Airport Authority would be liable to give effect to the impugned award, treat the workmen as permanent employees and will have to pay the salary to which regular employees are entitled from the date of the Award.

For reasons aforesaid and in the facts and circumstances of the case, we set aside the impugned orders dated 27th April, 2011 and 10th June, 2011 passed by the Division Bench of High Court and direct the appellant to pay the workmen the wages which they are entitled as revised from time to time from the date of the award till the High Court decides the Writ Petition No.109 of 2009 and Writ Petition No.123 of 2009. The arrears should be paid within two months. Month to month wages be paid on or before 7th day of the subsequent month. It is open to the appellant to withdraw the amount deposited with the High Court to pay the dues to the workers.

In view of interim order as ordered above, the order dated 24th February, 2009 passed by learned Single Judge in Writ Petition No.109 of 2009 and Writ Petition No.123 fo

2009, so far as it relates to Rule on interim relief and the order passed by Division Bench is modified to the extent above. The High Court is expected to decide the writ petitions on an early date preferably within six months'.

49. Thus the entire proceedings and the various orders passed referred to above arose in the Application under Section 17B. The Union had made an application under section 17B for the concerned workers, because, even though they had an order granting permanency in their favour, they were effectively not getting any benefit out of it without there being any stay of the Court. MIAL had prohibited them from entering the airport premises and in view of that situation that they filed the Application under Section 17B which was rejected on the ground that there is no reinstatement. These applications and the statements therein and the order passed will have to be understood in that context. Fact remains that there are no orders of termination issued by the Petitioner.

50. Furthermore the stand of the Petitioner itself also needs to be noticed. Ms. Cox has placed on record, copy of affidavit filed by one Mr.G.L.Verma Assistant General Manager(HR) of the Petitioner in the Apex Court in Special Leave Petition No.16751 - 52 of 2011. It referred to a statement made by the Petitioner during the course of the proceedings on 22 July 2014 that the services of the workers were not terminated and they were continued in service. An affidavit was filed to explain the statement on the background in which the statement was made.

51. The facts in the case of *Oshiar Prasad*⁶ relied upon by Mr. Talsania, were entirely different. In this case Bharat Coking Coal Ltd., Govt. of India Undertaking had invited tenders for construction of washery on turnkey basis and a contract was awarded to a contractor who was required to make washery operational. The contractor employed various skilled and unskilled workers and after completion of the work, contractor terminated all the workers and offered retrenchment compensation except thirty-nine skilled workers were subsequently terminated. These thirty-nine employees raised a dispute for absorption and continuation with M/s Bharat Coking. The workers filed a suit for declaration that they are entitled to continue their services of Bharat Coking. The trial Court did not grant temporary injunction and during the pendency of the suit services of the workers were terminated and they were no more in employment. The trial Court decreed the suit and directed Bharat Coking Coal to continue the services of the workers, who stood terminated. The matter reached Apex Court and the Apex Court directed them to approach Industrial Tribunal. The Industrial Tribunal answered the reference against the workers. The High Court confirmed the Award and the workers thereafter approached the Apex Court. The Apex Court noted the admitted position that the services of the workers, at whose instance reference was made, were terminated long time prior to making of the reference. The workers were not in service of either of the contractor or Bharat Coking on the date of making the reference. It is in this factual

matrix, the Apex Court reiterated the position of law that regularisation of services can be claimed only when contract of employment subsists. The reliance by Mr.Talsania on this decision in the facts of present case is therefore entirely misplaced. The present award directs permanency in the services of the Petitioner. MIAL is not a party in this proceeding. There is no termination by the Petitioner. The pleadings and the observations made in the proceedings under section 17B will have to be seen in the context of the relief sought and the statutory provisions. Considering this position, I do not think that based on this position alone the claim of the Union can be defeated.

52. Turning now to the main question to be considered in this petition. That is whether the contracts in question are sham and bogus. This issue is the pivotal issue in the case. Both Mr.Talsania and Ms.Cox have addressed the Court at great length citing various propositions of law. They have also cited various decisions. I have referred to the ones, which, in my respectful opinion, are directly relevant to the facts in issue.

53. Whether a contract is sham and bogus, is a question of fact. It is not a pure question of law. The allegation of the Union that the contracts in question are sham and bogus will have to be examined on the test laid down in the judicial pronouncements. The factual situation for each contract in each establishment will differ. The Apex Court in the case of *Ramruch K.Panda Vs Steel Authority of India*⁷, has made this position clear by observing as

⁷ - 1994 V SCC 304

under-

'7. It is true that with the passage of time and purely with a view to safeguard the interests of workers, many principal employers while renewing the contracts have been insisting that the contractor or the new contractor retains the old employees. In fact such a condition is incorporated in the contract itself. However, such a clause in the contract which is benevolently inserted in the contract to protect the continuance of the source of livelihood of the contract labour cannot by itself give rise to a right to regularisation in the employment of the principal employer. 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, as has been urged in this case, is a question of fact and has to be established by the contract labourers on the basis of the requisite material. It is not possible for the High Court or this Court, while exercising writ jurisdiction or jurisdiction under Article 136 to decide such questions, only on the basis of the affidavits. It need not be pointed out that in all such cases, the labourers are initially employed and engaged by the contractors. As such at what point of time a direct link is established between the contract labourers and the principal employer, eliminating the contractor from the scene, is a matter which has to be established on material produced before the court. Normally, the Labour Court and the Industrial Tribunal, under the Industrial Disputes Act are the competent fora to adjudicate such disputes on the basis of the oral and documentary evidence produced before them.

(Emphasis supplied)

Therefore, it is primarily for the Industrial adjudicator to examine the question of fact as to whether the contract in question is a camouflage or a smoke screen. This issue has to be decided based on requisite material, and the burden of proving the issue lies on the workers.

54. Serious grievance is made by Mr.Talsania that the Tribunal has utterly failed to undertake the required adjudication and has applied total wrong test to determine the issue. On the other hand, it is contended by Ms.Cox that the Tribunal has considered all the aspects referred to it for adjudication and has arrived at a correct finding that the contracts are sham and bogus.

55. With the assistance of the learned counsel for the parties, I have gone through the entire award. I have analysed the award by paragraph to indicate the complete lack of reasoning. The award of the Tribunal is of 196 pages with 48 paragraphs. Paragraphs 1 to paragraph 2 narrate the Reference. Paragraph 3 to paragraph 9 till-page 31, passages from the Claim is taken. From paragraph 10 -page 31 to paragraph 17 -page 111, passages from the written statement of the Petitioner are quoted. From paragraph 18-page 111 to paragraph 24-page 120, Rejoinder of Petitioner-Union is quoted. Thereafter paragraph 21-page 122 till paragraph 31-page 146, are devoted to discussion on maintainability of the reference. The Issue no.1, the main issue regarding the contract being sham and bogus, is dealt with in paragraph 32 to 42 page 147 to 191 of the award in the following manner: In paragraph 32, the Tribunal again describes the description of the work force and at the Airport; Paragraph 33 to 34 the Tribunal again refers to the contentions of the Union; In paragraph 35, the Tribunal refers to the documents and depositions of the witnesses of both the parties; Paragraph 36, 37, 38, 39 only reproduces the evidence of

the parties; Paragraph 40 states the manner in which the applications for production of documents were disposed of; In paragraph 41, the Tribunal states that what was referred to earlier was the evidence led by the parties in support of their respective case. Then in paragraph 42, is the discussion which is only in one paragraph, as under -

'42. No specific case is made out by the Authority by leading evidence that, particular contractor's person supervises the work of particular contractor. Even nobody is examined for contractor to show they were really working with Authority, with these workers. In this situation I find difficult to accept the case of the Authority that, really there were contractors who were working on the floor of the Authority. Besides not a single witness from contractor's side is examined by the Authority to support its case and to conclude that, there were really contractors and workers involved in the reference were working under them. On the contrary Authority is unable to give name of any of the person who attended for contractors or who supervises work for particular contractor. Initially Authority was saying that, Authority was neither maintaining record of attendance of these workers nor supervising the work of the concerned workmen. But slowly and gradually as case progressed Authority went on admitting that, it has to maintain record to make the payment to comply with the order of the Hon'ble High Court. Besides it goes on admitting that work is supervised by it and Authority has to make payment for the work. Besides, Authority go on admitting that, attendance was recorded as the Authority has to make the payment'.

56. Thereafter in this paragraph the Tribunal reproduces the statements of the Petitioner in the written statement and concludes the issue as under -

'42.

So from all this it reveals that there was no contract and admittedly from 1992 onwards there was no contractor. It is to be noted that reference is sent by the Central Government, Ministry of Labour in the year 2003 and record reveals that there was no contractor in picture atleast from 1992 as far as this reference is concerned. When there was no contract and work is done by these workers which is of perennial nature which is equally important to the work done by the permanent workers of the Authority. I have to conclude that, the contracts alleged by the Authority are sham, bogus and camouflage and there was no contractor at all to which the workers involved in the reference were working. So I answer this issue to that effect'.

57. Thereafter from paragraph 43 to 47 at page 191 to 194, the Tribunal wraps up the remaining issues and passes the impugned award.

58. The above analysis of the award would show that it is bereft of detailed discussion and is only reproduction of rival contentions. Firstly, the entire basis of the Award is flawed, as the Tribunal proceeds by placing the burden upon the Petitioner to prove that the contracts were not sham and bogus. From whatever discussion there is, it appears that the Tribunal has concluded the issue on a position post 1 January 1993. From 1 January 1993, for group A and group B, admittedly the work was done under supervision of the Petitioner. That there was no contract from 1 January 1993 and the work done by the workers was of permanent workers of the Authority, is the main finding to conclude that the contract is sham and bogus. There is no distinction made at all between the period before the concerned workers were continued

by the orders of the Court and the repeated plea of the Petitioner that in this period the concerned workers had to be employed by orders of the Court and no contractor was willing to take them.

59. Mr.Talsania, in view of this position initially submitted that the Award requires to be quashed and set aside and the matter be remanded to the Tribunal. Ms.Cox made a fervent plea that such course of action would only prolong the litigation and this Court based on material available should conclude the issue. Ms.Cox submitted that it would be unjust at this stage to relegate the parties again before the Tribunal. She relied upon the decision in the case of *Hindustan Lever Ltd. Vs Contract Laghu Udyog Kamgar Union Mumbai & Ors.*⁸ wherein, this course of action was adopted by the learned Single Judge by observing as under -

'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*

⁸ - 2010 II CLR 259

already been argued five times over a period of almost twenty five years'.

It is no doubt true that the litigation between the parties is going on since last 27 years. There have been various rounds in this litigation up to the Apex Court and it is necessary that the litigation be given quietus to. It was however made clear to the counsel that whether the contracts are sham and bogus is essentially question of fact and the inquiry in this petition will be done keeping in mind the limitations of writ jurisdiction and will not be like the court of first instance. When initially Mr.Talsania opened the arguments the entire thrust was to demonstrate how the award was totally without reasons and based on wrong foundations and that it requires a re-look by the Tribunal. To that Ms.Cox had relied upon the decision on the case of *Hindustan Lever*⁸ to contend that this Court should undertake the exercise and proceeded to argue the matter on merits to which full-fledged response on merits was given by Mr.Talsania. When the petition was heard over several sessions on merits, Ms. Cox submitted that if this Court feels that the matter needs re-look by the Tribunal, it could direct so. Such changing stands are not correct. If the matter needed to be remanded back on complete lack of reasoning by the Tribunal, it should have been stated at the outset saving substantial judicial time. Such arguments cannot be made after calling upon the Court to hear the matter on merits and after the Court has invested substantial judicial time. Furthermore, the Apex Court had requested that the petition be disposed of within period of six weeks. It is asserted by Ms.Cox

that the Union is confident of demonstrating from the material on record itself that the contracts are sham and bogus

60. Before this inquiry is undertaken, the provisions of CLRA need to be briefly noticed.

61. The preamble of the CLRA shows that it has been enacted to regulate the employment of contract labour in certain establishments and to provide for its abolition in certain circumstances and for matters connected therewith. As per S. 2(b) 'contract labour' is defined to cover a workman who 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. Section 2(c) defines 'Contractor' to mean a person who undertakes to produce a given result for the establishment, through contract labour or who supplies contract labour for any work of the establishment and includes a sub-contractor. S. 2(3), defines the term 'establishment' to mean any office or department of the Government of a local authority or any place where any industry, trade, business, manufacture or occupation is carried on. Section 2(g) defines 'principal employer' in relation to an 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 specified in this behalf, 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, the person so named, so far as workmen is concerned. The provisions of the CLRA contemplate a genuine contract system. Provision is made for registration of the establishments under Chapter III of the Act. Chapter IV deals with licensing of contractors and Chapter V deals with welfare and health of contract labour. Though the contractor is made responsible for payment of wages to each worker, presence of a nominee of the principal employer at the time of the disbursement of wages is required. If the contractor fails to pay the wages to the contract labour, the principal employer have to pay the full wages or unpaid wages, as the case may be, can recover the same from the amount payable to the contractor. Chapter VI deals with the contravention of the provisions of the Act, prescribes offences and lays down the procedure for prosecution of the offenders. Sec. 10 of the CLRA is of importance. Sub-sec. (2) of Sec. 10 of CLRA lays down the conditions on fulfillment of which abolition notification can be issued. It provides :

“Before issuing any notification under Sub-sec.(i) 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; and

(d) whether it is sufficient to employ considerable number of wholetime workmen.”

Sec. 10 empowers the appropriate Government to abolish contract labour system in any process, operation or other work in any establishment when any of the conditions laid down is or are fulfilled. Even if a contract labour system is abolished qua any activity, such abolition operates prospectively. The conditions mentioned in Sect. 10(2) of the Contract Labour Act are in connection with a genuine and legally permissible contract system, which may be prevalent in any establishment. The conditions laid down in S.10 of CLRA have nothing to do with the question as to whether contract labour system employed in any establishment is a genuine contract labour system or a mere camouflage. Such types of disputes are outside the ambit of Sec.10 of the CLRA and have to be decided by the Industrial Adjudicator under the Industrial Disputes Act. This is broadly the legal framework.

62. Before the assertion of the Respondents that the contracts are sham and bogus are addressed, two preliminary contentions raised by Mr.Talsania will have to be dealt with. First is that the Union is estopped from contending that the contract is sham and bogus. Second is that no enquiry regarding the contracts as sham and bogus can be held in absence of the contractors.

63. According to the Mr.Talsania, the Union taking contradictory stands, which they are not, permitted to, while it is the contention of Ms.Cox that the Union is not precluded in law from taking such stands. According to the Mr.Talsania, the Union first came to the court with the case that the contracts should be abolished and thereafter have changed their stand that the contracts are sham and bogus. It was submitted by Mr. Talsania that once case is taken up that the contract has to be abolished, it presumes that the contract system is exist and is genuine. It was also contended that the Union filed Writ Petition No. 1494 of 1989 for absorption upon abolition in view of the decision of the Apex Court in the case of *Air India Statutory Corporation Vs. United Labour Union*⁹ and when this decision was over-ruled by the Constitution Bench in *SAIL-I*¹ the Respondents found it inconvenient to continue with the stand and changed it to contracts being sham and bogus. Mr. Talsania places reliance on the decision in the case of *Steel Authority of India & Ors. Vs. Union of India*¹⁰-(*SAIL-II*). He also contended that the observations made by the Apex Court in the case of *Sarva Shramik Sangh Vs. Indian Oil Corporation*¹¹ relied upon by the Union were in the facts of that case.

64. Ms. Cox submitted that in Writ Petition No. 1494 of 1989, the Respondents – Union had asserted that the contractors who were party to the Petition were mere intermediaries used by the Petitioner to employ workmen. She contended that the

⁹ - [(1997) 9 SCC 377]

¹⁰ - (2006) 12 SCC 233

¹¹ - [(2009) 11 SCC 609]

position before the CLRA Act came into force was that contract labour matters were dealt with by the Industrial Tribunal under Section 10 of the Industrial Disputes Act, 1947 and the question generally arose whether the arrangement is sham and bogus and the Tribunal directed abolition of contract labour system if certain criteria was met. She submitted that these judicially evolved criterias now stand incorporated in Section 10 of the Act of 1970. Ms. Cox submitted that the Constitution Bench in *SAIL-I*¹ has categorically held that the jurisdiction of the Tribunal to decide claims of sham and bogus contracts is not taken away. She relied on the decision of the Division Bench of Gujarat High Court in the case of *Gujarat Mazdoor Panchayat v/s. State of Gujarat*¹² to contend that the dispute that the contract is sham and bogus and the applications for abolition under Section 10 of the Act of 1970 operate in different fields. She submitted that there is no inconsistency in the factual matrix asserted and alternate pleas are available in law and on same facts, alternate pleas can be taken. She contended that the earlier Petition did contain assertions that the contractors are mere intermediaries and have been set up by the Petitioner. She submitted that throughout the litigation the Respondents have pleaded that the contracts are sham and bogus.

65. Two issues arise from the contention of the counsels. First, whether there is any legal bar against the Respondent-Union from taking different pleas i.e. abolition of contract and that the contract is sham and bogus. Second what could be the effect of this position on the credibility of the assertion of the Union

¹² - [(1992) 2 LLJ 486]

regarding the contracts being sham and bogus.

66. As regards the first position, regarding the legal bar to take such alternate pleas, Mr. Talsania relied upon the decision of *SAIL-II*¹⁰ more particularly paragraph 28 therein which reads as under :

'The workmen whether before the Labour Court or in writ proceedings were represented by the same Union. A trade union registered under the Trade Unions Act is entitled to espouse the cause of the workmen. A definite stand was taken by the employees that they had been working under the contractors. It would, thus, in our opinion, not lie in their mouth to take a contradictory and inconsistent plea that they were also the workmen of the principal employer. To raise such a mutually destructive plea is impermissible in law. Such mutually destructive plea, in our opinion, should not be allowed to be raised even in an industrial adjudication. Common law principles of estoppel, waiver and acquiescence are applicable in an industrial adjudication'.

67. On the other hand M/s Cox relied upon the decision in case *Gujarat Mazdoor*¹² and in the case of *Sarva Shramik Sangh*¹¹ She contended that the applications for abolition of contract system under Section 10 of the Act and an assertion that the contract is sham and bogus to be adjudicated under Section 10 of IDA, operate in two different fields and are not overlapping. Both the contentions can be raised simultaneously and alternative submissions can always be taken.

68. In *Sarva Shramik Sangh*¹¹ the facts were that a petition was filed by the workers seeking a direction to the Central

Advisory Contract Labour Board, to hold an investigation under Section 10 of the Act and make an order abolishing contract labour system with regard to the workers. That writ petition was dismissed for want of prosecution. Thereafter the workers approached the High Court contending that the contract was sham and bogus. This petition was dismissed by the High Court holding, amongst other ground, that the workers were estopped from seeking any other relief once having sought a relief of abolition of contract by contending that the contract was sham, bogus, and not genuine. Before the Apex Court, reliance was placed by the employer on the observations of the Supreme Court in paragraph No.28 of the decision of *SAIL (II)*¹⁰ which is quoted above. The issue regarding inconsistent pleas therefore squarely arose before the Apex Court in case of *Sarva Shramik*¹¹. The Apex Court analysed the position of *SAIL (II)*¹⁰ in detail and held that in case of *SAIL (II)*¹⁰ the workmen had taken a definite stand that they were working under the contract and the dispute that was referred to was the one which arose under the Contract Labour Regulation Act (CLRA), could not by amending claims statement take a contradictory and inconsistent plea that the contract was sham and bogus. It is held that it was in that context the Supreme Court in *SAIL(II)*¹⁰ observed that it is impermissible to raise the mutually destructive plea. Having distinguished the decision of *SAIL(II)*¹⁰ on facts, thus the Apex Court in *Sarva Shramik*¹¹ emphasized that what would be impermissible is raising inconsistent and mutually destructive pleas in the same proceedings. It also emphasized that when there is no inconsistency in the facts alleged a party is not

prohibited from taking alternative pleas available in law if similar on facts and as such, alternative reliefs can always be claimed.

69. I do not think it is necessary to delve deeper in the legal intricacies of this proposition in view of the facts of the present case. In the present case, the reference was made to the Industrial Court by order of this to adjudicate the dispute as to whether the contracts were sham and bogus after hearing all the parties. This reference was made after the notification abolishing the contract was struck down. When the reference was made by this Court to decide as to whether the contracts were sham and bogus, the Petitioner could have objected that such dispute cannot be referred contending that Union is estopped from raising such dispute. This was not done and the dispute came to be referred for adjudication. In view of this position, I am not inclined in the facts and circumstances of the present case to hold at this stage that the Respondent-Union was estopped from raising a plea of the contract being sham and bogus. On this ground alone, the Award cannot be set aside.

70. Turning now to the second point, which emerges from this factual position. It may be permissible in law for the Union to take such alternate plea but what is the effect of the conduct of the Respondent-Union on the credibility of their assertion is another matter altogether. Serious grievance is made by Mr.Talsania that the arguments that the contracts are sham and bogus are arguments of convenience than substance. This grievance cannot be brushed aside lightly. The Union brought the

case of category A, category B and category C employees, to the Court by way of Writ Petitions when the concerned workers had hardly worked for a year or two, in few cases three to four years. The entire thrust then was to seek abolition of the contract primarily on the ground that there was no registration or license required under CLRA Act. On this basis, interim relief was granted in favour of these workmen.

71. I have examined the averments made by the Union in Writ Petition No. 1494 of 1989, copy of which is placed on record. Though the Union has asserted that the contractors are mere intermediaries, the thrust of the Union's case is that these contractors do not have licence and the Petitioner is not registered under the Act. This has been made basis of stating that the contractors are mere intermediaries. It is asserted that all the requirements of Section 10 of the Contract Labour Act are satisfied and the prayers that are sought are that the contracts that the workmen be treated as regular and permanent employees. When this Petition was filed the law laid down by the Apex Court in the *Air India*⁹ was holding the field. Thereafter the Union actively pursued the matter in respect of the abolition of contract system in the Petitioner establishment. Initially the Government of India had declined to abolish the contract labour. Thereafter again writ petitions were filed. Then the notification for abolition was issued by the Central Government, which notification was struck down by the Courts. Thus, the Union took its case for abolition to the logical end. After the notification was struck down by the Courts,

the Union switched over for getting a declaration that the contracts are sham and bogus. It was not that initially the Respondent-Union came with specific case and sought two alternate reliefs and during the hearing, one of the reliefs came to be pursued. The Respondent-Union pursued their challenge for abolition of contract system for almost a decade and succeeded in getting a notification issued for abolishing the contract issued, which the Courts subsequently set aside. It is after this channel was completely exhausted and taken to the logical end that the Respondent-Union switched over to the challenge regarding the contracts being sham and bogus. Therefore, even though I am not inclined to hold that the Respondent-Union was in law estopped from contending that the contracts were sham and bogus, the conduct of the Union will have to be taken into consideration for the purpose of ascertaining veracity of their assertions as to whether this defence is only to perpetuate the status-quo as regards the employment.

72. Second preliminary contention of Mr.Talsania was that the contractors were not made party to the reference. It was submitted that the Contractors were joined by the Union in the Writ petition and they were fully aware of their existence and yet the Union avoided joining the Contractors to the reference who were necessary party. It was contended by Ms. Cox that the Contractors are not necessary parties to the reference and the reference was never challenged on the ground that the Contractors were not made party and the dispute was between the workers and the Petitioner, and the Tribunal had to hold that the contracts are sham and bogus.

73. The Petitioner had not challenged the Reference on the ground that the contractors were not made party to the Reference and therefore, the Tribunal proceeded with the parties which were on record. In fact the Tribunal did not reflect on this issue at all as the Tribunal proceeded on an erroneous premise that the burden of proving the contract as sham and bogus was on the Petitioner and therefore, it was Petitioner's duty, if it so desired to join the Contractors. However, at this stage, since the Reference itself was not challenged on the ground of non-joinder of necessary parties, on this ground alone I am not inclined to set aside the impugned Award.

74. There could genuine reasons or circumstances in a given case where the workers are handicapped, for want of identity etc. to join the Contractor as party in their pursuit of declaration that the contract is sham and bogus. In the present case, no such difficulty is shown. The contractors were made party to the Writ petition when the abolition was sought and interim relief was sought for. The explanation that because in the writ petition since the Contractors did not appear, it was not necessary to join them as parties to the Reference, cannot be accepted. As stated earlier, there may be situations where workers have cogent reasons for not joining the contractor as party to the reference. No such fact situation exists in the present case. Therefore, the conduct of the Union in not making attempt to join the Contractors as party to the reference will reflect on the credibility of their assertion regarding the contract being sham and bogus. The Union,

on whom the burden lay to prove the contract as sham and bogus, took risk of not joining the contractors as a party Respondent. It could also been deliberate, so as to avoid bringing the facts before the Court. Ms.Cox had relied on the decision of *Hindustan Lever*⁸ to urge this court to consider the entire dispute. However, in that case, the contractors therein were made party respondents and were cross-examined before the tribunal and that evidence was available.

75. Turning now to the evidence, which is on record as regards the assertion regarding the contracts being sham and bogus.

76. As regards group A and B, there are two periods. The first, before these workers approached this Court in writ petitions when interim orders were passed. Second, after the interim orders were passed and they worked without a contractor under the supervision of the Petitioner, under the orders of the Court. As regards group C there will be one period as these workers worked through a contractor until their alleged discontinuance. For group A and B Union will have to show that the contracts on which they worked, before they were continued by the orders of this Court departmentally, were sham and bogus. As regards group C they will have to show that the contract on which they worked throughout was sham and bogus.

77. Taking up group A and B first. These workers were employed through the contractors who were given the work after

calling for tenders and though an open bidding process. It is was not that these contractors did not exist. Contract was entered into by calling for tender through advertisements. In Writ petition No.1494 of 1989, it was stated by the Respondent-Union that the contractors who were joined to the petition purported to be contractors, they are not lawful contractors but mere intermediaries. It was stated that the work done by the contract workers was of permanent nature and the contractors are rotated. It was stated that the contractors do not have licenses. The Division bench noted that as regards the workers involved in that petition, the contract was presently being undertaken by one M/s JAC Enterprises which contract was for period of 31 August 1991. In the Statement of Claim, which has been briefly reproduced in the earlier paragraphs, the Respondent-Union has stated that the work was of perennial nature, the workers were working under the supervision of the Petitioner, and they were performing similar and identical duties. M/s.JAC Enterprises was referred to however it was only termed that he is a so-called contractor. In the written Statement filed by the Petitioner, the Petitioner gave details of various contractors engaged with an assertion that they were independent contractors lawfully engaged after calling for tenders. As regards the period after 1 January 1993, it was asserted that there was no contractor, as none was ready to accept conditions of the workers being taken in their contract.

78. Parties led their oral evidence. In the examination in-chief, the witness of the Union stated that he was working as a

casual labour at the Cargo complex along with twenty other workers in 3 April 2007 when he along with others were stopped from coming to work. He stated that he was employed through Sakpal brothers, M/s.Girija enterprises, and thereafter M/s.JAC enterprises, which he termed as paper arrangement with a contractor. He narrated the course of events after the institution of the Writ petition in the year 1989 and the interim orders passed. In the cross-examination, he stated that he has no appointment order to show that he was working with the Petitioner. His name was not enrolled in Employment Exchange nor did he apply to the Petitioner.

79. As regards this period prior to the interim orders were passed by the Court, the main argument advanced by Ms.Cox, which also covers the other periods, is that there was no registration certificate in favour of the Petitioner and that the contractors did not have any license. It was contended that the only registration certificate which was produced on record was of 7 November 2000 which referred to repairing and painting and did not cover the work involved in the present controversy. For the period prior to grant of interim orders, as regards group A and group B employees, the main argument is lack of requisite documentation required under CLRA Act in favour of the Petitioner, which according to Ms. Cox shows that the arrangement is sham and bogus. It was also her contention that in spite of the Division bench directing the Petitioner to continue the contract system through licensed contractors and with registration,

contracts were carried out without any registration. According to Mr.Talsania, not having a registration or license will only have consequences under the CLRA Act and contract cannot be termed as sham and bogus on that count.

80. The CLRA Act which is framed to regulate employment of contract labour and provide for its abolition, lays down various conditions in respect of its regularisation. Chapter 2 deals with registration of establishments employing contract labour. Section 6 deals with appointment of registering officers. Section 7 mandates every principal employer of an establishment to which CLRA applies, to make an application in prescribed manner to Registering Officer. Section 8 deals with revocation of registration in certain cases. Section 9 deals with effect of non-registration as under -

'9. Effect of non-registration.-No principal employer of an establishment, to which this Act applies, shall-

(a) in the case of an establishment required to be registered under section 7, but which has not been registered within the time fixed for the purpose under that section,

(b) in the case of an establishment the registration in respect of which has been revoked under section 8, employ contract labour in the establishment after the expiry of the period referred to in clause (a) or after the revocation of registration referred to in clause (b), as the case may be'.

Section 23, which is a penal provision deals with contravention of provisions regarding employment of contract labour. Section 25 refers to a position where person committing an offence is a

company. Section 25 mandates that no Court shall take cognizance of any offence except of a complaint made by the prescribed authority in the manner laid down therein.

81. The question as to the effect of non-registration of the establishment arose for consideration of the Apex court in the case of *Dena nath and Others Vs. National Fertilisers Ltd. & Anr.*¹³. The question before the Apex Court was that if the employer does not get registration under Section 7 of the Act and the contractor does not get license under Section 12 of the Act whether the person so appointed by the principal employer through the contractor would be deemed to be direct employee of the principal employer. There was a conflict between the decisions of High Court of Punjab and Kerala on one hand and decision of Madras High Court, Bombay High Court, Gujarat High Court, and Karnataka High Court on the other hand. The Madras High Court, Bombay High Court, Gujarat High Court, and Karnataka High Court took a view that in such contingency contract labour becomes direct employee of principal employer. The Apex Court analyzed the scheme of CLRA Act and observed thus -

'22. It is not for the High Court to inquire into the question and decide whether the employment of contract labour in any process, operation or in any other work in any establishment should be abolished or not. It is a matter for the decision of the Government after considering the matter, as required to be considered under Section 10 of the Act. The only consequences provided in the Act where either the principal employer or the labour contractor violates the provision of Sections 9 and 12 respectively is the penal provision, as envisaged under the Act for which reference may

¹³ - 1992 (1) SCC 695

be made to Sections 23 and 25 of the Act. We are thus of the firm view that in proceedings under Article 226 of the Constitution merely because contractor or the employer had violated any provision of the Act or the rules, the Court could not issue any mandamus for deeming the contract labour as having become the employees of the principal employer. We would not like to express any view on the decision of the Karnataka High Court or of the Gujarat High Court (supra) since these decisions are under challenge in this court, but we would place on record that we do not agree with the aforequoted observations of the Madras High Court about the effect of non-registration of the principal employer or the non-licensing of the labour contractor nor with the view of Bombay High Court in the aforesaid case'.

(Emphasis supplied)

82. This question again arose for consideration of the Apex Court in the case of *Municipal Corporation of Greater Mumbai Vs K.V.Shramik Sangh & ors.*¹⁴. In this case the union representing around 2000 workers doing the cleaning work at the city of Mumbai, filed a petition against Municipal Corporation of Greater Mumbai, relief of abolition of contract was sought. It was also contended that the contract entered into by the Municipal Corporation with the contractors was a sham arrangement. The High Court allowed the Writ petition and directed that the system of contract labour shall be discontinued and 782 contract labour be absorbed as permanent employees. The High Court took note of the fact that there was no registration certificate in favour of the Petitioner. In appeal before the Apex Court, the Municipal Corporation contended that the High Court was not right in holding that the contracts were sham and bogus because they were in contravention of the provisions of CLRA Act. The

¹⁴ - 2002 AIR -SC- 1815

Respondent -Union defended the decision of the High Court contending that the contract system may be characterised as sham and bogus if *inter-alia* the employer or principal employer and the contractors have not obtained certificates required under the CLRA Act and the nature of work is essential and perennial to the establishment. The Apex Court, did not approve the view taken by the High Court by observing under -

'20. The material referred to relates to the complaints of the Union, recommendations of the Labour Commissioner, Labour Minister and the Labour Contract Advisory Board in regard to abolition of contract labour under Section 10 of CLRA Act but that material could not be a foundation or basis to say that the labour contract was sham, camouflage or a devised to deny the statutory benefits to the workers. From the judgment under challenge, it is clear that Air India case (supra) weighed with the High Court which judgment now stands overruled as already stated above. The High Court rejected the contention that jurisdiction to abolish the contract labour system vested with the appropriate Government under Section 10 of CLRA Act and that power could be exercised after obtaining advice of the Contract Labour Advisory Board which in turn had to keep several factors enumerated in Clauses (a) to (d) of Section 10(2) of CLRA Act stating that in the present case in almost 15 years, there was no registration of principal employer; none of the contractors ever held a licence under the Act; the work that was being carried on fellow within the parameters of Clauses (a) to (d) of Section 10(2) of the Act and having regard to what was said by the Chairman, Standing Committee of the Corporation and the contractors and the recommendation of the Labour Commissioner to abolish the contract labour system. Further the Minister for Labour of Govt. of Maharashtra went on to record in clear terms that the Government had taken a decision to abolish system of contract labour in the Solid Waste Management Department of the Corporation, the High Court thought that there was sufficient material for abolishing the contract labour system.

The High Court drew an inference that the State admitted that all the requirements were satisfied for acting under Section 10(2) but because of the election code of conduct it was unable to act and passed order for absorption of workers saying that it had no impediment to do so in view of its conclusions. Referring to Air India case (supra), the High Court observed that the said judgment suggested that a contract labour system can be said to be genuine only if it is carried in compliance with the provisions of the CLRA Act and anything contrary thereto would lead to the presumption that the purported contract labour system was merely a devise and sham. In our view, the conclusion of the High Court that the contract labour system in the present case was sham cannot be sustained in the light of what is stated above and particularly when the disputed questions of fact arose for consideration in the light of rival contentions raised by the parties. We have detailed them above to say so'.

Observing thus, the Apex Court permitted the Respondent Union to move the appropriate Court or Industrial Adjudicator to determine in respect of its case that the contracts were sham and bogus. The Apex Court therefore clearly held that the fact that requirements of CLRA Act are not met by the principal employer and the contractor, will not lead to the conclusion that the contract is sham and bogus and there should be automatic absorption.

83. Ms. Cox relied upon the decision of the Apex Court in the case of *Secretary, H.S.E.B. Vs. Suresh & Ors.*¹⁵. She placed heavy reliance on the following observations -

'19. It has to be kept in view that this is not a case in which it is found that there was any genuine contract labour system prevailing with the Board. If it was a genuine contract system, then obviously, it had to be abolished as per

¹⁵- 1999 (2) SCALE pg 315

Section 10 of the Contract Labour Regulation and Abolition Act after following the procedure laid down therein. However, on the facts of the present case, it was found by the Labour Court and as confirmed by the High Court that the so called contractor Kashmir Singh was a mere name lender and had procured labour for the Board from the open market. He was almost a broker or an agent of the Board for that purpose. The Labour Court also noted that the Management witness Shri A.K. Chaudhary also could not tell whether Shri Kahsmir Singh was a licensed contractor or not. That workmen had made a statement that Shri Kashmir Singh was not a licensed contractor. Under these circumstances, it has to be held that factually there was no genuine contract system prevailing at the relevant time wherein the Board could have acted as only the principal employer and Kashmir Singh as a licensed contractor employing labour on his own account. It is also pertinent to note that nothing was brought on record to indicate that even the Board at the relevant time, was registered as principal employer under the Contract Labour Regulation and Abolition Act. Once the Board was not a principal employer and the so called contractor Kashmir Singh was not a licensed contractor under the Act, the inevitable conclusion that had to be reached was to the effect that the so called contract system was a mere camouflage, smoke and a screen and disguised in almost a transparent veil which could easily be pierced and the real contractual relationship between the Board, on the one hand, and the employees, on the other, could be clearly visualised.

Based on these above observations Ms.Cox contended that not having requisite license is not an irrelevant criteria to be considered. The careful perusal of this decision shows that it follows the decision of the Apex Court in the case of *Air India*⁹. The decision of *Air India*⁹ has been specifically over-ruled by the Constitution bench in *SAIL (I)*¹. Furthermore, the Apex Court in the above decision narrated the manner in which the litigation

progressed and came to the Apex Court. It was opined by the Labour Court and confirmed by the High Court that the contractor was a mere name lender and had procured labour for the Electricity Board from the open market. The contractor there was a broker or agent of the Electricity Board. The witness of the Electricity Board had stated that he could not state whether the contractor was a licensed contractor or not. Therefore, the facts would show that the Apex Court in this decision did not take non-availability of registration as a ground to hold that the contract was sham and bogus. The Apex Court confirmed the factual finding that the contract was sham and bogus and the contractor was otherwise found to be for namesake and then proceeded to refer to the fact of non-registration. In that light, based on this decision, at the most it can be argued that if the Court comes to the conclusion that the contract is sham and bogus based on cogent material and well-established tests, then the fact that the principal employer did not have registration and that the contractor did not have license, would cement such conclusion. However, lack of registration and licenses required under the CLRA Act cannot *ipso facto* lead to the conclusion that the contract is sham and bogus.

84. Throughout the earlier round of litigation, and the claim statement and depositions in the present reference, and in this petition, it is repeatedly asserted by the Union that the work carried out by the concerned workers was of perennial nature and permanent employees do same work. The Petitioner denies this.

Even assuming this be the position as asserted by the Union, still it will not lead to declaring the contract being sham and bogus on that ground alone. In the decisions, which have been referred above, the Apex Court has made it amply clear that criterias under CLRA Act do not have bearing on the disputes regarding the contract being sham and bogus. The Constitution Bench in *SAIL-I*¹ has laid down that the abolition of the contract under section 10 and the resolution of dispute regarding the contract being sham and bogus operate independently. Section 10 of CLRA Act deals with prohibition of employment of contract labour. It reads as under -

'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 that is 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*'.

The appropriate Authority therefore, can prohibit employment of contract labour in an establishment having regard to the conditions of work; benefits provided to the contract labour and relevant factors such as whether the work is of perennial nature having regard to the nature of industry to it, business, or manufacture. It can take into consideration that whether the work is done ordinarily through regular employees. The argument that the work is of perennial nature is relevant for creating a case for abolition of contract system in the establishment. The remedy for the workers, in such case, is to approach the Appropriate Government for prohibition and abolition of the system. In the present case, it was so done, but the notification was quashed and set aside by the High Court which position was confirmed by the Apex Court.

85. The parameters listed in Section 10 of CLRA Act were initially laid down by the Apex Court in the case of *The Standard-Vacuum Refining Company of India Ltd. Vs Their workers and another* ¹⁶. In that case, also after laying down the principles the Apex Court did not hold that the contract was sham and bogus and only upheld the direction of the Tribunal to abolish the system. After the CLRA Act was enacted the test laid down by the Apex Court were incorporated in Section 10 of the Act. Therefore, the fact that the work is of perennial nature and is being done by regular employees will not *ipso facto* lead to a conclusion that the

¹⁶ - AIR 1960 SC 948 (V 47 C 168)

contract is sham and bogus. If there is no prohibition under the CLRA Act to employ contract labour, it cannot be said that because the work is of perennial nature and the work is being done by permanent employees that the contract is sham and bogus.

86. For the next ground as regard this period the Ms.Cox relied upon a letter dated 15 October 1991 issued to M/s JAC Enterprises to assert that the terms and conditions virtually left no profit for the contract and it is inconceivable that the contractor would work without adequate profit margin. Calculations in respect of letters to demonstrate how the contractor was receiving less amount were placed on record. This submission also will not take the case of the Union any further. The letter dated 15 October 1991 communicates the acceptance of tender and specifies certain terms and conditions. What was the exact profit margin and why these Contractors accepted the contract are the questions, which would have been best answered by the Contractor. There could be many reasons why the Contractors accepted such contract and debate on this question would be in realm of speculations. There was no cogent reason for the Union not join the Contractors as party and then putting forth all the queries to the Contractors, even assuming that there was less profit margin. In absence of anything more this ground alone will not lead to the conclusion that the contracts were sham and bogus.

87. The case of Union for the period before the group A and B workers were continued departmentally under interim

orders is primarily that the work was of perennial nature and the requisite registrations and license under CLRA Act were not obtained. As discussed above these grounds cannot lead to the conclusion that the contract was sham and bogus. For this period, the Petitioner engaged contractors. Contractors were engaged by inviting tenders. The burden of proving that the contracts were sham and bogus was on the Union. Inference will have to be drawn that the Union avoided to join the Contractors. There is no cogent evidence to hold the contract entered into by the Petitioner before the concerned workers were continued departmentally, were sham and bogus. The Union has attempted to obfuscate the issue by relying on the evidence regarding the period when the concerned workers were admittedly continued departmentally under the direction of the Court. If these two periods are separated, it sharply comes in focus that for the first period the Union has no evidence to show that the contracts were a camouflage except the factors, which are relevant for abolition of the contract system.

88. Now turning to the second period regarding group A and B. As regards group A, interim protection was granted in the year 1989 and thereafter on 3 May 1991 by the Division bench of this Court. As regards group B, interim protection was granted on 2 December 1992 in Writ petition No.2641 of 1992. The Division bench while granting interim relief in favour of the Respondent Union made the following observations and directions-

The following are the particulars with respect to the Cleaning Services provided by different contractors at the

behest of the first Respondent :-

(i) The contract initially undertaken by Respondent No.7 (Labour Services in Import Warehouse & Cargo Complex) was thereafter undertaken by Respondent No.6 and is presently undertaken by M/s.Jac Enterprises. This contract is for the period till 31.8.1991.

(ii) The contract initially undertaken by Respondent No.19 (Trolley Retrieval Services at First Floor Terminal II A & B) has since been entrusted to and undertaken by M/s.Ethenic Services. This contract is for the period till 14.4.1992.

(iii) The contracts undertaken by Respondents No.8, 11 and 12 came to an end in 1989 and accordingly the said Respondents/contracts are not covered by this order.

13. The Central Advisory Contract Labour Board is directed to investigate in accordance with law under Section 10 of the Contract Labour Act the demands of the Petitioner for prohibiting the employment of contract labour for various works covered by this Part and entrusted to the contractors in the premises/establishment of the first Respondent and to make a report to the Central Government and to this Court on or before 30.7.1991.

14. The first Respondent is directed to ensure that all contract workers covered by this order are paid the minimum wages of Rs.39.75 per day and in case of Supervisors Rs.42.75 per day (if at present they are paid below that). Payment should be made by the 7th of each month.

15. The existing contract system shall continue in respect of the concerned works subject, however, to the result of the injury under section 10 or any other or further order which may be passed by this Court hereafter and subject also to the directions issued hereinbelow.

16. No contractor not listed in the registration certificate of the first Respondent, or in respect of whom intimation has not been given as required by Rule 18(4), shall be

engaged by the first Respondent to carry out the works in question. In case no such contractor is available or forthcoming, the works shall be got done departmentally by the first Respondent till such time as the new contractor listed in its registration certificate, or in respect of whom intimation has been duly given under Rule 18(4), is available and engaged to do the works.

17. The works presently entrusted to Respondents No.5, 9, 14 and Jac Enterprises and Ethenic Services shall be got done only through the contract workers listed in Annexure 'B' annexed hereto. The parties are not ad idem as to whether certain workers were regularly employed as contract labourers. In respect of such workmen, remarks to that effect have been made in the concerned lists in the said annexure. These differences shall be resolved by the parties amongst themselves. In case any problem as regards the names or the number of workers so employed remains unresolved, liberty is reserved to parties to move the Court and obtain appropriate orders in respect of such workers.

18. It is clarified that the mere fact that the workers are continued to be employed for the works if any, carried out departmentally by virtue of this order will not enable them to claim as of right that they have become direct employees of the first Respondent. The question as to whether the workmen concerned would become direct employees of the first Respondent in case the Central Government ultimately prohibits the employment of contract labour to carry out the work of the Court so directs and, if so how many, and all connected questions are left open to be decided at the appropriate stage.

19. The directions issued in paragraphs 16, 17 and 18 of the order dated 3rd May 1991 passed in Writ Petition No.504 of 1991 shall apply mutatis mutandis as regards fixation of the hours of attendance in an eight-hour schedule in respect of the workers covered by this order; the formalities to be observed in case of any of the workers ceasing to work in the premises of the first Respondent and

the initiation of action, if any, against the workers in respect of acts of indiscipline or misconduct.

20. These interim directions are passed without prejudice to the rights and contentions of the parties.

21. An oral Application for the stay of the operation of this order is rejected.

22. Notice of Motion No.214 of 1911, No.222 of 1991 and No.144 of 1991 do not survive and they stand disposed of accordingly.

23. Certified copy of this order to be supplied on a priority basis'.

89. The above direction of the Division bench is clear that the existing contract system and the concerned workmen should be continued, in case any contractor is not available or forthcoming the work should be done departmentally by the Petitioner. Similar was the direction in respect of category B. Before the Tribunal, the Petitioner had categorically asserted that no contractor was forthcoming to take the responsibility of continuing the concerned workers, as they wanted to engage their own employees. It was specifically stated by the Petitioner that it was due to the orders passed by this Court directing the services of the workers. Admittedly, there was no contract entered into with any Contractors since 1 January 1993 as the contractors were not prepared to enter into contracts. The concerned workers were continued under the supervision of the Petitioner. It was categorically asserted that since 1986 contracts were awarded from time to time to M/s Vijay and Company, Girija Enterprises,

M/s Sakpal brothers, M/s.JAC Enterprises etc. and prior to January 1993, these workers were under the supervision, management, and control of the contractors and from January 1993 since they were directed under the orders of the High Court, the Petitioner had to do the work of supervision, management, and control over their work.

90. The fact that the group A and B workers continued under the orders of the Court cannot be disputed. It is also not disputed that from 1 January 1993 there was no contract and concerned workers continued under the supervision of the Petitioner. Once that position is established, it is beyond comprehension as to how it can be concluded that because after 1 January 1993 there was supervision of the Petitioner under the mandate of the Court, the earlier contracts were sham and bogus. The period, which the Tribunal took into consideration, was the period when the Petitioner engaged no contractor. The perusal of the award, which has been analysed earlier shows, that the entire conclusion of the Tribunal that the contract regarding category A and B is based on the period when there was supervision of the Petitioner due to the interim orders passed by this Court. The Tribunal has concluded that the fact that admittedly, from 1 January 1993 there was no contractor and when there was no contractor and work was of perennial nature, the contracts were sham and bogus. Even keeping the Award aside, and looking at the case again, the resultant position is that as far as group A and group B are concerned, there is no evidence at all to demonstrate

that the contracts were sham and bogus. The Contractors are not made party and the entire argument was based on the violation of the CLRA Act and need for abolition of the system. Therefore it will have to be concluded that the Union failed to discharge the burden to show that the contracts entered into by the Petitioner in respect of group A and group B, were sham and bogus.

91. Turning now to the case of group C workers. These workers, even after the interim order, continued under contractors. The contractors were: M/s More Marketing, M/s.Delite Engineering Ltd. and M/s Gannon Dunkerley & Co. Pvt. Ltd. Most of the time it was M/s Gannon Dunkerley & Co. Pvt. Ltd. These workers were working on the conveyor belt system. As regards these contracts being sham and bogus, the Union has produced documents in respect of M/s Gannon Dunkerley on record as well as has adduced oral evidence. Ms. Cox argued that the following points show that the contract entered into by the Petitioner with M/s Gannon Dunkerley and the others, in respect of group C workers, were sham and bogus.

- i There was no registration certificate in favour of the Petitioner.
- ii. The witness of the Petitioner admitted that he does not know whether the contractors had valid license.
- iii. The witness of the Petitioner admitted that these workers were working alongside with the permanent workers.
- iv. The witness admitted that the Petitioner maintained muster roll and attendance, the Petitioner supplied equipment and there

was no evidence to show supervision and control by the contractor.

v. As regards M/s Gannon Dunkerley, in respect of contract dated 15 November 2000, letter dated 28 September 2000 stated that contract rate is less than actual expenses and the contract was virtually without any profit.

vi. The contract with M/s Gannon Dunkerley specified that the Petitioner would reimburse the wages, bonus, ESI contribution, and Provident Fund.

vii. The contract specified how many mechanics, electricians, and helpers were required per shift.

viii. The contract contained minute details how the work will be done. The admissions of the witness of the Petitioner show that the Petitioner did not do costing with consumables.

ix. The work was twenty four hours throughout the month. The work was carried out with consultation of Assistant General Manager. The measurement books were kept to assess the work. Duty roster was kept. The work has increased in last 25 years and fresh labourers were employed through contract.

92. Ms. Cox has placed on record compilation of documents in support of her submissions and has drawn my attention to the deposition of witnesses and their cross-examination.

93. The Apex Court in the case *Workmen of Nilgiri Co-op. Mkt. Society Ltd. V. State of T.N. and others*¹⁷ after taking a survey of the decision has culled out parameters to determine existence

¹⁷ - (2004) 3 SCC 514

of the relationship in such cases. The observations of the Apex Court are reproduced below.

a. *Determination of the vexed Questions as to whether a contract is a contract of service or contract for service and whether the concerned employees are employees of the contractors has never been an easy task. No decision of this Court has laid down any hard and fast rule nor it is possible to do so. The question in each case has to be answered having regard to the fact involved therein. No single test - be it control test, be it organisation or any other test - has been held to be the determinative factor for determining the jural relationship of employer and employee.*

b. *This Court beginning from Shivanandan Sharma v. Punjab National Bank. Ltd. (1955)ILLJ688SC and Dharangadhara Chemical Works Ltd. v. State of Saurashtra and Ors. (1957)ILLJ477SC observed that supervision and control test is the prima facie test for determining the relationship of employment. The nature or extent of control required to establish such relationship would vary from business to business and, thus, cannot be given a precise definition. The nature of business for the said purpose is also a relevant factor. Instances are galore there where having regard to conflict in decisions in relation to the similar set of facts, the Parliament has to intervene as, for example, in the case of workers rolling bidis.*

c. *In a given case it may not be possible to infer that a relationship of employer and employee has come into being only because some persons had been more or less continuously working in a particular premises inasmuch as even in relation thereto the actual nature of work done by them coupled with other circumstances would have a role to play.*

d. *The control test and the organization test, therefore, are not the only factors which can be said to decisive. With*

a view of 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; (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.

e. I.T. Smith and J.C. Wood in 'Industrial Law', third edition, at page 8-10 stated:

"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 this doing it - 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 increase 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 modernise 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. 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, or remained apart from and independent of it. Once again, this 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 upon all the factors for and against a contract of employment and determining on which side the scales eventually settle. 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 PAYE and national insurance contributions, the organisation of the workplace, the supply of tools and materials (though there can still be a labour - only sub- contract) and the economic realities (in particular who bears the risk of loss and has the chance of profit and whether the employee could be said to be 'in business on his own account'). A further development in the recent case law (particularly concerning atypical employments) has been the idea of 'mutuality of obligations' as a possible factor, i.e. whether the course of dealings between the parties demonstrates sufficient such 'mutuality' for there to be an overall employment relationship. "

f. In Mersey Docks and Harbour Board v. Coggins & Griffith Liverpool Ltd. Lord Porter pointed out:

"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 all to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject-matter under discussion but amongst the many tests suggested I think that 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. "

g. *It is a well-settled principle of law that the person who sets up a plea of existence of relationship of employer and employee, the burden would be upon him.*

h. *In N.C. John v. Secretary Thodupuzha Taluk Shop and Commercial Establishment Workers' Union and Ors. (1973)ILLJ366Ker , the Kerala High Court held:*

"The burden of proof being on the workmen to establish the employer-employee relationship an adverse inference cannot be drawn against the employer that if he were to produce books of accounts they would have proved employer-employee relationship. "

i. *In Swapan das Gupta and Ors. v. The First Labour Court of West Bengal and Ors. it has been held:*

"Where a person asserts that he was a workmen of the Company, and it is denied by the Company, it is for him to prove the fact. It is not for the Company to prove that he was not an employee of the Company but of some other person."

94. Ms. Cox contended that these tests laid down by the Apex Court is not a mathematical formula and the facts and circumstances of each case will have to be kept in mind. It will have to be seen whether the Union discharged the burden of proving that the contracts in respect of category C workers were only paper arrangements. The tests laid down by the Apex Court, culled out above provide guidance to decide the issue. It has to be kept in mind that the Tribunal had approached the issue by applying reverse test by placing burden on the Petitioner. As far as the grounds regarding the work of being perennial nature and that there were no valid registrations and license, I have dealt with the

issue in respect of the other category of workmen as above and the same applies to this group as well.

95. Turning now to the evidence on record in respect of the group C employees. The contract with M/s Gannon Dunkerley, and other documents has been placed on record. The contracts are sought to be assailed as being sham and bogus primarily on the ground of supervision and control by the Petitioner. It is not that M/s.Gannon Dunkerley is a stranger to the conveyor belt system. Ms.Cox submitted that the witness of the Petitioner had stated that he does not have documents to show that these contractors are specialised agencies. M/s.Gannon Dunkerley had supplied the system. The Petitioner had categorically asserted that M/s.Delite Engineers and M/s.More Associates are also specialized. The Union could have demonstrated that these contractors were generalists and were undertaking petty contracts elsewhere. There is no such evidence. The Contractors could have been joined and cross-examined. The most important aspect is that M/s.Gannon Dunkerley is the supplier of the conveyor belt system to the Petitioner and assertion was that they also took the contract in respect of the labour. Heavy burden therefore, lay on the Union to demonstrate that the contract was sham and bogus. Mr.Agasthya Nair, witness of the Union has admitted that M/s.Gannon Dunkerley was paying his wages. He also admitted that M/s.Gannon Dunkerley supplied and installed Terminal system at Terminal 1-A. Mr. Sapti Rajnikant, witness of the Petitioner deposed that when the Terminal 1-A was commissioned

most of the contract labour was appointed by M/s.Gannon Dunkerley who was the supplier and installer of the Conveyor belt system. He had asserted that he and Mr.J.P.Singh used to give instructions to the engineer and supervisor appointed by the contractor to attend the faults in conveyor system and who in turn rectified the faults and instructed the contract labour to carry out the job assigned to them. Mr. Sapti also stated that the supervisors were M.K.Barel and Mr.Manish Sanghvi on behalf of M/s.Gannon Dunkerley and M/s Delite Engineers. The witness for the Union, Mr.Nair, admitted in his cross-examination that it was true that Mr.Barel on behalf of M/s.Gannon Dunkerley was supervising the work. He also admitted that Mr.Manish Sanghvi in the year 2003 on behalf of M/s Delite Engineers was supervising the work. Therefore, the fact that the supervisors of the contract were supervising this work of contract labour in respect of the conveyor belt is admitted by the witness of the Union. Furthermore, as stated earlier M/s.Gannon Dunkerley had supplied the conveyor system. Therefore, from the evidence led by the parties, position emerges that M/s.Gannon Dunkerley Co. Ltd. installed the conveyor system, M/s.Gannon Dunkerley paid the contract labour and supervisors of M/s.Gannon Dunkerley supervised the work. The same position is also for M/s Delite Engineers. Merely because the Union wants to make the concerned workmen permanent employees of the Petitioner, the legal and factual position cannot be twisted to absurd limits by somehow branding the contractors as sham and bogus.

96. Heavy reliance was placed by Ms.Cox on the documents produced by the Union in support of the claim of the contract being sham and bogus. The agreement between the Petitioner and M/s.Gannon Dunkerley dated 15 November 2000 was relied upon. It was submitted that the agreement stated that M/s.Gannon Dunkerley had to pay bonus, ESI and wages to the workers who would be reimbursed. It was contended that the work was round the clock. It was also contended that penalty would be levied for break down beyond period of four hours. Similarly, the agreement between Petitioner and M/s Delite Engineers was also relied upon. Reliance was placed on the job responsibilities and on Airport Management, which according to the Union showed a detailed supervision. It was contended that even minutest details were provided, which is not possible if the contract was an independent and an authentic contract.

97. Contract for most of the period was of M/s Gannon Dunkerley. Firstly, as stated above, M/s. Gannon Dunkerley had supplied the conveyor belt system and its supervisors were supervising the work and paying the wages. The question now is of the supervision of the Petitioner. The argument regarding minute details in the contract advanced by the Union cannot be accepted, as what is relied upon is a job description. When the Baggage conveyor belt system is operated, which is for the convenience of the passengers, the Petitioner, the Airport Authority, will naturally be concerned that the Contractor operates it smoothly and does not cause inconvenience to the passengers. When the contract

involved sophisticated machinery, which provided facilities to the travelers, and mishandling such system would cause inconvenience, the anxiety of the Petitioner to give detailed instructions to the Contractor as well as levying penalty, can be termed as unnatural. It is also not improbable that for such task the officers of the Petitioner would visit and crosscheck with the contractors and its workers. Such tasks cannot be just left alone to a contractor to carry out at its will. The concept of supervision and control cannot be a rigid formula in every case. It would vary from case to case, depending on the nature of the work. In this case the Petitioner - Airport Authority could not have given free charter to the Contractor. It was permissible for the Petitioner to engage contractors for contract labour. There is bound to be an element of supervision and control and merely because there is some degree of supervision and control that would not lead to the conclusion that the contract is sham and bogus, without looking at the nature of work and other circumstances. The Apex Court observed so in the case of *International Airport Authority of India Vs International Air Cargo Workers' Union and Other*¹⁸ as under -

'35. As noticed above, SAIL did not specifically deal with the legal position as to when a dispute is brought before the Industrial Adjudicator as to whether the contract labour agreement is sham, nominal and merely a camouflage, when there is no prohibition notification under section 10(1) of CLRA Act.

36. But where there is no abolition of contract labour under section 10 of CLRA Act, but the contract labour contend that the contract between principal employer and contractor is sham and nominal, the remedy is purely

¹⁸ - (2009) 13 SCC 374

under the ID Act. The principles in Gujarat Electricity Board continue to govern the issue. The remedy of the workmen is to approach the industrial adjudicator for an adjudication of their dispute that they are the direct employees of the principle employer and the agreement is sham, nominal and merely a camouflage, even when there is no order under section 10(1) of CLRA Act.

37. The industrial adjudicator can grant the relief sought if it finds that contract between principal employer and the contractor is sham, nominal and merely a camouflage to deny employment benefits to the employer and that there is in fact a direct employment, by applying tests like: who pays the salary; who has the power to remove/dismiss from service or initiate disciplinary action; who can tell the employee the way in which the work should be done, in short who has direction and control over the employee. But where there is no notification under section 10 of the CLRA Act and where it is not proved in the 20 industrial adjudication that the contract was sham/nominal and camouflage, then the question of directing the principal employer to absorb or regularize the services of the contract labour does not arise.

38. The tests that are applied to find out whether a person is an employee or an independent contractor may not automatically apply in finding out whether the contract labour agreement is a sham, nominal and is a mere camouflage. For example, if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by contractor, if the right to regulate employment is with the contractor, and the ultimate supervision and control lies with the contractor.

39. The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be

assigned/allotted to the principal employer or used otherwise. In short worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor.

Nothing is shown by the Union that the Petitioner selected the workers to be appointed. Neither it was shown that the contractor did not carry out supervision at all. On the contrary, supervision by the contractor is admitted.

98. As regards the clause in the contract regarding reimbursement of the dues such as bonus, Provident Fund, etc. is concerned, it is the statutory duty of the principal employer under CLRA Act to do so, and therefore, nothing much turns on this position asserted by Union. This clause only places a responsibility on the contractor to pay the bonus, Provident Fund, ESI facility in addition to wages of workers on minimum wage basis in presence of Engineer in-charge or its authorized representative every month. The payment is to be reimbursed by the Petitioner on submission of the documents. All that this clause indicates is that the amount be paid in presence of the Petitioner's nominee, and upon the contractor furnishing proof of payment, the amount would be reimbursed. This, in fact, is a statutory requirement under Section 21 of the CLRA Act, which reads as under -

'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 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 the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor'.

Section 21(2) reproduced above states that the nominee of principal employer has to remain present at the time of disbursement. Again, one fails to understand as to how this stipulation in the contract would lead to the contract being sham and bogus. The argument is more out of desperation than conviction.

99. Therefore, taking review of the factual situation as enumerated in the earlier paragraphs, the following picture emerges. The burden of proving the contract being sham and bogus is on the Respondent-Union. As Group A and B, were working through contractors before they were continued under supervision of the Petitioner by the orders of the court. The

contractors were engaged after calling for tenders through advertisements. There is no cogent evidence to show that these contracts were sham and bogus. The primary argument made for this group is of non-compliance with stipulations under CLRA Act and that profit margin for one of the contracts was low. This cannot lead to the conclusion that the contracts were sham and bogus. Admittedly, after this Court passed the interim orders the workers continued under supervision of the Petitioner and this supervision cannot lead to the conclusion that the contracts were sham and bogus. As regards the group C workers, they were employed primarily through M/s.Gannon Dunkerley and for short time through M/s More Associates and M/s.Delite Engineers. M/s.Gannon Dunkerley had installed the conveyor system and had paid the wages to the workers. Their supervisors supervised the work. Even M/s Delite Engineers supervised the work. Nothing is shown that contractors had no role to play. It cannot be said that these contract was sham and bogus. The conclusion will have to be drawn that the Respondent-Union failed to discharge its burden that contracts in respect of group A, B and C workers were sham and bogus.

100. Now turning to the alternate arguments made by Mr.Talsania that even assuming the contracts are held to be sham and bogus, the workers cannot be treated as permanent employees of the Petitioner. It was his submission that the Petitioner being a public body and governed by rules, entry in the services of the Petitioner has to be through public services. Reliance was placed

on the basis in the case of *Umadevi(3)*² and the subsequent decisions following it. On the other hand it is the contention of Ms. Cox that the case of *Umadevi (3)*² will not apply to contract labour and even assuming it does the Apex Court in the case of *Harinandan Prasad*⁴ has made the position clear that Industrial Adjudicator is not powerless to grant relief. Though this issue is argued *in extensio*, in view of the findings rendered by me that the contracts in question are not sham and bogus, it has lost much of its relevance. However, for the sake of completeness, I will address the question in brief.

101. The Petitioner-the Airport Authority of India, is a statutory authority established under the Airport Authority Act 1994. The Airport Authority of India is constituted under Section 3 of the Airport Authority Act 1994. It consists of persons to be appointed by the Central Government, Director General of Civil Aviation, or an officer not below his rank, and not less than eight and not more than 14 members appointed by Central Government. Section 12 lists the functions of the Authority. Chapter 5A provides for summary procedure for eviction of unauthorised occupants on the airport premises. Section 40 empowers the Central Government to issue directions. Section 41(1)(d) empowers Central Government to frame rules for appointment of the officers and other employees. Section 42(2)(b) permits the Authority to make regulations for conditions of services and remuneration of officers. Rules and regulations are to be laid before the Parliament. Petitioner is a public body and all citizens,

if qualified, have right to apply for employment with the Petitioner-Authority.

102. Before the Tribunal it was categorically asserted by the Petitioner that the permanent employees are recruited by the Petitioner through a procedure involving a public participation, such as advertisement, interview and Employment Exchange, etc. An absolute proposition is however advanced by Ms. Cox that when contracts entered by public bodies are held to be sham and bogus, there has to be an automatic absorption of such contract labours in public service on permanent basis. It was contended that the case of *Umadevi (3)*² is not applicable to such situations. The reliance was placed on the cases of *The Standard-Vacuum*¹⁷, *Gujarat Mazdoor Panchayat*¹² *General Manager Oil and Natural Gas Commission*¹⁹. It was contended that the Constitution bench in the case of *SAIL (I)*¹ has held that in case contracts being sham and bogus, the workers will have to be treated as employees of the principal employer.

103. In the case of *SAIL (I)*¹ the constitution Court had concluded the debate on the topic of contract labour as follows in paragraph 121-

'121. The upshot of the above discussion is outlined thus:

(1)(a) Before January 28, 1986, the determination of the question whether Central Government or the State Government, is the appropriate Government in relation to

¹⁹ - (2008) 12 SCC 275

an establishment, will depend, in view of the definition of the expression appropriate Government as stood in the CLRA Act, on the answer to a further question, is the industry under consideration carried on by or under the authority of the Central Government or does it pertain to any specified controlled industry; or the establishment of any railway, cantonment board, major port, mine or oilfield or the establishment of banking or insurance company? If the answer is in the affirmative, the Central Government will be the appropriate Government; otherwise in relation to any other establishment the Government of the State in which the establishment was situated, would be the appropriate Government,

(b) After the said date in view of the new definition of that expression, the answer to the question referred to above, has to be found in clause (a) of [Section 2](#) of the Industrial Disputes Act; if (i) the concerned Central Government company/undertaking or any undertaking is included therein eo nomine, or (ii) any industry is carried on (a) by or under the authority of the Central Government, or (b) by railway company; or (c) by specified controlled industry, then the Central Government will be the appropriate Government otherwise in relation to any other establishment, the Government of the State in which that other establishment is situated, will be the appropriate Government.

(2)(a) A notification under Section 10(1) of the CLRA Act prohibiting employment of contract labour in any process, operation or other work in any establishment has to be issued by the appropriate Government :

(1) after consulting with the Central Advisory Board or the State Advisory Board, as the case may be, and;

(2) having regard to (i) conditions of work and benefits provided for the contract labour in the establishment in question; and

(ii) other relevant factors including those mentioned in sub-section (2) of [Section 10](#);

(b) inasmuch as the impugned notification issued by

the Central Government on December 9, 1976 does not satisfy the afore-said requirements of [Section 10](#), it is quashed but we do so prospectively i.e. from the date of this judgment and subject to the clarification that on the basis of this judgment no order passed or no action taken giving effect to the said notification on or before the date of this judgment, shall be called in question in any tribunal or court including a High Court if it has otherwise attained finality and/or it has been implemented.

(3) Neither Section 10 of the CLRA Act nor any other provision in the Act, whether expressly or by necessary implication, provides for automatic absorption of contract labour on issuing a notification by appropriate Government under sub-section (1) of [Section 10](#), prohibiting employment of contract labour, in any process, operation or other work in any establishment. Consequently the principal employer cannot be required to order absorption of the contract labour working in the concerned establishment;

(4) We over-rule the judgment of this court in Air Indias case (supra) prospectively and declare that any direction issued by any industrial adjudicator/any court including High Court, for absorption of contract labour following the judgment in Air Indias case (supra), shall hold good and that the same shall not be set aside, altered or modified on the basis of this judgment in cases where such a direction has been given effect to and it has become final.

(5) On issuance of prohibition notification under Section 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 of 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 regularise the services of the contract labour in the concerned establishment subject to the conditions as may be specified by it for that purpose in the light of para 6 hereunder.

(6) If the contract is found to be genuine and prohibition notification under Section 10(1) of the CLRA Act in respect of the concerned establishment 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 as to maximum age appropriately taking into consideration the age of the workers at the time of their initial employment by the contractor and also relaxing the condition as to academic qualifications other than technical qualifications'.

(Emphasis supplied)

104. In the case of *SAIL(I)*¹ Constitution bench was not specifically considering the situation regarding entry into public service and the need to adhere to Article 14 and 16 of the Constitution of India. That issue squarely arose for consideration in the case of *Umadevi (3)*². Before the case of *Umadevi (3)*² came up before the Constitution bench, three Judges bench of the Supreme Court in the case of *A.Umarani Vs Registrar, Co-op. Societies*²⁰, had held that the appointments which were made in contravention of mandatory provisions of the Act and statutory rules would be illegal and cannot be regularised. It was held that

²⁰ - (2004) 7 SCC 112

even the Supreme Court under Article 142 could not issue such direction on mere equitable considerations.

105. A reference was made to Constitution Bench in the case of *Umadevi (3)*² since it was noticed that there were conflicting decisions of three Judges' Bench of the Apex Court regarding regularization and permanency in public service. The Apex Court took review of the entire case law regarding the scheme of public employment as envisaged under the Constitution. The primary emphasis was upon the recognition of the rights of those millions unemployed who are not before the Courts and that disputes regarding the public services are not a pure employer – employee disputes, but there is a third party i.e. the unemployed citizens who are not before the Court who are also aggrieved by the directions. It was noted that public bodies resort to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commission or otherwise as per the rules adopted and permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. The Constitution bench observed that a class of employment, which can only be called 'litigious employment', is seriously impairing the constitutional scheme. Equity for few who have approached the Court with a claim, cannot supersede the equity for the millions seeking employment and seeking a fair opportunity for competing for employment.

106. The Apex Court in *Umadevi-3*² observed that a contractual appointment comes to an end at the end of the contract, an appointment on daily wages or casual basis, would come to an end when it is discontinued. Merely because, an employee had continued under orders of Court, he would not be entitled to any right to be absorbed or made permanent in the service. The Constitution bench cautioned against needless sympathetic approach. A person, who accepts an engagement either temporary or casual in nature, is aware of the nature of his employment. He accepts the employment with full knowledge. The Constitution bench held that the argument that since one has been working for some time in the post, it would not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, would be contrary to equality of opportunity under Article 14. The Constitution Bench made it very clear that those decisions which were contrary to the principles enumerated in its decision or in which directions running counter to what was held in *Umadevi-(3)*² would stand denuded their status as precedent.

107. Therefore it cannot be said that case of *Umadevi (3)*² will have no application to a situation where the contract is declared sham and bogus. In my opinion, such workers cannot automatically be given permanent status by the Industrial Adjudicator, without looking at the facts and circumstances of the case. If the absolute proposition advanced by Ms. Cox of

automatic permanency in public service is accepted, it will open gates to various abuses. In *Umadevi-(3)*² the Constitution Bench noted the failure of the public bodies, at times the tacit approval and even collusion of some of the public officials, in bypassing the constitutional mandate in public employment. If it is held that moment contract is declared sham and bogus, the workers who are working on contract, even for a short time, will stand automatically absorbed and become permanent, without going through the established procedure, deliberately paper arrangements contract could be entered into by recalcitrant officials and within a short period such workers would be encouraged to approach the Court of law to seek interim orders and thereafter a final order in their favour. By this method, another avenue for back-door entry would open. In *Umadevi-(3)*² the Constitution Bench had emphasized that while dealing with the matters of public employment, the courts should not only keep in mind the employer and the workmen/employees before the court, but also the interest of those who are not before the court and waiting for entry in public services through legitimate means and the court should be alive to abuses of Article 14 and 16 of the Constitution. Furthermore, in paragraph 120 (5) the Constitution bench in *SAIL (I)*¹ has used the phrase “otherwise found suitable”. So even in the case of *SAIL (I)*¹ there is no absolute proposition laid down as advanced by Ms.Cox.

108. It was contended by Ms.Cox that in the case of *Umadevi (3)*¹ will have to be understood in the facts of the case

and the ratio laid down therein has to be with reference to the factual backdrop. She placed reliance on the decision of Appeal Court in *Quinn Vs Leathem – Earl of Harlbury L.C.; H.L.(I) -1901 pg.495* to contend that a judgment must be read as applicable to the particular facts and it is an authority for it actually decides and not for what logically follows from it. This proposition of law cannot be disputed, but the decision of Constitution bench in *Umadevi-(3)*² cannot be restricted to the facts before it. A Reference was made to the Constitution bench not for decision on the facts but to settle the law regarding entry in public service. The decision deals with the constitutional mandate regarding of entry in public service. Therefore if concerned workers are seeking entry in public service then this decision is directly applicable. The dictum of the Constitution bench is clear and unequivocal and it supersedes all contrary decisions. In the case of *Official Liquidator Vs Dayanand*²¹ the Apex Court reiterated that all Courts are bound by the Constitution bench in *Umadevi (3)*².

109. Ms. Cox relied upon the Service Regulations of the Petitioner to contend that the concerned workers will have to be treated as permanent if the contract is declared sham and bogus, as they will not fit in any other category. Such converse argument cannot be accepted. It is for the workers to demonstrate under which category they would fit and merely because a particular category is not described in the Service Regulations cannot mean that the concerned workers will become permanent employees, by-passing the constitutional mandate.

²¹ - 2008 (10) SCC (1)

110. On the other hand, the absolute proposition advanced by Mr. Talsania that even after declaration is given that the contract is sham and bogus in view of the decision of *Umadevi (3)*² in no circumstances there can be grant of permanent status to such employees in a public service, also cannot be accepted. The power of Industrial adjudicator and the law laid down by the constitution bench in *Umadevi-3*² arose for consideration in several decisions of the Apex court and the position was reconciled in *Harinandan Prasad*⁴. A review of the decisions on this subject was taken by this Court in *Sandip Baliram Sandbhor & Ors. V/s Pimpri Chinchwad Municipal Corporation & ors.*²² and it was observed thus-

'34. The review of the decisions would show that the dictum of the constitution bench in the case of Umadevi (3) is binding on all Courts, including the industrial adjudicator. Various arguments are advanced by the members of the bar under a mistaken impression that after the decision in MSRTC, the decision of Umadevi (3) is not applicable to the industrial adjudication governing public employment, which is entirely incorrect. However, in a circumstance where an unfair labour practice is committed by an employer by keeping the employees/workmen on temporary, casual and daily wage basis for years with an intention and an unfair labour practice of this magnitude is committed, then the industrial adjudicator is not powerless to grant relief. This position has been reconciled by the Apex Court in the case of Hari Nandan Prasad (supra).

35. An entry into a public employment must conform to Article 14 and 16 of the Constitution and one of the cardinal principle is that there has to be a public participation at the time of entry in public service. A

²² - (W.P. No.262 / 2015 of our Court dt. 03/12/2015)

clandestine and back door entry in the public service is violative of Articles 14 and 16 and no rights will therefore flow from such an entry. There are however cases where there is an exploitation of workforce by a public body by keeping such workers temporary for years with an object of depriving them the status of permanency. Such unfair labour practice, as indicated under Item 6 of Schedule IV of Act of 1971, is itself a negation of Article 14 of the Constitution. Once such an exploitation is proved, then the power of the Industrial adjudicator to take an affirmative action is not taken away. This however would depend on facts and circumstances of each case. In the case of Hari Nandan Prasad (supra), the Apex Court has indicated few of the parameters and has left it to facts and circumstances of each case. The Apex Court had deliberately kept this issue to be decided in the facts and circumstances of the case. Therefore, not only it is hazardous but also it will be impermissible to put this exercise in a mathematical formula. Whether an order of regularization would advance justice or defeats it, and will be contrary to the employer's right, would depend from case to case. Ultimately, the balance will have to be achieved between the rights of citizens for access to public employment visavis the need to prevent exploitation of the work force. The steps taken by the industrial adjudicator should be in furtherance of the equality doctrine'.

111. Thus, it will be a matter of achieving a balance by the Industrial Adjudicator between the competing rights. Therefore, even after a contract is declared sham and bogus ,neither there can be automatic absorption in public service, nor there can be a complete denial of claim of absorption and permanency. The Industrial Adjudicator will have to balance the competing rights, and in a given case, Industrial Adjudicator is not powerless to grant affirmative relief.

112. In the present case, the chart annexed to the Claim statement shows that the concerned employees had hardly worked for few months, maximum period being three years, before they approached the Court of law and interim orders were passed in their favour and the Court directed Petitioner to continue them. Some of the employees have joined the petition, after the interim orders were passed . It is for last 20 years that the Petitioner is forced to engage the concerned workmen. This engagement is a 'litigious engagement' as referred to in the case of *Umadevi (3)*^{two}. Even while granting interim relief Division bench had clarified that grant of this relief would not create equities in favour of the employees. The Union spent an entire decade for seeking a declaration that the contract is sham and bogus and continued with the interim relief on the ground of abolition of contract. After the decision in the case of *Air India*¹⁶, the Union changed tracks and pursued the litigation in different direction while continuing with the interim orders forcing the Petitioner to engage the services of the concerned workers. These workers had barely put in short period of service with the Contractors when they were continued by orders of the Court. Even after 2007 and in some cases after 2011 by orders of the Court they are being paid wages even though they are not actually working. Therefore a finding cannot be arrived at that there was exploitation of these particular workers who are before the Court. Ms. Cox tried to contend that these workers are struggling for a long time to get a declaration of permanency. It is no doubt true that they are in the courts since 1989. However, they have benefited from this litigation and have

continued in the services of the Petitioner under the order of the Court for two decades. It is in fact the Petitioner who has a cause to complain for being forced to engage these workers and paying them for two decades. They have been paid wages, where many are deprived of even a minimum wage.

113. The last point that was urged by Ms.Cox that assuming everything is against the Petitioner, the direction to the Petitioner to pay equal wages to the concerned employees be sustained and the Petitioner be directed to do so. The chart showing difference in wages has been placed on record by Ms.Cox. It is submitted that the concerned workers were paid less since they were working on contract basis. On the other hand, it was contended by Mr.Talsania that the Court does not have any power to grant such relief, which can only be done by the Authority under the CLRA Act.

114. Ms.Cox relied on the order passed by the Division bench of this Court in the case of *Contract Laghu Udhog*⁵ and Rule 25 (2)(v)(a) of Contract Labour (R & A) Central Rules 1971. The Rule reads thus:

'Rule 25 (v)(a) in cases where the workmen employed by the contractor perform the same or similar kind of work as the workmen directly employed by the principal employer of the establishment, the wage rates, holidays, hours of work and other conditions of service of the workmen of the contractor shall be the same as applicable to the workmen directly employed by the principal employer of the establishment on the same or similar kind of work:

Provided that in the case of any disagreement with regard to the type of work the same shall be decided by [the Deputy Chief Labour Commissioner (Central)].'

In the case of *Contract Laghu Udhog*⁵ the division bench made the following observations-

'15. Respondent No. 1 has proceeded on the basis of the report of Government Labour Officer which indicates that the work done by the contract labour was not the same as done by the regular workers of respondent No. 2 and unconnected with the manufacturing activities. This approach is wholly inappropriate and would defeat the legislative intent. We are of the opinion that the expression "perform the same kind of work" occurring in Rule 25 will have to be understood in the context of the definition of 'workman' in Section 2(l)(i) of the Act of 1970. It is well settled that a statutory Rule must be interpreted in such a way that it does not whittle down the Act of Parliament in any respect, for the Rule would become ultra vires. The Rules are framed in aid of the Act. Understood thus, the nature of work done by the contract labour will have to be classified as skilled, semi-skilled, or unskilled manual, supervisory, technical or clerical work in the establishment and not by physically comparing with the actual work done by the regular workers of the establishment relating to manufacturing activities alone or otherwise. The definition of "workman", in Clause (i) of Sub-section (1) of Section 2 of the Act, means any person employed in or in connection with the work of any establishment to do any skilled, semi-skilled or unskilled manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be express or implied, but does not include any such person - (A) who is employed mainly in a managerial or administrative capacity; or (B) who being employed in a supervisory capacity draws wages exceeding five hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested to him. functions mainly of a managerial nature; or (C) who is an out-worker that is to say, a person to whom

any articles or materials are given out by on behalf of the principal employer to be made up, cleaned, washed, altered, ornamented, finished, repaired, adapted or otherwise processed for sale for the purposes of the trade or business of the principal employer and the process is to be carried out either in the home of the out-worker or in some other premises, not being premises under the control and management of the principal employer. Admittedly, the work undertaken by the contract labour employed by respondent No. 2 does not fall in either of the exempted category of this definition but is covered by virtue of persons employed in connection with the work of establishment of respondent No. 2 to do skilled and unskilled manual work for hire or reward. As mentioned hereinabove, respondent No. 1 has relied upon the finding of the Government Labour of fleer that none of the contract labour was connected with the manufacturing activity and was not doing the same kind of work done by the regular workers. The view taken by the respondent No. 1, clearly misconstrues the expression "perform the same kind of work" occurring in Rule 25(2) (iv)(b) of the Maharashtra Contract Labour (Regulation and Abolition) Rules, 1971. The expression "perform the same kind of work" need not mean that the contract labour should actually do the same work as the workmen directly employed by the establishment. But the work performed by such contract labour will have to be broadly classified on the basis of skilled, semi-skilled, unskilled manual, supervisory, technical or clerical work for hire or reward. In our view, this meaning can be ascribed on the basis of Section 2(l)(i) of the Act of 1970, which defines "workman", read with Rule 25(2)(iv)(b); as well as the notification issued by the Government of Maharashtra under the provisions of Minimum Wages Act, which classifies the workers broadly in 4 categories, skilled, semi-skilled, unskilled and clerk. Moreover, Sub-clause (c) of Rule 25(2)(iv) stipulates that the rates of wages shall be such as may be specified by the Commissioner of Labour. In other words, the rates of wages specified under the Minimum Wages Act, are to be kept in mind while considering the claim of the workman under the Act of 1970. A fortiori, the classification of workmen done

under the Minimum Wages Act would apply or at any rate the principle underlying such classification would be relevant while examining the purport of "perform the same kind of work" provided for in Rule 25.

115. The CLRA Act exhaustively deals with the concept of regularisation of contract labour system if it is not abolished. Section 10 gives power to the appropriate authority to prohibit the system when the similar work is done through regular workers. Rule 25(2)(v)(a) of the Rules of 1971 has a proviso which states that in case of disagreement regarding type of work, it has to be decided by the Labour Commissioner. A right is created in favour of the contract workers under the Rules and a forum for asserting this right is provided under the Rules. Having once concluded that the concerned employees were the workers of the contractors and not of the Petitioner, question will remain of applicability of the Rules and provisions of the CLRA Act. The CLRA Act and the Rules has laid down a machinery for resolution of disputes. The Apex court in the case of *B.H.E.L. Workers' Association Hardwar and Ors. Vs Union of India & ors.*²³, has made this position clear. In this case, the Workers Association had filed writ petitions alleging that though the workers who were treated as contract labours were employed by *BHEL*.²³ they were not being paid the same wages as the regular workers. Rule 25(2)(v)(a) fell for consideration of the Apex Court and the Apex Court held as under-

'Similarly Rule 25 (ii) (v) (b) provides that in other cases the wage rates, holidays, hours of work and conditions of service of the workmen of the contractor shall be such as may be specified in this behalf by the Chief Labour

²³- (1985) SCR 611

Commissioner (Central). While determining the wage rates, holidays, hours of work and other conditions of service under Rule 25 (ii) (v) (b) the Chief Labour Commissioner is required to have regard to the wage rates, holidays, hours of work and other conditions of service obtaining in similar employments. There is no dispute before us that the *Payment of Wages Act* applies as much to contract labour as to labour directly employed by the principal employer of the establishment.

Thus we see that no invidious distinction can be made against contract labour. Contract labour is entitled to the same wages, holidays, hours of work and conditions of service as are applicable to workmen directly employed by the principal employer of the establishment on the same or similar kind of work. They are entitled to recover their wages and their conditions of service in the same manner as workers employed by the principal employer under the appropriate Industrial and labour Laws. If there is any dispute with regard to the type of work, the dispute has to be decided by the Chief Labour Commissioner (Central). It is clear that Parliament has not abolished contract labour as such but has provided for its abolition by the Central Government in appropriate cases under sec. 10 of the contract Labour (Regulation and Abolition) Act, 1970. It is not for the court to enquire into the question and to decide whether the employment of contract labour in any process, operation or other work in any establishment should be abolished or not. This is a matter for the decision of the Government after considering the matters required to be considered under sec. 10 of the Act. Similarly the question whether the work done by Contract labour is the same or similar work as that done by the workmen directly employed by the principal employer of any establishment is a matter to be decided by the Chief Labour Commissioner under the proviso to Rule 25 (ii) (v) (a). In these circumstances, we have no option but to dismiss both the writ petitions but with a direction to the Central Government to consider whether the employment of contract labour should not be prohibited under sec. 10. of

the Act in any process, operation or other work of the BHEL, Hardwar. There will also be a direction to the Chief Labour Commissioner to enquire into the question whether the work done by the workmen employed by the contractors is the same type of work as that done by the workmen directly employed by the principal employer in the BHEL, Hardwar.

(Emphasis supplied)

Ms. Cox tried to contend that this decision is rendered in respect of powers of the Court under Article 226 and not the powers of the Industrial Adjudicator. This argument will not take case of the Respondent Union any further. The Apex Court has clearly held that the authority to determine this issue would be the concerned Labour Commissioner under the Rules and therefore, this issue will have to be left to the Labour Commissioner to be decided as per law. The decision of the Division bench in *Contract Laghu Udhog*⁵ will have to be read in the context of the law laid down by the Apex Court in *BHEL*.²³

116. To conclude, the Reference cannot be said to be not maintainable since the Petitioner is prosecuting the present Writ petition and the arrangement between the Petitioner and MIAL is a private arrangement and the Petition will have to be decided on merits as it is. The contentions of the Respondent-Union made in the application under Section 17-B will have to be understood in the context in which they were made and it cannot be said that the Union is precluded from claiming declaration and permanency on that count alone. The Industrial Tribunal has not considered the material on record in proper perspective. There is no distinction

between the period of the claim as regards the category A and B. There is virtually no discussion as regards the contract before the protection by this Court. After the protection was given by this Court admittedly, the workers have worked under the supervision of the Petitioner. Considering the material on record and the fact that the burden is placed on the Union, after considering the evidence, it will have to be held that the Union has not succeeded in proving that the contracts are sham and bogus. Even otherwise, even if the contracts are held to be sham and bogus, no automatic permanency in service of the Petitioner, a public body, is permissible, without reference to the facts and circumstances. The facts in the present case show that the concerned workers worked for a limited period before continued by the orders of the Court. Some of them joined the petitions after the protection was granted. It cannot be said that there was any exploitation of these workers. As regards the contention for grant of equal pay, the said lies in the domain of Appropriate Authority under the Act and the Rules.

117. Though various grievances were made by Ms.Cox as regards the ills of contract labour system in general, which may be justified, but they are not germane for determination of the issue at hand. The contract system in the Petitioner-establishment was not abolished and it was permissible for the Petitioner to employ workers on contract basis. Only limited question is whether relevant contracts were sham and bogus, which has to be determined based on the criteria indicated by various decisions of

the Apex Court and this Court. Most of the arguments advanced are directed towards abolition of the contract system, which cannot be the scope of proceedings arising from decision of the Industrial Adjudicator. As rightly contended by Mr.Talsania that the Union's argument that contracts were sham and bogus is more of convenience than of conviction, having failed to get the prevalent contract system abolished.

118. In the circumstances, for the reasons stated above, the impugned award cannot be sustained. The writ petition will have to be allowed and it is accordingly allowed. The impugned award dated 26 May 2008 passed by the Central Government Industrial Tribunal, Mumbai is quashed and set aside. Rule is made absolute accordingly. No costs.

119. Ms.Cox seeks continuation of the interim arrangement. The request is opposed by Mr.Talsania. The interim arrangement, pursuant to the direction of the Apex Court is, to pay wages month to month on or before seventh day of subsequent month to the concerned workmen. Since it will take some time for the Respondents to approach the Apex Court and that the interim arrangement is being continued since September 2014, with effect from 2011, interest of justice requires that the Workers be given a fair opportunity to pursue their challenge.

120. Accordingly, the interim arrangement shall continue for the month of February 2016 and March 2016. The Petitioner will deposit the dues for February 2016 on or before 7 March 2016 in

this Court. For the month of March 2016, the Petitioner shall do so on or before 7 April 2016. The concerned workers will be entitled to withdraw these amounts upon furnishing an undertaking that in case any order is passed by the Court directing refund of these amounts to the Petitioner, they shall do so. Upon furnishing this undertaking, concerned workers, on proper identification, will be entitled to withdraw these amounts so deposited.

(N.M.Jamdar, J.)