
(2007) 08 CAL CK 0073
In the Calcutta High Court
Case No : M.A.T. No. 1797 of 2006

The State of West Bengal

APPELLANT

Vs

Prabir Chakraborty

RESPONDENT

Date of Decision : 17-08-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16, 38, 39
Contract Act, 1872 — Section 194

Citation : (2007) 3 CALLT 545

Hon'ble Judges : Surinder Singh Nijjar, C.J; Girish Chandra Gupta, J

Bench : Division Bench

Advocate : P.S. Debbarman, for the Appellant; D.K. Banerjee and Mr. R.K. Bhattacharjee, for the Respondent

Final Decision : Allowed

Judgement

Girish Chandra Gupta, J.—Both these appeals are directed against a common Judgment dated 15th December, 2005 delivered by our brother A.K. Banerji, J. holding that the petitioners, working as cooks, assistant cooks and helpers in the hostels of technical colleges, appointed by the Mess Committee of the respective college, are and should be treated as group-"d" employees under the respective institute and the benefits admissible to other group-"d" employees of the institutes should be extended to them. A direction for notional fixation of their pay from the date of their appointment has also been issued. However the actual benefits have been directed to be extended from the date of filing the writ petitions. The facts and circumstances of the case briefly stated are as follows:

2. Prior to 7th December 1981 the engineering and technological colleges, polytechnic colleges, junior technical schools and the institutions for the handicapped under the administrative control of the Director of Technical Education, it appears, were engaged in serving food to their students through the Hostel Committee of the respective college who on their turn had privately appointed cooks, assistant cooks, kitchen attendants/helpers, helpers, assistants

etc. By the circular dated 7th December, 1981 issued by the Education Department, Technical Branch of the Government of West Bengal, the following scheme was introduced.

No. 998-Edn (T) Calcutta, the 7th December, 1981

From : Shri N. Ghosal,

Deputy Secretary to the Govt. of W.B.

To : The Director of Technical Education, W.B.

Sub : Introduction of Uniform service conditions for the workers/employees of Hostels/Messes attached to the Engineering & Technological Colleges, Polytechnics, Junior Technical Schools and the Institutions for the Handicapped under the administrative control of the Director of Technical Education, West Bengal.

The question of introduction of uniform service conditions for the workers/employees of the Hostels/Messes attached to the Engineering & Technological Colleges, Polytechnics, Junior Technical Schools and the Institutions for the Handicapped under the administrative control of the Director of Technical Education, West Bengal was engaging the attention of the State Government for some time past.

The undersigned is now directed by order of the Governor to say that after careful consideration of the matter the Governor has been pleased to decide that the following guidelines shall be followed by the authorities in regard to the employment of the categories of employees:

1) At every Mess/Hostel attached to the Engineering & Technological Colleges/ Polytechnics/Junior Technical Schools/Institution for the Handicapped there should be a hostel committee of Central Students Welfare Committee which should be constituted in the manner prescribed by the Director of Technical Education, West Bengal in this behalf. The hostel mess employees shall be considered as employees of the respective Hostel Committee/Central Students" Welfare Committees who shall have to maintain service records of the employees concerned according to the manner prescribed by the Director of Technical Education in this behalf.

2) The staff pattern of such hostels/messes shall be as follows:

a) Cook : One

b) Assistant Cook : One

c) Kitchen Attendant/Helper : One

d) Helper/Assistant : Two

The staff shown above should form the core staff.

For Boarders between 60 to 80 one additional post of helper and for Boarders between 80 to 200 one additional post of Cook and one additional post of helper may be provided.

Provided that no additional staff for any of the Hostels/Messes shall be appointed until the surplus staff according to the above staff pattern in some of the hostels, if any, are suitably adjusted by absorption in similar category of posts subject to the approval of State Government.

3) The recruitment of additional staff in excess of core staff should be determined according to the staff pattern enunciated above and the staff may be appointed by the respective committee on approval of the Director of Technical Education, West Bengal.

4) These employees shall be given the scale of pay of Rs. 220-5-260-6-308-7-364-8-388/- per month.

5) They shall be given 50% of the dearness allowance sanctioned by the State Government in respect of their employees of comparable scale of pay. It is desirable that the authorities of Hostels/Central Students' Committee shall provide board and dormitory type accommodation free of cost to such employees.

6) These staff shall retire on attaining the age of 60 years and shall be entitled to the retirement gratuity of 1/2 months' pay for each completed year of service subject to a maximum of 15 months' pay on the basis of the last pay drawn.

7) The additional burden of expenditure on account of these measures shall be borne by the State Government subject to the conditions that the amount of emoluments that are being paid by the respective institutions to these staff prior to the sanction of ad-hoc subvention for 1.9.79 shall continue. Funds will be released by the Director of Technical Education, West Bengal on receipt of utilisation certificates in respect of the grants made in the previous year.

8) This order shall take effect from 1st April, 1981.

9) These order issues with the concurrence of the Finance Department vide their U.O. No. Group-B/2292 dated 16.10.81.

10) The Accountant General, West Bengal has been informed.

Sd./- N. Ghosal Deputy Secretary.

3. Pursuant to the aforesaid scheme the Director of Technical Education by his letter dated 4th June 1992 addressed to the Principal, Raiganj Polytechnic granted approval to the recommendations of the Hostel Committee for appointment of one cook, one assistant cook, one kitchen/helper and two helpers/assistants.

4. By an office order dated 29th July 1992 the Chairman of the Hostel Committee of Raiganj Polytechnic appointed the petitioners No. 1, 2, 3 and 4 provisionally for a period of six months or until further orders and specifying in clear terms

that the appointment was a non-government one on the following terms and conditions:

The undersigned is pleased to appoint the following persons as Hostel/Mess employee in the Raiganj Polytechnic hostel in the post mentioned against the name with effect from the date on which they join the post on provisional basis for six months or until further order whichever is earlier.

While acting in the posts mentioned they will draw pay in the scale of pay Rs. 800-15-920-18-1118-21-1265/- plus half the Dearness allowance admissible from time to time to the scale as above.

The appointment is made subject to the terms, conditions etc. of the order relevant to the posts concerned and this appointment is terminable on a months notice (or a months pay & allowance in lieu thereof) from either side.

This appointment is purely a non-Govt. one and their duties etc. will be guided by the rules and regulations framed by Hostel Committee from time to time. They will have to report to the Hostel Supdt. within one month from the date of this order, otherwise this offer will be treated as cancelled.

5. The petitioners No. 5 and 6 were appointed by the Chairman of the Hostel Committee by his office order dated 14th August, 1996 on identical terms and conditions. The petitioners No. 7 and 8 were similarly appointed by the Chairman of the Hostel Committee by an office order dated 17th April 1998. The petitioners have disclosed salary sheets which go to show that salary bills of the petitioners were and still are raised on the basis of the aforesaid appointments.

6. By the Government order dated 7th October 1996, the workers and employees of the hostels/messes attached to the engineering and technical colleges, government and sponsored polytechnics, junior technical schools and the institutes of the handicapped, in partial modification of the circular dated 7th December 1981 noticed above, were allowed 90% dearness allowance in lieu of 50% dearness allowance. The service conditions of the employees of the hostels were to that extent altered. By a further government order dated 20th July 2000 basic pay of the employees of the aforesaid institutes was increased with effect from 1st January 1996 pursuant to the recommendations of the Pay Committee. It was however clarified that pay fixation shall take place with affect from 1st January 1996 only notionally and actual increment shall commence with effect from 1st January 2000. Dearness allowance payable to the employees of the hostels/messes was also increased to 95 per cent. All other terms and conditions stated in the government order dated 17th December, 1981 read with subsequent government orders were directed to remain inforce.

7. By a further government order dated 5th April 2002, the aforesaid revised pay scale was directed to be fixed notionally with effect from 1st February 1999 in the place of 1st January 1996, as directed by the earlier government order dated 20th July, 2000.

8. The government order dated 5th April 2002 appears to have sparked off the present litigation. The writ petitioners approached this Court with a prayer for an order declaring that the petitioners are the non-teaching employees of the Raiganj Polytechnic; an order directing the State to pay the scale of pay and other allowances including the service benefits admissible, to the post of non-teaching employees belonging to the category of the petitioners and an order rescinding the government order dated 5th April, 2002 has also been claimed on the ground that:

(a) the petitioners were appointed, by the Chairman of the Hostel Committee who is also the Principal of the Raiganj Polytechnic, strictly in accordance with the recruitment rules and procedure and their appointments were approved by the orders dated 4th June, 1992 and 10th March, 1998;

(b) the salary and allowances payable to the petitioners is disbursed by the government of West Bengal;

(c) the service conditions were framed by the government of West Bengal by a circular dated 7th December 1981;

(d) the petitioners are part and parcel of the polytechnic colleges and they should be treated as its employees;

(e) supply of food in the hostels has to be treated as an essential requirement;

(f) the utensils and crockery are provided by the State and that

(g) for the aforesaid reasons the service of the petitioners should be regularised as non-teaching employees of the concerned polytechnic college. It would at this stage be profitable to notice paragraph 15 of the writ petition which reads as follows:

That the petitioners state that in any event the respondents authorities are required to act strictly in accordance with the law and in strict conformity with the statute and their acts and action should not be arbitrary but should be non-discriminatory, reasonable and rational basis and as such they ought to regularise and/or treat hostel/mess employees of Raiganj Polytechnic as the non-teaching employees (Group "D") employees the petitioners are entitled to get their scale of pay and other allowances including all service benefits as admissible to the non-teaching employees to the category of the petitioners.

9. Mr. Banerjee, learned advocate appearing for the respondents writ petitioners has confined his submission to the lone issue as to "whether the petitioners are employees of the concerned polytechnic?"

10. He submitted that the point is covered by a Division Bench Judgment of this Court in the case of State of West Bengal Vs. Sreedam Sarkar and Others, wherein the following view was expressed.

In the view I take of the matter authorities regarding equal work, equal pay are

not of much relevance. On 28.11.1990, Hon''ble Mr. Justice A.M. Bhattacharjee and I have delivered a Judgment in the matter (F.M.A. 629 of 89), Divisional Railway Manager, Eastern Railway, Asansol & Ors. v. Satyajit Mazumdar & Ors. wherein we have considered the circumstances under which an employee employed under a public employer, even if working through a contractor, can claim to have become, in law, the direct employee under the concerned public employer. In that case, we have relied upon the decision of the Supreme Court in Hussainbhai, Calicut Vs. The Alath Factory Thezhilali Union, Kozhikode and Others, We have held that the Courts have power in appropriate situation to lift the veil and look at the situation of real employment to decide whether the employee has in law become entitled to be absorbed by the public employer.

Indeed it is not possible for a public employer today de facto to employ a person as an employee, and carry on under a subterfuge, that, de jure he is the employee of some other (here non-existent) body. I cannot permit the Kalyani University to take the stand that though for all practical purposes the writ petitioners work as mess or Hostel workers of the Kalyani University, yet, they are to be treated as employees of visiting committee, which never got under way. On this ground, and on the basis of the principles set out in Satyajit Mazumdar's case (supra), the writ petitioners have clearly become employees of Kalyani University.

11. Mr. Banerjee also drew our attention to an unreported Judgment in the case of Haradhan Das & Ors. v. The University of Burdwan & Ors. in W.P. No. 12935(W) of 2001 wherein a learned single Judge of this Court relying on State of West Bengal Vs. Sreedam Sarkar and Others, , referred to hereinabove, held that the employees of the hostels were the employees of the university itself and were entitled to the benefits admissible to the group-D staff.

12. He also relied on an unreported Division Bench Judgment arising out of the Judgment of the learned single Judge in the aforesaid case of Haradhan Das & Ors. (supra). The Division Bench upheld the view expressed by the learned single Judge and dismissed the appeal.

13. He also relied on an unreported Judgment of a Division Bench in the case of State of W.B. v. Gautam Maity & Ors. being F.M.A. No. 79 of 2004 wherein the Judgment in the case of State of West Bengal Vs. Sreedam Sarkar and Others, was applied.

14. He therefore submitted that the law has been well settled. The Judgment reported in State of West Bengal Vs. Sreedam Sarkar and Others, was challenged before the Supreme Court but the SLP was dismissed. He accordingly submitted that there is no scope for any interference and the appeal should be dismissed.

15. He lastly relied on a Judgment of the Supreme Court in the case of Shivnandan Sharma Vs. The Punjab National Bank Ltd., wherein it was held that if a master employs a servant and authorises him to employ a number of persons to do a particular job the employees thus appointed by the servant would be the

servants of the master. He wanted to contend that since the Principal of the Raiganj Polytechnic College, who was also the Chairman of the Hostel Committee, an employee of the State, was authorised to employ the petitioners therefore the petitioners are also the employees of the State.

16. Mr. Dob Barman learned advocate appearing for the appellant submitted that by the impugned order the unequal's have been directed to be treated as equals. He submitted that such a direction is grossly illegal and should be set aside. He also relied on a Judgment reported in 2002(4) CHN 135 wherein the following view was expressed.

If the statutes by which the concerned University is governed do not provide for establishment, maintenance or recognition of any hostel but hostel facilities are provided to the students or employees with the consent of the University as a "students welfare" or "employees welfare" measures, the employees of such hostels cannot claim to be employees of the University notwithstanding the fact that the management of the University is virtually controlling the management of the hostel and is even releasing grants for providing such facilities.

17. Lastly he relied on a Judgment in the case of State of Karnataka and Others Vs. KGSD Canteen Employees Welfare Association and Others, . In that case 74 persons working in the Karnataka Government Secretariat Departmental Canteen contended that they had rendered more than 10 years of service and were in effect and substance employees of the State Government itself, although they were termed as the employees of the canteen. They applied for regularisation. Their claim was upheld by the High Court. But the Apex Court dismissed the writ petition and allowed the appeal holding that the petitioners in the first place should have approached the labour Court and that the employees recruited otherwise than by following the mandate of articles 14, 15 and 16 could not be regularised.

18. Mr. Banerjee, learned advocate appearing for the respondents writ petitioners submitted that the Judgment in the case of State of Karnataka v. KGSD Canteen-Employees Welfare Association & Ors. (supra) has no manner of application to the facts and circumstances of the present case because that was a case concerned with the question of regularisation whereas the present writ petition is concerned with the declaration of the status of the petitioners.

19. The Judgment relied on by Mr. Banerjee in the case of Shibananda Sharma v. PNB Ltd. (supra), in our opinion, has no relevance insofar as the present controversy is concerned, for the simple reason that the appointments made by an employee on the basis of authorisation of the master were held to be the employees of the master on the principle of section 194 of the Contract Act, although that has not been indicated in so many words. Moreover the employees in that case were appointed by the employee for the purpose of carrying on the principal function of the employer viz. banking. Section 194 of the Contract Act reads as follows:

Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

20. The authority in the present case emanates from the circular scheme dated 7th December 1981 which clearly provides that the appointment shall be a non-Govt. one. Therefore the question of bringing in the concept of section 194 of the Contract Act would not arise. The aforesaid stipulation in the scheme has to be construed as a proviso which would necessarily render section 194 of the Contract Act inapplicable. Moreover such a proviso in the appointment of the employees in the case of Shibabanda Sharma (supra) was not there.

21. We shall now consider the Judgment in the case of State of West Bengal Vs. Sreedam Sarkar and Others, which is really the basis of all subsequent Judgments relied upon by Mr. Banerjee.

22. In that case the concerned hostel employees were deemed to be the employees of the University of Kalyani because the Visiting Committee which was supposed to have appointed the employees of the hostel in that case was never formed. The Kalyani University Act 1981, by Clause X of section 21, empowered the Executive Council of the University to appoint teachers, officers and other employees and to fix their emoluments. In the absence of the Visiting Committee, the Division Bench held that the employees should be deemed to have been appointed in exercise of this power granted by the statute. The Division Bench also relied on a Judgment in the case of Hussainbhai, Calicut Vs. The Alath Factory Thezhilali Union, Kozhikode and Others, which was a case concerning dismissal of the employees working in the factory through contractors. The employees employed through contractors were held to be the employees of the factory for the reasons indicated in paragraph 5 which reads as follows:

The true test may, with brevity, be indicated once again. Where a worker or group of workers labours to produce goods or services and these goods or services are for the business of another, that order is, in fact, the employer. He has economic control over the workers' subsistence, skill, and continued employment. If he, for any reason, chokes off, the worker is, virtually, laid off. The presence of intermediate contractors with whom alone the workers have immediate or direct relationship ex contract is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, we discern the naked truth, though draped in different perfect paper arrangement, that the real employer is the management, not the immediate contractor. Myriad devices, half-hidden in fold after fold of legal form depending on the degree of concealment needed, the type of industry, the local conditions and the like, may be resorted to when labour legislation casts welfare obligations on the real employer, based on Articles 38, 39, 42, 43 and 43A of the Constitution. The Court must be astute to avoid the mischief and achieve the purpose of the law

and not be misled by the maya of legal appearances.

23. This Judgment in our view has no application to the present case for the simple reason that the appellants do not labour to provide services for the business of the college which is confined to imparting education.

24. The point for consideration is whether there is a relationship of master and servant between the petitioner and the Raiganj Polytechnic?

25. We already have indicated that the petitioners were appointed by the Chairman of the Hostel Committee. The terms and conditions of the appointment, appearing from the office orders by which the writ petitioners were appointed, clearly stipulate that the employment is a non-government one and that too temporary for a period of six months or until further order, terminable by a month's notice on either side. Mere payment by the government, in our opinion, cannot bring into existence the relationship of master and servant. Reference in this regard can be made to the Judgment in the case of *State of Gujarat and Another Vs. Raman Lal Keshav Lal Soni and Others*, wherein the following view was expressed.

Several factors may indicate the relationship of master and servant. None may be conclusive. On the other hand, no single factor may be considered absolutely essential. The presence of all or some of the factors, such as, the right to select for appointment, the right to appoint, the right to terminate the employment, the right to take other disciplinary action, the right to prescribe the conditions of service, the nature of the duties performed by the employee, the right to control the employee's manner and method of the work, the right to issue directions and the right to determine and the source from which wages or salary are paid and a host of such circumstances, may have to be considered to determine the existence of the relationship of master and servant. In each case, it is a question of fact whether a person is a servant of the State or not.

26. The conditions of service appearing from the office orders and the administrative order dated 7th December, 1981 go to show that the master of the petitioners is the Hostel Committee. The right to select for appointment, the right to appoint, the right to take disciplinary action including termination appear to have been vested in the Hostel Committee. The nature of the duties, to be discharged by the writ petitioners, are to be prescribed by the Hostel Committee. The right to control as also the right to determine the manner and method of working is also vested in the Hostel Committee. There is thus ample reason to hold that there is no relationship of master and servant between the petitioners and the Raiganj Polytechnic.

27. The next question which falls for determination is whether the petitioners can be deemed to be the servants of the Raiganj Polytechnic by implication?

28. Such an inference can only be drawn provided Raiganj Polytechnic is under a statutory obligation to run the canteen/mess. No such obligation was brought to

our notice. In the case of G.B. Pant University of Agriculture and Technology, Pantnagar, Nainital Vs. State of Uttar Pradesh and Others, , the workmen of the cafeteria were deemed to be employees of the University because the University was obliged under the regulations framed under the U.P. Agricultural University Act to run such canteens.

29. The relevant part of the regulations in that case reads as follows:

It shall be compulsory for each student residing in a hostel to join the cafeteria of that hostel unless otherwise permitted by the Chief Warden of the hostel on the request of the guardian of the student, and the recommendation of the Warden of that hostel to take food with his guardian. In that event the Chief Warden shall inform all officers concerned of the University, for example, Comptroller, Dean Student Welfare, Hostel Warden, etc.

30. In view of the above regulation it was held that:

The detailed analysis as above has been introduced in this Judgment so as to exhibit the control of the University in the matter of running of the cafeteria. As noticed above, a residential university having a canteen facility and the inmates of the hostel not being permitted to have food from outside cannot possibly be said to be a mere welfare service to the students. It is a requirement of the Regulations framed under the Act and thus having statutory sanction and force—the issue thus comes up for consideration as to whether it is a mere ancillary benefit conferred on to the inmates of the hostel or an essential requirement. The Regulations pertaining to the hostel accommodation and the supplies of food do not warrant any other conclusion than to treat it as an essential requirement so far as the inmates of the hostel are concerned.

31. It would appear from the paragraph extracted above that a distinction has been made between a welfare service to the students and a statutory obligation and/or essentiality. We are inclined to hold that in the present case the scheme introduced by the administrative order dated 7th December, 1981 and further modification thereto from time to time, whereunder the petitioners were appointed, is nothing but a welfare service to the students. The petitioners therefore cannot be deemed to be the employees of the Raiganj Polytechnic.

32. The facts and circumstances in the connected W.P. No. 3949(W) of 2003 forming subject matter of M.A.T. No. 1798 of 2006 are identical except that the writ petitioners in that case were appointed to serve in the hostel/mess of the Regional Institute of Printing Technology on 1st April, 1981 that is to say long before the introduction of the scheme by the circular dated 7th December, 1981.

In the result the appeal succeeds. The order under challenge is set aside.

There shall be no order as to costs.

Urgent Xerox certified copy of this Judgment, if applied for, be delivered to the learned advocates for the parties on compliance of all formalities.

Surinder Singh Nijjar, C.J.

33. I agree.

Appeal Succeeds