

(2010) 07 DEL CK 0426

In the Delhi High Court

Case No : Writ Petition (C) 1433 of 1992

Central Government Employees Consumer Cooperative
Society Ltd. Workers Union

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 01-07-2010

Acts Referred:

Constitution of India, 1950 — Article 12
Industrial Disputes Act, 1947 — Section 2

Citation : (2010) 07 DEL CK 0426

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : S.D. Singh and Rahul Kumar Singh, for the Appellant; Poorva Nanawati, Proxy Counsel for Sachin Datta, for R-1 and 2, Rani Chhabra and J.P. Jain for R-3, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—The petitioner No. 1, a Union (of which petitioner No. 2 is the Secretary) of about 400 workers employed with Kendriya Bhandar, earlier known as Central Government Employees Consumer Co-operative Society Ltd. (respondent No. 3), a Society originally registered under the Delhi Co-operative Societies Act and now registered under the Multi State Co-operative Societies Act seeks a declaration that its members are civil servants of the Central Government and further seeks a direction to the Government of India to pay to them the same pay scale, other allowances and benefits as being paid to the employees of the Central Government. I may notice that though in the prayer paragraph a direction to treat the petitioner union as civil servants similarly to the employees of the Central Services Sports Control Board & Departmental Canteens was sought, the respondent No. 1 Union of India in its counter affidavit denied that the employees of the Central Services Sports Control Board were civil servants of the Central Government or were for the said reason being paid the same scale, allowances and benefits as of the employees of the Central

Government. The petitioner has been unable to produce any document to show that the employees of the Central Services Sports Control Board are treated as Government employees. The case of the petitioner thus survives only as far as it relates to parity with the employees of the departmental canteens, with the judgment of the Supreme Court in K.J. John, Assistant Public Prosecutor, Grade-I, Palai Vs. The State of Kerala and others, forming the mainstay of the case of the petitioner.

2. The petitioner seeks the aforesaid relief for the reasons/grounds stated herein below:

2.1 That the Central Government Employees Consumer Co-operative Society Ltd. now known as Kendriya Bhandar and impleaded as respondent No. 3 (and which has also opposed this petition) was set up in 1963 in accordance with the recommendations of the Staff Welfare Review Committee and the Second Pay Commission of the Union Cabinet. It was set up as a welfare project to ensure availability of foodstuffs and other essential items of daily use at fair prices to the Central Government Employees and employees of Autonomous Corporations set up by the Government of India.

2.2 That in accordance with the aforesaid recommendations of the Staff Welfare Review Committee and Second Pay Commission, besides the respondent No. 3, the Central Services Sports Control Board and Departmental Canteens were also established.

2.3 That the respondent No. 3 has been funded by the Central Government and has been functioning under the control of the Ministry of Personnel, Public Grievances and Pensions, New Delhi.

2.4 That the petitioner and the Sports Control Board and the Departmental Canteens are performing similar kind of duty and it is discriminatory on the part of the Government of India to treat the employees of the Sports Control Board and the Departmental Canteens as civil servants while not so treating the employees of the respondent No. 3.

2.5 That the management of the respondent No. 3 is not autonomous but is effectively controlled by nominees of the Union Government.

2.6 That the majority of the Directors of the respondent No. 3 are nominated by the Government of India and they represent the interest of the Government of India. The Government of India is also entitled to remove the nominated Directors.

2.7 That the key post of Chairman of Board of Directors of the respondent No. 3 is always held by the nominee of the Government. Similarly the appointments to the chief posts of General Manager, Secretary & Chief Accounts Officer of the respondent No. 3 are also made by the Government of India and thus any decision taken by the said officers is in fact a decision of the Central Government.

2.8 That the other posts of the respondent No. 3 are filled by the General Manager who acts as a representative of the Central Government. Thus the employees of the respondent No. 3 are either appointed or nominated by the Central Government and the master servant relationship exists between the Government of India and the employees of the respondent No. 3; the General Manager of the respondent No. 3 being essentially a representative of the Government of India.

2.9 That the respondent No. 3 is also funded, subsidized and given loans by the Union of India apart from suitable accommodation for stores, godowns, head office on nominal rent. The control of the Union of India is deep and pervasive as it holds as much as 89% shares of the respondent No. 3 Society. The Government of India has also stood collateral guarantee for the respondent No. 3.

2.10 That the operations of the respondent No. 3 are heavily subsidized by the Union Government.

2.11 Reliance is placed on the report for the year 1980-81 of the Department of Personnel and Administrative Reforms, Ministry of Home Affairs inter alia to the effect that besides providing accommodation either free or on a nominal rent of Rs. 1/- p.m. for all the stores including office accommodation, the rent liability for the accommodation provided by FCI to the respondent No. 3 is borne by the Government of India and further that the Government is reimbursing 100% of the pay and allowances in respect of the superior staff of the respondent No. 3 and that the Government has made investment towards share capital of the respondent No. 3 to the tune of approximately Rs. 8,41,640/- and a further sum of Rs. 16 lacs out of the consolidated loan of Rs. 24 lacs given to the respondent No. 3 was then still outstanding.

2.12 That although the employees of the respondent No. 3 do not directly serve the Union of India, they serve the employees of the Union Government and therefore serve the Government itself, just as the employees of the Departmental Canteens in Railways who have been accorded status of civil servants.

2.13 That there is a disparity in the wages and other facilities enjoyed by the employees of the respondent No. 3 and other Central Government employees. The employees of the respondent No. 3 do not have proper service rules, promotional channels, retirement benefits (pensions) housing accommodation etc. and the same violates the principle of "equal pay for equal work".

2.14 That in the service of the respondent No. 3 there is stagnation at the same post, there being no promotional channel or avenue for advancement.

3. The counsel for the petitioner urged that the petitioner claims two reliefs; of declaration of its members as civil servants of the Central Government with same pay scale as that of the workers of the Central Government and even if such declaration were not to be granted, a direction for the pay scale of the respondent No. 3 to be the same as that of the employees of the Central

Government. However neither do I find any such case having been made out in the petition nor is it open for this Court to fix the pay scales of any organization unless a clear case of hostile discrimination is made out, as held in Union of India (UOI) and Another Vs. P.V. Hariharan and Another, and in State of Haryana and Another Vs. Haryana Civil Secretariat Personal Staff Association, . No case of hostile discrimination is made out in the present case. The entire case as set out in the petition is of the members of the petitioner union upon being declared as civil servants being entitled to the same scales as other employees of the Central Government. The pivotal question therefore is whether the petitioner is entitled to the declaration of its members as Government servants. If that relief were to be denied to the petitioner, the question of this Court issuing any direction qua the pay scales of the respondent No. 3 and for which no case independent of being a Government servant has been made out in the petition, does not arise.

4. The counsel for the respondent No. 1 Union of India, to meet the argument of the petitioner of "equal pay for equal work" also invited attention to Grih Kalyan Kendra Workers" Grih Kalyan Kendra Workers" Union Vs. Union of India and others, holding that the question of discrimination could arise only in the case of workers doing similar work in the same organization and cannot apply to employees of different organizations. Reliance was also placed on All India Railway Institute Employees" Association through the General Secretary Vs. Union of India through the Chairman, where the claim of the employees of Railway Institutes/Clubs for being treated as employees of the Railway was negated on the ground that the staff of the said Institutes/Clubs were not paid from the consolidated fund of India and whatever facilities were being provided to them were provided only as a special case and not on account of any obligations under any law. It was further held that the service in such Institutes/ Clubs is in the nature of private employment while the Railway employees are recruited according to the rules of recruitment. It was further held that to treat the employees in Railway Institutes/Clubs as Railway employees would amount to back door entry of these employees into Government service without following the regular procedure. The said Institutes/Clubs were distinguished from the canteens finding that the canteens were part of the establishment while such Institutes and/or Clubs were not inspite of the same being part of Staff Welfare Measure under the Railway Establishment Manual. Moreover, it was found that the provision for Institutes/Clubs was not mandatory.

5. The Bye Laws of Kendriya Bhandar effective from 9th May, 2003 and copy whereof was handed over by the counsel for the petitioner show that the object with which the respondent No. 3 has been constituted is to obtain, distribute and market foodstuffs, essential commodities and other consumer goods at reasonable prices primarily for the benefit of Central Government employees and employees of Subsidiary/Autonomous Organizations set up by the Government of India or Union Territory Administration and other consumers with its area of operation and to undertake wholesale and retail trade in the said goods. The membership of the respondent No. 3 is open to employees aforesaid besides to

employees of any other corporation owned or controlled by the Central Government. An existing shareholder on retirement from service though remains a member but only as an associate member without any voting right. The ultimate authority of the society vests in the General Body of the society. The total number of Government nominees on the Board of Director of the respondent No. 3 consisting of 13 Directors is not to exceed 3 and the Directors nominated by the Government hold office at the discretion of the Government. A reading of the said Bye Laws does not support the pleas in the petition. Save for a right to appoint three nominees on the Board of Directors of the respondent No. 3 comprising of 13 Directors the Bye Laws do not provide of any control or interference by the Government in the affairs of the respondent No. 3. Even if the Government has been nominating one of its officers for the post of Secretary, General Manager or Chief Accounts Officer of the respondent No. 3, the same is not mandatory under the Bye Laws (supra) and is a matter of mutual arrangement between the Government and the respondent No. 3. The respondent No. 3 can at any point refuse appointment of any nominee of the Government as its General Manager, Secretary or Chief Accounts Officer.

6. The counsel for the respondent No. 3 besides contending that the respondent No. 3 is a juristic person in its own right has relied on judgment dated 9th January, 2002 of this Court in CWP No. 3035/1999 titled R.K. Mishra v. Krishak Bharati Cooperative Ltd. holding KRIBHCO to be not a State within the meaning of Article 12 of the Constitution of India. It was held that to qualify as a State, the entire share capital of the corporation is to be held by the Government and the Government is to exercise deep and pervasive control over the said corporation and the financial assistance by the Government to the corporation ought to be to meet almost the entire expenditure of the corporation. It is contended that it is not so in the present case and thus if the respondent No. 3 does not qualify to be a State within the meaning of Article 12 of the Constitution of India it certainly cannot be said to be Government.

7. The question whether employees of/in departmental canteens are employees of the department/establishment or not has been the subject matter of several judgments of the Apex Court. Mention may be made of the following and of which several have been cited by the counsel for the parties also -

- i The Saraspur Mills Co. Ltd. Vs. Ramanlal Chimanlal and Others, .
- ii. M.M.R. Khan (supra).
- iii. Parimal Chandra and Others Vs. Life Insurance Corporation of India and Others,
- iv. Employers in relation to the Management of Reserve Bank of India Vs. Their Workmen,
- v. Secretary, H.S.E.B Vs. Suresh and Others etc. etc.,
- vi Indian Petrochemicals Corpn. Ltd. and Another Vs. Shramik Sena and Others,

- vii. Indian Overseas Bank Vs. I.O.B. Staff Canteen Workers" Union and Another,
- viii. Hari Shankar Sharma and Others Vs. Artificial Limbs Manufacturing Corporation and Others,
- ix. Workmen of the Canteen of Coates of India Ltd. v. Coates of India Ltd. : (2004) 3 SCC 547.
- x. Haldia Refinery Canteen Employees Union and Others Vs. Indian Oil Corporation Ltd. and Others,
- xi. State of Karnataka and Others Vs. KGSD Canteen Employees Welfare Association and Others,
- xii. Hindalco Industries Ltd. Vs. Association of Engineering Workers,

8. From the aforesaid judgments qua departmental canteens, whether statutory or otherwise, two streams can be discerned. 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.

9. Wherever the courts have found the intermediary, whether a society or a committee of employees or a contractor immediately under whom the employees were employed, to be a sham or to have been introduced with the intention of depriving the employees of the canteen from statutory benefits which would have become due to them by 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, where 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.

10. In *The Saraspur Mills Co. Ltd.* (supra), the cooperative society with whom the workers were employed was held to have been entrusted by the establishment which owed a statutory duty to run the canteen, to so run and operate the canteen and because the canteen was held to be an amenity provided by the establishment to its employees, the employees of the canteen were held to fall within the definition of employee in the ID Act, as employee of the establishment.

11. In *M.M.R. Khan* (supra) 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.

12. 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.

13. In the *Reserve Bank* (supra) 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.

14. In *Secretary, HSEB* (supra) 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.

15. 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.

16. In *Indian Overseas Bank* (supra), 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.

17. In Artificial Limbs Manufacturing Corporation (supra), 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.

18. In Coates of India Ltd. (supra), the applicability of the Factories Act requiring canteen to be provided in the industrial establishment was held to be not determinative of whether workmen employed in that canteen were employees of the establishment or not. The workmen in that case were found to be employed by the contractor who was running the canteen. Notwithstanding the furniture and utensils in the canteen having been provided by the establishment and three of the six membered canteen committee (to supervise and control the affairs of canteen) having been nominated by establishment, the workmen were not held to be employees of establishment because their employment was controlled by the contractor managing the canteen and not the establishment.

19. 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.

20. In KGSD Canteen Employees Welfare Association (supra) the canteen was being run by the private contractor for a long time, though prior hereto it had been set up by a committee of ten persons of whom six were representing the State Government. The Supreme Court appears to have been mainly guided by the factum of the canteen being run through the contractor for a long time prior to the dispute being raised.

21. In Hindalco Industries Ltd (supra) 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.

22. Besides the aforesaid judgments, mention must also be made of-

a. Workmen of Nilgiri Coop. Mkt. Society Ltd. Vs. State of Tamil Nadu and Others, which though not regarding canteen workers, lays down the test of supervision and control and mutuality of obligation. 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.

b. Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc. etc., also not relating to canteen workers but relating to contract labour.

c. International Airport Authority of India Vs. International Air Cargo Workers' Union and Another, where the Supreme Court revisited the entire controversy, though not in the context of canteen workers. The Industrial Tribunal in this case

had held the workers to be the 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:

i. 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.

ii. 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.

23. In the aforesaid backdrop, it will be seen that the case of the petitioner cannot be equated in any manner whatsoever with that of the employees of departmental canteens who were held to be employees of the department. The establishment of the respondent No. 3 cannot be considered at par with the establishment of the departmental canteens. Only because initiation for setting up of the respondent No. 3 came from the Government, it cannot/would not make the employees of the respondent No. 3, employees of the Government.

24. Moreover, there was no obligation whatsoever on the Government of India to set up the respondent No. 3. The same did not form a part of the service conditions of the employees of the Government and also cannot be said to be an obligation opted by any employer to its employees. The step of initiation of the establishment of the respondent No. 3 taken by the Government was not as an employer but for the general welfare of the citizens. The setting up of the respondent No. 3 has nothing to do with the terms of employment between the Government and its employees and has nothing to do with the productivity of the said employees and in which the Government as an employer may be said to be interested.

25. There is no material in the present case of the control by the Central Government on the employees of the respondent No. 3. It is also not the case that the setting up of the respondent No. 3 was intended to be a sham or a camouflage for an obligation otherwise made by the Government to its employees and/or that the respondent No. 3 was set up to avoid any such obligations.

26. The present case is also not a case of any employee joining the employment

of the respondent No. 3 being under any notion of joining the employment of the Government, as was happening in the case of those employed in the departmental canteens. It has not been shown that the Government has been regulating the terms of employment and the service conditions of the employees of the respondent No. 3 as an employer. The respondent No. 3 otherwise is an independent juristic person and the identity of the respondent No. 3 is separate from that of its members and merely because Government is a member of the respondent No. 3 would not turn the respondent No. 3 itself into Government.

27. The counsel for the petitioner has however contended that various orders of the respondent No. 3 concerning the service conditions of employees and/or dismissal of services of the employees have been passed by Government Officers deputed to the respondent No. 3. It is urged that for this reason they ought to be treated as orders of the Government. The contention cannot be accepted. For an order relating to service conditions of the employment to be an order of the Government, it has to be issued in the name of the Government. Merely because it is issued by a government servant on deputation/nomination in another body, would not make it the order of the Government. A government servant on deputation to the respondent No. 3, while discharging his functions in the said Society acts as an official of the Society and not as an official of the Government.

28. The counsel for the petitioner while admitting that the employees of the respondent No. 3 are not serving the Government has contended that since they are serving the employees of the Government, they should be deemed to be serving the Government. The service rendered by the employees of the respondent No. 3 to the Government servants, is not such service as is necessary for discharge of their functions as Government servants by the said Government servants and thus cannot be stated to be a part of their employment. Hence, serving the Government servants is materially different from serving the Government.

29. The stores of the respondent No. 3 are not situated so as to be accessible only to the Government servants. Though situated in premises provided by the Government, their location is such, as can be accessible to all and not to the Government servants alone. Otherwise, also there is no restriction to the sale by the said stores to any person other than Government servants. The stores of the respondent No. 3 are, in this sense also, materially different from departmental canteens which are run from/in generally a part of the premises housing the department and which are unlikely to be used by any person other than a departmental employee.

30. The counsel for respondent No. 1 also referred to Mahendra L. Jain and Others Vs. Indore Development Authority and Others, laying down that an illegal appointment cannot be legalized by taking recourse to regularization; what can be regularized is an irregularity and not an illegality; the constitutional scheme does not contemplate any back door appointment. The Supreme Court held that no post in the canteen having been sanctioned by the State, the employees of

the canteen could not be said to be the employees of the Government and salary on a regular scale of pay is payable only to an employee when he holds a status. In this regard, the subsequent judgment in Secretary, State of Karnataka and Others Vs. Umadevi and Others, may also be noted. The courts by their order cannot impose persons not recruited in employment as per prescribed procedure on the Government. The relief claimed by the petitioner is, in the circumstances, in the teeth of the said judgment.

31. I, therefore, do not find any merit in the writ petition, the same is dismissed.

No order as to costs.