

(2010) 04 DEL CK 0082

In the Delhi High Court

Case No : Writ Petition (C) No. 14178 of 2004

AIR India Ltd.

APPELLANT

Vs

Rakesh Kumar and Others

RESPONDENT

Date of Decision : 08-04-2010

Acts Referred:

Delhi Factories Rules, 1950 — Rule 65, 68, 68(2), 70

Factories Act, 1948 — Section 46

Industrial Disputes Act, 1947 — Section 17B, 2, 25F

Citation : (2010) 126 FLR 614 : (2010) 4 LLJ 26 : (2010) 6 SLR 646

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Sandeep Sethi, Sangeeta Bharti, Nidhi Minocha and Shweta Mishra, for the Appellant; Rohit Bhat and Vikas Mehta for Respondents 1 to 29, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—These three writ petitions impugn the common award dated 5th May, 2004 of the Central Government Industrial Tribunal (CGIT) in three industrial disputes having identical reference, with only the names of the workmen in each being different, as under:

Whether the demand of workmen S/Shri... employed by Chefair to provide canteen services at the establishment of Air India is justified that they be treated as deemed employees of the management of Air India? If so, to what relief are the concerned workmen entitled to?

2. The matter in controversy in all the three writ petitions is informed to be same and the counsel for the petitioner and the counsel for the workmen respondents in all the petitions have made common submissions with reference to the paper book in WP(C)14178/2004.

3. The claim of the workmen in each of the three cases before the CGIT was that

they had been employed with the respondent No. 1 Air India on casual basis in the Air India Ground Service Department Canteen, Indira Gandhi International Airport, New Delhi; that their employment with the respondent No. 1 Air India was through the respondent Chefair Flight Catering which is a unit of the respondent Hotel Corporation of India (HCI) and which is a Government Corporation. It was further their claim that the said canteen is established and maintained by Air India under the Provisions of Section 46 of the Factories Act, 1948; that vide notification dated 21st January, 1991, the Lieutenant Governor of Delhi has directed that Rules 65-70 of the Delhi Factories Rules 1950 apply to the factories specified in the schedule to the said notification; that the Air India Ground Service Department Canteen is mentioned at serial No. 9 at the said schedule; that the said canteen has been established for the welfare of more than 2000 workers employed in the premises of the respondent Air India. It further emerges from the statement of claim that it was the claim of the respondent workmen that the respondent HCI is under contract with the respondent Air India to maintain and run the said canteen; that the appointment letter for the period of 40 days were being issued to each of the workman and on expiry of the said 40 days fresh appointment letters again for 40 days were issued to each of the workman and that each of the workman had completed the statutory period of 240 days in a year; that the said workmen employed temporarily had been called for interview several times but had not been selected and on the contrary persons junior to them had been regularized. It was further the plea that the device of "contract" by the respondent Air India to the respondent HCI had been deployed to deny the workmen their legitimate right of regularization and other consequential benefits as an employee of Air India and to circumvent the various provisions of the Contract Labour (Prohibition and Abolition) Act, 1970. The workmen further claimed that they had been performing duties/work of a permanent and perennial nature continuously required by the respondent Air India but were being paid wages less than the regular employees performing the same duties. It was also alleged that issuance of appointment letter for 40 days with artificial break in service was an unfair labour practice. The workmen thus claimed the relief of regularization of their service with back wages in the respondent Air India.

4. The respondent Air India filed a reply to the aforesaid claim petition denying that the workmen were its employee or that any employer/employee relationship existed between the workmen and Air India. It was further pleaded that HCI of which Chefair was a unit was an independent entity and as per its Memorandum of Association was engaged in the business, inter alia, of establishing and running canteens; that the canteen was being run and maintained by the respondent HCI on the basis of fixed subsidy per employee of Air India which then was of Rs. 340/- per month; that the respondent Air India was not aware of the number of employees engaged by the respondent HCI and had no control over the said employees who were governed by the rules, regulations and service conditions of the respondent HCI. It was pleaded that while the infrastructure of

the canteen had been provided by the respondent Air India, its management had been entrusted to the respondent HCI which was providing canteen services to Air India employees under the contract of running and maintaining the said canteen. It was further pleaded that the appointment letters, token numbers, ESI cards etc. had been issued to the workmen by the respondent HCI only and in the circumstances no remedy of regularization could lie against the respondent Air India. It was further pleaded that it was not a case of the respondent Air India engaging any labour through contractor but a case of the respondent Air India engaging the respondent HCI to provide canteen services. It was denied that the provisions of Contract Labour Act were attracted and without prejudice to the said plea it was further pleaded that the power to abolish the system of contract labour vested only in the appropriate government and not in the Labour Court. It was also denied that the canteen aforesaid was a statutory canteen inasmuch as the respondent Air India was not employing more than 250 workers. Without prejudice to the said plea it was further pleaded that even if it were to be a statutory canteen, the respondent Air India having engaged the respondent HCI to provide the canteen services, the employees, if any, of HCI would not become the employees of Air India.

5. The award records that the respondents Chefair and HCI also filed a reply pleading that no dispute had been raised by the workmen against Chefair and HCI and the reference made to the GCIT was also not directed against them and hence they had been wrongly impleaded as the respondents and no orders could be passed against them.

6. The CGIT in the award has found/held:

- i. that Air India has not denied that the canteen aforesaid is a statutory canteen;
- ii. that the respondent Air India has not denied that the canteen had been established for the welfare of more than 2000 workers;
- iii. It is not disputed that the canteen is established within the premises of Air India;
- iv. That HCI carries on its business under the control and administration of Air India as provided in its Memorandum of Articles of Association.
- v. That Air India and HCI cannot be said to be entirely separate and independent entities.
- vi. that from the Articles of Association of the respondent HCI it is very much clear that HCI acts under the control of Air India and therefore it cannot be separated from Air India and any act done by the HCI for or in respect of the business or statutory duty of Air India cannot be said to be an independent act of HCI;
- vii. that therefore the overall supervision and management of the business cannot be separated and it cannot be accepted that the canteen was run

independently by the respondent HCI on any contract basis;

viii. that contract by Air India to HCI for canteen services and hiring of employees for the said purposes by HCI is merely a camouflage since it is obligatory on the part of the Air India to establish a canteen, hence any workman employed to work in the canteen through any agency will be deemed to be an employee of the owner of the canteen i.e. Air India;

ix. Reliance was placed on Kanpur Suraksha Karamchari Union (Regd.) Vs. Union of India (UOI) and Others, and M.M.R. Khan and others etc. Vs. Union of India and others, etc.,

x. That Air India had constituted a Committee of persons nominated from its employees and of the employees of HCI for looking into the problems relating to service, hygiene etc in the said canteen;

xi That the Deputy Manager of the Air India had in his affidavit deposed that nearly 2000 employees avail the food and snacks from the canteen and thus the plea of Air India that the canteen was for less than 250 workers cannot be accepted.

The CGIT thus held that the respondent workmen were employees of Air India and the demand of the workmen was held to be justified. Further, finding that the workmen had been terminated from their service during the pendency of the dispute either before the conciliation officer or before the CGIT such termination was held to be illegal; the mandatory provisions of Section 25F of the Industrial Disputes Act were found to have been not followed. Hence, the termination of employment was set aside and the respondent workmen held entitled to reinstatement in service with continuity and consequential benefits, regularization and parity in pay together with 50% back wages.

7. Aggrieved from the aforesaid award the present three petitions were preferred. This Court stayed the operation of the award and which order continues. On applications u/s 17B of the Industrial Disputes Act being filed by the respondent workmen, orders were made for payment of arrears of wages last drawn by the workmen from the date of the award and during the pendency of the present proceedings.

8. The counsel for the parties have been heard.

9. The senior counsel for the petitioner, at the outset, has urged that the findings in the award, insofar as on the basis of the relationship between Air India and HCI are concerned, cannot be sustained in view of the orders of this Court in other proceedings. It is contended that in or about the year 1996 writ petitions were filed in this Court for the same relief as claimed before the CGIT. The said writ petitions were dismissed by a judgment dated 24th May, 1999 of a Single Judge of this Court (Justice K. Ramamoorthy) on the ground that before the workmen could maintain the writ petition they should establish that HCI is owned by Air India and merely because HCI is a subsidiary of Air India will not

constitute the employees of HCI as the employees of Air India. It is contended that LPA 521/1999 was preferred to the Division Bench and which was also dismissed on 29th November, 2001 on the basis of Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc. etc., and Hari Shanker Sharma v. Artificial Limbs Manufacturing Corporation Civil Appeal No. 7731/1997 disposed of on 26th November, 2001 laying down that it cannot be said as an absolute proposition of law that whenever in discharge of a statutory mandate, a canteen is set up or other facility provided by an establishment, the employees of the canteen or such other facility become the employees of that establishment. Attention is invited to another order dated 31st January, 2008 of the Division Bench of this Court in LPA 189/1999 titled Anil Kumar and Ors. v. Air India which was dismissed citing the aforesaid Division Bench order.

10. In my opinion however, the aforesaid orders of the Single Judge and the Division Bench would not come in the way of the CGIT having taken a view contrary thereto. All that this Court in the orders aforesaid held was that the question whether HCI is owned by Air India entails a disputed question of fact which is required to be adjudicated by the CGIT/Labour Court. In the aforesaid light it is to be determined whether any case for interference in the award aforesaid is made out.

11. The senior counsel for the petitioner has next contended that the CGIT has erred in presuming that the petitioner Air India had admitted that the canteen was a statutory canteen and was for the benefit/welfare of the 2000 employees. Attention is invited to the written statement/reply filed before the CGIT where the said facts are denied. It is contended that there was no other evidence before the CGIT of the canteen being a statutory canteen or for the benefit of 2000 employees. However, the counsel for the respondent workmen draws the attention to affidavit by way of examination in chief of Mr. Surinder Kumar, Deputy Manager of Air India, filed before the CGIT. He has in para 9 of the affidavit deposed "that the employees of Air India (nearly 2000) are availing food and snacks from the canteen for which a fixed subsidy is paid to the Hotel Corporation of India". Thus it cannot be said that the CGIT has proceeded on a wrong premise or on the basis of admissions which do not exist, so as to invite interference in the award on that ground alone. It will thus have to be examined otherwise, whether any case for interference in the award is made out.

12. Attention of the senior counsel for the petitioner was drawn to the judgment in M.M.R. Khan (supra) relied upon in the award also. It is contended that in that case the workmen were employed in the canteen but through the device of a labour contractor and were found to be under the control and supervision of the railway establishment whose canteen it was; on the contrary in the present case the petitioner Air India has never had any control or supervision over the respondent workmen. It is further contended that in M.M.R. Khan (supra) the provisions for running/operation of the canteen were in the Establishment Manual

of the Railways but there is no such thing in the present case. In the present case the contractor running/operating the canteen i.e. HCI has an independent status. It is argued that the CGIT has also not returned any finding that Air India exercises any control over the employees. Attention is invited to Haldia Refinery Canteen Employees Union and Others Vs. Indian Oil Corporation Ltd. and Others, and Workmen of Nilgiri Coop. Mkt. Society Ltd. Vs. State of Tamil Nadu and Others, where the test of control and supervision over the employees was laid down. It is contended that the CGIT in the present case has failed to apply the said test. Reference is also made to Workmen of the Canteen of Coates of India Ltd. v. Coates of India Ltd. : (2004) 3 SCC 547 and to Artificial Limbs Manufacturing Corporation (supra). It is contended that, what to talk of evidence, in the present case there are no pleadings even of the petitioner Air India having any control or supervision over the respondent workmen. Attention is also invited to the sample appointment letters and the evidence of the workmen before the CGIT. It is also contended that the appropriate Government has not prohibited the employment of even contract labour in the canteen. Reference is also made to Employers in relation to the Employers in relation to the Management of Reserve Bank of India Vs. Their Workmen, and to Secretary, State of Karnataka and Others Vs. Umadevi and Others,

13. Per contra, the counsel for the respondent workmen has, at the outset, contended that the legislature in its wisdom has not permitted any appeal from the award of the Labour Court/Industrial Tribunal; that this Court cannot enter into the facts; that the findings of the CGIT in the present case are findings of fact and which cannot be re-tested by this Court in the exercise of the writ jurisdiction. It is further contended that the Industrial Disputes Act is a benevolent legislation for protection of workmen and the said aspect cannot be lost sight of by this Court while dealing with the matter. Reference is made to Harjinder Singh Vs. Punjab State Warehousing Corporation, followed in Krishan Singh Vs. Executive Engineer, Haryana State Agricultural Marketing Board, Rohtak (Haryana), where the Supreme Court though noting the shift in the approach of courts for sometime in between on the plea of globalization and economic liberalization but has reiterated the purpose of the labour/industrial law.

14. The counsel for the respondent workmen continuing with his submission while emphasizing that the contractor in the present case i.e. HCI is a hundred percent subsidiary of the establishment running the canteen i.e. Air India, invited attention to Indian Petrochemicals Corpn. Ltd. and Another Vs. Shramik Sena and Others, He contends that the rules of pleadings/evidence in the Labour Court/CGIT are not the same as in the Civil Court. It is his contention that CGIT has given three reasons in the award for holding the workmen to be employees of the petitioner Air India. Firstly, owing to the canteen being a statutory canteen within the meaning of Section 46 of the Factories Act; secondly owing to the respondent HCI working under the control and supervision of the petitioner Air India because of being a fully owned subsidiary of Air India and lastly of the nominees/employees of the petitioner Air India being in the Committee

regulating the hygiene, menu etc of the canteen. It is also argued that the work of the canteen is of a permanent/perennial nature. It is contended that thus it cannot be said that the award is not a reasoned award and this Court ought not to go into the reasons and interfere with the same. Attention is also invited to the subsidy being meted by the petitioner Air India to each employee for availing the canteen services. Attention is also invited to a letter dated 24th May, 1988 of Air India to contend that Air India was exercising the control of removal/transfer of the employees. It is also urged that the infrastructure for the canteen had been provided by Air India. It is contended that Air India thus had a large role to play in the operation and management of the canteen and in the circumstances the veil of the contractor had to be lifted and the judgment in *M.M.R. Khan* is fully applicable. Attention was also invited to *Parimal Chandra and Others Vs. Life Insurance Corporation of India and Others*, 1 and to *Secretary, H.S.E.B Vs. Suresh and Others etc. etc.*, and to *Sureshchandra Singh and Others Vs. Fertilizer Corpn. of India Ltd. and Others*, and *Hindalco Industries Ltd. Vs. Association of Engineering Workers*,

15. The senior counsel for the petitioner in rejoinder has drawn attention to the affidavit filed on behalf of the Chefair Flight Catering/HCI; he has also contended that the correspondence referred to by the respondent workmen is not of control and supervision of the employees and has sought to distinguish the judgments relied upon by the respondent workmen.

16. It would thus be seen that qua canteens in an establishment, whether statutory or otherwise, there are two streams of judgments. One stream holds the workmen/employees of the said canteen to be the employees of the establishment and the other stream of judgments has refused to recognize the workmen/employees of the canteen as employees of the establishment. I have analyzed the judgments in both the streams to crystallize as to what prevailed with the Court in holding one way or the other. However before proceeding to do so, it is deemed expedient to consider the effect, if any, of the respondent HCI being a 100% subsidiary of the respondent Air India. The CGIT has held the respondent workmen to be the employees of Air India for this reason also.

17. A perusal of the Memorandum and Articles of Association of HCI shows that the general management of business of HCI vests in the Board of Directors of HCI subject to the directions, if any, from time to time of Air India in regard to the finance and conduct of the business and affairs of HCI. The composition of the Board of Directors of HCI is controlled by Air India in consultation with the Government of India. The question which arises is whether for the said reason only it can be said that the employees though employed by HCI are employees of Air India. This stares in the face of the first principles of Corporate Law, dating back to *Solomon v. Solomon and Co. Ltd.* 1897 AC 22 where it was held that in law a company is a person altogether different from its shareholders. Air India is nothing but the sole holder of the shares of HCI. However HCI is a legal entity independent of its shareholders. Merely because the shareholder is one, the said

fact does not eliminate the difference in the identity of a company as a separate legal identity from its shareholders. Also, merely because the Articles of Association of a company provide that the management or its affairs and business and finances shall be subject to the direction, if any, issued by the sole shareholder, the said fact again does not merge the identity of the shareholder with the company. Neither has the CGIT returned a finding nor have the respondent workmen contended that in the exercise of the aforesaid Articles of Association of HCI, Air India has issued a directive as to whom to employ and whom not to employ and is regulating or supervising the terms of employment of any of the employees of HCI. Thus, in my view the mere fact of HCI being a 100% subsidiary of Air India and the aforesaid peculiar Articles of Association would not be decisive of whether the employees aforesaid of HCI and working in the canteen of Air India are to be treated as employees of the Air India or not.

18. During the hearing, I had repeatedly put to the counsel for the respondent workmen as to how they were prejudiced in any way by not being the employees of the petitioner Air India whose employees they are seeking to be and as to why they were not satisfied with being the employees of HCI whose employees they were as per the documents. It was inquired whether HCI is continuing to be in business. Though it was informed that HCI continues to be in business but no answer whatsoever was given as to why the respondent workmen were seeking to be the employees of Air India. All that was replied was that if in law they are entitled to the declaration of being the employees of Air India, they are entitled to the said declaration and the question of prejudice by being employees of HCI does not arise.

19. One thing which emerges is that in the present case, no motive to defeat any rights of the employees, in Air India entering into a contract with Chefair (a unit of HCI) for operating its canteen, even if it be a statutory canteen have been established. It was not as if by employing workmen in HCI instead of in Air India, the workmen were being made employees of a weaker entity against whom they can claim no rights. After all HCI is also a Government of India company as Air India is.

20. It is further to be noticed that it was/is not the case that HCI has been incorporated for the sole purpose of operating the canteen aforesaid for Air India. HCI was set up and is carrying on business as an independent legal entity in diverse fields, primarily in the Hotel Industry. It appears that because HCI was perceived as an expert in the business of catering/management of canteens, that Air India, even if held to be required u/s 46 of the Factories Act to provide and maintain a canteen for its workers, instead of doing so itself, chose to entrust the same to HCI. The question which arises is whether such engagement of experts to run and operate the canteen makes the employees of the said experts the employees of the establishment.

21. In my opinion it does not. Section 46 is placed under Chapter V of the Factories Act under the heading "Welfare". The mandatory provision for a

canteen is a measure for the welfare of the workers. The only obligation of the establishment is to provide and maintain a canteen. Similarly, an obligation is placed to provide shelters, restroom, lunchroom, cr?ches in the establishment/factory premises. The Delhi Factory Rules, 1950 require such a canteen to be near to the factory, to be away from any latrine, urinal, boiler house, coal stacks, ash dumps and any other source of dust, smoke or obnoxious fumes. The canteen building is to be built as per the specified design as to ensure hygiene, ventilation etc. Sufficient furniture and equipment is to be provided in the canteen and the food and other items in the canteen are to be sold on a no-profit basis and the prices charged are subject to the approval of the Canteen Managing Committee. The Canteen Managing Committee is to comprise of nominees of the factory/establishment as well as the workmen. From a perusal of the Factories Act and the Rules, there does not appear to be any requirement for the canteen to be operated i.e., the actual buying of raw materials and cooking, service etc to be done by the establishment/factory itself and the Act and the Rules also do not prohibit the same from being contracted out. The Management of a factory or an establishment in most cases is unlikely to have expertise in the operation of a canteen. Merely because a factory/establishment makes huge profits in its field is no guarantee that it will, in consonance with the spirit of the provision of canteen in the establishment, provide good canteen facilities also to its workmen; a factory manufacturing cars would not necessarily be a good manufacturer of snacks and food items.

22. The question which next arises is whether such a factory ought to be compelled to manufacture/arrange for and serve such snacks and food items itself even though when it has no expertise in the said field and without any real effort on its part to do so resulting in a shabbily run canteen. It is likely to be counterproductive to the welfare of the workmen. The answer obviously has to be No. Today?s times are times of specialization. An expert in the food and beverage industry and in the running of canteens is likely to provide better canteen facilities to the workmen for whose benefit the canteens are intended to be, than the factory/establishment in which the canteen exists. Rule 68 of the Factory Rules (supra) shows that the prices to be charged for snacks and food item in the canteen may include profit of upto 5% on the working capital. An expert in the field of catering and food business is likely to procure food items in bulk and at a much cheaper rate than the factory/establishment owner. The quality/variety of the food served is also likely to be much better if provided and served by an expert rather than by the factory/establishment owner. Thus if it is found that the operation of the canteen has been entrusted to such an expert, then it cannot be said that the employees deployed by such expert in such canteen become employees of the factory/establishment. I may however notice that under Rule 68(2)(g) the wages of the employees serving in the canteen are not to be taken into consideration while fixing the prices of snacks and food items to be charged in the canteen. However the same, in my view, does not necessarily mean that the employees of the expert engaged to operate the

canteen have to be the employees of the factory/establishment. The said provision can be given effect to by, while fixing the prices to be charged in the canteen, taking out therefrom the component of wages which may have been incorporated by the expert in its price for providing the canteen services, so that such component of wages of employees does not enter into the fixation of prices of food stuff and snacks to be sold/provided in the canteen. Today we have food chains in each city which have the capacity to provide tasty and cheap food stuff and snacks to a large number of people simultaneously and which same food stuff if sought to be provided by the individual factory/establishment to their respective employees on its own is likely to be costlier and of inferior quality.

23. HCI in the present case is seen as one such expert. It has been providing flight catering services to Air India and other airlines besides carrying on other allied businesses. As aforesaid, HCI was not incorporated merely to run the canteen of Air India so as to keep the employees of the said canteen, managed through the medium of HCI, at arm's length from Air India. HCI is a business entity in its own right and no mala fides have been established in Air India entrusting the operation and management of the canteen aforesaid to HCI. As aforesaid, inspite of repeated asking, no prejudice is shown to have been caused to the workmen in them being the employees of the HCI instead of Air India. Of my own I can only gauge that may be as employees of Air India they may be entitled to a free flight once in a while and which they may not be entitled to as an employee of HCI. However, that is hardly determinative of the matter in controversy. Again it is not as if Air India is attaining to offload its canteen employees to an entity which is sick or near the stage of being closed down. HCI is informed to be a running concern.

24. That brings me back to the stream of judgments aforesaid. The criteria/reasoning which has been mentioned by me hereinabove is found to be determinative in the views taken in the two streams of judgments also. Wherever the courts have found the intermediary to be a sham or to have been introduced with the intention of depriving the employees of the canteen from statutory benefits and being the employees of the factory/establishment and the canteen was found to be practically being run and operated by the factory/establishment itself, the courts have granted the relief to the workmen by declaring them to be the employees/workmen of the establishment. However, wherever the engagement of the intermediary was found to be genuine and interposed for having undertaken to produce a given result or for supply of contract labour for work for the establishment, under a genuine contract and not as a mere ruse/camouflage to evade compliance with various beneficial legislations, the employees were not granted the relief and not held to be the employees of the factory/establishment.

25. In M.M.R. Khan the responsibility for operation of the canteen, under the establishment Manual of the Railways vested completely with the Railway Administration and the disciplinary action against the canteen workers was to be

as per the procedure set out in the Rules therefore with respect to the railway employees and the contractual obligation for the said canteen were also in the name of the President of India and the accounts of the canteens were also controlled by the Railways. In these circumstances the employees of the canteen were held to be the employees of the Railways.

26. In *Parimal Chandra Raha* (supra) a distinction was carved out between an obligation to run a canteen and an obligation to provide facilities to run a canteen. A canteen run pursuant to the latter obligation was held to not become part of the establishment. On the facts of that case, the employer LIC in that case was found to have undertaken the obligation to run the canteen as distinct from an obligation merely to provide the facilities to run a canteen. It was also found that though the contractor engaged had been changed from time to time but the workers had remained the same. It was in these facts that it was held that the canteen had become a part of the establishment of LIC and the workers of the canteen, who at the instance of LIC had continued in spite of change in contractor, were held to have become employees of LIC. The contractors also were not found to be independent contractors but merely those engaged to work at the direction of LIC. The contractors in that case were engaged not for their expertise in the field of providing food stuffs and snacks but as mere agents of LIC.

27. Similarly, in *Indian Petrochemicals Corporation Ltd.* (supra) the workmen in the canteen had continued despite change of contractor and the establishment/factory had made it obligatory for the contractor to ensure continuity of such canteen workmen. Moreover, the establishment/factory had not challenged the finding of the Industrial Court in an earlier proceeding of the canteen workers being employees of the establishment/factory and which factor weighed heavily with the Supreme Court in holding/declaring the said canteen workers to be the employees of the establishment/factory. On facts the contractor was also found to be working completely under the supervision, control and direction of the establishment/factory and not as an independent contractor.

28. In *Indian Overseas Bank* (supra) also, as a matter of fact the bank itself was found to be running the canteen and the canteen workers were also found to be enlisted under a welfare fund scheme, provident fund scheme and medical scheme of the bank. It was in these facts that the said canteen workers were held to be the employees of the bank.

29. In *Hindalco Industries Ltd.* (supra) also it was the establishment/factory which was found to be running the canteen and in the circumstances the workers employed in the canteen were held to be the workers of the factory/establishment.

30. In *Secretary, HSEB* (supra) also the veil of a contractor was lifted finding the engagement of the intermediary contractor as a sham and the actual control and supervision of the canteen workers being that of the establishment/factory.

However, in the Reserve Bank (supra) case finding the Bank to be not having any control over the canteen workers and the said workers being found to be dealt by the Canteen Committee exclusively, they were not held to be the employees of the Reserve Bank. To the same effect is Artificial Limbs Manufacturing Corporation where the responsibility of running of the canteen was found to be the responsibility of the contractor alone and the establishment/factory was not found to be having any hand in the selection or other affairs of the canteen workers. Similarly, in Haldia Refinery (supra) the contractor was found to be having a free hand not only in the running of the canteen but also qua the engagement of workers working in the canteen. It was further held that merely because the establishment/factory exercises some control to ensure hygiene and other conditions in the canteen would not make the employees of the contractor the employees of the establishment.

31. Nilgiri Cooperative Marketing Society (supra) is not regarding canteen workers though lays down the test of supervision and control and mutuality of obligations. It also lays down that the burden of proving the existence of relationship of employer and employee is on the person who asserts the same.

32. Steel Authority of India (supra) is also not relating to canteen workers but relating to contract labour. In this context I may notice that the present is not a case of HCI merely providing contract labour to Air India for running a canteen. I had, during the course of hearing, enquired from the counsel for Air India whether there was any agreement/contract in writing between Air India and HCI qua running of the canteen. The answer is in the negative. However, that would be immaterial. It was for the respondent workmen who were seeking declaration as the employees of the Air India to show that the canteen in fact was being run/operated by Air India and not by HCI. I have already discussed the pleadings hereinabove and which do not contain any such material. The claim appears to have been made merely on the basis of the judgment of the Supreme Court in M.M.R. Khan. The copies of the evidence led before the CGIT have also been filed either with the paper book or handed over during the course of hearing. There is nothing in the evidence also to show that notwithstanding the engagement of HCI as an expert to run and operate the canteen, the canteen continued to be operated by Air India. Reference to the Minutes of the Meetings dated 10th August, 1979, 25th August, 1995, 17th August, 1983, 8th January, 1988 and 20th January, 1988 by the counsel for the respondent workmen also does not show that the canteen was being run/operated by Air India rather than HCI so as to make the employees of HCI in the said canteen the employees of Air India. Rather they only show the Air India was concerned about the functioning of the said canteen and a grievance was made about the same to HCI with a request to improve the same. Similarly, the memos dated 24th May, 1988, 10th July, 1987, 9th February, 1996, 6th October, 1995, 2nd February, 1996 by the counsel for the respondent workmen also do not show that Air India had any supervision or control over the workmen. Merely because Air India requested certain workmen in the canteen who may not have been found to be suitable to be replaced does

not mean that Air India had control over the said workmen. Rather the request to HCI shows that the control over the workmen was of HCI and not of Air India.

33. I find that recently in *International Airport Authority of India Vs. International Air Cargo Workers' Union and Another*, the Supreme Court revisited the aforesaid controversy, though not in the context of canteen workers. The Industrial Tribunal in this case also had held the workers to be employees of IAAI. The Single Judge of the Madras High Court set aside the award. However the Division Bench allowed the workers' appeal and restored the award. The Supreme Court set aside the order of the Division Bench of High Court and restored the judgment of the Single Judge; the workers were not declared to be employees of IAAI. The Supreme Court applied the tests of:

A. Whether the contract is sham/camouflage/nominal or genuine and held that if contract is found genuine the Industrial Tribunal/labour court has no option but to reject the reference made to it because in such case there is no relationship of employer and employee and hence no industrial dispute within the meaning of Section 2(k) I.D. Act.

B. Control and Supervision A distinction was carved out between control and supervision of work and control and supervision of employment. It was held that control and supervision of work (described as secondary control) even would not make the employee of the contractor the employee of the factory/establishment, if the salary of the employee is paid by the contractor and if the right to regulate the employment and ultimate supervision (all described as primary control) is with the contractor.

34. Applying the tests in the aforesaid judgment also, I am unable to sustain the award of the CGIT.

35. That brings me to the question of the scope of interference in the award in writ jurisdiction. As aforesaid, the premise in the award that merely because the HCI is a 100% subsidiary of Air India, the employees of HCI would be employees of Air India is found to be erroneous in law. The other premise in the award of merely because the workmen being employees in a canteen of Air India is also contrary to the law as declared by the Supreme Court. The test as culled out hereinabove is whether the intermediary is an independent contractor or merely an agent of the establishment/factory. The CGIT has not returned any finding that HCI in the present case was running the canteen at the asking and directions of Air India and not as an independent contractor. In the absence of the same, the finding of the employees of HCI in the canteen being run/operated by HCI for the employees of Air India being the employees of Air India cannot be sustained. In *International Airport Authority of India (supra)* also it was held that where the findings of the Tribunal are contrary to the judgments of the court, a case for interference is made out.

36. As far as the argument of the counsel for the petitioner of the Industrial Disputes Act being a benevolent legislation and any view which this Court ought

to take being guided by the said consideration, is concerned, this Court cannot take a one sided view only. It cannot be lost sight of that the Air India is since on the verge of bankruptcy and is weighed down with the problem of being over staffed. The judgment of this Court cannot be based on such consideration especially when the award of the CGIT is found to be contrary to law. Having not found a case of the respondent workmen to be entitled to be declared to be the employees of Air India, if owing to consideration of the ID Act being a social welfare legislation, the writ petitions are dismissed, it may virtually be the last nail in the coffin for the petitioner Air India. The senior counsel for the petitioner has informed that the petitioner Air India is already facing a severe crunch owing to payment of wages u/s 17B of the Act to the respondent workmen though they were not the employees of the petitioner Air India and the petitioner Air India had no connection whatsoever with them. It is further informed that it was for this reason only that the Supreme Court while not interfering with the order u/s 17B of the Act had directed the early/expeditious disposal of the present writ petition.

37. Before parting with the case I may notice that the respondent workmen though claiming to be entitled to be regularized and whose services appeared to have been disengaged by HCI, had raised the dispute against and claimed the relief against Air India only. They did not, in the alternative, claim any relief against HCI or its unit Chefair. Though this Court is conscious that the effect of allowing this petition would be that the respondent workmen, though being not held to be employees of Air India, would get no relief against HCI also, but that situation is a making of the respondents themselves and this Court is unable to grant any relief to the respondent workmen.

38. The petitions are therefore allowed. The award dated 5th May, 2004 of the CGIT is set aside and quashed. It is held that the respondent workmen employed by Chefair a unit of HCI and with which Air India had entered into a contract to provide canteen services at the establishment of Air India are not entitled to be treated as/deemed to be employees of Air India. Consequently, they are not found entitled to any relief. The petitions are disposed of. However, no order as to costs.