

(2011) 01 DEL CK 0475

In the Delhi High Court

Case No : Writ Petition (C) 6582 of 2003

Mohan Singh and Others

APPELLANT

Vs

Chairman, Railway Board and Others

RESPONDENT

Date of Decision : 13-01-2011

Acts Referred:

Factories Act, 1948 — Section 46

Citation : (2011) 1 AD 653 : (2011) 177 DLT 151 : (2011) 129 FLR 98 : (2011) 3 LLJ 510 : (2012) 2 SLJ 263

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : D.K. Garg, for the Appellant; Jitendra Kumar Singh, for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.—Eighteen Petitioners employed in the Railway Staff Canteen at Moradabad Division have filed this petition praying for directions to the Railways to recognize the canteen and regularize their services as railway employees. This writ petition was further amended to challenge the decision dated 9th September, 2002 of the Railways rejecting the Petitioners, request for recognition. The Petitioners base their petition essentially on the judgment of the Supreme Court in M.M.R. Khan v. Union of India 1990 (Suppl) SCC 191.

2. The Petitioners state that Moradabad is one of the oldest railway junctions and the railway staff canteen there has been running in the Divisional Railway Manager's ("DRM") office for more than 70 years now. According to the Petitioners, there are more than a thousand employees in the Moradabad Division and the canteen in question caters to all of them.

3. The Petitioners submit that in M.M.R. Khan, the Supreme Court held that there was no difference between the employees of statutory recognized canteen and those of non-statutory recognized canteens. The employees of both canteens

would be treated as railway employees. It is submitted that by withholding recognition to the canteen in which the Petitioners are working, the Railways were acting arbitrarily and unreasonably. It had deprived the Petitioners of the regularization of their services and consequently being treated as railway employees.

4. The Railways in its reply refers to the instructions contained in para 2233 of Indian Railway Establishment Manual ("IREM") Vol. II, 1990 Edition. It states that the canteen in which the Petitioners are employed is a non-statutory non-recognized canteen. A reference is made to the observations of the Supreme Court in para 38 of the decision in M.M.R. Khan. It is urged that the Petitioners are not entitled to recognition or to regularization of their services as railway employees. It is stated that pursuant to the judgment in M.M.R. Khan Master Circular No. 38 was issued whereby it is decided that setting up of new canteen should be referred to the Railway Board for approval and that no commitment should be made for setting up of new statutory /non-statutory canteens. A reference is also made to the impugned decision dated 9th September, 2002 of the Railway Board which states that in terms of the decision in M.M.R. Khan all vacancies in the canteen were to be advertised and that the staff of the existing canteen cannot be absorbed automatically and would have to compete with the eligible candidates from the open market. It was further communicated that neither the new canteens would be opened departmentally, nor recognition granted to the existing un-recognized canteens. The Railways, therefore, decided to continue the status quo in respect of Moradabad as it would not be feasible to take over the canteen.

5. On 22nd December, 2009 this Court passed the following order:

The Respondent Railway authorities will file an affidavit stating on oath when the employees' strength at division office at Moradabad crossed the figure of 250 employees. The affidavit shall also indicate whether there is any statutory canteen in division office at Moradabad and the canteen in which the Petitioners are employed is being regarded and treated as an appropriate canteen under the provisions of the Factories Act or the Railway Manual. The said affidavit will be filed within a period of four weeks.

Counsel for the Petitioner states that he wants to amend the writ petition. It is open to the Petitioner to file an amendment application. If any such application is filed, the same will be considered on merits.

List on 22nd February, 2010.

6. The above order was not complied with and on 4th August, 2010 the followed order was passed by this Court:

1. Learned Counsel for the Respondent will file an affidavit stating the exact number of employees in the Moradabad Railway Division and also indicate that if apart from the Petitioner there is any other canteen catering the employees.

Learned Counsel for the Petitioners refers to the letter dated 2nd March, 2000 written by the Divisional Railway Manager ("DRM"), Moradabad to the General Manager (P), Northern Railway which is annexed as Annexure "O" (page 45 of the paper book) as well as the letter dated 2nd January, 2001 (at page 47 of the paper book) written by the DRM. The affidavit be filed within two weeks.

2. List on 5th September, 2010.

7. Pursuant to the above order the Respondent had filed an additional affidavit on 14th September, 2010 stating inter alia that the Divisional Office at Moradabad employed 909 persons. It was further stated that the records pertaining to period 2000 and 2001 were not available and "therefore, it is not possible to state under which basis letters dated 2nd March, 2000 and 2nd January, 2001 were written." It was stated that the canteen in question was not run with the railway funds and it had not been established after the approval of the Railway Board. No records of the canteen staff was maintained by the Railways. Consequently, the canteen could not be recognized under the provisions of the Factories Act, 1948 ("Act") or the IREM.

8. The Petitioners filed an additional affidavit on 20th December, 2010 enclosing a complete computerized list of 1217 employees working in the office of the DRM, Moradabad. It is further stated that all the Petitioners have been provided dress, medical aid, free traveling passes, residential accommodations, privileges ticket orders and other facilities by the Railways. Consequently, for all practical purposes, they were Railway employees.

9. Mr. D.K. Garg, learned Counsel appearing for the Petitioners submits that in terms of Section 46 of the Act, it was incumbent on the Railways to have a statutory canteen in the office of the DRM, Moradabad since that office employed more than a 1000 persons. It is further stated that the Railways are mandatory required to comply with Section 46 of the Act. The establishment of a statutory canteens was not dependent on any, approval. by the Railway Board. Even under the IREM it is mandatory to have a statutory canteen where the number of employees is more than 250. Mr. Garg refers to the additional affidavit dated 14th September, 2010 of the Railways in which it is stated that there is other canteen in the office of the DRM, Mordabad. It is stated that the impugned decision dated 9th September, 2002 is contrary to the settled legal position as explained in M.M.R. Khan. Mr. Garg points out that the decision was followed subsequently in National Thermal Power Corporation Ltd. Vs. Karri Pothuraju and Others, .

10. Appearing for the Railways Mr. Jitendra Kumar Singh, learned Counsel submitted that since the Railway Board had not approved the canteen in question as a statutory canteen it could not be treated as one u/s 46 of the Act. Secondly, it is submitted that since the canteen is a non-statutory one and has not been recognized by the Railways, it is covered by the observations of the Supreme Court in para 38 of the decision in M.M.R. Khan. It is submitted that consequent

upon the said decision the Railways issued Master Circular No. 38 which incorporated the decision of the Railways not to accord the recognition of new canteens. Further all appointments to vacancies in a recognized canteen must be made by recruitment from the open market. In any event there was no question of absorbing the Petitioners in the regular service of the Railways. Reliance is placed on the decision of the Supreme Court in *Canteen Mazdoor Sabha Vs. Metallurgical Engg. Consultants (I) Ltd. and Others*, ; and of this Court in *Balwant Singh and Others Vs. Union of India and Others*, .

11. The above submissions have been considered by this Court.

12. The Supreme Court in *M.M.R. Khan* was dealing with canteens run by the workers in different railway establishments. In para 2 of the judgment the Supreme Court classified these canteens into three categories, i.e. (i) statutory canteens which are required to be provided compulsorily u/s 46 of the Act where the number of employees exceed 250; (ii) non-statutory recognized canteens-- where the number of employees are less than 250 but exceed 100. These canteens are established with the prior approval and recognition of the Railway Board under the IREM; and (iii) non-statutory non-recognized canteens when the number of employees is less than 100 and the canteen is established without the prior approval or recognition of the Railway Board. After discussing Section 46 of the Act, the Supreme Court observed as under (SCC p. 195)--

It is evident from the aforesaid provision that the occupier of a factory (a railway establishment for the purposes of the said provision is a factory in the meaning of the Act) is not only obliged to run a canteen where more than 250 workers are employed but is also obliged to abide by the rules which the concerned Government may make, including the rules for constitution of a managing committee for running the canteen and for representation of the workers in the management of the canteen. The occupier may also be required to bear a part of the expenses of running the canteen and to comply with the rules prescribing standards in respect of construction, accommodation, furniture and other equipment of the canteen and foodstuffs to be served and the prices to be charged for them.

13. The Supreme Court in *M.M.R. Khan* then referred to the provisions of the IREM and para 2229 thereof which in turn referred to Section 46 of the Act. The relevant portion of the said Clause reads as under:

2229. Provisions of Canteens as a statutory obligation--The provisions of Section 46 of the Factories Act, 1948, impose statutory obligation on the Railway Administrations to set up canteens in railway establishments which are governed by the Factories Act and employ more than 250 persons.

A reference was also made by the Supreme Court to paras 2232 and 2233 of the IREM which dealt with the Management of the Canteens.

14. The Supreme Court in *M.M.R. Khan* then proceeded to hold that there was

hardly any difference between the statutory canteens and non-statutory recognized canteens. It was held that the employees of both types of canteens should be treated at par. They should also be treated for all purposes as railway servants. In para 38 of the judgment in M.M.R. Khan the Supreme Court dealt with non-statutory non-recognized canteens and held that such canteens which were not started with the approval of the Railway Board did not cast any obligation on the Railway Administration. The said canteens were run on ad hoc basis and, therefore, the workers employed therein were not entitled to claim the status of the railway servants.

15. The result of the discussion was encapsulated in para 39 of the decision in M.M.R. Khan which reads as under:

39. The result, therefore, is that the workers engaged in the statutory canteens as well as those engaged in non-statutory recognized canteens in the railway establishments are railway employees and they are entitled to be treated as such. The Railway Board has already treated the employees of all statutory and 11 Delhi based non-statutory recognized canteens as railway employees w.e.f. October 22, 1980. The employees of the other non-statutory recognized canteens will, however, be treated as railway employees w.e.f. April 1, 1990. They would, therefore, be entitled to all benefits as such railway employees with effect from the said date, according to the service conditions prescribed for them under the relevant rules/ orders.

16. It appears to this Court that the decision in M.M.R. Khan has settled the issue regarding the statutory obligation of the Railways under the Act and the IREM where the number of employees exceeds 250. Admittedly, in the office of the DRM, Mordabad, even according to the Railways, there are over 900 employees. Therefore, there can be no manner of doubt that Section 46 of the Act read with the relevant clauses of the IREM, as extracted hereinabove, cast an obligation on the Railways to have a statutory canteen. This obligation does not hinge upon any "approval" by the Railways. Where there is a canteen at Mordabad for over 70 years catering to more than 900 employees, and where there is no other canteen, the Railways would be acting contrary to Section 46 of the Act in not treating it as a statutory canteen. The Railways cannot take advantage of their failure to comply with the requirements of Section 46 of the Act and treat the only canteen at Mordabad as a non-statutory canteen. For all practical purposes, the said canteen is in fact the statutory canteen. The so called non-approval by the Railway Board to such canteen makes no difference to this legal position.

17. The Master Circular No. 38 relied upon by the Railways also requires the constitution of a Managing Committee for statutory canteens. The Master Circular has to be read in conformity with Section 46 of the Act and the corresponding Clauses of the IREM.

18. It was submitted by learned Counsel for the Respondents that since the

Petitioners have described themselves as workers of "a non-statutory" "recognized" canteen they cannot claim the said canteen to be a statutory one. This submission is without merit. From the point of view of the Petitioners, they may be anxious to have the Railways recognize them as canteen employees since in any event, after the decision in M.M.R. Khan, there is no distinction between the employees of a statutory canteen and those of a non- statutory recognized canteen.

19. Consequently, this Court holds the impugned decision dated 9th September, 2002 rejecting the plea for recognition of the canteen at Mordabad to be contrary to the statutory obligation of the Railways u/s 46 of the Act read with the relevant clauses of the IREM. The decision dated 9th September, 2002 of the Railways is hereby set aside.

20. The decision in M.M.R. Khan covers the case on hand in all forms. This Court finds that the decisions cited by the Respondents are in the context of other establishments and are not applicable to the case on hand.

21. The writ petition is accordingly allowed. The railway canteen at Mordabad shall be treated by the Railways to be a statutory canteen u/s 46 of the Act read with the relevant clauses of the IREM. The employees of the said canteen, including the Petitioners herein, shall be treated as railway employees, from the respective years of their joining as indicated in Annexure "A" to the writ petition, with all consequential benefits.

22. The writ petition is disposed of in the above terms with no order as to costs.