
(1996) 04 BOM CK 0054
In the Bombay High Court
Case No : Writ Petition No. 243 of 1995

Kamgar Sabha

APPELLANT

Vs

State of Goa and Others

RESPONDENT

Date of Decision : 23-04-1996

Acts Referred:

Factories Act, 1948 — Section 10, 12, 25, 46, 7
Industrial Disputes Act, 1947 — Section 10, 10(1), 9

Citation : (1996) 74 FLR 2486 : (1998) 3 LLJ 748

Hon'ble Judges : R.K. Bhatta, J; P.S. Patankar, J

Bench : Division Bench

Judgement

1. The petitioner is registered Trade Union. Though there is a dispute raised whether all the canteen employees are its members or not, the petitioner has filed two affidavits of canteen employees showing that they are its members. The respondent No. 2 is a company. It runs a canteen for its employee at its factory place situated at Santa Monica Works, Corlim. It employs more than 250 workers in the said factory. It is engaged in manufacture of various drugs and medicines. The said canteen is run through a Contractor, that is, respondent No. 3 as respondent No. 2 obliged by Section 46 of the Factories Act, 1948 (hereinafter referred to as "the Act"). The respondent No. 2 is registered u/s 7 of the Contract Labour (Regulation and Abolition) Act, 1970 and respondent No. 3 has obtained a license u/s 12 of the said Act.

2. The petitioner has pressed the following prayers only :-

"(b) That this Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction directing the respondent company to treat the canteen contractors workers as the permanent workmen of the respondent company.

(d) That this Honourable Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction directing the respondent company to cease and desist from engaging contractors

and employing workman whose names are given at Exhibit "C" for doing the work of the petitioners members."

It is to be noted that the petitioners has not pressed the prayer regarding confirmation or probationers as it does not survive today and the prayer made against the State Government-Respondent No. 1 is also given up.

3. In the light of the prayers mentioned above we shall state the pleadings of the parties.

4. The petitioners alleged respondent No. 2 is carrying on adverse labour policy and is not prepared to treat the canteen workers as its workers. It has set up a middle man in the guise of a Contractor. It is a statutory canteen within the meaning of Section 46 of the Act. The canteen workers are having a right to be treated as direct workmen of respondent No. 2 company. The respondent No. 2 Company engages more than 250 workers and, therefore, compelled by law to have a canteen. The workers of the canteen are doing the work which the respondent company is by law required to maintain. Those workmen are required to be treated automatically as workmen of the company. The company has refused to extend equality in the payment of wages and other service conditions. The canteen workers are entitled to be treated as employees of the company and to get the benefits of service conditions and security of employment.

5. The company is engaging variety of contractors for carrying on its normal work. This is borne out by the fact that during the strike period no workman owing allegiance to the petitioner was working during the strike period even then the respondent No. 2 company was able to carry on the manufacturing activities. A list of contractors is given at Exhibit "C" to the petition indicating the name of the Contractor, the nature of the work carried on and approximate number of workmen employed by those Contractors. The petitioners has further averred that respondent No. 2 company has indulged in this practice with a view to break the legal strike. It is contended that respondent No. 2 is guilty of unfair labour practice.

6. There is a reply filed on behalf of respondent No. 2 sworn by Ramnath Padmanabh Rataboli dated 4th September 1995. He has contended that no mandamus can be issued against the company as it is not a statutory authority and is not required to discharge any statutory function or perform any public duty. It is not guilty of non-compliance with any statutory obligations and, therefore, this petition under Article 226 of the Constitution of India is not maintainable. It is also pointed out that petitioner has filed Special Civil Suit No. 10/94/A for identical reliefs against the company and it is pending for final disposal. The petitioner tried to get interim relief in that suit. However, it has failed. Similarly it has failed to get interim relief in the High Court also. It is also pointed out that alternative and efficacious remedy is available to the petitioner under the Industrial Disputes Act, 1947 or under the Industrial Employment

(Standing Orders) Act, 1946 or under the Factories Act, 1948. Therefore, this petition is not maintainable. It is also pointed out that the respondent No. 2 company is entitled to engage a Contractor for running the canteen. It has employed contract labour during the strike period and it was not barred and it was done by the company even prior to the said strike. The company was not guilty of any unfair labour practice.

7. It is also contended that employees of the contractor working in the canteen do not become employees of the company merely because the company is required to set up a canteen under the Factories Act. Whether they are employees of the company or not is required to be adjudicated by an Industrial Tribunal and there is no fiction in law that the employees of the canteen contractor are employees of the company. The company is registered under the Contract Labour (Regulation and Abolition) Act, 1970 and similarly the canteen contractor - respondent No. 3 has also obtained the license. The workmen of the said canteen have signed settlement with regard to their conditions of services with the said contractor - respondent No. 3. There is no privity of contract between the company and the employees of the contractor. The contractor is neither controlled nor supervised by the company or its officers. Therefore workmen engaged by the canteen contractor are not entitled to be treated as employees of the company and for getting the benefits available to the employees of the company. Their conditions of services are regulated by settlement between the contractor and their Union. It is denied that the company engaged contractors for execution of work which is regular work of the company. It is pointed out that contractors employees do not attend to any manufacturing activities. There were workmen who were not on strike and the company was carrying on its manufacturing activities partly with the help of those workmen and its officers. It is denied that it has engaged contract labour to break the strike. It is also averred that the strike was illegal and that company is not guilty of any unfair labour practice under the Industrial Disputes Act, 1947. It has not committed any breach of any provisions of the Industrial Disputes Act.

8. There is affidavit-in-reply filed on behalf of respondent No. 3. It is dated 24th November 1995 and sworn by Chaman Lal Sesodia, Proprietor of respondent No. 3. In the said affidavit he has pointed out that he is running the said canteen since 1986 onwards. It is the business of his firm to organise and run canteens in various industrial concerns and it is actually running such canteens. The services of the employees of his firm are transferable from one concern to the other. He has obtained licence under the provisions of Contract Labour (Regulation and Abolition) Act, 1970 for running the canteen in respondent No. 2's factory. It has obtained independent Provident Fund Code bearing No. MH-15216 for covering the employees of his various establishment including those engaged in the canteen at the respondent No. 2's factory. There are 45 workmen employed and their work is supervised and controlled by one Manager and four Supervisors employed by respondent No. 3. It has signed settlements from time to time under the provisions of Industrial Disputes Act, 1947. There is one Charter of

Demands dated 15th January, 1995 still pending. The relations between the respondent No. 3 and respondent No. 2 company is one of principal to principal and not of any agency. Respondent No. 3 is an independent contractor and as such exercises full control and supervision in running the said canteen. Those employees are not at all under the control or supervision of the respondent No. 2 company or its officers and they do not have any privity of contract with the said company. They cannot be treated as regular employees of the company. The employees are not engaged continuously in the work as they are supposed to discharge the duty of cooking, and serving snacks and meals during specified hours only. It is denied that respondent No. 3 is just a middleman. It is contended that respondent No. 3 is a full - fledged contractor running such canteens in various establishment and having full control and supervision over its employees. If the prayers are granted, then his business shall suffer seriously. This would amount to abolition of contract labour even if no notification has been issued as required under the Contract Labour (Regulation and Abolition) Act, 1970. It is legally entitled to run the canteen and the employees employed therein are employees of respondent No. 3.

9. On behalf of the petitioner there is affidavit dated 23rd January 1996 filed by one Chand Bibi, General Secretary of the petitioner. It is mainly to show that the petitioner is authorised to file the petition on behalf of the canteen employees. He has affirmed what is stated in the petition and denied the contrary statements made on behalf of respondent No. 2. He has denied that there is no privity of contract between the company and the contractor's workmen and the workmen employed in such statutory canteen are in reality employees of the principal employer, that is, company. It is denied that the work of such employees of the canteen is not controlled or supervised by the company or its officers. He wanted to rely upon the contract entered into between respondent No. 2 and respondent No. 3 to meet the submission in that respect.

On behalf of the petitioner a further affidavit on one Bhujanga Vaman Nayak dated 3rd February, 1996 is filed. He has stated that he is the General Secretary of the petitioner. He has stated that the company is not re-calling the workmen who were employed prior to lockout on 14th January, 1994 and getting done the said work through contract labour. It comes to nearly 50% in different departments and he has pointed out that there are nearly 509 such workers employed by various contractors in various departments who are doing the work of permanent nature.

10. Further two affidavits are filed on behalf of respondent No. 2. They are sworn by Ramnath P. Rataboli. Both are dated 8th March, 1996. They are filed for disputing the various statements, submission and averments made in the affidavit dated 23rd January, 1996 and he has reiterated what he has stated in the affidavit dated 4th September, 1995 as true and correct. It is pointed out that under the Act there is no deeming provision so that the canteen employees employed by the Contractor can become the employees of the principal employer-

company. He has denied that the company has engaged in any unfair labour practice. It is stated that there is no bar in engaging contract labour or that the company is guilty of committing any unfair labour practice under Schedule V of the Industrial Disputes Act. He has denied that the company has engaged contract labour for doing the work of regular employees. It is pointed out that contract labour was engaged prior to the strike and lock-out for doing the work which is not connected with any manufacturing operation or activity. It is further stated that the Contractors are paying substantial wages to their workers. He has denied that there is contract labour of 509 workers in various departments.

11. In view of the pleadings of the parties, the following three questions arise for our consideration. :-

(1) Whether the employees of the canteen presently run by respondent No. 3 are employees of respondent No. 2 company for the purpose of the Act ?

(2) Is the respondent No. 2 - company guilty of committing unfair labour practice under Item No. 9 of Vth Schedule of Industrial Disputes Act, 1947 ?

(3) Whether the petitioner can get the prayers in this petition under Article 226 the Constitution of India ?

12. It is first submitted that Section 46 of the Act imposes statutory obligation upon the occupier to provide and maintain a canteen for the use of the workers of a factory where more than 250 workers are ordinarily employed. Respondent No. 2 is covered by Section 46 and accordingly it has provided a canteen. It is a statutory canteen and the natural corollary thereof is that the workers employed in such canteen are the employees of respondent No. 2, though the said canteen is run by respondent No. 3. In support of this submission the Learned Counsel for the petitioner has relied upon three Judgments of the Apex Court and one by the Division Bench of this Court.

13. Section 2(1) of the Act defines "worker" as follows :-

"(1) "worker" means a person (employed, directly or by or through any agency (including a contractor) with or without the knowledge of the principal employer, whether for remuneration or not) in any manufacturing process or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process (but does not include any member of the armed forces of the Union).

Section 46 falls in Chapter V dealing with Welfare. It provides for canteens. Section 46(1) is as follows :-

"The State Government may make rules requiring that in any specified factory wherein more than two hundred and fifty workers are ordinarily employed, a canteen or canteens shall be provided and maintained by the occupier for the use of the workers."

Section 46(2) requires that rules be framed regarding standards of construction, accommodation, furniture and equipment of the canteen regarding food stuffs to be served, constitution of managing committee, rates of food stuffs etc. In fact there are Goa, Daman and Diu Factories Rules, 1985. There are Rules dealing with canteens from Rule 96 to Rule 102. They provide for where the canteen building should be located, how the said building should be, how the dining hall, equipment used in the said canteen should be. It deals with the prices to be charged regarding the food stuffs. The prices to be fixed with the approval of the Canteen Managing Committee and the sale is to be on a non-profit basis. It also deals about the nature of Managing Committee and says that in case the canteen is managed by Workers Co-operative Society registered under the Co-operative Societies Act, then it may not be necessary to appoint a canteen managing committee. It also provides for maintenance of accounts and annual medical examination of the canteen staff. It is evident from the aforesaid provision that the occupier is not only obliged to run a canteen where more than 250 workers are employed but it is also obliged to abide by the Rules framed by the concerned Government. The first ruling in support relied upon is The Saraspur Mills Co. Ltd. Vs. Ramanlal Chimanlal and Others, . It was held that since under the Factories Act it was the duty of the company to run and maintain the canteen for the use of its employees, the workers employed by the Co-operative Society running it become the employees of the company for getting the benefits of wages, etc. In the said case the company was running a canteen as provided u/s 46 of the Act by engaging a co-operative society. The said society employed workmen in the canteen. An application came to be filed under the Bombay Industrial Relations Act, 1946 praying for the payment of wages, dearness allowance, etc. as per the award of the Industrial Tribunal. In support thereof they contended that they became the workers of the company and the company was bound to pay wages and dearness allowance etc. as per the award. This was because the company was obliged to have a canteen under the Factories Act. The running of the canteen was ordinarily a part of the undertaking which was run for the welfare of the company employees. In order to discharge its legal obligation the canteen was run. This contention came to be accepted by the Industrial Court and affirmed by the Apex Court. The Company's contention that they cannot be treated as its employees was negated. We find that there is no material difference in the definition of "worker" as contained in the Act or the definition of "employee" and "employer" as contained in the Bombay Industrial Relations Act. The definition of "worker" is further extended and now includes even a person employed through any agency including a contractor.

14. In the said case the Apex Court has also taken into consideration its judgment reported in Ahmedabad Mfg. and Calico Ptg. Co. Ltd. Vs. Ram Tahel Ramnand and Others, . The Apex Court approved the proposition that an employee engaged in a work or operation which was incidentally connected with the main industrial activity is a company's workman if other requirements of the statute were satisfied.

15. The next case relied upon is 1990 2 CLR 261 M.M.R. Khan and Others etc. v. Union of India and Others etc. In the said case the Apex Court was concerned with three types of canteens. First whether employees of statutory canteens, which are required to be provided compulsorily in view of Section 46 of the Act, were employees of the Railways ? Second whether the employees of non-statutory recognised canteens, that is, the canteens recognised by the Railway Board but which employ less than 250 employees ? Third whether employees of non-statutory non-recognised canteens are the employees of the Railway ? It was held that only the employees of the Statutory canteens and of the non-statutory recognised canteens are the employees of the Railways. The Apex Court first considered the definition of "worker" in Factories Act and observed :-

"Since in terms of the Rules made by the State Government under S. 46 of the Act, it is obligatory on the Railway Administration to provide a canteen, and the canteens in question have been established pursuant to the said provision there is no difficulty in holding that the canteens are incidental to or connected with the manufacturing process or the subject of the manufacturing process. The provision of the canteen is deemed by the statute as a necessary concomitant of manufacturing activity."

The Apex Court thereafter considered the various provisions of the Railway Establishment Manual and its circulars regarding recognition etc., as it was not only considering statutory canteens but also of two other categories. In paragraph 21 it is observed :-

In fact as has been pointed out earlier the Administrative Instructions on departmental canteens in terms state that even those canteens which are not governed by the said Act have to be under a complete administrative control of the concerned Department and the recruitment, service conditions and the disciplinary proceedings to be taken against the employees have to be taken according to the rules made in that behalf by the said Department. In the circumstances, even where the employees are appointed by the Staff Committee Co-operative Society it will have to be held that their appointment is made by the Department through the agency of the Committee Society as the case may be. In addition, as stated earlier, the Railway Board by its circular dated June 8, 1981 had communicated that it was decided to treat the employees of all statutory canteens, as railway servants irrespective of the type and management of the canteens, and to extend to them the conditions of service and emoluments of the railway servants as existed on October 21, 1980, w.e.f. 22nd October 1980."

It is clear from the observations contained in paragraph 21 that the Apex Court has taken into consideration certain Additional material and finally held that the relationship of employer and employee stands created between the Railway Administration and the canteen employees from the very inception in case of two types of canteens only.

16. The next judgment relied upon by the Learned Counsel for the petitioner is

Parimal Chandra Raha & Ors. v. Life Insurance Corporation of India & Ors. 1995 2 CLR 194. In the said case the Apex Court held that the canteen employees were liable to be treated as regular employees of the Life Insurance Corporation and the same employees were entitled to the benefit of the pay scales and other service conditions available to regular employees of the Life Insurance Corporation. In paragraph 27 it was held :-

"What emerges from the statute law and the judicial decision is as follows :

(i) where, as under the provisions of the Factories Act, it is statutorily obligatory on the employer to provide and maintain canteen for the use of his employees, the canteen becomes a part of the establishment and, therefore the workers employed in such canteen are the employees of the management.

(ii) where, although it is not statutorily obligatory to provide a canteen, it is otherwise an obligation on the employer to provide a canteen, the canteen becomes a part of the establishment and the workers working in the canteen, the employees of the management. The obligation to provide a canteen has to be distinguished from the obligation to provide facilities to run canteen. The canteen run pursuant to the latter obligation, does not become a part of the establishment....."

17. The Learned Counsel for the petitioner next relied upon the Division Bench Judgment of this Court reported in 1995 (2) Goa L.T. 19, Pratap Mardolkar, son of Anant Mardolkar v. Goa Shipyard Limited and Others. The Division Bench of this Court held that employees working in a canteen provided and maintained u/s 46 of the Act are liable to be treated as direct employees of the owner of the factory, the canteen being a part of the establishment of the factory.

18. We would like to point out the latest Judgment of the Supreme Court in Employers in relation to the Management of Reserve Bank of India Vs. Their Workmen, . The Apex Court has observed as follows :-

"15. In applying the law laid down by this Court, as stated above, we should distinguish those line of cases, where a statutory liability is cast on the employer for maintaining the canteen viz., as per Section 46 of the Factories Act or due to the extended meaning given to the definition of the word "employer" in the particular statute, any other person like a contractor to whom an owner of the undertaking had entrusted the execution of any work which was ordinarily part of an undertaking or industry was also covered. See in this connection The Saraspur Mills Co. Ltd. Vs. Ramanlal Chimanlal and Others, and Basti Sugar Mills Ltd. Vs. Ram Ujagar and Others, . We should at once state that the principles laid down in those line of cases cannot apply herein, since admittedly (a) no statutory liability is cast on the Bank to run a canteen and Section 46 of the Factories Act is inapplicable herein; and (b) the Industrial Disputes Act does not contain an extended definition of the word "employer"."

19. The Learned Counsel appearing for respondent 2 and 3 tried to distinguish

The Saraspur Mills Co. Ltd. Vs. Ramanlal Chimanlal and Others, on the ground that it dealt with definition of "employer" and "employee" contained in Bombay Industrial Relations Act. Relevant part of definition of "employee" and "employer" considered by the Apex Court was as follows :-

"3(13) "employee" means any person (including an apprentice) employed in any industry to any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be express or implied and includes - (a) a person employed in the execution of any work in respect of which the owner of an undertaking is an employer within the meaning of Sub-clause (e) of clause (14)

(14) "employer" includes -

(e) Where the owner of any undertaking in the course of or for the purpose of conducting the undertaking entrusts the execution of the whole or any part of any work which is ordinarily a part of the undertaking, to any person otherwise than as the servant or agent of the owner, the owner of the undertaking."

But, a combined reading of these definitions suggest, that in an undertaking covered by the Bombay Industrial Relations Act if any work, which is ordinarily part of the undertaking, has been entrusted to a contractor for execution and, for executing such work, the contractor engages contract labour, then, notwithstanding the fact that there is no relationship of employer and employee between the principal employer and the contractor's workmen, such workers are deemed to be employees of the principal employer. The position is same if we consider definition of "worker" u/s 2(1) of the Act. The amended definition of "worker" (quoted above) includes a person employed through a contractor in any work incidental to or connected with the manufacturing process.

20. The learned Advocate for the petitioner tried to distinguish 1990 2 CLR 261 M.M.R. Khan's case (cited supra) on the ground that it is based on the provisions of Railway Establishment Manual and provisions contained in Railway Board Notification. He submitted that because of that the Apex Court held that there was relationship of employer and employee created. It is not possible to accept this. The Apex Court considered provisions of Section 46 of the Factories Act and the Rules framed thereunder and came to the conclusion that the canteens (statutory canteen) in question have been established pursuant to the said provision and they were incidental to or connected with the manufacturing process or the subject of the manufacturing process. Therefore, they were deemed to be the employees of Railway. In addition to that the Apex Court also considered Railway Establishment Manual and Railway Board Notification as it was also considering employees engaged in non-statutory recognised canteens and non-statutory non-recognised canteens. After considering this the Apex Court came to the conclusion that there was relationship of employer and employee created between the Railway Administration and the Canteen employees. This is clear from the opening words contained in paragraph 21. They

are as follows :-

"In fact as has been pointed out earlier the Administrative Instructions on departmental canteens in terms state that even those canteens which are not governed by the said Act have to be under a complete administrative control of the concerned Department and the recruitment, service condition and the disciplinary proceedings to be taken against the employees have to be taken according to the rules made in that behalf by the said Department....".

This makes it clear that the Apex Court considered the Railway Board Notification and Railway Establishment Manual in addition.

21. In this respect it is further submitted that the said definition of "worker" is only for the purpose of the Factories Act and it cannot be used to create such a fiction to abolish contract labour as the Factories Act does not abolish it. The preamble to the Factories Act shows that it is made to consolidate and amend the law regulating labour in factories. It is a beneficial legislation meant for welfare of employees. It imposes a duty in the larger interest of the Society upon the employers to follow those provisions and we are giving full effect to the statutory provision contained in Section 46.

22. The learned Advocate for respondent 2 and 3 distinguished 1995 2 CLR 194, *Parimal's* case, on the ground that it is to be read in the context of the facts of that case and the case law considered by the Apex Court. In fact conclusions were drawn by the Apex Court after considering the various decisions and whether employer was Life Insurance Corporation falling under Article 12 of the Constitution or a company not falling under it make so difference if we consider what the Apex Court has laid down in this case. For the same reason attempt made by the Learned Counsel on behalf of the respondents 2 and 3 to distinguish the Division Bench Judgment of this Court in the matter of *Pratap Mardolkar* 1995 (2) Goa L.T. 19 (cited supra) must fail. The Learned Counsel relied upon paragraphs 5 and 6 thereof and pointed out that respondent No. 1 company issued a Circular on 29th June 1977 to the effect that employees' canteen of the Goa Shipyard Ltd. will be inaugurated. It will be under the Management of Goa Shipyard Employees' Consumers' Co-operative Society Ltd. The company will meet the expenses in respect of the salary and wages of the canteen staff, fuel, electricity, water besides providing utensils, etc. There was substantial material to indicate that de facto and de jure control was of company on the management of the canteen though it was entrusted for running to the said Society. The General Manager has also issued instructions from time to time regulating the working of the canteen. Officer appointed by the company was looking after the affairs of it. Company was placing orders for purchase of various articles and equipments for the said canteen. The Learned Counsel for respondents 2 and 3 submitted that in view of these facts those canteen workers were held to be the workers of the company. It is not possible to accept this in view of the clear annunciation of the ratio by the Division Bench as mentioned above. In our opinion, the narration of those facts makes no difference as far as our case is

concerned. Further if we look to the agreement between respondent 2 and 3 dated 31st December 1993, it makes clear that the company was having control; that the company was to supply at its own cost the cooking utensils, crockery, etc. Uniforms worn by the employees including head gear was to be specified by the company. The electricity, water, fuel, furniture and fixtures were to be given by the company without any charges. The company was to be the sole judge regarding the standard of quality of food and the standard of hygiene. The quality of food was to be maintained as directed by the company. No doubt wages were to be paid by respondent No. 3 to those employees, but it was to submit regularly to the company all the details regarding attendance, weekly off days, wages, etc. Respondent No. 3 was also to indemnify the company against any claim suffered or damage sustained by the company due to respondent No. 3's failure to follow the legal provision. Clause 12 no doubt made provisions that the employees employed in the canteen shall be of respondent No. 3 and respondent No. 3 shall be responsible for their wages etc. But it was also provided that in case the conduct of any employee was not satisfactory according to the company, then respondent No. 3 shall remove him. Clause 13 gives general power of authority to the company regarding overall supervision. Therefore, respondent No. 2 has retained much of the control over the functioning of the canteen. It is difficult to say that respondent No. 3 is an independent contractor as such. Much of the discretion of respondent No. 3 was taken away. It becomes difficult to accept the case of Respondent No. 3 that the relationship was of principal to principal. Even assuming that respondent No. 3 was an independent contractor, in view of Section 46 and further the fact that the canteen is incidental to or connected with the manufacturing process, it becomes part of the company. It is a necessary concomitant of the manufacturing activity of the company. Obviously proper nourishment can bring in better production.

23. The learned Advocate for respondent 2 and 3 relied upon the Division Bench Judgment of the Madras High Court in *Workmen employed in the Canteen run by SRF Ltd., Madras v. Government of Tamil Nadu and Others* reported in 1995 2 CLR 136. We respectfully differ from the view taken by the Division Bench. It is not possible to accept the view that in spite of there being responsibility to provide and maintain a canteen for the workmen u/s 46 of the Factories Act on the company, the employees of the canteen cannot become automatically the employees of the company. It is also not possible to accept that merely because the principal employer was registered u/s 7 and the contractor obtained licence u/s 12 of the Contract Labour (Regulation and Abolition) Act and further there was no Notification issued u/s 10 of the said Act, the canteen employees cannot be treated as employees of company or there would be abolition of contract. (Incidentally we may point out that the quotation mention in paragraph 18 of the said judgment misses the word "not" while quoting from the Apex Court's judgment in the case of *M.M.R. Khan*'s (cited supra).

24. In our opinion as far as this case is concerned, whether respondent No. 2 is

registered u/s 7 and respondent No. 3 has taken licence u/s 12 of the Contract Labour (Regulation & Abolition) Act, 1970 is not relevant. It is also not relevant to construe the agreement between respondents 2 and 3 or that it is operative till the end of December 1996. We are not prohibiting respondent No. 2 to run or manage canteen through an agency permissible under law such as a registered co-operative society. But we are granting a declaration that those employees shall be treated as employees of the company for all purposes.

25. There are some other contentions raised by the Learned Counsel for the Respondents 2 and 3 and Judgments cited. In fact in view of the decisions of the Apex Court and the Division Bench judgment of our Court mentioned above, it is not necessary to deal with them. However, we are considering them.

26. It is submitted that the effect of granting prayers would be to nullify the contract between the respondents 2 and 3 and this can only be done u/s 10 of the Contract Labour (Regulation & Abolition) Act, 1970. There is no notification issued to that effect u/s 10. Therefore, there can be no mandate issued for abolition of contract labour or the canteen workers can be made workers of respondent No. 2 by fiction. Reliance is sought to be placed on Gujarat Electricity Board, Thermal Power Station, Ukai, Gujarat, v. Hind Mazdoor Sabha & Ors., 1995 1 CLR 967. In paragraph 50 it was observed :-

"50. Our conclusion and answers to the question raised are, therefore, as follows :

(i) In view of the provision of Section 10 of the Act, it is only the appropriate Government which has the authority to abolish genuine labour contract in accordance with the provisions of the said Section. No Court including the industrial adjudicator has jurisdiction to do so."

In the said case the Gujarat Electricity Board employed 1500 skilled and unskilled manual labourers through various contractors. In pursuance of agreement between the parties the disputes relating to contract labour, their wages etc. were referred for adjudication to Industrial Tribunal. The Tribunal directed abolition of contract labour and absorption of those employees as employees of the Board. There was no Notification issued u/s 10 of the Contract Labour (Regulation & Abolition) Act, 1970. The Apex Court in that context so held. In our case we are considering the effect of Section 46 of the Act.

27. The Learned Counsel for respondent 2 and 3 relied upon 1992 1 CLR 1, Dena Nath & Ors. v. National Fertilisers Ltd. & Ors. In the said case the question involved was that if the principal employer does not get registration u/s 7 of the Act and/or the contractor does not get licence u/s 12 of the Contract Labour (Regulation & Abolition) Act, 1970 whether the persons so appointed by the principal employer through the contractor would be deemed to be the direct employees of the principal employer. It was held that no direction can be given under Article 226 as no notification has been issued by the appropriate Government u/s 10 of the Act vis-a-vis the type of establishment concerned.

Therefore, there can be no abolition of contract labour by making them direct employees of the principal employer. This can only be done by the Government u/s 10 of that Act and in such a situation the penal provision u/s 25 may only be attracted. Again we are not concerned in this case with such a situation. Further whether the employer is registered u/s 7 and the contractor has obtained licence u/s 12 is not relevant while considering the statutory provision u/s 46 of Act. It is submitted that Section 2(2)(b) of the Contract Labour (Regulation and Abolition) Act defines "workman" and provides as follows :-

"a workman shall be deemed to be employed as "contract Labour" in or in connection with the work of an establishment when he is hired in or in connection with such work by or through a contractor, with or without the knowledge of the principal employer."

The Learned Counsel for respondent 2 and 3 submitted that only this provision creates fiction by providing a deeming provision. But no such fiction is created while providing the definition of "worker" under the Act. However, in our opinion, Section 46 itself provides that if the requirements thereof are complied then the canteen workers are to be deemed as employees of the principal employer. It is not necessary to provide specifically any fiction when the definition of "worker" contained in Section 2(1) of the Act provides to include employees employed through any agency including a contractor and who were engaged in any manufacturing process or any kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process.

28. The learned Advocate for the respondents 2 and 3 relief upon the Apex Court Judgment in Criminal Appeal No. 93 of 1955 dated 18th February, 1958 Chintaman Rao and Another v. State of Madhya Pradesh. The Court was dealing with definition of "worker" prior to the amended definition of "worker" contained in the Factories Act. Question arose whether term worker includes independent contractors employees. Sattedars employed to manufacture bidis and their coolies were held to be not workers. However, now the amended definition of "worker" makes the whole difference as pointed above.

29. Then reliance is place on the judgment of the Apex Court reported in Ghatge & Patil Concerns Employees" Union v. Ghatge & Patil (Transports) (Private), Ltd. and another dated 22nd August 1967 (Civil Appeal No. 487 of 1966). The Apex Court was dealing with Motor Transport Workers Act, 1961. It was not concerned with engagement of contract labour and there was no question of any such statutory liability involved as in the present case.

30. Reliance is then placed on the Judgment of the Apex Court reported in Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra, . It was held that the principles according to which the relationship between employer and employee or master and servant has got to be determined are well settled. The prima facie test applied in order to determine the relationship is the existence of right of control in respect of the manner in which the work is to be done. There is

a distinction between a contract for service and a contract of service. In the first case the master can order or require what is to be done while in the second case he cannot only order or require what is to be done but how it shall be done. It was held that greater the amount of direct control exercised over the person rendering the service by the person contracting for them, the stronger the ground for holding it to be a contract of service. In view of this it is submitted that in the present case the canteen workers were under the control and supervision of respondent No. 3 and, therefore, they were employees of respondent No. 3 only. It is submitted that from the replies filed indisputably the control and supervision over the canteen employees is that of respondent No. 3 and hence they are employees of respondent No. 3. However, here we are concerned with giving effect to Section 46 of the Act and not with the position under the general law. In addition we have also pointed out what is the effect of the agreement between respondent 2 and 3 dated 21st January, 1993. We also pointed out that Section 46 is fully applicable in the present case considering the test laid down by the Apex Court as discussed above. Hence this judgment is of no relevance.

31. The Learned Counsel for the respondents 2 and 3 next submitted that the petitioner must approach the Factories Inspector in view of Section 9 of the Act read with Rule 18 of the Goa, Daman and Diu Factories Rules, 1985 and this Court cannot grant the reliefs. It is not possible to accept this submission. No doubt an aggrieved party can approach the Factories Inspector for claiming certain reliefs. It may be possible for the Inspector to direct the company to have a canteen if the provisions of Section 46 are applicable to it. But, in our opinion, the declaration as sought by the petitioner cannot be granted by the Factories Inspector. In any case it is not possible and desirable to ask the petitioner and to approach the Factories Inspector when it is seeking to enforce a statutory duty cast u/s 46 of the Act. Hence we reject this contention.

32. The Learned Counsel for respondents 2 and 3 next contended that the petitioner should approach the Industrial Tribunal u/s 10 of the Industrial Disputes Act, 1947 and should pray first for abolition of contract labour and then for absorption and this Court cannot grant the relief. In support of this submission the Learned Counsel relied upon 1995 1 C.L.R. 967 (cited supra). The Apex Court mainly decided the question whether Court can pass an order of abolition of contract labour in the absence of notification by Government u/s 10 of the Contract Labour (Regulation & Abolition) Act, 1970. Next it was held if there is a notification then the workmen of the contractor can raise an industrial dispute irrespective of the fact whether the contract is genuine or not. If the labour contract is genuine a composite industrial dispute can still be raised for abolition of the contract labour and the absorption of those workers. This does not mean that in every case the workmen or their union must approach the Industrial Tribunal under the Industrial Disputes Act for getting relief of absorption or this Court cannot grant it under any circumstances. Here essentially the prayer is to direct Respondent No. 2 to treat the canteen workers

of respondent No. 3 as its workers and abide by statutory provisions of Section 46 of the Act. The consequence thereof is absorption.

33. The Learned Counsel for respondent 2 and 3 also relied upon Surendra Prasad Kungsal Vs. M.M.T. Corpn. of India and another, . It was a case filed by employees of non-statutory canteens of the Food Corporation of India and Minerals and Metals Trading Corporation of India, therefore, it was held that question of fact would arise in view of the Apex Court judgment in M.M.R. Khan's case (supra). So direction was given that the petitioners-Unions should approach the Industrial Tribunal u/s 10(1)(d) of the Industrial Disputes Act, 1947. Obviously this has no application to the present case as there is no dispute that the canteen is run by the respondent No. 3 as a statutory canteen.

34. The Learned Counsel for respondent 2 and 3 next submitted that this petition raises a question of fact and, therefore, no relief can be granted. It was submitted that whether the contract between respondent No. 2 and No. 3 is bonafide or not requires to be first decided. In our opinion, this question is irrelevant in view of the fact that respondent No. 2 is obliged to follow the statutory liability cast upon it.

35. The Learned Counsel for respondents 2 and 3 relied upon 1994 2 CLR 402, R.K. Panda & Ors. v. Steel Authority of India & Ors. However, in our opinion, the reliance is misplaced. In that case employees of contractors pointed out that they were working as contract labourers for 15 to 20 years continuously and doing the same work done by regular employees of the company. The work is perennial. Hence they prayed that they be absorbed as regular employees of the company and paid accordingly. In that context the Supreme Court observed :-

"6. It is true that with the passage of time and purely with a view to safeguard the interest of workers, many principal employers while renewing the contracts have been insisting that the contractor or the new contractor retains the old employees. In fact such a condition is incorporated in the contract itself. However, such a clause in the contract which is benevolently inserted in the contract to protect the continuance of the source of livelihood of the contract labour cannot by itself give rise to a right to regularisation in the employment of the principal employer. Whether the contract labourers have become the employees of the principal employer in course of time and on whether the engagement and employment of labourers through a contractor is a mere camouflage and a smoke screen, as has been urged in this case, is a question of fact and is to be established by the contract labourers on the basis of the requisite material."

As it is not concerned with statutory liability, we reject this contention.

36. The Learned Counsel for respondent 2 and 3 next submitted that mandamus under Article 226 of the Constitution cannot be issued for granting the prayers. The Learned Counsel for the petitioner submitted that the petitioner is asking the respondents 2 and 3 to follow the statutory duty which is cast upon them for the

welfare of the workers. It is in the nature of public duty. The Learned Counsel relief upon the Division Bench Judgment of this Court reported in 1983 L. I.C. 759, Scindia Steam Navigation Co. Ltd. and another v. Scindia Employees' Union and others. The Division Bench relied upon the observation of the Apex Court in case of The Praga Tools Corporation Vs. Shri C.A. Imanuel and Others, . In the said case the Apex Court has observed :-

"No doubt, Art. 226 provides that every High Court shall have power to issue to any person or authority orders and writ including writs in the nature of habeas corpus, mandamus, etc. or any of them for the enforcement of any of the rights conferred by Part III of the Constitution for any other purpose. But it is well-understood that a mandamus lies to secure the performance of a public or statutory duty in the performance of which the one who applies for it has a sufficient legal interest. Thus, an application for mandamus will not lie for an order of reinstatement to an office which is essentially of a private character nor can such an application be maintained to secure performance of obligation owed by a company towards its workmen or to resolve any private dispute.... Therefore, the condition precedent for the issue of mandamus is that there is in one claiming it a legal right to the performance of a legal duty by one against whom it is sought. An order of mandamus is, in form, a command directed to a person, corporation or an inferior tribunal requiring him or them to do a particular thing therein specified which appertains to his or their office and is in the nature of public duty. It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or corporations to carry out duties placed on them by the statutes authorising their undertakings."

In view of this the Division Bench observed :-

"It is now well-established that a mandamus lies to secure the performance of a public or statutory duty, though it is not necessary that the person or authority or whom the statutory duty is cast need be a public official or an official body. If it is found that the Company has some obligation to perform a statutory or a public duty, then it may not be possible to contend that no writ can be issued to the company merely because the Companies Act does not provide for the enforcement of the public duty or a statutory duty."

37. The Learned Counsel for the petitioner relied upon *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, . It was held :-

"Article 226 confers on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "Any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person

or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied."

38. The Learned Counsel for the petitioner also relied upon Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., . In the said case it was held that mandamus can even be issued to a private educational institution whether receiving aid or not for complying with the statutory provisions and in view of the statutory duty cast upon it. In turn the Apex Court relied upon the Judgment of that Court in Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another, .

39. A against this the Learned Counsel for the respondent 2 and 3 relief upon the Division Bench Judgment of this Court in 1995 1 CLR 270 Dayandeo Dattatraya Kale & Ors. v. State of Maharashtra & Ors. In that case the petitioners sought for cancellation of selection and appointment of clerks and peons by respondent No. 8 the Ahmednagar District Central Co-operative Bank Ltd., on the ground that the interviews that were held were nothing but a farce. They prayed for fresh recruitment etc. setting aside the earlier one. In view of that it was held that writ of mandamus cannot be granted under Article 226. This has no application. On the contrary the Division Bench has pointed out what P.P. Crag in his book on Administrative Law, 2nd Edition, page 391 has observed. The observation were that the duty is public if it flows from the statute prerogative, common law, charter, custom or even contract. In the present case Section 46 of the Act imposed statutory duty for the welfare of working class. The title of the said Chapter V in which this Section falls is "Welfare". It is in the nature of public duty. Mandamus is a wide remedy. Wherever injustice is done by violating public duty or statutory duty by any person or body, it must reach to undo it or for doing justice. Hence we hold that mandamus in the present case can be issued.

40. The next question is whether the respondent No. 2 is guilty for committing unfair labour practice as contemplated by Item 9 of Fifth Schedule of the Industrial Disputes Act, 1947. The item is as follows :-

"9. To show favouritism or partiality to one set of workers regardless of merit."

In fact the petitioner has stated in the petition that respondent No. 2 is guilty of committing unfair labour practice under Item 6 of Fifth Schedule, that is, to abolish work of regular nature and to give work to contractors for breaking strike. The petitioner has made out the case that there was legal strike in the company, during that period the company engaged various contractors and the manufacturing was carried out through them so as to break the legal strike. Now this is not pressed. It is orally now pointed out that after the strike was over the workers were taken back by the company, but some of them are given work and some are not. This is because the company is still employing some contract

labour. Thus the company is showing favouritism or partiality to some workers. First we find no factual basis for this in the petition. Further all this has been denied. It has been pointed out that all employees had not gone on strike. The manufacturing activity was carried on with the help of those who has not gone on strike and the officers of the company. Only legally permissible contract labour is engaged. It is pointed out that all workers are paid but they cannot be given work immediately as all the contract labour cannot be wished away overnight. It is pointed out by the Learned Counsel for the respondent No. 2 that it is in the interest of the company to get rid of the contract labourers and to get the work done through the regular employees who are paid for doing nothing. He stated that the efforts of the company are going on and the remaining employees shall also be provided with work as early as possible. Taking into consideration all this we find no substance in this contention.

41. In view of the above we give the following direction :-

The respondent No. 2 is directed to treat all the employees who were working with respondent No. 3 on the date of filing of this petition, that is 14th August, 1995, and continued working thereafter, and those who have completed 240 days today as regular employees of the company from 1st of May, 1996 and be paid wages, allowances and benefits as payable to the regular employees of the company doing similar work. The respondent No. 2 is hereby directed to fit those employees in an appropriate pay scale in the light of the pay scale fixed for regular employees of the company doing similar work and to give them same facilities, allowances and other service conditions. If the regular employees of the company are not doing comparable or similar work as of canteen employees, then, they shall be put at least on par with those regular employees getting minimum wages in the company and given the pay and all the benefits. Rule is made absolute accordingly. In the facts and circumstances of the case there shall be no orders as to costs.

The Learned Advocate for respondent No. 2 prays for stay of this order. Prayer rejected.