

(2012) 06 MAD CK 0171
In the Madras High Court
Case No : Writ Petition No. 244 of 2008

The Workmen, Madras Fertilizers General Workers' Union	APPELLANT
Vs	
Management, Madras Fertilizers Ltd., Manali, Chennai - 600068 and The Presiding Officer, Industrial Tribunal, Tamil Nadu, 2nd Floor, City Civil Court Buildings, Chennai - 600104	RESPONDENT

Date of Decision : 05-06-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16, 162, 226
Contract Labour (Regulation and Abolition) Act, 1970 — Section 10, 10(1)
Factories Act, 1948 — Section 46
Industrial Disputes Act, 1947 — Section 18(1), 2(k)

Citation : (2012) 135 FLR 607 : (2012) LLR 1077

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : K.M. Ramesh, for the Appellant; Rita Chandrasekhar for M/s. Aiyar and Dolia for R1, for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru

1. The petitioner is a Trade Union. In this writ petition, they have challenged an Award passed by the Industrial Tribunal at Chennai made in I.D. No. 58 of 2002 dated 27.11.2006. By the impugned Award, the Tribunal rejected the reference made by the State Government and refused to grant any relief to the workmen represented by the petitioner Union. The writ petition was admitted on 04.01.2008.

2. At the initiative of the petitioner Union, an industrial dispute was raised u/s 2K of the Industrial Disputes Act, 1947 for making permanent of 73 workers employed in the canteen run by the Management. Since the Conciliation Officer as he could not bring about mediation gave a failure report. On the strength of the failure report and applying its mind, the State Government issued G.O.(D)

No. 985 Labour and Employment Department, dated 12.11.2002 for adjudication of the dispute by the Industrial Tribunal at Chennai.

3. The order of reference reads as follows:-

"Whether the claim of the Union that 73 contract employees who are working in the canteen of Madras Fertilizers Limited/Management whose names found in the list are to be made permanent is justified? If so to pass necessary orders?"

4. Aggrieved by the reference, the Management filed a writ petition being W.P. No. 22442 of 2003 challenging the validity of reference. But however, subsequently, the writ petition was dismissed on 27.10.2003 with liberty to the Management to raise all the objections before the Industrial Tribunal.

5. On receipt of the order of reference, the Industrial Tribunal registered the dispute as I.D. No. 58 of 2002 and issued notice to the parties. On behalf of the petitioner Trade Union, a claim statement was filed on 05.07.2003. The first respondent Management filed counter statement dated Nil (March 2004).

6. Before the Tribunal, the Trade Union examined two witnesses, G.Muthu as W.W.1 and S.Pachaiappan as W.W.2 and on their side, 13 documents were filed and marked as Exs.W1 to W13. On the side of the Management, one G.A.Joseph Parthiban was examined as M.W.1 and on their side, 67 documents were filed and marked as Exs.M1 to M67.

7. The Tribunal framed three issues, which reads as follows:-

"1. Whether the Petitioner's Union has competency of interest to raise an Industrial Dispute u/s 2(k) of the I.D.Act (Framed by this Tribunal on the basis of Pleadings)?

2. Whether the Contractor is a necessary party to this Industrial dispute (Framed by this Tribunal on the basis of pleadings)?

3. Whether the claim of the Union that 73 contract employees who are working in the canteen of Madras Fertilizer Ltd./Management whose names found in the list are to be made permanent is justified? If so, to pass necessary orders?"

8. In respect of the first issue, the Tribunal held that the petitioner Trade Union has competency to raise industrial dispute u/s 2-K of the I.D.Act. In respect of the second issue, the Tribunal held that the mere fact that the Contractor who allegedly employed the workmen were not made necessary and proper party to the dispute, the dispute cannot be incompetent and the Tribunal can validly adjudicate the issue. On the third issue, the Tribunal held that since it was proved as a matter of fact that the workmen were employees of the Contractor and there was no prohibition for engagement of contract labour in the canteen run by them, the question of granting relief to them does not arise. But it gave liberty to the Union to take up the issue before the forum provided under the Contract Labour (Regulation and Abolition) Act, 1970.

9. The stand of the petitioner Union was that the first respondent is manufacturing agricultural fertilizers and markets under the brand name "Vijay". It employs over 1000 workers and 300 officers permanently. A canteen has been set up for the welfare of the workmen in terms of Section 46 of the Factories Act, 1948. The canteen runs through all the three shifts and at the time of reference, 73 employees were employed. The categories of workmen includes Cooks, Suppliers and Cleaners and they have been engaged continuously for over 30 years. Even when the Management went in for floating tenders calling for Contractors and engaged different Contractors according to their convenience, the workmen engaged by them continues to be the same. They were also covered by Provident Fund and ESI Act. Medical facilities were allowed to be availed by them. The canteen workers were supplied with Uniform, Footwear, Soap, Towel and Coconut oil. Despite their continuous service, the management never thought fit to make them permanent. Since it is a statutory canteen run by the Management and on concessional basis tea, coffee, tiffin, food and other facilities were extended to permanent employees, the Management is incurring more than Rupees One Crore annually towards the canteen subsidy. The Management is a Public Sector undertaking and making a profit of around Rs. 76 Cr. Since the contract entered into between the Management and the so called contractor is only sham and nominal and a device to deny them the statutory benefits, the Tribunal should grant the relief of permanent status to the workmen.

10. Per contra, the first respondent has filed a counter statement stating that the staff canteen is maintained for supply of food to the employees, contractors and visitors. The canteen is also providing food to the neighbouring organisations like Metro Water, Tamil Nadu Electricity Board and Railways. The canteen is run through an independent Contractor selected by tender process. The Contractor pays salary to the workmen and also takes care of benefits such as PF, Bonus, Minimum Wages, ESI. It is left to the discretion of the canteen contractor to employ its own workers. The Management is not aware of the fact that the same employees continues even though there were different contractors over a period. It was admitted that more than Rs. 1.60 Crores was paid to the Contractor for the year 2002-2003. Section 46 of the Factories Act only provides for a statutory obligation to provide for a canteen but it does not indicate that the canteen must be run by employees engaged by the Principal Employer. The workmen represented by the Union have entered into a settlement with the Contractor u/s 18(1) of the I.D.Act for increase in their wages. The Contractors were duly licensed. The Contractor has to run the canteen in terms of the agreement entered into between the parties and there is no employer-employee relationship between the workmen covered by the reference and the Management. The allegation that they are making Rs. 76 crores profit is denied. On the other hand, the loss suffered by the company as on 31.12.2003 stood at Rs. 170.76 Cr. The permanent employees manpower which stood at 1758 as on 31.01.1998 has been brought down to 1196 as on 30.03.2004.

11. The Tribunal on the basis of the pleadings and materials first found that it is

open to the petitioner Union to raise a dispute and it has got competency to raise a dispute u/s 2-K of the I.D.Act. On the question of non-joinder of parties, the Tribunal held that it is not necessary that the Contractor is a necessary and proper party for adjudication of the dispute. But on the merits of the demand, the Tribunal found that initially, the Contractor was one Murali Catering Services. Subsequently, during June 2003, one new contractor by name C.Ramachandran was engaged by the Management. The previous contractor was relieved after he had settled wages, bonus, PF and other statutory benefits payable to the workmen. The Tribunal found that there were successively different contractors namely A.Ravindran, ESSGEE Caters and so on. The tender documents file specified the number of workers to be employed in their terms of employment. The documents also showed that PF and ESI were to be borne out by the Contractors. The Tribunal after referring to other documents filed, came to the conclusion that in the absence of any prohibition to engage contract labour and that Section 46 of the Factories Act only obliges the Management to provide a canteen and that the Management successively employed different contractors after awarding contract by floating tenders and there being no relationship between the workmen covered by the reference and the first respondent Management, declined to grant relief.

12. Mr. K.M.Ramesh, learned counsel for the petitioner submitted that when a canteen is run as a welfare measure pursuant to a statutory obligation and when workers have been engaged over three decades without any break, the Tribunal was wrong in rejecting the order of reference.

13. Per contra, Ms. Rita Chandrasekhar, appearing for M/s. Aiyar and Dolia, for the first respondent placed heavy reliance on the judgment of the Supreme Court reported in 2001 (1) L.L.N. 786 [VST Industries Ltd., v. VST Industries Workers' Union and another] and relied on the following passages found in paragraphs 9 to 11:-

"9. This Court in *Indian Petrochemicals Corpn. Ltd. v. Shramik Sena*⁵ referred to the decisions in *Parimal Chandra Raha* case¹, *Reserve Bank of India v. Workmen*⁶ and *M.M.R. Khan v. Union of India*⁷ and held that the workmen of a statutory canteen, as in the present case, would be workmen of an establishment for the purposes of the Act only and not for other purposes. Thereafter, this Court further examined whether the material on record would show that the workmen are employees of the management for all purposes and adopted some of the tests as follows: (SCC p. 450, para 25)

"1. The canteen has been there since the inception of the appellant's factory.

2. The workmen have been employed for long years and despite a change of contractors the workers have continued to be employed in the canteen.

3. The premises, furniture, fixture, fuel, electricity, utensils etc. have been provided for by the appellant.

4. The wages of the canteen workers have to be reimbursed by the appellant.
5. The supervision and control on the canteen is exercised by the appellant through its authorised officer, as can be seen from the various clauses of the contract between the appellant and the contractor.
6. The contractor is nothing but an agent or a manager of the appellant, who works completely under the supervision, control and directions of the appellant.
7. The workmen have the protection of continuous employment in the establishment."

10. In the present case, the findings recorded by the learned Single Judge on examination of the facts available is that there had been a canteen within the premises of the appellant up to the year 1982 and it is only from 1982 onwards the management of the canteen has been entrusted to a private contractor; that even after change of the contractor, the canteen workers have continued to be the same irrespective of the change in the contractors from time to time; that wages were paid to the workmen in the canteen by the management through the contractor; that the appellant has provided the accommodation, furniture, fuel, electricity, utensils, etc.; that the management exercises control over the standard in quality, quantity and the rate of the food items supplied to the workmen for whose benefit the canteen is established. Thus, these circumstances clearly indicate that the appellant has complete control over the activities in respect of the canteen and the contractor has absolutely no discretion either in regard to the menu, quality and quantity of the food items much less the rate at which the same are supplied to the workmen. When the management of the appellant exercises such a complete control, the canteen shall be deemed to be run by the management itself. The appellant in any manner cannot controvert these facts.

11. We do agree that the respondents have a strong case on merits. Since we have held that the High Court had no jurisdiction to entertain a petition under Article 226 of the Constitution, we would have set aside the order made by the High Court. However, in the special features of the case, although we do not agree with the High Court on the first question raised we feel, after clarifying the legal position, that we should not disturb the decision given by the High Court."

14. The learned counsel also referred to a later decision of the Supreme Court in *International Airport Authority of India Vs. International Air Cargo Workers' Union and Another*, where the previous judgment was squarely considered. Reference was made to the following passages found in paragraphs 35 to 37:-

"35. As noticed above, SAIL³ did not specifically deal with the legal position as to when a dispute is brought before the industrial adjudicator as to whether the contract labour agreement is a sham, nominal and merely a camouflage, when there is no prohibition notification u/s 10(1) of the CLRA Act.

36. But where there is no abolition of contract labour u/s 10 of the CLRA Act, but

the contract labour contend that the contract between the principal employer and the contractor is sham and nominal, the remedy is purely under the ID Act. The principles in Gujarat Electricity Board² continue to govern the issue. The remedy of the workmen is to approach the industrial adjudicator for an adjudication of their dispute that they are the direct employees of the principal employer and the agreement is sham, nominal and merely a camouflage, even when there is no order u/s 10(1) of the CLRA Act.

37. The industrial adjudicator can grant the relief sought if it finds that contract between the principal employer and the contractor is sham, nominal and merely a camouflage to deny employment benefits to the employer and that there is in fact a direct employment, by applying tests like: who pays the salary; who has the power to remove/dismiss from service or initiate disciplinary action; who can tell the employee the way in which the work should be done, in short, who has direction and control over the employee. But where there is no notification u/s 10 of the CLRA Act and where it is not proved in the industrial adjudication that the contract was a sham/nominal and camouflage, then the question of directing the principal employer to absorb or regularise the services of the contract labour does not arise."

15. In these two decisions, the parameters under which canteen employees engaged in a canteen run u/s 46 of the Factories Act and their entitlement to get permanency in the establishment of the Principal employer came to be considered by the Supreme Court and answered against the workmen.

16. Apart from the above judgments, there is yet another judgment in State of Karnataka and Others Vs. KGSD Canteen Employees Welfare Association and Others, , wherein, the Supreme Court dealt with the similar issue and in paragraphs 44 and 49, it was observed as follows :

44. The question which now arises for consideration is as to whether the High Court was justified in directing regularisation of the services of the respondents. It was evidently not. In a large number of decisions, this Court has categorically held that it is not open to a High Court to exercise its discretion under Article 226 of the Constitution either to frame a scheme by itself or to direct the State to frame a scheme for regularising the services of ad hoc employees or daily-wage employees who had not been appointed in terms of the extant service rules framed either under a statute or under the proviso to Article 309 of the Constitution. Such a scheme, even if framed by the State, would not meet the requirements of law as the executive order made under Article 162 of the Constitution cannot prevail over a statute or statutory rules framed under the proviso to Article 309 thereof. The State is obligated to make appointments only in fulfilment of its constitutional obligation as laid down in Articles 14, 15 and 16 of the Constitution and not by way of any regularisation scheme. In our constitutional scheme, all eligible persons similarly situated must be given opportunity to apply for and receive considerations for appointments at the hands of the authorities of the State. Denial of such a claim by some officers of

the State time and again had been deprecated by this Court. In any view, in our democratic polity, an authority howsoever high it may be cannot act in breach of an existing statute or the rules which hold the field.

49. The High Court was, thus, not correct in holding that the members of the first respondent could be treated on a par with the Hospitality Organisation of the State of Karnataka. Such equation is impermissible in law. In the Hospitality Organisation of the State, the posts might have been sanctioned. Only because food is prepared and served, the same would not mean that a canteen run by a Committee can be equated thereto.

In the light of the above legal precedents and the factual findings rendered by the Tribunal, this Court is not persuaded to interfere with the impugned Award. Hence, the writ petition stands dismissed. No costs.