

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**LETTERS PATENT APPEAL NO.337 OF 2011
IN
WRIT PETITION NO.6216 OF 2011**

Oil & Natural Gas Corporation Ltd.)
A Company registered under the Companies)
Act having its Regional Office at NSE)
Building, Bandra-Kurla Complex, Bandra,)
Mumbai - 400 051.)Appellant

V/s.

1. Petroleum Employees Union)
A Trade Union registered under the Trade)
Unions Act, 1926 having its office at Tel)
Rasayani Bhavan, Tilak Road, Dadar (E),)
Mumbai - 400 014.)
2. General Employees Association)
A Trade Union registered under the Trade)
Unions Act, 1926 having its office at Tel)
Rasayani Bhavan, Tilak Road, Dadar (E),)
Mumbai - 400 014.)
3. Oil & Natural Gas Corporation (BOP))
Karmachari Sanghatana)
A Trade Union registered under the Trade)
Unions Act, 1926 having its office at Flat no.)
304, Tambe nagar, Mulund (West), Mumbai)
400 080.)
4. Vijay Electrical)
Hind Rrajasthan Building, Dadar, Mumbai)
400 014.)
5. Sam Fire Services)
C/o. ONGC, Vasundhara Bhaven, Mumbai -)
400 051.)
6. Shri Y. Baburao)
C/o. ONGC, Vasundhara Bhavan, Mumbai)
400 051.)
7. R.N. Paint Engineering Works)
C/o. ONGC, Vasundhara Bhavan, Mumbai-)
400 051.)
8. Damodar Tech. Ind Pvt. Ltd.)
C/o. ONGC, Panvel, Dist. Raigad.)
9. Shri Enterprises)
C/o. ONGC Uran, Dist. Raigad.)

10. International)
- C/o. ONGC, Uran, Dist Raigad.)
11. Babu Caterers)
- C/o. ONGC, Uran, Distt. Raigad.)
12. Asha Caterers)
- C/o. ONGC, Poonam Nagar, Andheri,)
- Mumbai.)
13. Romeo Marine Management)
- C/o. ONGC, Uran, Mumbai.)
14. Rank Control)
- C/o. ONGC, Uran, Mumbai.)
15. International Engineering & Marine)
- Works,)
- C/o. ONGC Vasundhara Bhavan, Mumbai)
- 400 051.)
16. Techno Mechanical Engineering)
- Hind Rajasthan Building, Dadar, Mumbai)
- 400 014.)
17. S.S. Construction)
- C/o. ONGC, Vasundhara Bhavan, Mumbai)
- 400 051.)
18. Moosa Services)
- C/o. ONGC, Vasundhara Bhavan, Mumbai)
- 400 051.)
19. Danish Sales Corporation)
- C/o. ONGC, Vasundhara Bhavan, Mumbai)
- 400 051.)
20. S.P. Gharat)
- C/o. ONGC, Panvel, Dist. Raigad.)
21. R.D. Gharat)
- C/o. ONGC, Panvel, Dist. Raigad.)
22. Aarnan Shipping Corporation)
- C/o. ONGC, Vasundhara Bhavan, Mumbai-)
- 400 051.)
23. Romeo Marine Management)
- C/o. ONGC, Vasundhara Bhavan, Mumbai)
- 400 051.)
24. M.S. Kalapi)
- D-28, Yogi Nagar, Borivli (W), Mumbai-400)
092.)
25. Union of India)
- Through Ministry of Labour, New Delhi.)
- Notices to be served on the Respondent)
- No.25 through the Central Government)

Pleader/Advocate, Ministry of Law, Legal)
 Affairs, Aayakar Bhavan Annex, Marine)
 Lines, Mumbai - 400 020.)Respondents

WITH
 INTERIM APPLICATION NO.1860 OF 2022
 WITH
 CIVIL APPLICATION NO.402 OF 2011
 IN
 LETTERS PATENT APPEAL NO.337 OF 2011
 WITH
 CIVIL APPLICATION NO.47 OF 2018
 IN
 LETTERS PATENT APPEAL NO.337 OF 2011
 WITH
 CIVIL APPLICATION NO.240 OF 2013
 IN
 LETTERS PATENT APPEAL NO.337 OF 2011
 WITH
 CIVIL APPLICATION NO.298 OF 2013
 IN
 LETTERS PATENT APPEAL NO.337 OF 2011
 WITH
 INTERIM APPLICATION NO.1708 OF 2021
 IN
 LETTERS PATENT APPEAL NO.337 OF 2011
 WITH
 CIVIL APPLICATION NO.25 OF 2019
 IN
 LETTERS PATENT APPEAL NO.337 OF 2011
 WITH
 INTERIM APPLICATION NO.1860 OF 2022
 IN
 LETTERS PATENT APPEAL NO.337 OF 2011

.....

Mr. J.P. Cama, Senior Advocate a/w. Mr. Gobindram D. Talreja and Mr. Rahul Mantri i/b. Gobindram D. Talreja and Associates for appellants.
 Mr. Sanjay Singhvi, Senior Advocate a/w. Ms. Rohini Thyagarajan and Mr. Avinash Belge i/b. Mr. R.D. Bhat for respondent nos.1 and 2.
 Mr. Ashutosh Mishra for UOI/Respondent.
 Mr. Shaligram G. Mishra in person.

.....

CORAM : K. R. SHRIRAM & RAJESH S. PATIL, JJ.
RESERVED ON : 28th APRIL 2023
PRONOUNCED ON : 5th JUNE 2023

JUDGMENT: (PER K. R. SHRIRAM, J.)

1 Appellant is impugning judgment and order dated 8th September 2011 by which the learned Single Judge was pleased to dismiss the Writ Petition filed by Appellant. In the Writ Petition, Appellant was impugning an Award dated 28th February 2011 (the said Award) passed by the presiding officer Central Government Industrial Tribunal No.II) (hereinafter referred to as “The Tribunal”) in Reference CGIT – 2/10 of 2003.

2 The Tribunal, by the said Award, had disposed the Reference made on 27th February 2003 by the Government of India, Ministry of Labour. The Tribunal was pleased to declare that the contracts between Appellant and various Contractors in respect of workmen covered by the Reference and particularly in List A and List B are sham, bogus and mere camouflage. The Tribunal also declared that the workmen in these lists were absorbed as per the order of this court and they are entitled to appropriate wages and other service benefits on par with permanent workmen of Appellant. It was also held that the said workmen are entitled to the benefits of settlement dated 12th July 2000.

Facts, briefly stated, are as under :

3 Appellant is a Government of India Corporation engaged *inter alia* in Oil exploration and drilling. According to Appellant, from time-to-time Appellant required specified kinds of workers for short duration.

Hence, they entered into separate agreements with several Contractors for engagement of contract labourers. In the present case, there were approximately 21 Contractors engaged in various activities such as Housekeeping, Canteen, Security, etc.

4 In the year 1991, workers, through their Union, filed Writ Petition being Writ Petition No.2185 of 1991, seeking direction to the Central Government to issue a Notification abolishing Contract Labour under Section 10 of The Contract Labour (Regulation and Abolition) Act, 1970 (for the sake of brevity hereinafter referred to as the 'CLR Act'). Necessary order was passed by the Hon'ble Court on 27th August 1991. By the same order the status quo order dated 2nd May 1991 was continued.

5 Thereafter an Abolition Notification was issued on 8th September 1994 abolishing Contract Labour in 13 forms of employment. The workers thereafter approached this Court by way of Writ Petition No.401 of 1996 and Writ Petition No.1240 of 1996, claiming that in view of the aforesaid abolition order they should be ordered to be regularized. Petitioners were the same Unions which are Respondent Nos.1 and 2 herein. An interim order of status quo was passed on 18th March 1996 in Writ Petition No.401 of 1996.

Ultimately, both these Writ Petitions were clubbed together and disposed on 31st August 1996 by a common judgment of His Lordship Mr. Justice A.P. Shah J. (as he then was), directing that the concerned

workers were entitled to be absorbed into Appellant's establishment retrospectively from 1st April 1997.

However, the Court further noted that it would not be possible for Appellant to absorb all the Contract workers and therefore liberty was granted to Appellant to determine the requisite complement which Appellant required and to absorb only that number. As for the balance, they were to be discharged in accordance with Chapter V-B of the Industrial Disputes Act, 1947 (for the sake of brevity hereinafter referred to as the 'I.D. Act').

6 Both parties challenged the aforesaid order. In Appeal (Lodging) No.32 of 1997 filed by Respondent Union, Division Bench of this Court consisting of M.R. Shah, C.J. and F. I. Rebello, J. (as they were) passed an interim order on 20th January 1997 directing that *"till further orders, workers who were in service on the date of the aforesaid interim order (18th March 1996) should be treated as direct employees from the date of the judgment of the learned Single Judge, i.e., 31st August 1996."* The two appeals were registered as Appeal No.1285 of 1996 and 1286 of 1996. Appeals filed by Appellant Corporation came to be allowed by a judgment and order dated 13th December 2002 of their Lordships Mr. Justice R. J. Kochar and Mr. Justice S. A. Bobde (as they were). The division bench concluded:

(a) The earlier judgment and order dated 31st August 1996 of Mr. Justice A. P Shah (as he then was) directing Appellant Corporation to absorb Respondent workers were subject to the said appeal and therefore had not reached finality. Further, the interim direction of the Hon'ble Court to treat the Contract Labourers as direct workers cannot be construed as a direction which had become final and therefore it is not possible to hold that the absorption, if any, was not liable to be set aside.

(b) The question of sham and bogus contract could not be gone into by the High Court in its Writ Jurisdiction.

(c) Whereas the judgment of the learned Single Judge was valid on the date when it was passed, the Constitution Bench judgment in *Steel Authority of India Limited V/s. National Union Waterfront Workers & Ors.*¹ (hereinafter referred to as *SAIL one*) had changed the legal position. As the Division Bench was bound by the aforesaid Constitution Bench judgment, Appellant's appeal was therefore allowed, and the aforesaid judgment dated 31st August 1996 of the learned Single Judge was quashed and set aside.

(d) Since it was the case of the workmen that contracts were sham and bogus, they were free to approach the Appropriate Government authority for an Order of Reference and that, if they did so, the Government should act as soon as possible. This order was stayed for six weeks.

(e) In the light of the above judgment, the workers withdrew their Cross Appeal No.243 of 1997.

1. 2001 (7) SCC 1

7 Instead of applying for a Reference, the workers moved the Hon'ble Supreme Court of India by filing Special Leave Petition No.301 of 2003 and Special Leave Petition No.303 of 2003. By an order dated 3rd February 2003, the Hon'ble Supreme Court noted that pursuant to the earlier order of the High Court, the workers had been continued as employees of Appellant and "not as contract labour". The Apex Court recorded that the workers case was that they were in fact absorbed and as such must be treated as continued pursuant to the above orders of the High Court. The Court noted, however, that this was a question of fact and left the issue open so that the matter should, if at all, be considered by the Industrial Adjudicator. Status quo was ordered for three months, i.e., up to 2nd May 2003.

8 On 27th February 2003, the Central Government made an Order of Reference raising only the question as to (a) whether the contracts between Appellant and the Contractors employing workmen enlisted at Ex. - A & B were a camouflage or ruse and not genuine contracts?, (b) and if so, whether the demand of the workmen for absorption in ONGC is legal and justified?, and (c) if the answer to issue (a) is negative, then to what relief are the workmen entitled to? The said Order of Reference states that it was made as per the directions of the Supreme Court. However, a perusal of the order dated 3rd February 2003 of the Hon'ble Supreme Court shows that there was no such direction.

This Reference was registered as Reference (CGIT) No.2–10 of 2003.

9 On 1st May 2003, the Tribunal extended the aforesaid status quo order. Meanwhile, Respondent Nos.1 and 2 filed their Statement of Claim, one on 25th March 2003 and the other on or about 1st May 2003. ONGC (BOP) Karmachari Sanghtana, on or about 1st April 2003, filed its separate Statement of Claim. It was, *inter-alia*, pleaded by the Unions that:

(i) appellant had admittedly employed them on contract basis.

(ii) pursuant to the orders of this Court, the Central Government constituted a Central Advisory Contract Labour Board under the aforesaid CLR Act to investigate whether an Abolition Notification should be passed as requested.

(iii) the Unions were seeking absorption pursuant to the Abolition Notification dated 8th September 1994.

(iv) attention of the Tribunal was specifically drawn to the pleadings which depicted the factual position after the judgment of Mr. Justice A. P. Shah (1st April 1997).

(v) the main prayer of Respondent Unions was that the workers listed at Ex. - A thereto be treated as regular employees with effect from their initial appointment (i.e., prior to 1st April 1997) and to pay them consequential benefits including arrears.

10 Appellant filed its two separate Written Statements in reply to the two separate claim statements filed by Respondent Nos.1 & 2 and Respondent No.3, Sanghatana contending, *inter-alia*, as under:

(i) Reasons for appointment of Contract Labour.

(ii) The Contractors were duly licenced and Appellant was duly registered under the aforesaid provisions of the CLR Act.

(iii) Contracts were issued on a yearly basis.

(iv) The Contractors were registered as separate establishments under the provisions of the Bombay Shops and Establishments Act, 1948, wherever applicable.

(v) Supervision and control of the Contract Labour was by the concerned contractors and they paid the wages of the workers directly. They also issued wage slips and identity cards. They were independently assessed under the Income Tax Act. Further, proper work orders were issued to the concerned Contractors, and agreements were signed with each of them in accordance with law.

(vi) Some of the contracts had expired by efflux of time and therefore those contracts had come to an end. Some were due to expire shortly.

(vii) Appellant also dealt with the Statement of Claim paragraph wise.

(viii) The workers listed at Ex. - A of the Statement of Claim were not currently in employment.

11 Respondent workers filed an application on 30th July 2004 for additional issues. Significantly, the workers stand was their claim that the issue regarding sham and bogus contracts had become redundant since according to them they had all been taken on Appellant's Muster Rolls. Equally, it was contended that issue no.2 relating to absorption had also now, according to them, become redundant. Respondent Unions prayed for framing of additional issues by the Tribunal. The Tribunal framed additional issues.

12 Significantly, Appellant has annexed to the petition an order dated 19th November 2005 of another Division Bench, i.e., R. M. Lodha and D. G. Karnik, JJ. (as they were) in Appeal No.173 of 1997 in Writ Petition No.2244 of 1992, where the Division Bench has also concluded at paragraph 8, that in an identical situation with respect to other contract employees of ONGC, there was no absorption following upon similar orders of the Hon'ble Court (of Mr. Justice A.P. Shah as he then was) in their favour. Paragraph 8, for ease of reference, reads as under:

"8. The Supreme Court in the case of Steel Authority of India clarified that Air India Statutory Corporation is overruled prospectively and that direction or order, if implemented and having attained finality shall not be set aside, altered or modified. The question before us is whether the implementation of the judgment by the present appellant in absorbing the concerned employees during the pendency of appeal can be said to have attained finality. Our answer is in the negative. The fact

that the appeal against the judgment of the learned Single Judge is pending, any action of absorption by the appellant during the pendency of appeal pursuant to the judgment of the learned Single Judge, by no stretch of imagination, can be said to have attained finality as the very correctness of the judgment of the learned Single Judge in directing the absorption of the concerned employees is in issue in appeal and is surely subject to the decision in the appeal. We, thus, hold that the absorption of the concerned contract workers during the pendency of the appeal had not attained finality at any point of time much less before the judgment of the Supreme Court in the case of Steel Authority of India Ltd.”

13 The workers led evidence of their first witness. Mr. Jitendra P Naik (PW.1). He was cross examined by Appellant. Later evidence of second witness E.M. Ravindran (PW.2) of the workers was led. He was also cross examined by Appellant.

14 Appellant led evidence of its first witness S.R. Kurup (M.W.1), who was cross examined.

15 Appellant then led evidence of its second witness R.C. Bajaj (M.W.2). He was also cross examined. Thereafter, evidence of one Peter Alex Gonsalves (M.W.3), the Provident Fund Inspector was recorded. He was also cross-examined. It supports the fact that the Contractors and Appellant are separate entities. Appellant then led evidence of one G. Rajendran (M.W.4). He was also cross examined.

16 The Tribunal thereafter passed the said Award dated 28th February 2011. The Tribunal held:

The reference is allowed as follows:

(I) It is declared that the contracts between ONGC and the

various contracts in respect of the workmen under reference in list 'A' & 'B' are sham, bogus and mere camouflage.

(ii) It is also declared that, the workmen under reference in list 'A' & 'B' were absorbed as per the order of Hon'ble High Court and they are entitled to the wages at an appropriate scale code and other service benefits available to the permanent workers of the management as per the settlement dated 12/07/2000. The first party (No. 1) ONGC is directed to pay the pay and allowances and other benefits, arrears thereof as applicable the permanent workers to the workmen under reference in list 'A' & 'B' w.e.f. the date of their respective initial appointments.

iii) No order as to cost.

Dated: 28/02/2011

*Sd/-
(K.B. KATAKE)
PRESIDING OFFICER
CGIT-2, MUMBAI*

This was impugned by Appellant in Writ Petition No.6216 of 2011.

17 The learned Single Judge upheld the findings of the Tribunal. According to learned Single Judge, the Tribunal was correct in view of the fact that Appellant treated the workmen concerned as their direct employees and removed the Contractors, and that amounted to absorption which has reached finality. Learned Single Judge also has observed that Appellant having admitted that the Contractors were removed, and workers were treated as direct employee amounts to absorbing the workmen.

The learned Single Judge also concurred with the view of the Tribunal that the contracts between ONGC and Contractors were sham and

camouflage or ruse and was not genuine contracts, not merely because the interim orders of the Court, but due to the effect of the Notification abolishing contract labour.

18 **Submissions of Mr. Cama:**

18.1 At the outset, as an over view, despite the fact that the Reference is limited to whether or not the contracts were sham and bogus, the Tribunal has also taken up and considered, whether as a matter of fact, that the concerned workers have been absorbed as per the orders of this Hon'ble Court. The Tribunal has then also adjudicated on the question of sham and bogus contracts without considering the details of each of the 21 contracts. Indeed, Respondents only led the evidence of Mr. Jitendra P Naik (PW.1) and Mr. E.M. Ravindran (PW.2) who were contract labourers of M/s. Bharat Enterprises and M/s. Moosa Services, respectively. The Tribunal has also not applied any of the tests laid down by the Supreme Court for determining sham and bogus contracts and has come to conclusion based on pure *ipse dixit*. Further, contrary to the decision of the Constitution Bench of the Supreme Court in the case of ***Secretary, State of Karnataka V/s. Uma Devi²***, the Tribunal has proceeded to grant regularization and back wages calculated at the rate of wages of regular full-time workers of Appellant even though the original appointment had not been made as per Appellant's Recruitment Rules.

2. (2006) 4 SCC 1

18.2 At the further outset, the Tribunal has gone beyond the scope of Reference. It is settled law that the Tribunal can only decide the question by the terms of Reference and cannot go beyond the Reference as held in *U.P Electricity Supply Company Limited V/s. Workmen of M/s. S.M. Choudhary Contractors and Another*³, and *Pottery Mazdoor Panchayat V/s. Perfect Pottery Co. Ltd. and Anr.*⁴

18.3 The terms of Reference required only issues no. 2, 3, and 4 below to be decided but the Tribunal in the said award has framed four issues as under:

ISSUES

- 1) *Whether employees enlisted in Ex. A & B are absorbed by ONGC in pursuant to the order of Hon'ble High Court w.e.f. 1.4.1997 and are the employees of the Corporation?*
- 2) *Whether the contracts between ONGC and the Contractors employing the workmen enlisted in Ex-A & B were camouflage or ruse and are not genuine contracts?*
- 3) *Whether the demand of workmen for absorption in ONGC is legal and justified?*
- 4) *What relief the workmen are entitled to?*

It is not permissible for Tribunal to adjudicate the dispute beyond the terms of dispute as it was not vested with an enhancing power or jurisdiction. Its exercise of powers is restricted to the terms of Reference, and it cannot travel beyond the terms of Reference.

18.4 As the terms of Reference only cover issue nos.2, 3 and 4, by framing issue no.1 the Tribunal has exceeded the jurisdiction. As held by the

3. AIR 1960 SC 818

4. (1979) 3 SCC 762

Apex Court in *Pottery Mazdoor Panchayat (Supra)*, the Tribunal did not have jurisdiction to inquire whether employees enlisted in Ex. - A & B are absorbed by the ONGC pursuant to order dated 1st April 1997 and are the employees of the Corporation.

18.5 The Tribunal has erred in any event that the concerned employee enlisted in Ex. - A & B are absorbed by ONGC pursuant to the order of High Court. The reason being, the Division Bench of this Court while deciding Appeal No.1285 of 1996 in Writ Petition No.401 of 1996 along with Appeal No.1286 of 1996 in Writ Petition No.1240 of 1996, by its judgment (R.J. Kochar and S.A. Bobde, JJ.) dated 13th December 2002, has only held that the interim order of the Court initially directing Appellant to treat Respondents/contract labourers as their direct employees with effect from the date of judgment and any other interim order cannot be construed as a direction that has become final. Therefore, it is not possible to hold that the absorption, if any, is final and is liable to be set aside.

This Court in Appeal No.173 of 1997 in Writ Petition No.2244 of 1992 filed by Appellant herein, by a judgment dated 19th November 2005, has held that the absorption of the concerned employees during the pendency of appeal cannot be stated to have attained finality.

18.6 Moreover, there is absolutely no evidence to speak of that the workmen were absorbed. The interim order dated 20th January 1997 in Appeal (L) No.32 of 1997 in Writ Petition No.1240 of 1995 only stated till

further orders, Appellant shall treat the workmen, who were in the service on the date of the interim order passed by the learned Single Judge as their direct employees from the date of the judgment, viz., 31st August 1996. The order reads as under:

“CORAM : M.R. Shah, C.J. & F.I. Raballo, J.

Date : Monday, 20th January, 1997

P.C. :

Heard the Learned Counsel for the parties.

Till further orders, Respondent No.1 shall treat the workman, who were in their service on the date of the interim order passed by the Learned Single Judge, as their direct employees from the date of the Judgment, viz., 31st August, 1996.”

18.7 Even in the evidence, Respondents’ witnesses say Appellant was only treating the workmen as direct employees and not as regular employees under separate and distinct terms of employment. They were only being treated as direct employees, but they were not direct or regular employees.

18.8 The Tribunal has erred in concluding that the contracts that Appellant had entered into with the Contractors were sham and bogus relying on the workmen’s evidence but there is no evidence at all and in any case to that effect after 1st April 1997. The Tribunal had to consider evidence before 31st March 1997 and not after.

18.9 There is no evidence to speak of from the workmen. The Tribunal has relied on the evidence of Appellant’s witnesses. Nowhere has Appellant’s witnesses stated that the workmen were absorbed as regular

employees. Just because the Contractors, pursuant to the order dated 28th January 1997, were removed from 1st April 1997 and the workmen were treated as direct employees, the Tribunal has concluded that the contract was sham and bogus. But there was no contract after the workmen were treated as direct workers with effect from 1st April 1997 because the Contractors had been removed.

The cross-examination of the worker's witness (PW.1) discloses, *inter-alia*, the following:

- (a) He admits that he has no evidence to show that he had ever applied to ONGC for a job.
- (b) It was true that M/s. Bharat Enterprises was paying his salary after deducting Provident Fund.
- (c) Bonus was given to him by M/s. Bharat Enterprises.
- (d) It was true that M/s. Bharat Enterprises was submitting Bills to ONGC which were paid to M/s. Bharat Enterprises.
- (e) From 1st April 1997 he claims to be on the Muster Roll of ONGC.
- (f) That there were two Musters maintained by ONGC, one for its permanent employees and the other for "employees like me".
- (g) There are several other similar distinguishing factors in the aforesaid cross examination.

In his cross examination, Union witness P.W.2 admits as under:

- (a) He was engaged by Contractors M/s. Moosa Services.
- (b) His salary was paid by and Provident Fund were deducted by the Contractor.
- (c) His PF Contributions were remitted to the PF Authority by the Contractor and Bonus was also paid to him.
- (d) That ONGC has recruitment and Promotion Rules.
- (e) That no appointment letter was ever issued to him by ONGC and that he is not getting all the benefits given by ONGC to its regular employees.
- (f) He was not getting benefit of Golden Jubilee Celebrations which given to permanent employees of ONGC.
- (g) He was getting 21 days leave salary whereas ONGC employees get 30 days leave.
- (h) He was claiming direct employment with ONGC "because of order given by the Hon'ble High Court".
- (i) He has no idea whether he was signing the muster maintained by ONGC for permanent employees.
- (j) He was given salary and DA as per the MoU signed between ONGC and Contract Workers Unions, whereas regular employees were getting salary as per settlement signed by

ONGC and Union.

- (k) He was not getting benefits of the Agreement signed between ONGC and the Union of regular Employees.
- (l) Contrary to the above, according to him his pay scale shows that he got the same benefits of regular employees of ONGC (this is mutually inconsistent).
- (m) He is already absorbed in the services of ONGC.
- (n) He has no appointment order from ONGC.
- (o) ONGC regular employees are getting unlimited medical benefits which he was not getting.

18.10 The moment a Notification is issued abolishing contract labour, it would by default mean that the contract was valid.

18.11 The employees on the one hand cannot state that they had been working under the Contractors and should be absorbed. At the same time, they took a contradictory stand that they were also workmen of Appellant. The Apex Court in ***Steel Authority of India Limited V/s. Union of India and Others***⁵ (hereinafter referred to as *SAIL two*) has held that to raise such plea would amount to destructive plea which is impermissible in law. The Court in paragraph 28 of the judgment held:

“28. The workmen whether before the Labour Court or in writ proceedings were represented by the same Union. A trade union registered under the Trade Union 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

5. (2006) 12 SCC 233

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.”

18.12 The Tribunal has erred in coming to a conclusion that there is an automatic absorption because that could never have happened. In fact, the learned Single Judge also has proceeded on that basis, which is not correct. This is because before the Apex Court in *SAIL one (Supra)*, the main question that arose for consideration was whether there should be an automatic absorption of the contract labour in the establishment of the principal employer as a consequence of abolition. Notification issued under Section 10(1) of the Contract Labour (Regulations and Absorption) Act 1970 (for short, “CLRA Act”) says that if the contract is found to be genuine and Absorption Notification under Section 10 of the CLRA Act in respect of the concerned establishment has been issued by the appropriate Government, then the principal employer if he 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. Therefore, there can never be an automatic absorption of

contract labours. In fact, by this judgment, the Apex Court has overruled the judgment of the Apex Court in *Air India Statutory Corporation V/s. United Labour Union and Ors.*⁶ in which the Apex Court had held that there will be automatic absorption. The Apex Court in paragraphs 4 and 7 of *Nitinkumar Nathalal Joshi V/s. ONGC Limited*⁷ held:

“4. We heard Shri T.R. Andhyarujina, learned Senior Counsel on behalf of the appellants and Mr. Mukul Rohatgi, learned ASG on behalf of the respondents. What is the effect of abolition of contract labour by virtue of the notification issued by the Central Government under Section 10 of the Industrial Disputes Act was considered in detail in Steel Authority of India Ltd. v. National Union Waterfront Workers [(2001)7 SCC1 : 2001 SCC (L & S) 1121]. The main question that arose for consideration in that case was whether there should be an automatic absorption of contract labourers working in the establishment of principal employer as regular employees consequent upon the notification under Section 10(1) of the Act. This Court held in clauses (5) and (6) of paragraph 125 at SCC p.63 as under:

“125. (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 with various beneficial legislations so as to deprive the workers of the benefit thereunder. If the contract is found to be not genuine but a mere camouflage, the so-called contract labour will have to be treated as employees of the principal employer who shall be directed to regularise the services of the contract labour in the establishment concerned subject to the conditions as may be specified by it for that purpose in the light of para 6 hereunder.

6. 1997 (9) SCC 377

7. (2002) 3 SCC 433

(6) If the contract is found to be genuine and prohibition notification under Section 10(1) of the CLRA Act in respect of the establishment concerned has been issued by the appropriate government, prohibiting employment of contract labour in any process, operation or other work of any establishment and where in such process, operation or other work of the establishment the principal employer intends to employ regular workmen, he shall give preference to the erstwhile contract labour, if otherwise found suitable and, if necessary, by relaxing the condition 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.”

5.....

6.....

7. The learned counsel for the appellants contended that the decision in Steel Authority of India Ltd. Case is prospective in operation, therefore, these appellants should have been given the benefit of employment under the principal employer, the first respondent ONGC Limited. It is true that in Steel Authority of India Ltd. case it was specifically made clear in clause (4) of paragraph 125 as follows :(SCC pp. 62-63)

“125. (4) We overrule the judgment of this Court in Air India case prospectively and declare that any direction issued by any industrial adjudicator/any court including the High Court, for absorption of contract labour following the judgment in Air India case 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.”

(emphasis supplied)

19 **Submissions of Mr. Singhvi are as under:**

19.1 The judgment of the Hon’ble Supreme Court in *SAIL one (Supra)* overruling the judgment of the Supreme Court in *Air India Ltd.*

(*Supra*) has expressly been made to operate prospectively. It says that any direction issued following *Air India Ltd. (Supra)* will not be set aside if the direction has been implemented and this has become final.

The Division Bench (Kochar and Bobde, JJ.) of this Court interpreted this to mean that it is the direction which must become final and that since an appeal therefrom was pending before this Court it had not attained finality. However, in the SLP (C) No.301 of 2003, filed by Respondent Nos.1 and 2 against the aforesaid final order and judgment of the Division Bench, the Hon'ble Supreme Court has clarified that it is the implementation that has to become final. Noting that this necessarily being a question of fact, the Supreme Court explicitly left it open to the Industrial Tribunal to decide such question. At that time there being only one proceeding envisaged before a Tribunal (viz., whether the contracts between Appellant and various Contractors were sham and bogus) it must be presumed that it was left open to the Tribunal to decide.

19.2 An Order of Reference issued by an appropriate government in exercise of its powers under Section 10(1) of CLR Act can be widely couched and it will be for the Industrial Tribunal to crystalise the issues between the parties upon examining the respective pleadings [*State of Madras V/s. C.P. Sarathy & Anr.*⁸]. In the present case, the Order of Reference dated 27th February 2003 clearly has three parts and the third part leaves scope to enquire into whether the absorption had in fact been

8. 1953 SCR 334

completed and what relief flows therefrom.

The recitals to the Order of Reference show that the order of the Supreme Court was in the contemplation of the Government, and it cannot be said that the Central Government decided to ignore the order of the Supreme Court especially since in making a Reference an appropriate Government performs a purely administrative function and cannot adjudicate upon the dispute [*C.P. Sarathy (Supra)*]. Further, the Reference itself was made pursuant to and within the timeframe stipulated in the order of the Supreme Court.

In any case, Appellant has been unable to, either during arguments or otherwise, ascribe any other meaning to the third portion of the Order of Reference, i.e., “if not, to what relief are the workmen entitled?”

19.3 Much has been argued about the application for framing an issue filed by Respondent Nos.1 and 2 in the Industrial Tribunal, where at one place it has been mentioned that the then issue no.1 as framed (on whether the contracts were sham and bogus) has become redundant. However, in paragraph 12 of the application, Respondents have *inter alia* proposed a reformulation/recasting of this very issue, viz., whether prior to 31st March 1997 the contracts were sham and bogus.

The third Union represented by Mr. Mishra had also filed an application to frame an additional issue in respect of whether the workmen

stood absorbed pursuant to the order of the leaned Single Judge. In reply to this application, Appellant itself acknowledged the need to frame such additional issue and in fact prayed that it be framed in different words.

Even otherwise, if it is felt that the third part of the Reference is unclear then clarity can be obtained by the Tribunal by looking at the pleadings [*Delhi Cloth & General Mills V/s. Workmen & Ors.*⁹]. There can be no doubt that both parties were aware of the issue no.1 (as ultimately framed) from the beginning. The pleadings make it clear that both parties addressed this issue. They subsequently even led evidence on the same. Mere wording of the Reference is not decisive in the matter of tenability of a Reference. It is, therefore, not open to Appellant to now claim that this issue was beyond the terms of the Reference [*Sheshrao Bhaduji Hatwar V/s. P.O. First Labour Court & Ors.*¹⁰].

As such, the pleadings clearly show what were the real issues in dispute which include the issue no.1 as framed. Hence, it is clear that neither party was taken by surprise and no prejudice was caused to either of them [*Ram Sarup Gupta V/s. Bishun Narain Inter College*¹¹].

19.4 The judgment of the Supreme Court in *Pottery Mazdoor Panchayat (Supra)* has no relevance to the facts of the present case. There could be no gainsaying that the history of matter (including the demand letters of the workmen) prior to the Order of Reference indicated that there

9. (1967) 1 SCR 882

10. 1990 SCC OnLine Bom 738

11. (1987) 2 SCC 555

was earlier never any dispute as to fact of the closure, but that the dispute was restricted to questioning the justifiability of the closure (which had been held by an earlier judgment of the Supreme Court to not be a competent matter for an Industrial Tribunal to deal with). It was in this context that the Supreme Court proceeded to hold that the High Court was right in concluding that the Labour Court/Industrial Tribunal could not travel beyond the terms of the Reference by examining whether the closure did in fact take place. The present case is on a wholly different footing – the order of the Supreme Court following which the Order of Reference was issued expressly left open the question of whether the workers in fact stood absorbed so that the same could be decided by the Industrial Tribunal.

Similarly, the judgment of the Supreme Court in *U.P. Electric Supply Co. Ltd. (Supra)* has no relevance here. Firstly, only the Contractors, and not the main Company, were made parties in the Order of Reference itself and secondly, the issue of non-abolition which was not referred by the Government and was not an issue that was in any manner connected with the three other issues referred (which in fact pertained only to the Contractors). It was in these peculiar circumstances that the Supreme Court held that the Tribunal had travelled beyond the terms of the Reference. In the present case, the third part of the Order of Reference has been widely worded and leaves ample room for the Tribunal to enquire into whether the present workers were in fact absorbed by Appellant.

19.5 The Supreme Court directed that it was open to the Industrial Tribunal to decide upon whether the presently concerned employees were absorbed and as such continued pursuant to the order of the learned Single Judge of the High Court.

It is clear that the workmen were continued, and it is nobody's case that they were not. Appellant admits that pursuant to and in keeping with the timeframe prescribed in the order of the learned Single Judge of the High Court, the Contractors were removed with effect from 31st March 1997, but the workers were continued. However, it is their case that they were not absorbed since they were not given the same wages and extended the same conditions of service as other regular workers. A new category called "direct employees" was created.

The findings of the learned Industrial Tribunal in this regard are in paragraphs 19 to 23 of the Award. Relying on the pleadings and the evidence of Appellant's own witnesses, S.R. Kurup (M.W.1) and G. Rajendran (M.W.4), the Tribunal has reached the conclusion that the absorption was final with effect from 1st April 1997. The Tribunal has dealt with the issue of whether issue no.1 could justifiably be framed. The Tribunal has also dealt with the judgment in *Nitinkumar N. Joshi V/s. ONGC Ltd.*¹² and distinguished its application on the basis that in that case the directions of the Hon'ble Single Judge for absorption were modified and

12. (2002) 1 CLR 1113 (SC)

were never given effect to [there, in fact, one contractor was removed and replaced by another]. The Tribunal, further, has dealt with the judgment of the Delhi High Court in ***ONGC Commission V/s. Delhi Multi-storied Building Employees Congress & Ors.***¹³, where the appointments itself were by way of interim relief. Accordingly, the Hon'ble Tribunal reached the conclusion that the act of absorption had reached finality. There is no perversity in this finding.

19.6 In any case, there was extensive evidence and material before the Tribunal to reach the conclusion that the workers were absorbed finally with effect from 1st April 1997. For instance, the evidence in examination-in-chief of P.W.1, Jitendra Naik extensively details the slew of enhanced benefits (earlier unavailable) which were extended to the present workmen w.e.f. 1st April 1997. Further, there was abundant material before the Tribunal in the form of various Office Memos and Circulars issued by Appellant – some of which was proved by the Union Witness and some of which was not. Illustratively, the Circulars issued by Appellant itself attest to the fact that as far back as September-November 1996, Appellant had started implementing the order of the learned Single Judge – crucially, in view of the continued requirement of the presently concerned workmen, whose work was explicitly recognized as being perennial and statutory in nature.

19.7 The learned Single Judge in the impugned judgment has

13. Decision dated 22.12.2005 in LPA Nos.5 & 12 of 1998

negated the argument that the said Award of the Tribunal was based only on the interim order dated 20th January 1997 of the Division Bench (which in fact was passed in the appeal filed by the Unions, and not Appellant, aggrieved by the date from which the workmen were directed to be absorbed by the learned Single Judge). The learned Single Judge has adverted to the pleadings before the Tribunal, considered all the evidence, especially that of Appellant's witness R.C. Bajaj (M.W.2) and has finally reached the conclusion that the Tribunal had reached its findings based on such material. The learned Single Judge has not only found no perversity in this finding but has agreed with it that the act of absorption has reached finality. The learned Single Judge has also offered a new perspective on this issue holding that since the present workers were offered the same work as the other regular workers (which was clear from the material on record) it was clear that the absorption was complete based not only on the interim order of the Division Bench but as a direct fallout of the abolition notification of 1994. Hence, there is no perversity in the impugned judgment of the learned Single Judge.

19.8 Both the Tribunal and the learned Single Judge have rejected the argument that because Appellant did not pay the same wages to the workers in flagrant violation of the orders of this Court as paid to the other regular workers the absorption was not final. Industrial law does not recognize any category of "direct" workmen as being distinct from "regular"

workmen. It is not denied that from 1st April 1997 an employer-employee relationship existed between Appellant and the present workmen without the intervention of any contractor. The workmen were, among other things, taken on Appellant's muster rolls and paid wages and several other additional benefits directly (which were earlier not extended). The Provident Fund accounts were maintained by Appellant which allotted different CPF numbers to the workmen.

19.9 The Tribunal has, moreover, dealt with the argument that since the Unions had first approached the Central Government for abolition, they could not now be heard to say that the contracts between Appellant and Contractors were sham and bogus. The view taken by the Tribunal in this regard is in consonance with the view of the Hon'ble Supreme Court in ***Sarva Shramik Sangh V/s. Indian Oil Corporation***¹⁴ where the Court held that where the case of the workers is that the contract was sham and nominal, they could seek a relief that they should be declared as the direct employees of the principal employer; and if that contention failed and it is found that the contract was valid, then they can seek issuing a direction to the central government to consider their representation for abolition of contract labour.

19.10 The judgments relied upon by Appellant to contend that Respondents are barred now from claiming that the contracts are sham and bogus have no bearing whatsoever to the facts of this case, since they were

14. (2009) 11 SCC 609

all rendered in a context where the plea that the contracts were sham and bogus had either:

(a) Not been taken in the earlier round of litigation [*Rashtriya Chemicals & Fertilizers Ltd. and Anr. V/s. General Employees Association*¹⁵];

(b) Never been raised, was not made a term of Reference and only the Contractors were made parties [*U.P. Electric Supply Co. Ltd. (Supra)*];

(c) Was sought to be raised by way of an amendment or an additional Statement of Claim (*SAIL two*);

None of the above circumstances have arisen here. To the contrary, Respondents have all along maintained, including in the writ petitions filed earlier for directions of absorption, that the Contractors were mere name lenders and that there in fact existed a master-servant relationship between Appellant and the present workmen.

19.11 It can be noted from the said Award that the main arguments raised by Appellant before the Tribunal were negative arguments. Firstly, they argued that since the Unions had claimed abolition, they could not now say that the Contractors were sham and bogus. Secondly, they argued that the contract workers could not be regularized since they were not recruited by the company. Thirdly, they argued on the basis of *Uma Devi (Supra)* that declaring them to be permanent on the basis of the contracts being sham and bogus would amount to “back door entry”. No argument was made by

15. (2007) 5 SCC 273

Appellant based on the principles governing sham and bogus contract. It is also a matter of crucial importance that none of the scores of Contractors came to the Tribunal in response to the notices issued to them. A vast majority of these Contractors (19 out of 23 to be precise) had their addresses “c/o of ONGC”, which itself shows that they never had any independent existence.

19.12 The Tribunal has referred to evidence to hold that though the Contractors changed the workers remained constant. The Tribunal has found that MOUs concerning the contract workers were signed between the Unions and Appellant without the intervention of the Contractors. The Tribunal has relied on this fact to reach the conclusion that the workers were under the direct control of Appellant. It is irrelevant that the principal employer can sign settlements with the contract workers under Section 30(2) of the Contract Labour Act – the point is that such contracts go to show that Appellant controlled all the service conditions of the contract workers and not the Contractors. The Tribunal has further found from the evidence that the workers were doing the same work as the regular employees and were supervised by Appellant. The Tribunal has also found from the evidence of the Company Witness G. Rajendran (M.W.4) that disciplinary action based on the same Rules as those applicable to other regular employees was taken by Appellant who was maintaining its attendance card and salary register. There is nothing to show that these

admissions of Appellant's Witnesses are for the period after 1st April 1997. Though M.W.4, G. Rajendran joined in 2009, he has stated in paragraph 2 of his affidavit-in-lieu of examination-in-chief that he is deposing on the basis of information gathered by him from Appellant's records, which as Manager (HR) he had access to. In view of all the above, the Tribunal has reached the conclusion that contracts were sham and bogus.

The learned Single Judge has considered this issue and found that there is no perversity so far as the findings of the Industrial Tribunal on this issue is concerned. The learned Single Judge has considered and reached the conclusion that the concerned workers were entitled to the benefits of the Settlement dated 12th July 2000 and found no error in directing that these benefits should be paid from their respective initial appointments. The learned Single Judge has also considered an additional factor that the present workmen were shown to be engaged through Contractors even after the abolition notification of 1994 when Contractors could not have been engaged.

There is nothing perverse in the findings of the Industrial Tribunal and the learned Single Judge on this aspect.

19.13 On the question of finding out whether the contract is sham and bogus, the Supreme Court has evolved the tests to be applied. The original tests flowed out of the concept of vicarious liability where the question was whether the contractor is told what work is to be done or also

how the work is to be done. These were called contracts for service or contracts of service, respectively. In the first case, the contractor was an independent contractor and in the second, he was an employee. This gave rise to the concept of supervision and control [*Dhrangadhara Chemical Works v/S. State of Saurashtra*¹⁶]. Though the tests have evolved now [*Silver Jubilee Tailoring House V/s. Chief Inspector of Shops and Establishment*¹⁷] which shows the shift from control being the only test, supervision and control remain an important portion of the tests. The recent judgments concerning this test are considered and summarized in *Workmen of Nilgiri Co-op. Mkt. Society Ltd. V/s. State of Tamil Nadu & Ors.*¹⁸

19.14 Even if we take the tests enumerated in *Balwant Rai Saluja V/s. Air India Ltd.*¹⁹ relied upon by Appellant, there is no error in the application of these tests:

(a) Who appoints the workers – It has emerged in the evidence of the workers that the interviews were conducted by officers of Appellant at the time of initial recruitment.

(b) Who pays the salary/remuneration – there is a clear admission in the evidence of P.W.1 that all the salary/bonus/PF etc. is reimbursed by Appellant. This is identical to the situation in *Hindalco Industries Ltd. V/s. Association of Engineering Workers*²⁰ where even though

16. (1957) SCR 152

17. (1974) 3 SCC 498

18. (2004) 3 SCC 514

19. (2014) 9 SCC 407

20. (2008) 13 SCC 441

the Contractors were actually paying the workmen, it was Hindalco which was ultimately reimbursing them.

(c) Who has the authority to dismiss – the evidence does not show that any person was ever dismissed. However, it is admitted in the evidence of M.W.4, G. Rajendran that Appellant had the power and did take disciplinary action against some of the presently concerned workers and it may thus be presumed that the workers could be dismissed.

(d) Whether there is continuity of service – it is clearly admitted by M.W.1, S.R. Kurup, that though the Contractors changed every 1-3 years the workers remained the same. Gratuity was paid by ONGC says M.W.4, G. Rajendran. Appellant has sought to argue that the gratuity was paid by ONGC only after 1997. This is not borne out by the evidence, and the fact that the Contractors were kept only for a period of 1-3 years shows that they could never have been fastened with the liability to pay gratuity, since as per the Payment of Gratuity Act, 1972, the same is payable only after 5 years of continuous service. The judgment of the Supreme Court in ***R.K. Panda V/s. Steel Authority of India***²¹ relied upon by Appellant to contend that the mere fact of continuity of service would not be decisive was rendered in circumstances where the Supreme Court was directly approached by way of a petition under Article 32 and could not adjudicate disputed questions of fact. It was squarely against this background that the Supreme Court held that whether the contractor was mere smokescreen or camouflage is a

21. (1994) 5 SCC 204

matter which only an industrial adjudicator could determine.

(e) Extent of control of supervision – It is clear that complete control and supervision was with Appellant as the Contractor only visited once a month [PW.1 - Jitendra Naik, M.W.2 - PF Inspector R.C. Bajaj, M.W.1 - S.R. Kurup]. The Tribunal has also found on the basis of evidence that supervision and control was clearly in the hands of Appellant. That the MOUs were signed about contract workers without the Contractors shows the extent of control of Appellant over the terms and conditions of service of their service [M.W.1, S.R. Kurup].

Thus, the Industrial Tribunal has not misdirected itself with regard to the test to be applied. In fact, Appellant has been unable to show which of these tests the workmen have not been able to satisfy. No specific argument in this respect was raised either before the Tribunal or the learned Single Judge.

19.15 Section 11 of the Industrial Disputes Act, 1947 (hereinafter referred to as I.D. Act) stipulates that the Industrial Tribunal can resort to such procedure as it deems fit. It is not hamstrung by the procedural restraints put upon the Civil Courts. The evidence act will not apply in full force to the proceedings before the Industrial Tribunal. It need not rely upon “evidence” but can rely upon material. [*Food Corporation of India Workers Union V/s. Food Corporation of India & Anr.*²²]

If the material exists, the findings of an Industrial Tribunal can

22. (1996) 9 SCC 439

be supported upon such material. In the present case, the Tribunal has indeed based its findings on the evidence led before it. However, if one were to find this evidence insufficient even then the said Award of the Tribunal could certainly be sustained on the basis of the material available. In this context, if it is contended that the Tribunal has not worded its findings artistically there is clearly sufficient material on record from which the conclusions in the said Award can be supported [*Hindustan Lever Limited V/s. Hindustan Lever Research Centre Employees' Union*²³].

19.16 The judgment in *Uma Devi (Supra)* laying down that the regularization of those who have been working through “back door entry” and where there are no posts available has no bearing whatsoever in the facts of this case. It has emerged in the evidence of the Unions that the concerned workers were appointed pursuant to interviews conducted by specific officers of ONGC as evident from the evidence of PW.1, Jitendra Naik and P.W.2, E.M. Ravindran. On the other hand, there is no specific evidence led by Appellant to rebut this. Nothing whatsoever was ever brought on record by Appellant to show how many posts exist, and it is for Appellant to discharge this burden.

19.17 The Supreme Court in *Maharashtra State Road Transport Corporation V/s. Casteribe Rajya Parivahan Karmachari Sanghatana*²⁴ having considered the decision in *Uma Devi (Supra)* as also a number of

23. Decision dated 26.09.2006 in Writ Petition No.54 of 2004 (unreported) of Single Judge

24. (2009) 8 SCC 556

judgments thereafter has laid down that where the number of posts are not disclosed and where the workmen are employed for years to do the same work as other regular workers (which is not disputed here) but are deprived of all consequential benefits of permanency the same would amount to an unfair labour practice.

19.18 In any event, it is now no longer open to Appellant to raise the issue of the availability of posts in light of its own earlier statement – as recorded in the order dated 14th August 2014 in CA No.62 of 2014 that the plea of non-availability of posts would not be raised by Appellant in order to frustrate/nullify the effect of the Award of the Industrial Tribunal.

19.19 Neither the judgment in *Umadevi (Supra)* nor the judgments in *Vibhuti Shankar Pandey V/s. State of Madhya Pradesh*²⁵ and *State of Rajasthan V/s. Daya Lal & Ors.*²⁶, which were both dealing with cases where employees had directly approached the High Courts under Article 226 with a prayer for regularization, can have any application in the facts at hand.

19.20 Many of the same questions were raised in a similar situation in *GM, ONGC Silchar V/s. ONGC Contractual Workers Union*²⁷. The facts were that a large number of contract workers of Appellant had raised a dispute claiming regularisation. The Tribunal held in favour of the workers. The learned Single Judge reversed the finding of the Tribunal. The Division Bench set aside the judgment of the learned Single Judge mainly on the

25. 2023 I CLR 657

26. (2011) 2 SCC 429

27. (2008) 12 SCC 275

ground that a Writ Court may not act as a Court of Appeal. The matter travelled to the Supreme Court where this judgment was rendered. The court said that in the absence of perversity or patent illegality in the finding of the Tribunal it was impermissible for the High Court to reach a different conclusion. It was further stated that though the Reference was worded as if it was accepted that the workers were contract workers, on the basis of the case of *Delhi Cloth and General Mills (Supra)* the Tribunal could pierce the veil to find out the real dispute when both sides were aware of the same. The argument that in view of *Umadevi (Supra)* the workers could not be absorbed was negated. The tests used by the Tribunal were put down and on that basis, the learned Supreme Court held in favour of the workers.

In all these circumstances, the Award of the Tribunal and the impugned judgment of the learned Single Judge deserve to be upheld.

20 The submissions of Mr. Mishra were basically in the lines of Mr. Singhvi. He also made certain allegations against Appellant that it was adopting dilatory tactics and Respondent was not objecting etc. We do not think that is relevant to the matter at hand. He also filed certain documents, but they do not appear to have been filed before the Tribunal as part of the Statement of Claim or any witness has deposed to them. Therefore, we do not wish to advert to them.

OUR VIEWS:

21 We entirely agree with the stand taken by Appellant. Appellant

is justified in questioning the jurisdiction of the Tribunal to frame and decide issue no.1.

As regards the order of the Tribunal that the employees enlisted in Ex. - A & B are (a) absorbed by the ONGC pursuant to the order of Hon'ble High Court dated 1st April 1997 and (b) are the employees of Appellant, was without jurisdiction.

The Reference dated 27th February 2003 made by the Government of India, Ministry of Labour was only to adjudicate: (a) whether contracts between ONGC and Contractors employing workmen enlisted in Exh. A & B were camouflage or ruse and were not genuine contracts? (b) if so, whether the demand for workmen for absorption of ONGC is legal and justified? and (c) if not, what reliefs are the workmen entitled to. The reference reads as under:

***“GOVERNMENT OF INDIA / BHARAT SARKAR
MINISTRY OF LABOUR/SHRAM MANTRALAYA.
New Delhi dated the 27.02.2003.***

1. *NO.L-30015/3/2003IR (M): WHEREAS the Central Government is of the opinion that an industrial dispute exists between the employer s in relation to the management of Oil And Natural Gas Commission ltd and all the contractor as enlisted in WP NO. 401/1996 and their workmen in respect of the matter specified in the schedule here to annexed:*
2. *AND WHEREAS the Hon'ble Supreme Court of India on SLP(C) NO.301/2003 directed the government to refer the dispute to adjudication in accordance with the direction of the Hon'ble High Court Of Mumbai.*
3. *NOW THEREFORE in exercise of the powers conferred by clause (d) of subsection (1) of section 10 of Industrial Dispute Act.1947 the central government hereby refers the said dispute for adjudication to the Central Government, industrial Tribunal, Mumbai. The said Tribunal shall give*

its award within a period of three months.

THE SCHEDULE

Whether contracts between ONGC and Contractors employing workmen enlisted in Exhibit 'A' & 'B' were camouflage or ruse and not genuine contract. If so, whether the demand of the workmen for absorption in ONGC is legal and justified ? If not to what relief are the workmen entitled?"

(emphasis supplied)

This means the Tribunal shall first adjudicate whether the contracts between ONGC and Contractors were sham and bogus. If they were so, i.e., sham and bogus, then whether the demand of the workmen for absorption is legal and justified. If answer to these two issues were in affirmative, the matter ends. The workmen get absorbed. If answer to first issue is negative, then the second issue will also be negative. Consequently, answer to the third issue will be to discharge such workmen, i.e., terminate their services or at Appellant's option discharge in accordance with law.

22 There was no reference by the Government to the Tribunal to adjudicate, as to whether employee enlisted in Exh. A & B are absorbed by ONGC in pursuance to the order of the Hon'ble High Court with effect from 1st April 1997 and are the employees of the corporation. As held by the Apex Court in *U.P. Electricity Supply Company Limited (Supra)* and *Pottery Mazdoor Panchayat (Supra)*, the adjudication on this issue by the Tribunal was without jurisdiction. The Tribunal cannot adjudicate upon question it was not called upon to adjudicate. Paragraphs 4 and 5 of the *U.P. Electricity Supply Company Limited (Supra)* read as under:

“4. The main contention on behalf of the company before us is that even assuming that the Government had power under Section 5 read with clause 12 of GO No. U-464 (LL)XXXVI-B-257(LL)/1954, dated July 14, 1954, to implead the company as a party, the main issue decided by the Tribunal was not referred to it and the Tribunal could only decide the three matters of dispute included in the order of reference of July 31, 1956. Therefore, insofar as the Tribunal went beyond the three matters of dispute specified in the reference and decided the question whether the workmen concerned were in the employ of the company or of the Contractors it was acting without jurisdiction as this matter was never referred to it.

5. We are of opinion that this contention must prevail. As we have already pointed out, there were four matters before the Conciliation Board including the question of non-abolition of the contract system. Further before the Conciliation Board not only the Contractors but the company was also a party, for obviously the question of non-abolition of the contract system would necessitate the presence of the company as a party to the proceedings. When however the Government referred the dispute to the Tribunal on July 31, it did not include the fourth item which was before the Conciliation Board relating to the non-abolition of the contract system among the matters in dispute. It also did not include the company as one of the parties to the dispute, for the reference order refers only to two parties to the dispute, namely, the Contractors and their workmen. On such a reference there could be no jurisdiction in the Tribunal to decide the question whether these workmen were the workmen of the company or of the Contractors, for such a question was not referred to the Tribunal. It is true that on August 13, 1956, the company was impleaded as a party to the dispute referred by the notification of July 31; but the matters in dispute remained unamended, and the question of non-abolition of the contract system or the question whether these workmen were the employees of the company in fact and in reality was not included in the matters of dispute by amendment under the proviso to Section 4 of the Act. In these circumstances it is immaterial to consider whether the impleading of the company as a party on August 13, 1956, was legal and valid or not. Assuming that it was legal and valid, the fact remains that Issue 1 set out above by us which is undoubtedly the crux of the question in this case was not referred to the Tribunal at all and did not arise out of the three matters of dispute specified in the reference order of July 31, 1956. In these circumstances the order of the Tribunal by which it held that these workmen were the workmen of the company was beyond its jurisdiction. The entire order of the Tribunal is directed against the company and must therefore be set aside in whole as without jurisdiction and we need not express any opinion on the merits. We therefore allow the appeal and set aside the order of the Tribunal against the appellant. In the circumstances we pass no order as to costs.”

(emphasis supplied)

Paragraphs 3, 5, 8 and 11 of *Pottery Mazdoor Panchayat*

(*Supra*) read as under:

“3. Conciliation proceedings having failed, the Madhya Pradesh State Government, on June 26, 1960, referred an industrial dispute to the arbitration of the Industrial Court under Section 51 of the State Act. The main questions referred to the Industrial Court were :

Whether the proposed closure by the management of the Perfect Pottery Co. Ltd., Jabalpur, of their pottery factory at Jabalpur, with effect from July 1, 1967, is proper and justified ? And

To what retrenchment compensation are the employees entitled, if it is decided that the proposed closure is proper and justified ?

4.

5. On July 1, 1967 the respondent purported to close down the business. We say “purported”, because whether the business was, truly and in fact, closed or not is a matter on which the parties have joined issue. The case of the appellant is that respondent had closed the place of business and not the business itself. After the closure, or shall we say the ‘alleged closure’, the Central Government on September 16, 1967, made a reference under Section 10(1)(d) of the Central Act to the Central Government Industrial Tribunal-cum-Labour Court, Jabalpur, on the following question :

Whether the employers in relation to the Poly Pather Clay Mines of Perfect Pottery Co. Ltd., Jabalpur, were justified in closing down the said mine and retrenching the following 81 workers with effect from July 1, 1967. If not, to what relief are the workmen entitled ?

6.

7.

8. The two Tribunals came to contrary conclusion on the principal question as to whether they had jurisdiction to inquire into the propriety of or justification for the closure. The Central Government Industrial Tribunal-cum-Labour Court held by its award dated July 3, 1968 that it had no jurisdiction to inquire whether the decision of the management to close down the business was proper and justified but that it was entitled to consider whether, in fact, the business was closed. On the other

hand the Industrial Court, by its award dated November 15, 1968 held that it had no jurisdiction either to inquire into the propriety of the closure or because of the terms of reference, to consider whether there was or was not a real closure.

9.

10.

11. Having heard a closely thought out argument made by Mr. Gupta on behalf of the appellant, we are of the opinion that the High Court is right in its view on the first question. The very terms of the references show that the point of dispute between the parties was not the fact of the closure of its business by the respondent but the propriety and justification of the respondent's decision to close down the business. That is why the references were expressed to say whether the proposed closure of the business was proper and justified. In other words, by the references, the Tribunals were not called upon by the Government to adjudicate upon the question as to whether there was in fact a closure of business or whether under the pretence of closing the business the workers were locked out by the management. The references being limited to the narrow question as to whether the closure was proper and justified the Tribunals by the very terms of the references, had **no jurisdiction** to go behind the fact of closure and inquire into the question whether the business was in fact closed down by the management."

(emphasis supplied)

23 Mr. Singhvi's reliance on *C.P. Sarathy (Supra)* and *Delhi Cloth (Supra)* would not really help respondents. In the case of *C.P. Sarathy (Supra)*, it was a case where the Court only concluded that where an industrial dispute exists there is no need to mention the particular dispute. Nevertheless, it was desirable for the Government to clearly indicate the nature of the dispute in the Order of Reference.

In *C.P. Sarathy (Supra)*, the issue revolved around whether, once the Government has determined that the industrial dispute exists, the

Court can peruse the Reference order to determine whether there were sufficient materials before the Government. This is nothing to do with alteration or addition of the Order of Reference.

In *Delhi Cloth (Supra)*, the Court held where the Government has specified the points of issue, the Tribunal is confined to those points and matters incidental thereto and in many cases the Order of Reference is so cryptic that it was impossible to cull out therefrom the specific points on which parties are at issue. In such cases, the Tribunal can try and determine the real issue in dispute. It was further held that the parties cannot be allowed to contend that the true dispute was something other than what was referred. Paragraphs 20 and 30 read as under:

20. Proceeding in the order in which the arguments were addressed, we propose to deal with issues 3 and 4 first. Under s. 10(1) (d) of the Act, it is open to the appropriate Government when it is of opinion that any industrial dispute exists to make an order in writing referring "the dispute or any matter appearing to be connected with, or relevant to, the dispute, to a Tribunal for adjudication." Under s. 10(4) "where in an order referring an industrial dispute to a Labour Court, Tribunal or National Tribunal under this section or in a subsequent order, the appropriate Government has specified the points of dispute for adjudication, the Labour Court or the Tribunal or the National Tribunal, as the case may be, shall confine its adjudication to those points and matters incidental thereto."

XXXXXXXXXX

30. So far as the fourth proposition is concerned, Mr. Chari argued that the Tribunal had to examine the pleadings of the parties to see whether there was a strike at all. In our opinion, the Tribunal must, in any event, look to the pleadings of the parties to find out the exact nature of the dispute, because in most cases the order of reference is so cryptic that it is impossible to cull out therefrom the various points about which the parties were at variance leading to the trouble. In this case, the order of reference was based on the report of the Conciliation Officer and it was certainly open to the Management to show that the dispute which had been referred

was not an industrial dispute at all so as to attract jurisdiction under the Industrial Disputes Act. But the parties cannot be allowed to go a stage further and contend that the foundation of the dispute mentioned in the order of reference was non-existent and that the true dispute was something else. Under s. 10(4) of the Act it is not competent to the Tribunal to entertain such a question.

In fact, *Delhi Cloth (Supra)* supports Appellant's case. It is clear that where the terms of Reference are clear, both the Tribunal and the parties concerned are confined to the terms of Reference. In the facts of the present case, the terms of Reference are explicit and even the workmen have correctly understood the same as is evident from their application to modify the issues framed by the Tribunal. In any event, neither party has urged that the present Reference is cryptic or unclear.

24 The very terms of Reference show that the point of dispute was only whether the contracts between ONGC and the Contractors employing the workmen enlisted in Ex. - A & B were camouflage or ruse and are not genuine contracts and whether the demand of the workmen for absorption in ONGC was legal and justified and not whether these workmen were already absorbed by the ONGC as per the orders of the High Court with effect from 1st April 1997. In effect, that is why the Reference itself says – if the contracts were sham and bogus, whether the demand of the workmen for absorption in ONGC was legal and justified. That itself indicates workmen were not absorbed and hence were demanding to be absorbed. The Tribunal was not called upon by the Government to adjudicate whether

the employees have been absorbed pursuant to the orders of the High Court. The Tribunal cannot suo moto add to the Order of Reference and since, the Tribunal has based the first part of its Award on a non-referred issue, its entire reasoning on absorption of respondent workers is *ex-facie* beyond its jurisdiction and, therefore, perverse. The Tribunal, by the very terms of Reference had no jurisdiction to go into the issue as to whether the employees were absorbed pursuant to the order of the High Court. In view thereof, the order of the Tribunal with regard to the said issue has to be quashed and set aside as without jurisdiction and the learned Single Judge has erred in not quashing the same. On this point itself the said Award of the Tribunal and the order of the learned Single Judge has to be quashed.

25 As regards issue nos.2 and 3, i.e., whether the contracts between ONGC and the Contractors employing the workmen enlisted in Ex. - A & B were camouflage or ruse and are not genuine contracts, there is no evidence to prove that.

The Reference, as it stands required the Tribunal to firstly adjudicate on whether the contracts are sham and bogus and secondly if it was sham and bogus, then decide, whether the workmen were justified in claiming absorption.

Instead of doing the above, the Tribunal has decided, in the first instance, that the contract workers were in fact already absorbed by the High Court order. It has thus upturned the entire order of Reference and put

the cart before the horse.

26 As regards to the said issue, the Tribunal has not appreciated that the Order of Reference dated 27th February 2023 referring the demand of workmen for absorption in employment of Appellant and getting wages and benefits of regular workmen was to ascertain whether the contracts were sham and bogus prior to 1st April 1997. In fact, Respondent unions had themselves given an application dated 30th July 2004 to the Tribunal that the main issue framed by the Tribunal whether the contracts between ONGC and Contractors employing the workmen was a camouflage or ruse and were not genuine contracts was rendered infructuous and redundant since contracts ceased to exist with effect from 1st April 1997 as per the interim directions given by this Court on 20th January 1997. If that was the case of Respondent Union, the Tribunal need not have even adjudicated the issue. The Tribunal failed to appreciate that the directions given on 20th January 1997 by this Court were only interim in nature directing Appellants to treat the workmen as direct employees. The said directions had not attained finality as per the judgment of this Court passed on 13th December 2002 (Coram: R.J. Kochar and S.A. Bobde, JJ.). The Tribunal failed to appreciate that the learned Single Judge (Coram: A.P. Shah, J.) had in his judgment dated 31st August 1996, relied upon the judgment of the Apex Court in *Air India (Supra)* and that judgment had been overruled by the Apex Court in case of the *SAIL one (Supra)*.

27 Mr. Singhvi relied upon certain portions of the evidence of Appellant's witnesses S.R. Kurup (M.W.1) and G. Rajendran (M.W.4) to justify the conclusions arrived at by the Tribunal. Mr. Singhvi also relied on the evidence of P.W.1, Jitendra P. Naik to submit that certain benefits, which were not available before 1st April 1997, were made available after 1st April 1997. Mr. Singhvi also relied on various documents, the compilation of which he tendered in the Court. We are not inclined to consider those documents because there is nothing to indicate that these documents were received in evidence or even filed in the Tribunal. We do not see any reference to these documents in the pleadings either, i.e., in the Statement of Claim. Even the witnesses have not deposed to those documents.

 Mr. Singhvi relied upon a judgment of the Apex Court in *Food Corporation of India (Supra)* to submit that the Tribunal is not a Court and Tribunal should not expect a party to prove the document in evidence as per the provisions of the Evidence Act. There should be only "material" and not evidence as required by the Evidence Act.

28 In our view, this judgment is not applicable because (a) it does not deal with the jurisdiction of the Appeal Court and (b) it required the Tribunal to consider the material "placed" by the parties without requiring strict proof thereof. The expression "placed" must, of necessity, refer to legally "placed", i.e., after it is exhibited and deposed to. Once it is legally

“placed”, the Tribunal ought not to ask for strict proof of its contents. In the present case, these documents do not appear to have been “placed” for the consideration of the Tribunal since we find that even the impugned said Award of the Tribunal makes no reference to them. The Tribunal also has trappings of the Court. While it may not be hidebound by the rules prescribed in the Evidence Act it is nonetheless a quasi-judicial Tribunal proceeding to adjudicate upon a *lis* between the parties arrayed before it and must decide the matter on the evidence produced by the parties before it. A contention to substantiate which evidence is necessary, has to be pleaded. If there is no pleading raising a contention, there is no question of substantiating such a non-existing contention by evidence. It is well settled that allegation, which is not pleaded, even if there is evidence in support of it, cannot be examined because the other side has no notice of it and if entertained it would tantamount to granting an unfair advantage to the first mentioned party. Paragraphs 31 to 34 of ***Shankar Chakravarti V/s. Britannia Biscuit Co. Ltd. and Anr.***²⁸ read as under:

“31. Rule 15 confers power to admit a call for evidence. Rule 16 enables the Labour Court or Industrial Tribunal to administer oath. Rule 60 prescribes the form of application to be made under s. 33. the application has to be in Form J or K, as the case may be, and has to be on verification. The cause-title in the prescribed form requires that the applicant and the opposite party should be specifically described in the application. These forms are more or less analogous to a plaint in a suit and the reply to be filed would take more or less the form of a written statement. Where the parties are at variance for facility of disposal issues will have to be framed. It is open to it to frame an issue and dispose it of as a preliminary issue as held in M/s. Dalmia Dadri Cement Ltd. v. Its Workmen(1). Parties have to

28. (1979) 3 SCC 371

lead evidence. Section 11C confers power of a civil court under the Code of Civil Procedure on the Labour Court or Industrial Tribunal in respect of matters therein specified. The Labour Court or Tribunal would then; proceed to decide the lis between the parties. It has to decide the lis on the evidence adduced before it. While it may not be hide bound by the rules prescribed in the Evidence Act it is nonetheless a quasi-judicial Tribunal proceeding to adjudicate upon a lis between the parties arrayed before it and must decide the matter on the evidence produced by the parties before it. It would not be open to it to decide the lis on any extraneous considerations. Justice, equity and good conscience will inform its adjudication. Therefore, the Labour Court or the Industrial Tribunal has all the trappings of a Court.

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

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

34. The employer terminates the service of a workman. That termination raises an industrial dispute either by way of an application under s. 33 of the Act by the employer or by way of a the by the appropriate Government under s. 10. If an

application is made by the employer as it is required to be made in the prescribed form all facts are required to be pleaded. If a relief is asked for in the alternative that has to be pleaded. In an application under s. 33 the employer has to plead that a domestic enquiry has been held and it is legal and valid. In the alternative it must plead that if the Labour Court or Industrial Tribunal comes to the conclusion that either there was no enquiry or the one held was defective, the employer would adduce evidence to substantiate the charges of misconduct alleged against the workman. Now, if no such pleading is put forth either at the initial stage or during the pendency of the proceedings there arises no question of a sort of advisory role of the Labour Court or the Industrial Tribunal unintended by the Act to advise the employer, a party much better off than the workman, to inform it about its rights, namely, the right to lead additional evidence and then give an opportunity which was never sought. This runs counter to the grain of industrial jurisprudence. Undoubtedly, if such a pleading is raised and an opportunity is sought, it is to be given but if there is no such pleading either in the original application or in the statement of claim or written statement or by way of an application during the pendency of the proceedings there is no duty cast by law or by the rules of justice, reason and fair play that a quasi-judicial Tribunal like the Industrial Tribunal or the Labour Court should adopt an advisory role by informing the employer of its rights, namely, the right to adduce additional evidence to substantiate the charges when it failed to make good the domestic enquiry and then to give an opportunity to it to adduce additional evidence. This, apart from being unfair to the workman, is against the principles of rules governing the procedure to be adopted by quasi-judicial Tribunal, against the grain of adversary system and against the principles governing the decision of a lis between the parties arrayed before a quasi-Judicial Tribunal.”

(emphasis supplied)

In the present case, there is no reference to any of these documents in the workers' Statement of Claim and hence, they cannot be placed in evidence.

29 Further, the evidence before the Court has to be considered in its entirety. The Tribunal also did not consider the evidence of the workman Jitendra P. Naik (PW.1) himself. In his cross-examination he admits that

salary of permanent employees of ONGC is double than his own salary and permanent employees got many facilities which are not extended to workmen like him who are treated as direct employee. The cross-examination of the workers' witness (Jitendra P. Naik - P.W.1) discloses, *inter-alia*, that he has no evidence to show that he had ever applied to ONGC for a job, it was true that M/s. Bharat Enterprises was paying his salary after deducting Provident Fund, bonus was given to him by M/s. Bharat Enterprises, it is true that M/s. Bharat Enterprises was submitting Bills to ONGC which were paid to M/s. Bharat Enterprises, from 1st April 1997 he claims to be on the Muster Roll of ONGC, there were two Musters maintained by ONGC - one for its permanent employees and the other for "employees like me" and there are several other similar distinguishing factors in the aforesaid cross examination.

30 Another workman E.M. Ravindran (P.W.2) in his cross-examination also admits that he does not get all benefits given by Appellant to its employees. He also says that he is getting wages and DA as per the agreement signed between ONGC and contract workers whereas the regular employees of ONGC are getting salary as per agreement signed by ONGC and Union of regular employees and he does not get the benefits of that agreement. In his cross examination, E. M. Ravindran, Union witness P.W.2, admits that he was engaged by Contractors M/s. Moosa Services, his salary was paid by, and Provident Fund was deducted by the Contractor, his PF

Contributions were remitted to the PF Authority by the Contractor and Bonus was also paid to him, ONGC has recruitment and Promotion Rules, no appointment letter was ever issued to him by ONGC and that he is not getting all the benefits given by ONGC to its regular employees, he was getting DA and regular salary as per regular employees of ONGC, he was not getting benefit of Golden Jubilee Celebrations which was given to permanent employees of ONGC, he was getting 21 days leave salary whereas ONGC employees get 30 days leave, he was claiming direct employment with ONGC “because of order given by the Hon’ble High Court”, he has no idea whether he was signing the muster maintained by ONGC for permanent employees, he was not getting benefits of the Agreement signed between ONGC and the Union of regular Employees, his pay scale shows that he got the same benefits of regular employees of ONGC (this is mutually inconsistent), he is already absorbed in the services of ONGC, he has no appointment order from ONGC and ONGC regular employees are getting unlimited medical benefits which he was not getting.

31 Mr. Singhvi submitted that the Tribunal has also found on the basis of evidence that the MOUs were signed about contract workers without the Contractors which shows the extent of control of Appellant over the terms and conditions of their service. But the fact is that the original appointment by Contractors was continued by reason of interim orders of this Court. The Tribunal totally ignores the fact that under Section 30(2) of

the CLR Act, the principal employer is entitled to enter into a settlement directly with the contract labour. Therefore, there is no evidence to indicate from the workman's side that the contract was sham and bogus. In fact, no evidence has been attempted to be led to prove that the contract between ONCG and the Contractors prior to 1st April 1997 (prior to 1st April 1997 because the Contractors were removed by then) was sham and bogus. None of the witnesses of Appellant have anywhere admitted that these workmen were absorbed as regular employees. The consistent stand of Appellant's witnesses has been that these workmen were only treated as direct employees and that is the correct approach as that is what the order dated 20th January 1997 provide for, *"Till further orders, Respondent No.1 shall treat the workmen..... as their direct employee....."*.

32 According to the Tribunal the abolition of the contract labour system demonstrates that the contract labours were in fact the workers of Appellant. This conclusion is legally unsustainable because, abolition of contract labour system does not ipso facto make the erstwhile contract labour direct workers of Appellant. The Tribunal concludes that the Provident Fund Inspector Gonsalves (M.W.3), who was produced as Management's witness, had admitted that the Provident Fund of the concerned workers were deposited in the same Contributor Fund of ONGC. This is factually inaccurate when compared to actual evidence of this witness. This witness says:

“..... PF Code number is allotted to the employer

Sub code is granted to the Branch of the main employer as shown on page 15 of Ex.80. Not true to say that, In this case, main employer is ONGC. (Witness volunteers that main employer is Arnov Shipping Co.) Sub code was given as shown on page 18 of Ex-80 since Arnov Offshore Pvt. Ltd. Was main employer while obtaining sub code. Arnov Offshore services was providing services to ONGC and since ONGC wrote through Arnov Shipping Co. said correspondence is made. It is true that sub code no.37128-B was code number given first on 24/2/1995 as shown on page 15 of Ex.80. This sub code is not having relation with ONGC. I have no idea whether r on 8/9/94, 13 contracts were abolished including activities attended by Arnov Shipping Co.”

Also, this witness has produced several documents indicating the separate relationship of Appellant and the Contractors.

33 Further, in *Rashtriya Chemicals & Fertilizers Ltd. (Supra)* relied upon by Mr. Cama, the Apex Court has held that the applicability of the Contract Labour (Regulation and Abolition) Act pre-supposes existence of a valid contract. Paragraph 11 of the said judgment reads as under:

“11. As rightly contended by learned counsel for the appellants once the respondent No.1-Association approached the High Court on the foundation that the Contract Labour (Regulation and Abolition) Act,1970 (in short the 'Act') applied, it pre supposes existence of a valid contract. What the writ petitioner (respondent No.1 herein) wanted was quashment of Notification for reconsideration. In view of what has been stated in second SAIL case (supra) the High Court has to consider whether the stand taken in the writ petition was inconsistent. In the instant case the writ petitioner itself accepted that certain issues could not be decided in the writ petition. That being so, High Court giving directions in the nature done, do not appear to be appropriate. We are of the view that the High Court ought not to have given the directions in the manner done and should have left the respondent No.1-Association to avail remedy available in the I.D. Act.”

(emphasis supplied)

Therefore the Tribunal could not have concluded that the

contract was sham, bogus and mere camouflage.

34 To determine whether a contract was sham, bogus and camouflage, the factors that the Tribunal should have taken into consideration to establish an employer/employee relationship include:(a) who appoints workmen; (b) who paid the salary/remuneration; (c) who was the authority to dismiss; (d) who can take disciplinary action; (e) whether there is continuity in service; and (f) extent of control and supervision, i.e., whether there exists complete control and supervision.

It will be useful to reproduce paragraphs 61 to 65 of *Balwant Rai Saluja (Supra)* which read as under:

“61. Further, the above case made reference to International Airport Authority of India case xxxx wherein the expression “control and supervision” in the context of contract labour was explained by this Court. The relevant part of International Airport Authority of India case, as quoted in Bengal Nagpur Cotton Mills case is as follows: (Bengal Nagpur Cotton Mills case SCC pp. 638-39, para 12)

“12. ‘38. ... 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 a contractor, if the right to regulate the 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.’ (International Airport Authority of India case, SCC p.388, paras 38-29)”

62. A recent decision concerned with the employer-employee relationship was that of Nalco case. In this case, the appellant had established two schools for the benefit of the wards of its employees. The writ petitions were filed by the employees of each school for a declaration that they be treated as the employees of the appellant company on grounds of, inter alia, real control and supervision by the latter. This Court, while answering the issue canvassed was of the opinion that the proper approach would be to ascertain whether there was complete control and supervision by the appellant therein. In this regard, reference was made to Dharangadhra Chemical Works case wherein this Court had observed that: (Nalco case SCC pp.768-69, para 22)

“22. ‘14. The principle which emerges from these authorities is that the prima facie test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work, or to borrow the words of Lord Uthwatt at p.23 in Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Ltd.xxxx, ‘The proper test is whether or not the hirer had authority to control the manner of execution of the act in question’.’ (Dharangadhra Chemical Works case, AIR p. 268, para 14)”

63. The Nalco case further made reference to Workmen of Nilgiri Coop. Mktg. Society Ltd. v. State of T.N. xxx, wherein this Court had observed as follows: (Nalco case 16, SCC p. 771, para 27)

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

38. With a view to find out reasonable solution in a problematic case of this nature, what is needed is an integrated approach meaning thereby integration of the relevant tests wherefor it may be necessary to examine as to whether the workman concerned was fully integrated into the employer's concern meaning thereby independent of the concern although attached therewith to some extent.' (Workmen of Nilgiri Coop. Mktg. Society case, SCC p. 529, paras 37-38)"

64. It was concluded by this Court in Nalco case xxx that there may have been some element of control with Nalco because its officials were nominated to the Managing Committee of the said schools. However, it was observed that the abovesaid fact was only to ensure that the schools run smoothly and properly. In this regard, the Court observed as follows: (SCC p. 772, para 30)

"30. However, this kind of 'remote control' would not make Nalco the employer of these workers. This only shows that since Nalco is shouldering and meeting financial deficits, it wants to ensure that the money is spent for the rightful purposes."

65. Thus, it can be concluded that the relevant factors to be taken into consideration to establish an employer-employee relationship would include, inter alia:

- (i) who appoints the workers;
- (ii) who pays the salary/remuneration;
- (iii) who has the authority to dismiss;
- (iv) who can take disciplinary action;
- (v) whether there is continuity of service; and
- (vi) extent of control and supervision i.e. whether there exists complete control and supervision.

As regards extent of control and supervision, we have already taken note of the observations in Bengal Nagpur Cotton Mills case, International Airport Authority of India case and Nalco case."

(emphasis supplied)

35 Mr. Singhvi submitted that original tests flowed out of the concept of vicarious liability where the question was whether the contractor is told what work is to be done or also how the work is to be done. These were called contracts for service or contracts of service, respectively. In the

first case, the contractor was an independent contractor and in the second, he was an employee. This gave rise to the concept of supervision and control as held in *Dhrangadhara Chemical Works (Supra)*. Though the tests have evolved now, Mr. Singhvi submitted, as per *Silver Jubilee Tailoring House (Supra)*, supervision and control remain an important portion of the tests. The recent judgments concerning this test are considered and summarized in *Workmen of Nilgiri Coop. Mkt. Society Ltd. (Supra)*. Even if we take the tests enumerated in *Balwant Rai Saluja (Supra)*, relied upon by Appellant, there is no error in the application of these tests. We are afraid we cannot agree with Mr. Singhvi.

As noted earlier, we cannot read evidence and judgments in bits and pieces. We have to read them in entirety. In *Balwant Rai Saluja (Supra)* the Apex Court has clarified that contract of contract labour by the principal employer is a normal incident of the employment of contract. Though Mr. Singhvi states that there was no error in the application of the test enumerated in *Balwant Rai Saluja (Supra)*, none of these tests have been applied by the Tribunal. Moreover, the Tribunal (a) has failed to apply the law, i.e., Section 30(2) of the CLR Act, (b) has held contrary to the evidence of the PF Inspector Gonsalves (M.W.3) and the documents produced by him, (c) has placed sole emphasis on the fact that the Management exercised control over the erstwhile contract labour and (d) several binding judgments of the Apex Court though directly cited have not been considered

by the Tribunal.

36 Mr. Singhvi's attempt to turn the evidence in his favour referring to the test enumerated in *Balwant Rai Saluja (Supra)* also does not impress us. Jitendra Naik (P.W.1) has stated that he was interviewed by the officers of ONGC. Nothing turns much on that because he was to be deputed at the office of ONGC by the Contractor and ONGC would have wanted to know that the person being sent by the Contractor was suitable. Moreover, in his cross examination by Appellant, P.W.1 admits that it was M/s. Bharat Enterprises that inquired with him whether he was ready to work with them and he has no evidence to show that he applied to ONGC. He also admits that it was M/s. Bharat Enterprises that was paying his salary after deducting PF. Even bonus was given by M/s. Bharat Enterprises. He further admits, in his cross examination, that it was M/s. Bharat Enterprises that was submitting bills to ONGC and ONGC was paying the claim to M/s. Bharat Enterprises and he worked with M/s. Bharat Enterprises from 11th May 1992 upto March 1997.

Mr. Singhvi submits that there is a clear admission in the evidence of P.W.1, Jitendra Naik that all salaries/bonus/PF etc. was reimbursed by Appellant and that was identical to the situation in *Hindalco Industries Ltd. (Supra)* where even though the Contractors were actually paying the workmen, it was Hindalco which was ultimately reimbursing them. In Hindalco there were other factors which were in favour of the

Union which is not the case here.

37 As held by the Apex Court in *R.K. Panda and Ors. (Supra)*, 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. Therefore, the onus was on respondents to prove that the contract was a mere camouflage or ruse and the workmen have become the employees of Appellant in course of time. Paragraph 7 of *R.K. Panda and Ors. (Supra)* reads as 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)

38 As regards Mr. Singhvi's submissions that there is evidence that though the Contractors were changed every 1-3 years the workers remained the same and gratuity was paid by ONGC and there is no evidence to support the fact that the gratuity was paid by ONGC only after 1997 are all non-starters. In fact, Appellant's witness S.R. Kurup (M.W.1), in his cross examination actually states that he does not know how many contracts were entered into or the details of the contracts. In fact, he does not say anywhere, as submitted by Mr. Singhvi, that though the Contractors were changed every 1-3 years the workers remained the same.

39 On the issue of gratuity, Mr. Cama submitted that respondents have for the first time in this Court sought to claim that since Appellant was paying the workers gratuity, it must be presumed that they had accepted them as their direct employees. We agree with Mr. Cama that this has not been part of the pleadings or any evidence. Mr. Cama also submitted that Appellant has never paid the gratuity of any workmen who retired prior to interim order dated 1st April 1997. The onus would be on Respondents to prove otherwise. As regards employees who retired after 1st April 1997, Mr. Cama stated Appellant had initially refused to make the payments and the workers complained to the Controlling Authority under the Payment of Gratuity Act and the application was allowed. Appellant's appeal was dismissed but Appellant has challenged the said orders by way of five Writ

Petitions bearing No.7661 of 2006, 7662 of 2006, 7663 of 2006, 7664 of 2006 and 7665 of 2006 and all these petitions have been admitted and stay has been granted by an order dated 28th November 2006. These petitions, Mr. Cama submitted, are still pending. At the same time, Mr. Cama submitted that as the Contractors have been removed pursuant to the orders passed by this Court after 1st April 1997 just because Appellant paid them on humanitarian consideration so that the workmen are not left without gratuity in their old age cannot, by any stretch of imagination, be concluded that Appellant has accepted these workmen as their employees. We would agree with Mr. Cama. In fact, in *R.K. Panda and Ors. (Supra)*, the Court has held that mere fact of continuity of service would not be decisive.

40 Mr. Singhvi's submission that complete control and supervision was with Appellant as the contractor only visited once a month or the MOUs were signed with contract workers without the Contractors shows the extent of control of Appellant over the terms and conditions of service of their service do not appeal to us. Certainly, if someone is working in an organization like Appellant, the organization will have some control and supervision over the workmen at the least to the extent that the workmen do not create any disastrous situation in the place of work. That could never mean that the workmen have been absorbed by Appellant.

41 In *SAIL two (Supra)*, the Hon'ble Supreme Court, *inter alia*, held:

(a) The workers represented by the same Union had approached the Authorities under the CLR Act, for abolition of contract labour and for a Reference under the Industrial Disputes Act when that failed. They have done so based on the stand that the workers were working with the Contractors. It is therefore not permissible for them to take a “mutually destructive” plea by urging subsequently that the contracts were sham and bogus.

(b) That the doctrine of estoppels, waiver and acquiescence equally applies in industrial law.

(c) While issuing a Notification under the CLR Act, the State would have to proceed on the basis that the principal employer had appointed Contractors and that such appointments are valid in law. A sham contract doesn't exist and cannot be abolished. Paragraphs 15 and 18 read as under:

“15. 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. The 1947 Act was enacted, as the preamble indicates, for investigation and settlement of industrial dispute and for certain other purposes. It envisages collective bargaining. Settlement between Union representing the workmen and the Management is envisaged thereunder. It

provides for settlement by mutual agreement. A settlement or an award in terms of Section 18(3)(b) of the 1947 Act is binding on all workmen including those who may be employed in future. What assumes importance is the ultimate goal wherefore the 1947 Act was enacted, namely, industrial peace and harmony. Industrial peace and harmony is the ultimate pursuit of the said Act, having regard to the underlying philosophy involved therein. The issue before us is required to be determined keeping in view the purport and object of the 1947 Act.

It is interesting to note that in Modi Spinning & Weaving Mills Company Ltd. & Another v. Ladha Ram & Co. [(1976) 4 SCC 320], this Court opined that when an admission has been made in the pleadings, even an amendment thereof would not be permitted.

xxxxxxxxxxx

18. It is, thus, evident that by taking recourse to an amendment made in the pleading, the party cannot be permitted to go beyond his admission. The principle would be applied in an industrial adjudication having regard to the nature of the reference made by the Appropriate Government as also in view of the fact that an industrial adjudicator derives his jurisdiction from the reference only. There is another aspect of the matter which should also not be lost sight of. For the purpose of exercising jurisdiction under Section 10 of the 1970 Act, the appropriate Government is required to apply its mind. Its order may be an administrative one but the same would not be beyond the pale of judicial review. It must, therefore, apply its mind before making a reference on the basis of the materials placed before it by the workmen and/or management, as the case may be, While doing so, it may be inappropriate for the same authority on the basis of the materials that a notification under Section 10(1)(d) of the 1947 Act be issued, although it stands judicially determined that the workmen were employed by the contractor. The State exercises administrative power both in relation to abolition of contract labour in terms of Section 10 of the 1970 Act as also in relation to making a reference for industrial adjudication to a Labour Court or a Tribunal under Section 10(1)(d) of the 1947 Act. While issuing a notification under the 1970 Act, the State would have to proceed on the basis that the principal employer had appointed Contractors and such appointments are valid in law, but while referring a dispute for industrial adjudication, validity of appointment of the contractor would itself be an issue as the State must prima facie satisfy itself that there exists a dispute as to whether the workmen are in fact not employed by the contractor but by the management. We are, therefore, with respect, unable to agree with the opinion of the High Court.

We would, however, hasten to add that this judgment shall not

come in the way of the appropriate Government to apply its mind for the purpose of issuance of a notification under Section 10 of the 1970 Act.”

(emphasis supplied)

42 In *Rashtriya Chemicals & Fertilizers Ltd. & Anr. (Supra)* the Court, *inter alia*, held that once the workers approached the High Court on the foundation that the CLR Act applied “it pre-supposes existence of a valid contract”. Paragraph 11 reads as under:

“11. As rightly contended by learned counsel for the appellants once the respondent No.1-Association approached the High Court on the foundation that the Contract Labour (Regulation and Abolition) Act, 1970 (in short the 'Act') applied, it pre supposes existence of a valid contract. What the writ petitioner (respondent No.1 herein) wanted was quashment of Notification for reconsideration. In view of what has been stated in second SAIL case (supra) the High Court has to consider whether the stand taken in the writ petition was inconsistent. In the instant case the writ petitioner itself accepted that certain issues could not be decided in the writ petition. That being so, High Court giving directions in the nature done, do not appear to be appropriate. We are of the view that the High Court ought not to have given the directions in the manner done and should have left the respondent No.1-Association to avail remedy available in the I.D. Act.”

(emphasis supplied)

43 It was urged by Mr. Singhvi that the judgment in *SAIL two (Supra)* has been distinguished in the case of *Sarva Shramik Sangh (Supra)*. In our view, this judgment does not assist Respondents, *inter alia*, because:

(a) A Reference was refused by the Government. The workers filed a Writ Petition for a direction to refer. This was dismissed for non-presentation.

(b) Held further that from the 1st Petition the workers had taken

a stand that contract was sham and bogus. They had approached the High Court for a direction to the Contract Labour Authorities to hold that the contracts were sham and bogus because prior to SAIL judgment it was accepted that the workers could approach the CLR Authorities for investigation and abolition of contract labour.

(c) Therefore, their Second Petition for a Reference to the Industrial Tribunal did not constitute taking an inconsistent stand.

(d) *SAIL two (Supra)* was explained in paragraphs 24 to 26. It will be useful to reproduce paragraphs 14, 16 and 24 to 26 of *Sarva Shramik Sangh (Supra)*, which read as under:

“14. The assumption that the appellant had taken inconsistent stands in the two writ petitions is not correct. Even in the first writ petition, the appellant had contended that though the contractors changed from time to time, the workers in the canteen remained the same with continuity of service; that IOC had mala fide and illegally kept the workers as contract labour in order to keep them in a permanent state of insecurity and to deny them the wages and privileges available to permanent workers; that IOC was actually controlling, and supervising the canteen; and that only as a camouflage, the contractor was shown as running the canteen to create a pretence that the workmen of IOC were the workers of the contractor, when in fact they were the employees of IOC. In short, the appellant had contended that the contract was sham and nominal, in the first petition.

XXXXXXXXXXXX

16. The stand of the appellant and the workers was always consistent. But before the decision of a Constitution Bench of this Court in Steel Authority of India Ltd. v. National Union Waterfront Workers [2001 (7) SCC 1, for short referred to as 'SAIL-I], it was thought that the appropriate relief available was to seek an investigation and abolition of contract labour under the CLRA Act and consequently seek absorption. Therefore the prayer was made with reference to the CLRA Act in the first petition.

XXXXXXXXXXXX

24. The Labour Court held that the dispute referred was

whether the contract workers who were employed in the particular nature of contract work were justified in demanding absorption as regular employees; that the said dispute presupposed that the employees were contract workers under the contractors and the question therefore was whether the contract labour system should be abolished and contract workers had to be absorbed by the principal employer; that the employees who sought absorption by VISL were contract labour was evident from the averments made in the claim statement; and that the only remedy available to them was to file writ petition seeking a direction to the central government to take a decision under section 10 of CLRA Act to prohibit employment of contract labour. The Labour Court held that the question under reference related to abolition of contract labour and as the said question could be decided only by appropriate Government under section 10 of the CLRA Act, the dispute was not maintainable under ID Act. Therefore the Labour Court made an award holding that the reference was not maintainable.

25. The said award of the Labour Court was challenged in the High Court. A learned single Judge allowed the writ petition and directed the Union of India to treat the writ petition as a petition submitted by the Union raising an industrial dispute in terms of section 2(k) read with section 12(1) of the ID Act as also under the provisions of CLRA Act. The learned Judge further directed the central government to refer the said dispute to the Industrial Tribunal. The appeal filed against the said judgment of the learned Single Judge was dismissed by a division bench. Aggrieved thereby SAIL approached this Court.

26. It is in that background this Court held that the workmen having taken a definite stand that they were working under the contractors, and as the dispute that was referred was one which arose under the CLRA Act, the workmen could not, by amending the claim statement filed before the Labour Court, take a contradictory and inconsistent plea that the contract between VISL and the contractor was sham and bogus and they were the direct employees of VISL. This Court observed that it was impermissible to raise such mutually destructive pleas in law, having regard to the principles of estoppel, waiver and acquiescence which were also applicable in industrial adjudication.”

(e) In the present case a perusal of the original Writ Petition filed by Respondent workers, i.e., Writ Petition No.1240 of 1996 had expressly taken the stand that they were contract labour and sought abolition of contract labour. Indeed, it is therefore, that the Notification

dated 8th September 1994 had been issued and Respondents claim is based on that. It follows, therefore, that in *Sarva Shramik Sangh (Supra)* the second stand taken by the Union were substantially the same and, therefore, permissible. In *SAIL two (Supra)* the stand taken was that the contract should be abolished and therefore the subsequent stand that contract was sham and bogus was impermissible. This is the same situation herein.

(f) Further, the subsequent judgment in the case of *Rashtriya Chemicals (Supra)* has not been noted in *Sarva Shramik Sanga (Supra)*.

(g) It follows that the present workers have throughout based their claim on contract labour and its abolition. Based on *SAIL two (Supra)* their contracts are deemed valid.

44 Further in the present case the concerned workers at Exh. A & B were employed by as many as 21 separate Contractors. It follows that therefore it was obligatory on the part of the Tribunal to apply its mind to each of the 21 contracts which are involved. Not only has the Tribunal not referred to all the individual contracts separately, the Tribunal, has not even noted about them, even though the Contractors were arraigned before the Tribunal. In the absence of perusal of each of the contracts itself, and in the absence of evidence with regard to each of them it was not possible for the Tribunal to conclude that all the 21 independent different contracts were sham and bogus. Even respondent's evidence on record was provided by only the workers of two Contractors, i.e., M/s. Bharat Enterprises and

M/s. Moosa Services. Thus, apart from the fact that even these two workmen's witnesses do not establish the worker's case, there is no evidence on record with regard to the other 19 Contractors and their contracts. This omnibus conclusion unsupported by even a shred of material fact is *ex-facie* perverse. Even as regards to the two Contractors whose workmen gave evidence their cross examination destroys their case.

45 In our view, Respondents have miserably failed in establishing the contracts were sham and bogus and in any event as noted earlier had even filed an application dated 30th July 2004, before the Tribunal stating that the issue whether the contracts between ONGC and contract employees working enlisted in Ex. - A & B was camouflage or ruse and was not genuine contracts are infructuous or are redundant.

46 Even for a moment, we assume that workmen have been absorbed or ought to have been absorbed or have to be regularized, the same would be in violation of the constitutional scheme and would be irregular for want of compliance of one of the elements of process of selection that there can be no back door entries and appointment contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularized. The constitutional scheme provides that unless the employees claiming regularization had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant post these workmen are not

entitled to seek regularization as they are not regularized against any sanctioned posts. Therefore, there cannot be directions for absorption, regularization or permanent continuance of such workmen. That would in effect be amounting to back door entries. Paragraph 12 of the judgment of the Apex Court in *Daya Lal & Ors. (Supra)* reads as under:

“12. We may at the outset refer to the following well settled principles relating to regularization and parity in pay, relevant in the context of these appeals:

(i) High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularization, absorption or permanent continuance, unless the employees claiming regularization had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and courts should not issue a direction for regularization of services of an employee which would be violative of constitutional scheme. While something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularized.

(ii) Mere continuation of service by an temporary or ad hoc or daily-wage employee, under cover of some interim orders of the court, would not confer upon him any right to be absorbed into service, as such service would be 'litigious employment'. Even temporary, ad hoc or daily- wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularization, if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularization in the absence of a legal right.

(iii) Even where a scheme is formulated for regularization with a cut off date (that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on the cut off date), it is not possible to others who were appointed subsequent to the cut off date, to claim or contend that the scheme should be applied to them by extending the cut off date or seek a direction for framing of fresh schemes providing for successive cut off dates.

(iv) Part-time employees are not entitled to seek regularization as they are not working against any sanctioned posts. There

cannot be a direction for absorption, regularization or permanent continuance of part time temporary employees.

(v) Part time temporary employees in government run institutions cannot claim parity in salary with regular employees of the government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with government employees. The right to claim a particular salary against the State must arise under a contract or under a statute.”

(emphasis supplied)

47 Mr. Singhvi’s submissions that *Uma Devi (Supra)* has no bearing because the evidence of respondents show that workmen were appointed pursuant to interviews conducted by specific officers of ONGC, we disagree with him. This point of interviewing workmen by Appellant we have already dealt with earlier in paragraph 36. Nothing turns on that because Appellant would have wanted to know whether the workmen were suitable. For that matter anyone would have wanted to know. So what, we would say.

Mr. Singhvi submitted that it is also not open to Appellant to raise the issue of availability of posts in light of its earlier statement as recorded in the order dated 14th August 2014 in CA No.62 of 2014 that the plea of non-availability of posts would not be raised by Appellant in order to frustrate/nullify the effect of the Award of the Industrial Tribunal. This statement is of no assistance to respondents because during the pendency of this appeal, an application was taken out for early hearing of this appeal at which time the workmen – Union, expressed apprehension that Appellant has advertised for 185 posts and if that was allowed to be filled in, they would be rendered remediless. In that background, the statement was made

that the vacancies will not be filled up. That can never help Appellant because even before the Tribunal, Appellant had raised the issue that the workmen who have not undergone the process of recruitment and who are contract labourers cannot be regularised in view of the judgment of the Apex Court in *Uma Devi (Supra)*.

48 In *Uma Devi (Supra)*, the Court has emphasized the need for employment to be in sanctioned posts. This has been reiterated in ***Mahatma Phule Agricultural University & Ors V/s. Nashik Zilla Sheth Kamgar Union & Ors.***²⁹ where the Court held that when there were no sanctioned posts available to absorb all the workmen, the status of permanency cannot be granted when there are no posts. So also in *Daya Lal & Ors. (Supra)*.

49 We also find support for this view in *Vibhuti Shankar Pandey (Supra)* where paragraph 3 of the said judgment reads as under:

“3. The case of the appellant is that he was engaged in 1980 as a Supervisor, on daily rated basis, under a project of the State Water Resources Department of Madhya Pradesh. The appellant sought regularization on the post of Supervisor/Time Keeper. Admittedly, the minimum qualification for the said post was matriculation with mathematics; a qualification which the appellant did not possess. These qualifications were relaxed by a Government Circular dated 31.12.2010 and the appellant sought his regularization on the post of Supervisor/Time Keeper, as he was qualified for the post and had been working on daily wage basis for a long period of time. In fact, in another writ petition (W.P. 13997/2010) filed by the appellant earlier, the High Court of Madhya Pradesh vide order dated 02.11.2017, had given directions to the State Government to decide the claim of the writ petitioner in accordance with law. Vide order dated 18.06.2018 issued by the Office of Chief Engineer, Rani Avanti Bai Lodhi Sagar Project, the claim of the appellant for regularization was rejected for the reasons that though the minimum qualifications of matriculation with mathematics will not come in the way for his regularization, but the fact remains

29. (2001) 7 SCC 346

that the appellant was never appointed against any post. Moreover, his appointment was never made by the competent authority and there were no posts available at the time for regularization. The appellant on the other hand, had set his claim for regularization as persons who were junior to him as daily wagers were regularized in the year 1990 or even before. The learned Single Judge while allowing the writ petition gave directions for regularization of the appellant from the date on which his juniors were regularized. This order was challenged by the State Government before a Division Bench which allowed the appeal of the State Government. The Division Bench rightly held that the learned Single Judge has not followed the principle of law as given by this Court in Secretary, State of Karnataka and Ors. V. Umadevi and Ors., 2006 II CLR 261 (S.C.): (2006) 4 SCC 1, as initial appointment must be done by the competent authority and there must be a sanctioned post on which the daily rated employee must be working. These two conditions were clearly missing in the case of the present appellant. The Division Bench of the High Court therefore has to our mind rightly allowed the appeal and set aside the order dated 27.06.2019.”

(emphasis supplied)

50 It is also trite that where appointment is not made by following the rules and regulations of a Public Sector Undertaking, the mere fact that the contract labour or casual workers have remained in employment for a long period of time and that too, due to interim orders of the Court confers no equity upon them to be continued. An illegal appointment (as opposed to irregular appointment) cannot be allowed to continue. In this behalf, it will be necessary to refer to the following propositions in the judgment of the Constitution Bench of the Supreme Court in *Uma Devi (Supra)*:

(a) That although Courts are sometimes swayed by long service of temporaries or casuals, it is not as if a person who accepted such appointment is not aware of the nature of his employment. They accepted employment with eyes open.

(b) The Court further concluded that such workers (long service) do not have a claim based on alleged “legitimate expectation” and therefore, they cannot claim a right to be regularized even though they had not been selected in terms of the rules of appointment. This would run counter to the Constitutional mandate.

(c) The Court also specifically dealt with the case of contractual employment and held that where such employment is not based on proper selection under rules and procedure, he is deemed to be aware of the consequences of appointment being contractual in nature. He cannot then invoke the theory of legitimate expectations for being confirmed in post which could only be filled after following proper procedure.

(d) The Court further concluded that there is no fundamental right in favour of those who have been employed on daily wages or temporary or contractual basis to claim absorption in service.

(e) The Court considered giving employment to casuals, temporaries and contractual workers who have worked for 10 years in duly sanctioned vacant posts and who have done so “without intervention of orders of Court or Tribunals”.

(f) The Court further clarified that this related to irregular not illegal appointments. What are the differences between illegal appointments and irregular appointments was also explained in the judgment.

Paragraphs 45, 46, 47 and 53 of the said judgment read as under:

“45. While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain -- not at arms length -- since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution of India.

46. *Learned Senior Counsel for some of the respondents argued that on the basis of the doctrine of legitimate expectation, the employees, especially of the Commercial Taxes Department, should be directed to be regularized since the decisions in Dharwad (supra), Piara Singh (supra), Jacob, and Gujarat Agricultural University and the like, have given rise to an expectation in them that their services would also be regularized. The doctrine can be invoked if the decisions of the Administrative Authority affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there have been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn {See Lord Diplock in Council of Civil Service Unions V. Minister for the Civil Service, National Buildings Construction Corp'n. Vs. S. Raghunathan, and Dr. Chanchal Goyal Vs. State of Rajasthan. There is no case that any assurance was given by the Government or the concerned department while making the appointment on daily wages that the status conferred on him will not be withdrawn until some rational reason comes into existence for withdrawing it. The very engagement was against the constitutional scheme. Though, the Commissioner of the Commercial Taxes Department sought to get the appointments made permanent, there is no case that at the time of appointment any promise was held out. No such promise could also have been held out in view of the circulars and directives issued by the Government after the Dharwad decision. Though, there is a case that the State had made regularizations in the past of similarly situated employees, the fact remains that such regularizations were done only pursuant to judicial directions, either of the Administrative Tribunal or of the High Court and in some case by this Court. Moreover, the invocation of the doctrine of legitimate expectation cannot enable the employees to claim that they must be made permanent or they must be regularized in the service though they had not been selected in terms of the rules for appointment. The fact that in certain cases the court had directed regularization of the employees involved in those cases cannot be made use of to found a claim based on legitimate expectation. The argument if accepted would also run counter to the constitutional mandate. The argument in that behalf has therefore to be rejected.*

47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences

of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

XXXXXXXXXXXX

53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *S.V. Narayanappa, R.N. Nanjundappa and B.N. Nagarajan* and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."

(emphasis supplied)

51 The fact that mere long service confers no right on illegally appointed workmen has been further clarified as late as in the judgment of the Apex Court in ***Chief Executive Officer, Zila Parishad, Thane & Ors. V/s.***

Santosh Tukaram Tiware & Ors.³⁰ Further, as noted earlier, in *Daya Lal & Ors. (Supra)*, the Court has specified the rules relating to regularization and concluded in paragraph 12 as quoted above that there can be no regularization unless appointment is in pursuance of regular recruitment as per rules in open competitive process and against sanctioned vacant posts.

52 In the present case, the original appointments were by Contractors and not by the duly authorized appointing Authority of the Corporation. Of necessity, the recruitment rules have not been followed and there was no open advertisement, or interviews. The original appointment by Contractors was continued by reason of interim orders of this Court. Therefore, the benefit of 10 years' service is not available to Respondents. In *Uma Devi (Supra)* such employees are called "litigious employees". This position of the law relating to "litigious employees" has been reiterated in *Daya Lal & Ors. (Supra)*. Articles 14 and 16 of the Constitution of India should be scrupulously followed and regularization is only permissible when the appointment does not violate the rules of the selection process.

53 Applying the above judgments to the facts of the present case, it is clear that the present Respondents have continued in employment from 1st April 1997 due to regular interim orders passed by this Court. Therefore, ipso facto their continued service confers no right or equity upon them. On the other hand, they have through all these years received public employment and payment from the public exchequer. As noted in *Uma Devi*

30. 2023 I CLR 286 SC

(*Supra*) by this method they have prevented several other ordinary citizens who are qualified under the regulations of ONGC to obtain such employment. In such a case long service is against the Constitutional mandate and confers no equity or right upon Respondent workmen. In *Uma Devi (Supra)* the Court has emphasized the need for employment to be in sanctioned posts.

54 In *Uma Devi (Supra)* the Court has concluded that regularization is not a mode of appointment. Further, any mode of appointment other than pursuant to a valid advertisement, interview and due compliance with the rules and regulations amount to a backdoor entry in service. That being so, such appointments are per se illegal and cannot be regularized. In *Daya Lal & Ors. (Supra)*, the Court reiterated that irregular appointments going to root of selection procedure confers no rights upon the concerned workers.

In *U.P Power Corporation Ltd. & Anr. V/s. Bijli Mazdoor Sangh & Ors.*³¹, the Court concluded, however wide the power of the Industrial Tribunal may be, it is nevertheless bound by fundamental logic in *Uma Devi (Supra)*. In *Maharashtra State Road Transport Corporation & Anr. V/s. Casteribe Rajya Parivahan Karmachari Sanghatana (Supra)* relied upon by Mr. Singhvi, the Apex Court held that *Uma Devi (Supra)* did not expressly refer to The Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 and, therefore, there were no reasons to

31. (2007) 5 SCC 755

assume that the said judgment would also apply to negate specific provisions and powers of that statute.

55 The learned Single Judge has confirmed the Award of the Tribunal and with respect, the conclusion of the learned Single Judge are in our view, legally unsustainable, *inter alia*, for the following reasons:

(a) The learned Single Judge has concluded that the issues framed were in consonance with the order of Reference and that they have been answered accordingly. This is clearly contrary to the record as noted earlier.

(b) The learned Single Judge has emphasized that the act of absorption had reached finality. This is directly contrary to the decision of the learned Division Bench dated 13th December 2002 which was binding on the learned Single Judge.

(c) The learned Single Judge has further held that Appellant has “admitted” that the contractor’s workers were treated as workmen working in direct employment and that therefore, issue no.1 was rightly answered in the affirmative. The fact that this was only due to compliance with the interim orders of this Court has, unfortunately escaped his attention.

(d) The learned Single Judge has referred to the fact that the Contractors had changed but the workers were continued. It appears that the judgment of the Supreme Court in *R. K. Panda and Ors. (Supra)* was not

brought to his attention.

(e) The learned Single Judge has further concluded that the work being done by Respondent Union workers was regular and perennial. There is no material on record to substantiate this conclusion. Indeed, there is no material to indicate when any of 400 plus contract labourers were employed and for how long they continued in employment, prior to the interim order.

(f) The learned Single Judge has concluded that there was an admission by Appellant's witness Mr. S. R. Kurup (M.W.1) that there was no difference in the working of the direct employees and contract workers. In coming to this conclusion, the learned Judge has totally ignored the evidence of same Mr. S. R. Kurup (M.W.1), where he deposes that these workers were not workers of Appellant but had been treated as such due to the order of the High Court.

(g) Further, the learned Single Judge has completely failed to consider the evidence of Appellant's witness Shri. G. Rajendran (M.W.4) and to the fact that he has explained in detail the differences in the manner of employment of the contract labour and regular workers. He has also not noted the admitted differences between the two sets of workers as pleaded by the workers themselves in their original Writ Petition No.1240 of 1996.

(h) The learned Single Judge has further emphasized the fact that the terms and conditions of the contract workers were settled under a

MoU with the Unions of the contract workers. Here again, the learned Single Judge has not noted that this is expressly permissible under Section 30(2) of the CLR Act.

(i) Further, the learned Single Judge concludes that the continuation of the contract labour under the direct control of the Officers of the Corporation was not merely because of the interim orders passed by this Hon'ble Court, but that this was also as a fall out of the Notification abolishing contract labour. With respect, this again ignores the conclusion of the Constitution Bench judgment in *SAIL one (Supra)* that abolition of contract labour does not ipso facto give the erstwhile contract labour a right to be absorbed by erstwhile principal employer.

(j) Further, the learned Single Judge records that the Reference has been answered by taking into account the pleadings as also evidence. In holding as such the learned Single Judge has failed to note that the Tribunal has not even noted Appellant's evidence, documents or pleadings. The learned Single Judge has also not noticed the material admissions in the cross examination of the two witnesses (PW.1 and PW.2) of the workmen.

(k) Lastly, the learned Single Judge has not considered or substantively dealt with Appellant's submissions as regards the findings of the Tribunal regarding sham and bogus contracts even though the same was specifically argued before him.

In holding as above the learned Single Judge has failed to note the perversity which pervades the impugned Award of the Tribunal. In acting as such, the learned Single Judge has confirmed conclusions of the Tribunal which are ex-facie perverse. Consequently, the impugned judgment is legally unsustainable.

56 We also do not think that Appellant adopted any method of exploitation of workers. In our view, reference to *Bhilwara Dugdh Utpadak Sahakari Sanstha Ltd. V/s. Vinod Kumar Sharma (dead) by legal representatives and Ors.*³² by the learned Single Judge in paragraph 24 of the impugned order was not required in the facts and circumstances of this case.

57 In the circumstances, in our view, both the Tribunal as well as learned Single Judge erred in arriving at their respective conclusions. Both are hereby quashed and set aside.

58 Appeal, therefore, allowed. No order as to costs. Interim applications, if any, also stand disposed.

59 The workmen be discharged/terminated in accordance with law.

60 At the same time, since many of the workmen have either retired or expired and there are hardly about 150 left whose employment, in effect, was subject matter of this appeal, we would urge Appellant, if

32. AIR 2011 SC 3546

possible, to continue those workmen in the same manner or terms as they are on today for a period of three years or until they retire whichever is earlier, than discharge them/terminate their services.

61 Mr. Singhvi requests that the status quo to be maintained for a period of eight weeks. Since it was in force all this while, we grant status quo for a period of eight weeks from today.

(RAJESH S. PATIL, J.)

(K. R. SHRIRAM, J.)