
(2010) 07 DEL CK 0230

In the Delhi High Court

Case No : Writ Petition (C) No. 3420 of 1993

Ramesh Saxena and Others

APPELLANT

Vs

Chairman Managing Director, ITPO

RESPONDENT

Date of Decision : 01-07-2010

Acts Referred:

Companies Act, 1956 — Section 25
Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 2

Citation : (2010) 07 DEL CK 0230

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Rakesh Kr. Khanna, Rajiv Garg, Ashish Garg and Seema Rao, for the Appellant; V.K. Rao and Shiv P. Pandey, for the Respondent

Final Decision : Disposed Off

Judgement

Rajiv Sahai Endlaw, J.—The 34 petitioners employed in the canteen for the staff/employees of the respondent India Trade Promotion Organization (ITPO), by this writ petition seek a direction for being treated as the departmental employees of ITPO, with the same conditions of service as applicable to the other employees of ITPO and also claim an order restraining ITPO from taking any steps for retrenching the petitioners and/or for appointing a private contractor for running the said canteen. This Court on 23rd July, 1993 issued notice of the writ petition and the application for interim relief to the ITPO. On the next date i.e., 3rd August, 1993 the counsel for ITPO made a statement that no precipitative action will be taken till the next date. The said order was continued. On 6th September, 1993 Rule was issued in the writ petition. It was directed that the petitioners will continue to get their salary which they were entitled to get as per their appointment, during the pendency of the writ petition. The petitioners filed CM. No. 7353/1 994 also for interim direction to the ITPO to pay to the petitioners the various allowances like overtime allowance, arrears, award, bonus, medical allowances, lunch subsidy and arrears of revision of pay scales, as being paid to

the other employees of the ITPO. This Court vide order dated 1st December, 1994 clarified that the order dated 6th September, 1993 (supra) entitled the petitioners to get all what they were to get as per their appointment letters and finding that the petitioners were earlier being treated at par with the employee of ITPO and were getting the allowances claimed, were held entitled to the payment of the said allowances also under the interim order dated 6th September, 1993. It may also be mentioned that the SLP preferred by ITPO to the Supreme Court against the interim order was dismissed.

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

- i. The Saraspur Mills Co. Ltd. Vs. Ramanlal Chimanlal and Others, .
- ii. M.M.R. Khan and others etc. Vs. Union of India and others, etc., .
- iii. Parimal Chandra and Others Vs. Life Insurance Corporation of India and Others, .
- iv. Employers in relation to the Management of Reserve Bank of India Vs. Their Workmen,
- v. Secretary, H.S.E.B Vs. Suresh and Others etc. etc., .
- vi. Indian Petrochemicals Corpn. Ltd. and Another Vs. Shramik Sena and Others, .
- vii. Indian Overseas Bank Vs. I.O.B. Staff Canteen Workers" Union and Another, .
- viii. Hari Shankar Sharma and Others Vs. Artificial Limbs Manufacturing Corporation and Others, .
- ix. Workmen of the Canteen of Coates of India Ltd. v. Coates of India Ltd. : (2004) 3 SCC 547.
- x. Haldia Refinery Canteen Employees Union and Others Vs. Indian Oil Corporation Ltd. and Others, .
- xi. State of Karnataka and Others Vs. KGSD Canteen Employees Welfare Association and Others, .
- xii. Hindalco Industries Ltd. Vs. Association of Engineering Workers, .

3. From the aforesaid judgments qua departmental canteens, whether statutory or otherwise, two streams can be discerned. One stream holds the workmen/employees of the said canteen to be the employees of the establishment and the other stream of judgments has refused to recognize the workmen/employees of the canteen as employees of the establishment. I have analyzed the judgments in both the streams to crystallize as to what prevailed with the Court in holding one way or the other.

4. Wherever the courts have found the intermediary, whether a society or a committee of employees or a contractor immediately under whom the employees were employed, to be a sham or to have been introduced with the intention of depriving the employees of the canteen from statutory benefits which would have become due to them by being the employees of the factory/establishment and the canteen was found to be practically being run and operated by the factory/establishment itself, the courts have granted the relief to the workmen by declaring them to be the employees/workmen of the establishment. However, where the engagement of the intermediary was found to be genuine and interposed for having undertaken to produce a given result or for supply of contract labour for work for the establishment, under a genuine contract and not as a mere ruse/camouflage to evade compliance with various beneficial legislations, the employees were not granted the relief and not held to be the employees of the factory/establishment.

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

6. In *M.M.R. Khan* (supra) the responsibility for operation of the canteen, under the establishment Manual of the Railways vested completely with the Railway Administration and the disciplinary action against the canteen workers was to be as per the procedure set out in the Rules therefore with respect to the railway employees and the contractual obligation for the said canteen were also in the name of the President of India and the accounts of the canteens were also controlled by the Railways. In these circumstances, the employees of the canteen were held to be the employees of the Railways.

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

8. In the Reserve Bank (supra) finding the Bank to be not having any control over the canteen workers and the said workers being found to be dealt by the Canteen Committee exclusively, they were not held to be the employees of the Reserve Bank.

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

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

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

12. In Artificial Limbs Manufacturing Corporation (supra), the responsibility of running of the canteen was found to be the responsibility of the contractor alone and the establishment/factory was not found to be having any hand in the selection or other affairs of the canteen workers.

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

14. In Haldia Refinery (supra) the contractor was found to be having a free hand not only in the running of the canteen but also qua the engagement of workers working in the canteen. It was further held that merely because the establishment/factory exercises some control to ensure hygiene and other conditions in the canteen would not make the employees of the contractor the employees of the establishment.

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

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

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

a. Workmen of Nilgiri Coop. Mkt. Society Ltd. Vs. State of Tamil Nadu and Others, which though not regarding canteen workers, lays down the test of supervision and control and mutuality of obligation. It also lays down that the burden of proving the existence of relationship of employer and employee is on the person who asserts the same.

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

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

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

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

18. Thus the factual controversy in the present case will have to be examined in the backdrop of the aforesaid legal position. However, before that, the question

which arises is whether such a factual controversy can be examined in writ jurisdiction. Ordinarily when disputed questions of facts are involved, this Court would refuse to enter into an examination of the same and would relegate the parties to the industrial adjudicator. However, I find the facts in the present case to be uncontroverted. Moreover, the parties have filed documents from which the setting up of the canteen of ITPO and its operation is clearly borne out. The senior counsel for the petitioners during the course of hearing handed over certain other document (under cover of affidavit regarding their genuineness) to show the control and supervision of the canteen and the petitioners by the IPTO. The occasion for filing of the said documents arose when this Court during the course of hearing brought the recent dicta of the Supreme Court in International Airport Authority of India (supra) to the notice of the counsels and inquired as to how the petitioners fared in that respect. Though no counter affidavit has been filed by ITPO with respect to the said documents but the senior counsel for ITPO did not controvert the genuineness/authenticity of the said additional documents handed over and which are also referred to herein. The facts and the documents being uncontroverted, this Court can in exercise of powers under Article 226 of the Constitution examine whether the petitioners are entitled to the relief or not. I may mention that in Parimal Chandra Raha also similar question was examined in writ proceedings without coming through the route of industrial adjudicator.

19. Before considering the facts, yet another argument of the senior counsel for ITPO may also be considered. Attention was invited to the prayer clause in the writ petition to contend that the petitioners are not claiming the relief of declaration that they have been and are employees of ITPO but are by way of present writ petition seeking to be made employees of ITPO. Relying on Secretary, State of Karnataka and Others Vs. Umadevi and Others, it is urged that the relief claimed in the writ petition is thus in the teeth of the said judgment; that the petitioners cannot be regularized by an order of this Court as the employees of ITPO.

20. I do not find any merit in the said contention of the senior counsel for the respondent. The petitioners have in the body of the petition as well as in the grounds taken therein stated that they are in fact and substance the employees of ITPO. Merely because in the prayer paragraph in the writ petition, instead of a declaration to the said effect, a direction to the ITPO to treat the petitioners as employees of ITPO is sought will not disentitle the petitioners from an examination by this Court as to whether they are the employees of ITPO or of the ITPO Canteen Cooperative Society Limited. Such technical objection specially after the writ petition has remained pending for the last over 17 years cannot disentitle the petitioners to the relief if otherwise found entitled to. If the petitioners, as employees of the canteen of ITPO in accordance with the judgments (supra) held to have been and be the employees of ITPO, no question of their regularization or absorption in ITPO and grant of which relief is prohibited by Umadevi, arises.

21. Coming back to the facts, from the counter affidavit of ITPO the following facts emerge:

- a. ITPO is the changed name of Trade Fair Authority of India (TFAI)
- b. TFAI was formed on 13th December, 1976 as a Section 25 company under the Companies Act, 1956 and by merger of - (i) Directorate of Exhibition and Commercial Publicity (ii) India International Trade Fair Organization (both Government organizations) (iii) Indian Council of Trade Fair and Exhibitions (A society under the Societies Registration Act).
- c. Of the aforesaid three organizations, on merger whereof TFAI now known as ITPO was formed, Indian international Trade Fair Organization was located at Pragati Maidan. M/s Hindustan Food Cooperative Society was providing services of tea and snacks etc to the erstwhile India International Trade Fair Organization at Pragati Maidan. Upon formation of TFAI its registered office started functioning at Pragati Maidan and M/s Hindustan Food Cooperative Society started providing canteen services to TFAI. TFAI deemed it appropriate to encourage formation of a cooperative society to take up such canteen services. The Board of Directors of TFAI in their 9th Meeting held on 14th February, 1978 approved the establishment of a cooperative canteen at Pragati Maidan.
- d. That first an unregistered society consisting of certain employees of TFAI as members started operating w.e.f. 16th February, 1978. Subsequently, TFAI Cooperative Canteen Society Ltd, got itself registered on 7th June, 1985 and started providing canteen services to TFAI/ITPO and continued to so provide canteen services till the filing of the writ petition.
- e. All the petitioners were employed by the society aforesaid in or about the year 1978 and continued to be the employees of the society.
- f. The filing of the writ petition was necessitated because the administration division of ITPO in the meeting held under the Chairmanship of Chairman and Managing Director of ITPO on 13th July, 1993 noted that the quality of food, tea, coffee and snacks and services of the canteen had been deteriorating; that ITPO had been subsidizing the canteen to the extent of Rs. 26 lacs per annum of which approximately Rs. 16.72 lacs was by way of cash subsidy and rest as hidden subsidy in the form of free electricity/water charges, stationery, cleaning material, estimated rent of canteen premises and estimated hire charges for furniture etc. for the canteen; it was decided in the said meeting that with the payment to the 34 petitioners of wages at par with the ITPO employees scales, it was difficult for the canteen to function on efficient and viable basis. It was further noted that though the society passed a resolution for its dissolution and for retrenchment of the staff i.e. the petitioners but no action had been taken thereon. The administrative division of ITPO thus decided to appoint a private contractor for running the ITPO canteen. It was however agreed that the contractor finally appointed should give preference to the retrenched employees for employment.

22. The plea of the petitioners is that it is in fact the management of TFAI/ITPO only which was/is controlling and managing the affairs of the canteen and had employed the petitioners; that they used to get their wages from TFAI/ITPO only and their services were fully controlled by ITPO; though they were initially employed as daily wagers but ITPO had from time to time regularized their services; that the canteen was managed by a committee of nine members of whom five were nominated by ITPO and the others were also officers/staff of ITPO; that the Chairman and Secretary of the said Committee were also nominated by ITPO only; that 100% of the expenses relating to salary and allowances of the petitioners used to be provided by ITPO; that the effective control of the canteen as well as the services of the petitioners was of ITPO only; that they were being paid the same allowance, annual increments, contributory provident fund, medical allowances and scales as the employees of ITPO.

23. The petitioners, in support of their pleas aforesaid have filed before this Court -

i. Office orders though of the society regularizing the services of the petitioners but "with the approval of the competent authority" and providing that their services will be guided by the TFAI Canteen Conduct Rules.

ii. Office orders of TFAI nominating Chairman, Secretary and five members of the Managing Committee of the canteen.

iii. Documents by which the petitioners though being the employees of the society were admitted to the membership of TFAI Employees' Contributory Provident Fund.

iv. Orders of TFAI appointing the Manager of the canteen. The managers are not from amongst the petitioners but from amongst the staff of TFAI and was to act full time as canteen manager. Significantly the Canteen Manager was not appointed by the society but by TFAI.

v. Document showing that the benefit of office order of TFAI of revision of pay scale was, with the order dated 10th June, 1992 of the CMD of the TFAI, extended to the petitioners also. It is not understandable as to why the revision of pay scale of the petitioners, who if were the employees of the society, required the order of the CMD of TFAI.

vi. The notings on the files of TFAI to show that the decision with respect to the service matters of the petitioners was being taken by the CMD of TFAI.

vii. The order dated 16th December, 1982 of TFAI sanctioning payment of OTA to the petitioners in accordance with the scales and ceiling as approved by TFAI for daily wage staff and to the effect that the canteen was mainly for the benefit of TFAI staff and will be run during regular working hours of TFAI and such additional hours as may be decided by the Manager (Administration) of TFAI.

viii. Documents showing fixation of rates of tea, snacks and other food items sold

in the canteen by TFAI.

ix. Documents to show that all affairs relating to the canteen were discussed and decisions with respect thereto taken by TFAI and not by the society.

x. Office notings of TFAI of 17th October, 1990 treating TFAI Cooperative Canteen as an establishment in public sector as, even if not owned by TFAI, being controlled and managed by TFAI for the purpose of payment of bonus and making the provision of the Bonus Act applicable to the petitioners on the same lines and with the same conditions as those applicable to the regular employees of TFAI.

xi. Office order dated 26th April, 1995 of ITPO sanctioning payment of lunch subsidy to the petitioners.

xii. Letter dated 27th March, 1996 of ITPO giving instructions for opening of a new bank account of the Canteen Management Committee.

xiii. Order dated 12th April, 1996 of ITPO appointing Supervisors for financial as well as other affairs of the canteen.

xiv. Minutes of the Meeting held on 30th April, 1996 of ITPO wherein matters relating to canteen and its operation and security were discussed and decision with respect thereto taken.

xv. Documents to show payment of insurance premium of the petitioners by IPTO.

xvi. Office notings of 11th November, 2000 to show that the representation of casual employees of the canteen for regularization was dealt with and decision with respect thereto taken by the CMD of ITPO.

24. The aforesaid documents do not leave any manner of doubt whatsoever that the canteen in which the petitioners were employed was being run, managed and operated by ITPO and not by the society aforesaid. Only the device of a society appears to have been created as an intermediary.

25. Else there was no difference between the petitioners and the other staff of ITPO. The society in the circumstances is found to be a sham, introduced with the intention of depriving the employees of the canteen of the statutory benefits. The canteen is found to be practically being run and operated by the ITPO. It is not a case of ITPO having merely provided space and certain other facilities for running the canteen and the canteen being run independently by the society.

26. The society itself is found to be an alter ego of the ITPO. It was established with the sole object of running a canteen for use by its employees and none other than an employee of TFAI/ITPO could be a member of the society. The Managing Committee, as per the bye laws of the society, was to comprise of nine members who were all required to be employees of TFAI and of whom, under the bye laws five were to be nominated by the Chairman/CMD of TFAI and the remaining four to be elected by the general body out of the members of the

society. Besides the said nine members, the Chairman and Secretary of the Managing Committee were also to be nominated by the Chairman and Managing Director of the TFAI. There is nothing to show that there were any elections of the Society or any other members of the Managing Committee other than the nominees of the CMD of TFAI. There is also nothing to show that any other members, even if any of the Managing Committee ever took any decision regarding running of canteen or the employees. Thus, I find that the society was a sham. Again, as Indian Overseas Bank (supra), the petitioners are found to be enlisted under the provident fund scheme and medical schemes of TFAI/ITPO. The petitioners have throughout been dealt with directly by the TFAI/ITPO and not by the society. Thus the application of both the tests carved out in International Airport Authority of India lead to the inference of the petitioners being the employees of ITPO and not of the society.

27. The writ petition therefore succeeds. The Rule issued earlier is made absolute. The petitioners are declared as the employees of the respondent ITPO and are thus entitled to be treated so. Consequently, it is only ITPO and not the society which is entitled to terminate the services of the petitioners in accordance with law and even if the ITPO decides to give the operation of the canteen to private contractors as proposed in 1993, that would have no effect on the employment of the petitioners under ITPO and ITPO would be required to absorb the petitioners in other posts/works. The senior counsel for the ITPO relying on KGSD Canteen Employees Welfare Association has contended that ITPO has no cadre or post for canteen workers and the same cannot be directed to be created. However, in view of the finding hereinabove that the society was a camouflage/sham, the said plea is not available. The petitioners have throughout been dealt with by ITPO and ITPO is thus deemed to have the post/cadre in which the petitioners were employed. The petitioners are also awarded costs of this petition of Rs. 50,000/-. The petition is disposed of.