

(2002) 02 KL CK 0020
In the High Court Of Kerala
Case No : OP No. 11090 of 1997 (T)

Transformers and Electricals Kerala Ltd.

APPELLANT

Vs

The Industrial Tribunal Alappuzha, The Secretary, Ernakulam Jilla Canteen, Bakery and Hotel Mazdoor Sangh (BMS), The Secretary, Telk Canteen Workers Union, The Secretary, Telk Canteen Employees Union (CITU), The Telk Employees Welfare Society Ltd., The Telk Employees Canteen Co-operative Society Ltd. and Government of Kerala

RESPONDENT

Date of Decision : 15-02-2002

Acts Referred:

Constitution of India, 1950 — Article 14, 16
Contract Labour (Regulation and Abolition) Act, 1970 — Section 10, 10(1)
Factories Act, 1948 — Section 46
Industrial Disputes Act, 1947 — Section 2
Kerala Factories Rules, 1957 — Rule 91, 92, 93, 94, 95

Citation : (2002) 2 ILR (Ker) 532

Hon'ble Judges : J.B. Koshy, J

Bench : Single Bench

Advocate : M. Pathrose Mathai and Saji Varghese, for the Appellant; P. Ramakrishnan, for R3, K. Shrihari Rao, for R2, P.R. Ramachandra Menon and Rajesh Nair for R6 K.L. Joseph, Government Pleader and C. Anil Kumar, for R1 and 7, for the Respondent

Final Decision : Dismissed

Judgement

1. Petitioner is a company incorporated under the Companies Act. It is employing more than 1200 workers in its factory. A canteen is run by the contractor in the company compound; but outside the factory premises. The above said canteen is registered under the Kerala Shops and Commercial Establishments Act. It was originally run by individual contractors. It was also run by various societies. Now, the canteen is run by Telk Employees' Canteen Co-operative Society. Canteen employees have their own separate trade unions and the canteen workers are represented by respondents 2, 3 and 4. Trade unions representing the company

employees are different.

2. The Union representing the workman of the canteen made certain demand and placed a charter of demands purporting to be for the long-term settlement on the expiry of the earlier long term settlement signed by the Contractor and the three Unions. Ext.P2 is the demand. One of the demands in Ext.P2 is to recognise the canteen workers as company workers. Other demands were regarding the revision of their salary and other service conditions. The petitioner company replied to the labour authorities that no demand or industrial dispute can be raised by the workmen of the canteen represented by their Unions against the petitioner company in the absence of any employer-employee relationship between the petitioner and the workmen of the canteen contractor. However, the Government of Kerala referred for adjudication the issue of said charter of demands dated 29-5-1991 as dispute between the Unions representing the workmen in the canteen and the petitioner company as well as contractor to the fifth respondent by Ext.P1 reference order.

3. First respondent industrial tribunal numbered the dispute as I.D.No.60/2. Against the claim for treating canteen workers as company workers, company contended the validity of the reference order itself and contended that there can be no industrial dispute with regard to that issue. According to the petitioner company, in the absence of any employer-employee relationship between the petitioner and the workmen of the contractor, there could be no industrial dispute and the respondent unions could not raise any industrial dispute. Therefore, the order of reference is without jurisdiction and without the authority of law in as much as there is absolutely no employer-employee relationship between the petitioner and the canteen workers who are all workmen of the contractors with whom binding long term settlement under the Industrial Dispute Act were signed from time to time. Disciplinary action against the workmen in the canteen was taken by the contractor only who are paying the wages and benefits etc. Further, it was specifically contended that appointments in the petitioner company could be made only from candidates sponsored by the Employment Exchange against vacancies notified by the petitioner to the Employment Exchange according to the provisions of the Employment Exchanges (Compulsory Notification) Act and the orders of the Government and also certain categories of employees only under the Kerala Public Service Commission (Additional Functions in respect of Certain Companies and Corporations) Act, 1970. No appointment can be made in any manner otherwise than in accordance with the aforementioned statutory provisions and orders of the Government which are in accordance with the statutory requirement and conditions of equality of opportunity in public employment and embodied in Articles 14 and 16 of the Constitution of India. It is totally impermissible to circumvent the aforementioned provisions of law and procedure under the guise of abolition of contract labour or in any other manner. It was also contended that abolition of contract system can be done only as per the provisions of Contract Labour (Regulation and Abolition) Act and not under the Industrial Disputes Act.

4. The contractor was also arrayed as a management in the dispute. It was the contention of the Union that the company (petitioner herein) is running a canteen for the exclusive use of the employees of the company and that of company's guests. Altogether there are 78 employees in the canteen. Out of them, two are employed as staff and six are employed as supervisors. The building, furniture and fixtures, cooking utensils and everything connected with the canteen are provided by the company. The expenses towards electricity charges for lighting and cooking are also met by the company. Water is also made available by the company. The canteen is being run under the direction and supervision of the persons authorised for the purpose by the company. Although the canteen is now managed through a Welfare Society of the employees, it has no authority in the matter of working of the canteen, fixation of wages and determination of staff strength. The entire expense of the canteen are met by the company. All the workmen employed in the canteen have got service from the very inception. Irrespective of the change in the contractors, they are continuing in service without any break. They are brought under coverage of the ESI Scheme and Provident Fund Scheme. In the funds created under the Provident Fund Scheme, the Canteen employees are also members. Therefore, for all practical purposes, the canteen is treated as one of the departments of the company. In other Government companies of the locality which are comparable to TELK, the canteen workers therein are treated as the employees of those companies and their terms of employment are also determined by these companies. The Tribunal did not specifically go through the validity of the industrial dispute. But, the Tribunal held that the canteen is a statutory canteen and the employees therein are entitled to absorption in the company in view of the decision of the Supreme Court in *Parimal Chandra and Others Vs. Life Insurance Corporation of India and Others*, In paragraph 7 of the award, it was held as follows:

"7. It is not in dispute that canteen was started in the year 1966. The statutory obligation became enforceable in the case of TELK from the date of notification, viz., 18-10-1988. Therefore, from the above said date onwards, the canteen functioning in the premises of the TELK has to be treated as part of the establishment and the workers therein are to be treated as the employees of the establishment."

After holding so, revision of salary was ordered as if they are company employees. This Ext.P4 award is challenged by the petitioner company.

5. Ext.P4 award is based mainly on the observations of the Supreme Court judgment in *Parimal Chandra Raha's* case (supra). In the above case, there was a finding that there was due contract and supervision of work by the employer over the employees of the canteen. After considering the nature of employment, control and supervision, the Apex Court held as follows:

"12. Further, the record shows that almost all the workers of the canteen like the appellants have been working in the canteen continuously for a long time

whatever the mechanism employed by the Corporation to supervise and control the working of the canteen. Although the supervising and managing body of the canteen has changed hands from time to time, the workers have remained constant. This is apart from the fact that the infrastructure for running the canteen, viz., the premises, furniture, electricity, water etc. is supplied by the Corporation to the managing agency for running the canteen. Further, it cannot be disputed that the canteen service is essential for the efficient working of the employees and of the offices of the Corporation. In fact, by controlling the hours during which the counter and floor service will be made available to the employee, by the canteen, the Corporation has also tried to avoid the waste of time which would otherwise be the result if the employees have to go outside the offices in search of such services. The service is available to all the employees in the premises of the office itself and continuously since inception of the Corporation, as pointed out earlier. The employees of the Corporation have all along been making the complainants about the poor or inadequate service rendered by the canteen to them, only to the Corporation and the Corporation has been taking steps to remedy the defects in the canteen service. Further, whenever there was a temporary breakdown in the canteen service, on account of the agitation or of strike by the canteen workers, it is the Corporation which has been taking active interest in getting the dispute resolved and the canteen workers have also looked upon the Corporation as their real employer and joined it as a party to the industrial dispute raised by them. In the circumstances, we are of the view that the canteen has become a part of the establishment of the Corporation. The canteen committees, the co-operative society of the employees and contractors engaged from time to time are in reality the agencies of the Corporation and are, only a veil between the Corporation and the canteen workers. We have, therefore, no hesitation in coming to the conclusion that the canteen workers are in fact the employees of the Corporation."

Even though the Supreme Court was considering the case of a non-statutory canteen in that case, it held that if the employer has a statutory duty to provide canteen for the use of its employees, the canteen is part of the establishment and appointment of contractors or an agency is only device and employees in the canteen will be treated as employees of the main establishment. But, the Supreme Court also stated that the obligation to provide a canteen is distinguished from the obligation to provide factories to run the canteen. In para 9(ii) of the above decision, the Court held as follows:

"(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 come a part of the establishment."

In Sub-para (iii) it was held that:

(iii) Whether the provision for canteen services has become a part of the service conditions or not, is a question of fact to be determined on the facts and circumstances in each case."

In sub-para (iv) of the decision, main parameters to be considered while answering such question such as supervision, control etc. are described by the Apex Court. It is pointed out by the Counsel for the Union that Section 46 of the Factories Act provides that State Government may make rules requiring to provide canteen in any specified factory wherein more than 250 workers are employed. Rule 91 (1) and (2) of the Kerala Factories Rules read as follows:

"91. Canteen: (1) Rules 91 to 97 shall come into force in respect of any class or description of factories on such dates as the State Government may be notification in the official gazette appoint in this behalf.

(2) The occupier of every factory notified by the State Government and wherein more than two hundred and fifty workers are ordinarily employed shall provide in or near the factory an adequate canteen according to the standards prescribed in these rules."

Notification was also issued. Therefore, it is the statutory duty of the company to provide a canteen. In view of the observation of the Supreme Court, Tribunal has to find whether such canteen employees can be treated as employees of the company and whether the dispute raised by the Union of consequent valid.

6. I also note that in the above decision, the Apex Court did not consider the question whether contractor's workmen or their union can raise a valid industrial dispute. The very same judges considered the question elaborately in the subsequent decision in Gujarat Electricity Board, Thermal Power Station, Ukai Vs. Hind Mazdoor Sabha and Others, . After considering the decisions of the Apex Court in Workmen of Dimakuchi Tea Estate Vs. The Management of Dimakuchi Tea Estate, and Standard Vacuum Refining Co. of India Ltd. v. Its Workmen and Ors. (1960) II LLJ 233 and the entire case law, the Supreme Court held that in view of Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 only the appropriate Government has the authority to abolish contract labour in accordance with the provisions of that Act and no court including the Industrial Adjudicator has jurisdiction to abolish contract labour. If the contract is genuine, dispute regarding their service conditions cannot be raised against the management of main establishment by the employees or union of the contractor's employees; but, such disputes can be raised by the Union of workmen in the main establishment. It was also held that if the contract is sham or not, the workmen of the so called contractor can raise an industrial dispute for declaring that they were always the employees of the principal employer. In paragraph 50 of the decision in Gujarat Electricity Board's case (supra), it was held as follows:

"(ii) If the contract is sham or not genuine, the workmen of the so called contractor can raise an industrial dispute for declaring that they were always the

employees of the principal employer and for claiming the appropriate service conditions. When such dispute is raised, it is not a dispute for abolition of the labour contractor and hence the provisions of Section 10 of the Act will not bar either the raising or the adjudication of the dispute. When such dispute is raised, the industrial adjudicator has to decide whether the contract is sham or genuine. It is only if the adjudicator comes to the conclusion that the contract is sham, then he will have jurisdiction to adjudicate the dispute. If, however, he comes to the conclusion that the contract is genuine, he may refer the workmen to the appropriate Government for abolition of the contract labour u/s 10 of the Act and keep the dispute pending. However, he can do so if the dispute is espoused by the direct workmen of the principal employer. If the workmen of the principal employer have not espoused the dispute, the adjudicator, after coming to the conclusion that the contract is genuine, has to reject the reference, the dispute being not an industrial dispute within the meaning of Section 2(k) of the ID Act. He will not be competent to give any relief to the workmen of the erstwhile contractor even if the labour contract is abolished by the appropriate Government u/s 10 of the Act.

In view of the above decision of the Apex Court, when an industrial dispute is raised by the workmen of the contractor against the principal employer or main establishment, the industrial tribunal is bound to consider whether there is valid industrial dispute or not. In this case, the management disputed the employer-employee relationship and raised such a question in the written statement. If the Tribunal finds that contract is sham or not and employees are really employed by the company itself, the Tribunal can consider the merits of the case. If it finds that the contract is not sham but a genuine contract, he cannot give any relief against the company as the industrial dispute against the company is without jurisdiction. The question whether the contract is sham or genuine; whether industrial dispute is valid or not etc. were not considered by the Industrial Tribunal in this case.

7. When a contract can be held to be sham or not is discussed elaborately by the Apex Court in *Secretary, H.S.E.B Vs. Suresh and Others etc. etc.*, . It was held that in industrial law also, principle of "lifting of the veil" shall be applicable and Court has to find out whether contract was genuine or a mere camouflage, smoke and a screen and the veil can be pierced if there is sufficient evidence. This matter was again discussed and power of the industrial tribunal to decide the question was considered again by the Apex Court in *VST Industries Ltd. Vs. VST Industries Workers' Union and Another*, Tests laid down to consider when employees of the canteen can be treated as employees after referring to *Indian Petrochemicals Corporation Limited v. Shramik Sena and Ors.* JT 1999 (5) SCC 339 *Employers in relation to the Management of Reserve Bank of India Vs. Their Workmen*, ; *M.M.R. Khan and others etc. Vs. Union of India and others*, etc., were laid down as follows:

"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."

In *Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc. etc.*, a Constitution Bench held that abolition of contract labour can be done by the appropriate Government as provided under the Contract Labour (Regulation and Abolition) Act and not by the industrial tribunal or by any other forum. But, overruling the dicta laid down in *Air India Statutory Corporation, etc. Vs. United Labour Union and others* [overruled], it was held that even if contract system is abolished in any area, principal employer is not bound to accept them as their employees and there is no automatic absorption. After analysing the case law including *Gujarat Electricity Board's* case (supra) and all other previous cases regarding the question whether contract is a sham or not, it was held as follows:

"103. An Analysis of the cases discussed above, shows that they fall in three classes: (1) where contract labourer is engaged in or in connection with the work of an establishment and employment of contract labour is prohibited either because the industrial adjudicator/court ordered abolition of contract labour or because the appropriate government issued notification u/s 10(1) of the CLRA Act, no automatic absorption of the contract labourer working in the establishment was ordered; (ii) where the contract was found to be sham and nominal rather a camouflage in which case the contract labourer working in the establishment of the principal employer was held, in fact and in reality, the employees of the principal employer himself. Indeed, such cases do not relate to abolition of contract labour but present instances wherein the court pierced the veil and declared the correct position as a fact at the stage after employment of contract labour stood prohibited; (iii) where in discharge of a statutory obligation of maintaining canteen in an establishment the principal employer availed the services of a contractor and the courts have held that the contract labourer would indeed be the employees of the principal employer."

8. In this case, petitioner management raised an objection that industrial dispute is not maintainable because dispute was not raised by the workmen of the

establishment but by the workmen of the contractor and as such it is not maintainable. This was held so in Gujarat Electricity Board's case (supra). But, as held in that case as well as in Steel Authority of India's case (supra), when the preliminary objection is considered, the tribunal should consider whether contract is sham or genuine. If it is sham and rally workmen employed by the contractor are workmen of the main establishment, the dispute raised by their Union is also valid and they shall be treated as valid. That possibility shall be considered by the Tribunal in this case after analysing the Apex Court judgment referred to above especially with regard to the question considered by the courts with regard to canteens run by the factories. In this connection, I also refer to paragraph 99 of the judgment of the Supreme Court in Steel Authority of India's case (supra) which analysed the Gujarat Electricity Board's case (supra) relied on by the petitioner and paragraph 121 (5) wherein it was held that:

".... If the contract is found to be not genuine but a mere camouflage, the so-called contract labourer will have to be treated as employees of the principal employer who shall be directed to regularise the services of the contract labourer in the concerned establishment subject to the conditions as may be specified by it for that purpose in the light of para 6 hereunder."

9. Separate order need not be passed on the preliminary point. That issue shall be first decided with a finding. Thereafter, if the finding is that it is maintainable, tribunal has to give its award on merit considering the industry-cum-region basis, financial capacity of the employer and other well defined principles in wage revision. No such effort was made in the present award. Both parties are free to adduce fresh evidence. Since the reference was made in 1992, the Industrial Tribunal shall pass the award within six months from the date of receipt of a copy of this judgment. Registry is directed to send a copy of this judgment to the Tribunal urgently.