(2012) 04 KL CK 0051

In the High Court Of Kerala

Case No : Writ Petition (C) . No. 16909 of 2008 (K)

HMT Machine Tools Ltd. APPELLANT

Vs

Industrial Tribunal, Alappuzha and Others RESPONDENT

Date of Decision : 13-04-2012

Acts Referred:

Factories Act, 1948 — Section 46
Industrial Disputes Act, 1947 — Section 2(k)

Citation : (2012) 4 LLJ 711

Hon'ble Judges : A.M. Shaffique, J

Bench : Single Bench

Advocate : M. Pathrose Matthai, Ms. Mariam Mathai and Saji Varghese, for the Appellant; P. Ramakrishnan, Jacob P. Alex, Joseph P. Alex and V. Vijulal, Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

A.M. Shaffique, J.—Petitioner challenges Exhibit P-1 award passed by the Industrial Tribunal, Alappuzha. The dispute referred for adjudication was whether the demand for regularisation of the employees of the H.M.T. canteen as regular employees of H.M.T. Ltd. is justified. The H.M.T. canteen is run by a Co-operative Society formed in the year 1985. It is alleged that the employees of the canteen that the Society is under the control of the H.M.T. Ltd., the Management. The employees of the canteen were workers in employment of the canteen even prior to the formation of the Society. After formation of the Society the Managing Committee of the Society is managed by H.M.T. Ltd. The Managing Committee consists of four persons to be elected from general body and four persons from officers of the Management. Hence according to them, the employees of the canteen cannot be treated as employees of the Society but they are in effect employees of H.M.T. Ltd. (Management).

2. The Management contended that the Society being a juristic person having its own bye-laws and rules, cannot be said to be owned or controlled by the

management. The Society was formed in 1985 at the instance of workers of the canteen and they are members of the Society and the Society is the employer of all the workers. Accordingly, for the reason that certain officers of the company are among the managing committee of the Society, it does not take away the juristic character of the Society nor would it indicate that the Society is under the control of the company.

3. Before the Tribunal, the Management relied upon the oral evidence of M.W. 1 and M.W. 2 and marked Exhibits M-1 to M-16. On behalf of the workmen two witnesses were examined as W.W. 1 and W.W. 2 and they relied upon Exhibits W-1 and W-19.

4. The Tribunal, after an elaborate consideration of the facts and circumstances of the matter and on a consideration of the evidence on record had come to a finding that the canteen is administratively and financially controlled by the Company and therefore the canteen workers are in fact, the workmen of the Management Company and consequently an award has been passed declaring that the employees of the Society are under the control of the Management and entitled for regularisation in the service of the Management.

5. The Management impugns Exhibit P-1 award. They mainly contend that the Cooperative Society registered under the Kerala Cooperative Societies Act, 1969 is a body corporate having perpetual succession and common seal and having the power to hold properties, enter into contracts, institute and defend suits and other legal proceedings and to do all things necessary for purpose for which it was constituted. Since the Society is governed by the provisions of the Co-operative Societies Act and the bye-laws, the members of the Society and the Society have different legal status and their rights are governed in terms with the applicable provisions. The said Society having taken the license under the provisions of the Contract Labour (Regulation and Abolition) Act, 1970 and having entered into a genuine contract with HMT Ltd. it was wrong on the part of the Tribunal to have treated the said agreement as sham and the Tribunal has wrongly relied upon the judgment of the Supreme Court in Gujarat Electricity Board, Thermal Power Station, Ukai Vs. Hind Mazdoor Sabha and Others, .

6. Whereas the 5th respondent has filed a counter affidavit supporting Exhibit P-1 order. They also produced Exhibit R-5(a) to R-5(e) in order to emphasize the point that the employees of the canteen are under the disciplinary control of the management of the company. The petitioner has also produced additional documents along with I.A. No. 13515/2010 as Exhibits P-2 to P-3(c).

7. The learned senior counsel Sri. Pathrose Mathai appearing on behalf of the petitioner contends that u/s 46 of the Factories Act, there is a statutory obligation on the part of the Company to provide a canteen and such canteen can also be formed by the workers of the company in the form of a Society as provided under Rule 96(6) of the Kerala Factories Rules, 1957 (hereinafter referred as the ''Factories Rules''). So when such a Society is formed by the

workers of the factory and an agreement is executed between the said Society and the Company to run a canteen, the question is whether such an agreement can be treated as sham and that it is controlled by the Management. The learned senior counsel refers to the provisions of the Cooperative Societies Act in order to indicate that the Society formed is a juristic person having its own perpetual succession as governed by the provisions of the Co-operative Societies Act and the bye-laws framed thereunder. It is also argued by the learned senior counsel that though as per Rule 94 of the Factories Rules, the canteen is run on a non-profit basis, when it is managed by a Society of workers a profit margin upto 5% is possible.

8. Whereas, on the other hand, Sri. Ramakrishnan appearing on behalf of the contesting respondents supports the order passed by the Tribunal and contends that the contract is sham and not genuine and that the workmen are entitled to raise an industrial dispute declaring that they were employees of the HMT Ltd. and entitled to be regularised.

9. Both sides relied upon and explained the following judgments to bring home their respective contentions.

(i) Gujarat Electricity Board, Thermal Power Station, Gujarat v. Hind Mazdoor Sabha and Others (supra).

(ii) Indian Petrochemicals Corpn. Ltd. and Another Vs. Shramik Sena and Others, .

(iii) VST Industries Ltd. Vs. VST Industries Workers'' Union and Another, .

(iv) Hari Shankar Sharma and Others Vs. Artificial Limbs Manufacturing Corporation and Others, .

(v) Haldia Refinery Canteen Employees Union and Others Vs. Indian Oil Corporation Ltd. and Others, .

(vi) State of Karnataka and Others Vs. KGSD Canteen Employees Welfare Association and Others, .

(vii) M.M.R. Khan and others etc. Vs. Union of India and others, etc., : 1995-III-LLJ-166(SC).

(viii) Kerala Electrical and Allied Engg. Co. Ltd. Vs. Leemns D''Cruze and Others,

(ix) Hindusthan Newsprint Industrial Canteen Workers Union Vs. Hindusthan Newsprint Ltd., .

10. The Tribunal after considering the evidence on record relied upon the following circumstances to arrive at a finding that the contract arrangement between the HMT Ltd. and the Society was sham.

(i) As per the bye-laws of the Society the Managing Committee is to consist of eight members out of which four of the members are elected by the General

Body and four members are ex-officio members representing the management of HMT Ltd. Since the President who is always elected from one among the ex-officio members, has a casting vote and if the votes are equal the President''s casting vote will tilt the majority as a result of which the Management has maximum control.

(ii) From the evidence of the Assistant General Manager of H.M.T. Ltd. it was evident that the wages, bonus, festival allowance and other payments made to the Canteen workers are reimbursed by H.M.T. Ltd. to the Society, which establishes absolute financial control in regard to the running of the canteen.

(iii) Letter issued by the Assistant General Manager to the Managing Director of H.M.T. Ltd. indicates that since the number of employees in the company were reduced on account of voluntary retirement scheme, similar V.R.S is also to be proposed with reference to the workers of the Society, since the number of employees of the canteen has to be reduced corresponding to the reduction of employees in the company due to VRS. According to the Tribunal, this letter indicates that H.M.T. Ltd. has clear cut administrative control with regard to the policy matters to be implemented by the Society such as introduction of voluntary retirement scheme.

(iv) Though there are separate settlements entered into between the canteen management and the canteen workers, the same was necessitated as the trade unions of the H.M.T. Ltd. were not prepared to sponsor the claims of the canteen workers. The management or their representatives in those settlements are none other than the officers of H.M.T. Ltd. Therefore such settlements cannot be taken into consideration to consider that the canteen workers have no connection with the company.

(v) In Exhibit M-4 agreement dated August 5, 2001, it can be seen that the society shall run the canteen in consultation with and in accordance with the directions issued by the. company and at specified place and such supply of food items as approved by the company at a price fixed by the company from time to time and the food supplies are open for inspection by the company and that the society is permitted to use building, furniture, vessels, utensils, cutlery, electrical equipments of the company, the company shall supply free of cost of electric power and water necessary for the functioning of the canteen, that the society shall serve food to the employees of the company and such other persons permitted by the company and that all persons employed in the canteen shall get themselves medically examined as may be directed by the company, that the company shall pay cash subsidy and therefore the agreement by itself manifests effective control by H.M.T. Ltd. in respect of running of the canteen.

(vi) W8 notice issued by the Returning Officer for election of Employees'' representatives to the Board of Trustees of H.M.T. Ltd. Provident Fund where the canteen workers are also given voting rights.

11. Now, on the basis of the decisions relied upon what is required to be

considered is the correctness of the above findings and whether such findings will entitle the employees of the Canteen to get regularisation of employment.

12. Gujarat Electricity Board, Thermal Power Station, Gujarat v. Hind Mazdoor Sabha and Others (supra) is referred to contend that if contract between the management and the contractor is not genuine, the workmen or the contractor themselves can raise a dispute u/s 2(k) of the Industrial Disputes Act, for securing proper service conditions from the principal employer on the footing that the workmen concerned were always the employees of the principal employer and they were denied their dues. In such a dispute the workmen are required to establish that the so-called Labour Contract was sham and was only a camouflage to deny their legitimate rights. It is relying upon the above judgment, it is contended that Exhibit M-4 agreement is not genuine and it is sham.

13. Indian Petrochemicals Corpn. Ltd. v. Shramik Sena (supra) is relied upon to contend that even if a canteen in the establishment is being managed by a contractor if the canteen was in existence from the inception of the establishment and the employees who were initially employed were inducted from time-to-time in the canteen and if continued to work in the said canteen uninterruptedly the same would suggest that they were permanent employees of the canteen. The Supreme Court has also observed that the fact that the premises, furniture, fixture, fuel, electricity, utensils etc. were provided by the management, that the wages of the canteen workers were reimbursed by the management and the supervision and control of the canteen was exercised by the management through its authorised officer, the Contractor was only an agent of the management and therefore it could only be seen that the workers of the canteen were the workmen of the management.

14. In VST Industries Ltd. v. VST Industries Workers'' Union (supra) it was held that when the circumstances clearly indicate that the management has complete control over the activities in respect of the canteen and the contractor has absolutely no discretion either in regard to the menu, quality and quantity of food items much less the rate at which the same are supplied to the workman, the canteen shall be deemed to be run by the management itself.

15. In Hari Shankar Sharma v. Artificial Limbs Manufacturing Corporation (supra), it is held 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 any other facility is provided by an establishment, the employees of the canteen or such other facility become the employees of that establishment. It would depend on how the obligation is discharged by the, establishment. It may be carried out wholly or substantially by the establishment itself or the burden may be delegated to an independent contractor. There is nothing in Section 46 of the Factories Act or any provision of any other statute which provides for the mode in which the specified establishment must set up a canteen. Where it is left to the discretion of the establishment concerned to discharge its obligation of setting up a canteen either by way of direct recruitment or by employment of a contractor, it cannot be postulated that in the latter event, the persons working in the canteen would be the employees of the establishment.

16. In Haldia Refinery Canteen Employees Union v. Indian Oil Corpn. Ltd. (supra), it is held that:

A free hand has been given to the contractor with regard to the engagement of the employees working in the canteen. There is no clause in the agreement stipulating that the canteen contractor unlike in the case of Haldia Refinery Canteen Employees Union v. Indian Oil Corpn, Ltd. (supra) shall retain and engage compulsorily the employees who were already working in the canteen under the previous contractor. There is no stipulation of the contract that the employees working in the canteen at the time of the commencement of the contract must be retained by the contractor. The management unlike in Indian Petrochemicals Corpn. Ltd. case is not reimbursing the wages of the workmen engaged in the canteen. Rather the contractor has been made liable to pay provident fund contribution, leave salary, medical benefits to his employees and to observe statutory working hours. The contractor has also been made responsible for the proper maintenance of registers, records and accounts so far as compliance with any statutory provisions/obligations is concerned. A duty has been cast on the contractor to keep proper records pertaining to payment of wages, etc. and also for depositing the provident fund contributions with the authorities concerned. The contractor has been made liable to defend, indemnify and hold harmless the employer from any liability or penalty which may be imposed by the Central, State or local authorities by reason of any violation by the contractor of such laws, regulations and also from all claims, suits or proceedings that may be brought against the management arising under or incidental to or by reason of the work provided/assigned under the contract brought by the employees of the contractor, third party or by the Central or State Government authorities.

The management has kept with it the right to test, interview or otherwise assess or determine the quality of the employees/workers with regard to their level of skills, knowledge, proficiency, capability, etc. so as to ensure that the employees/ workers are competent and qualified and suitable for efficient performance of the work covered under the contract. This control has been kept by the management to keep a check over the quality of service provided to its employees. It has nothing to do with either the appointment or taking, disciplinary action or dismissal or removal from service of the workmen working in the canteen. Only because the management exercises such control does not mean that the employees working in the canteen are the employees of the management. Such supervisory control is being exercised by the management to ensure that the workers employed are well qualified and capable of rendering proper service to the employees of the management.

17. In State of Karnataka v. KGSD Canteen Employees'' Welfare Assn. (supra) it is held as follows:

We have referred to the aforementioned decisions in order to show that in each of the aforementioned cases the industrial adjudicator was required to apply the relevant tests laid down by this Court in the fact situation obtaining therein. Most of the cases referred to hereinbefore were considered by this Court in the peculiar facts and circumstances obtaining therein and, thus, it is even not proper for the industrial adjudicator to apply the ratio of one decision to the exclusion of other without considering the facts and circumstances involved therein. The law, however, does not appear to be settled as to whether even in a case where the employer is required to run and maintain a canteen in terms of the provisions of the statute, the employees of the canteen would automatically be held to be the workers of the principal employer for all intent and purport and not for the purpose of the Factories Act alone. We, however, are not concerned with the said question in this matter and refrain ourselves from making any observation in respect thereof.

33. We, however, intend to point out that in a case of this nature even an industrial adjudicator may have some difficulty in coming to the conclusion that employees of a canteen for all intent and purport are employees of the principal employer.

18. Therefore, the point that ultimately arise for consideration is whether the agreement Exhibit M-4 is sham or not. The answer to this question rests not only on a mere perusal of the terms of the agreement but the constitution of the Society as well.

19. The Society has been formed by virtue of Rule 96(6) of the Factories Rules which reads as follows:

96. Managing Committees

xxxx

xxxx

(6) Where the workers of a factory in which a canteen has been provided by the occupier in accordance with rules 91 to 93 for the use of the workers, desire to run the canteen by themselves on a co-operative basis with share capital contributed by themselves, the management may permit them to run the canteen in accordance with the byelaws of the co-operative canteen, subject to such conditions the Chief Inspector may, in consultation with the Registrar of Co-operative Societies, impose.

20. The Society is admittedly registered under the Co operative Societies Act 1969. Society is run by the workers themselves and once such a society is formed, it is bound by the bye-laws and becomes a separate juristic person.

Ultimate control of the society will definitely be with the General Body of the Society as provided u/s 27 of the Co-operative Societies Act, 1969, which has all the powers as enumerated under the provisions of the said Act. Hence it cannot be normally stated that the Management of HMT Ltd. can have any control. Its General Body is to approve the bye-laws, on the basis of which the Managing Committee is constituted. If the workers in that General Body decides that the officers of the management shall also be members of the Managing Committee, for various reasons that by itself cannot indicate that the administrative control of the society rests with the management of H.M.T. Ltd.

21. When an agreement is executed voluntarily between a juristic person and another juristic person, it cannot prima facie be termed as sham or not genuine. Unlike in the cases referred above this is not a case where an independent contractor was engaged for running a canteen. Here it is a case where a society is formed by virtue of the provisions of the Factories Rules which enables formation of such a society. When such a society is running a canteen on the basis of an agreement with the management of H.M.T. Ltd., it cannot be equated in the same manner as that of an independent contractor, for the reason as already stated, that the Society itself is formed by the workers of H.M.T. Ltd. under a statute. In other words, a society formed under Rule 96(6) of the Factories Rules stands on an entirely different footing and has to be dealt with separately.

22. Viewed in that angle, the question to be considered is whether the agreement is not genuine or sham. It is stated by the Tribunal on appreciation of evidence that the H.M.T. Ltd. has maximum control over the activities of the Society, the financial control, control over policy matters relating to voluntary retirement benefits etc. overlooking the settlements arrived between the canteen employees and the society.

23. One important feature is that even if the Society of the workers is running the canteen it has to comply with the provisions of the Factories Rules. The terms of agreement only stipulate the same. Since it is the statutory obligation of the management to run the Factory necessarily when the question of wages and other emoluments of canteen employees arises or in regard to administrative or financial matters are concerned the management representatives who are in the Managing Committee of the Society will have a say in the matter. That by itself cannot be treated as a reason to come to a conclusion that the Management has absolute control over a juristic person like a society. As already indicated the general body of the Society is having ultimate control of the affairs of the Society and if they shall desire to obtain reimbursement of their expenses, or seek the opinion of the Management over policy matters, it cannot be said that the agreement is not genuine. Hence I do not mink that the order passed by the Tribunal is justified. Findings of the Tribunal does not lead to the conclusion that H.M.T. Ltd. has absolute control over the Society and hence it cannot be stated that the Agreement is not genuine or sham. For the above reasons the order of

the Tribunal requires to be set aside.

Hence this writ petition is allowed and the order passed by the Tribunal Exhibit P1 is set aside.

