

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of decision : 25.03.2009

+ LPA No.1836-96 of 2006

BADARPUR POWER ENGINEERS &
WORKERS UNION AND ORS. ...APPELLANTS
Through: Ms. Richa Kapoor, Advocate.

Versus

THE GENERAL MANAGER,
BADARPUR THERMAL POWER STATION & ORS. ...RESPONDENTS
Through: Mr. Raj Birbal, Sr. Advocate with
Ms. Raavi Birbal &
Ms. Pinki Talukdar, Advocates
for Respondents 1 & 2.

Mr. Amit Khemka &
Mr. Sanjay Rohtgi, Advocates
for Respondent No.3.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

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| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | No |
| 2. | To be referred to Reporter or not? | No |
| 3. | Whether the judgment should be
reported in the Digest? | No |

SANJAY KISHAN KAUL, J. (Oral)

1. The appellant Union and its workers filed a Civil Writ
Petition in this Court bearing No.610/1995 against
respondents 1 & 2 herein alleging that they were the
canteen workers of the canteen of respondents 1 & 2
located at Badarpur. It is alleged that the canteen was run
through its contractors for twenty (20) years and though
the contractors used to change, the workers in the canteen

remained the same. Approximately 60 workers are stated to have put in service in the canteen for various posts such as cook, canteen boy, cash clerk, etc. and the service period is alleged to be from 6 to 15 years. The appellants alleged that the wages were being paid by the respondents and even provident fund was being deducted from the year 1990. The appellants alleged that on 14.2.1995 they came to know that their services were going to be terminated and on 16.2.1995 they were prevented from entering the premises. The appellants claimed that their termination is illegal and invalid, their retrenchment was in violation of the provisions of Section 25-B of the Industrial Disputes Act, 1947 (hereinafter referred to as the ID Act) and that they have put in continuous service ranging from 6 to 15 years. On these allegations the appellants filed the writ petition seeking restraint against the respondents from terminating their services or interfering in the functioning of the appellants with the prayer to regularize their services. The appellants have also prayed for giving details of the accounts of deductions made on account of provident fund and for directions to the Regional Provident Fund Commissioner (for short 'RPFC') to initiate penal action against respondents 1 & 2, respondent No.3 being the RPFC.

2. Respondents 1 & 2 resisted the writ petition alleging that the appellants were contract workers who were engaged by the contractor. It is pleaded that there can be no regularization in such a case and there was no relationship

of employer and employee. The counter affidavit stated that the wages were being paid by the contractor and the contractor had not even been made a party to the proceedings. It is further pleaded that the contractor was given a license under the Contract Labour (Regulation & Abolition) Act, 1970 (hereinafter referred to as the Contract Labour Act). It is, thus, pleaded that the liability of respondents 1 & 2 as principal employer would only arise in case the contractor failed to pay wages of the appellants. The writ petition is alleged to be raising disputed questions of fact.

3. Respondents 1 & 2 admitted that the provident fund was being deducted but by the contractor and there was some dispute about the allocation of the Provident Fund Code Number. The Indian Coffee House is stated to have taken over the running of the canteen and had brought in its own employees to run the canteen.
4. The RPFC took a stand that the liability for the provident fund was of the principal employer being respondents 1 & 2.
5. The writ petition was decided vide impugned order dated 1.8.2006. The learned single Judge of this Court relied upon the pronouncement of the Supreme Court in National Thermal Power Corporation Ltd. Vs. Karri Pothuraju & Ors. AIR 2003 SC 3647 where it was observed that in cases where there was a statutory liability on the company concerned to run a canteen in the factory, the employees working in the canteen would be covered by the definition

of the word “employee” as per the obligations of an industrial establishment under the Factories Act, 1948 (hereinafter referred to as the Factories Act). In such situations the contract labour working in the canteen was treated as the workers of the principal employer. The learned single Judge, thus, observed that since there was a statutory obligation to run the canteen, the establishment of a relationship of employees-employer between the appellants and respondents 1 & 2 was established. It was, however, simultaneously noted that these appellants were no more working with respondents 1 & 2 as their services had been terminated and thus they could raise an industrial dispute in terms of Section 2 (k) of the ID Act which would be liable to be referred under Section 10 of the ID Act to the Industrial Tribunal if the termination of the appellants was illegal and unjustified. It was held that the Court while exercising writ jurisdiction under Article 226 of the Constitution of India could not entertain disputed questions of fact. Since the workers were not working with the respondent establishment, it was held that the Court cannot direct regularization of contract workers and in any case such a direction could not be made merely because they were held to be covered under the definition of “employee”.

6. Insofar as the aspect of deduction of provident fund is concerned it was noticed that respondent No.3 had held proceedings under Section 7A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter

referred to as the EPF Act) against respondents 1 & 2 establishment and vide order dated 6.8.2004 determined a sum of Rs.12,75,238.00 as due in respect of canteen workers for the period January 1978 to December 1994. After adjusting a sum of Rs.5,20,878.00 already paid by respondent establishment, the balance amount of Rs.7,54,360.00 was paid by respondent establishment to respondent No.3 on 15.9.2004.

7. We have heard learned counsels for the parties.
8. Learned counsel for the appellants contends that once a finding has been arrived that the appellants are employees of the respondent establishment nothing more is required to be adjudicated by reference of a dispute under the ID Act and the writ court was competent to issue directions in this behalf. It has been further pleaded that the respondent management has failed to furnish the bifurcation of the amount deposited towards provident fund in respect of each of the employees. Learned counsel referred to the judgement of a Division Bench of the Andhra Pradesh High Court in A.P. Dairy Development Co-operative Federation Ltd. Vs. Shivdas Pillai & Ors. 1992 (1) LLJ 153 where directions were issued in writ appeal to the effect that once a canteen was established, the workers of the canteen would be treated as employees of the establishment under the Factories Act. This arises from the obligation of an establishment to provide for a canteen under Section 46 of the Factories Act. A similar view has been taken again by the Andhra Pradesh High Court in WA No.385/1996.

9. Learned counsel also invited our attention to the judgement in Civil Appeal No.5990/1997 titled NTPC Vs. Karri Pothuraju & Ors. decided on 13.8.2003 by the Supreme Court where it was held that the respondent establishment was under a statutory obligation to provide and maintain a canteen for the benefit of all those serving in the union and the workers of the canteen would be the employees of the company.
10. Learned counsel emphasized that in Bombay Telephone Canteen Employees' Association Vs. Union of India & Anr. AIR 1997 SC 2817 it was held that the powers conferred under Article 226 of the Constitution of India could be well utilized to protect the security of a tenure against arbitrary action of an employer and no reference was liable to be made for that purpose under Section 10 of the ID Act.
11. Learned counsel for respondents 1 & 2, on the other hand, emphasized that the appellants have been held to be employees only within the meaning of the Factories Act and in this behalf has referred to the subsequent judgement of the Supreme Court in Haldia Refinery Canteen Employees' Union & Ors. Vs. M/s. Indian Oil Corporation Ltd. & Ors. 2005 LLR 529. The Supreme Court observed that what had been held in the earlier judgements was that the employees working in a canteen were the employees of the management for the purposes of Factories Act alone and did not *ipso facto* become the employees of the establishment for any other purpose. Learned counsel also referred to the judgement of Indian Petrochemicals Corporation Ltd. & Anr. Vs. Shramik Sena & Ors. (1999) 6

SCC 439, which expounded the same principal and observed as under:

“22. If the argument of the workmen in regard to the interpretation of *Raha* case is to be accepted then the same would run counter to the law laid down by a larger Bench of this Court in *Khan* case. On this point similar is the view of another three-Judge Bench of this Court in the case of *Reserve Bank of India v. Workmen*. Therefore, following the judgment of this Court in the cases of *Khan* and *R.B.I.* we hold that the workmen of a statutory canteen would be the workmen of the establishment for the purpose of the Factories Act only and not for all other purposes.

23. Having held that the workmen in these appeals are the respondent's workmen for the purposes of the Factories Act, we will now deal with the next question arising in this appeal as to whether from the material on record it could be held that the workmen are, in fact, the employees of the Management for all purposes.

24. Before answering this question, we would like to observe that, normally, this being a question of fact, this Court would have been reluctant to examine this question which in the ordinary course should be first decided by a fact-finding tribunal. However, as stated above, in this case parties have filed detailed affidavits and documents which, in our opinion, are sufficient for us to decide this question without the need for any oral evidence.”

12. It was, thus, submitted that the learned single Judge had rightly directed that such a dispute to be decided by the Industrial Tribunal. To the same effect are the observations in Hari Shankar Sharma & Ors. Vs. M/s. Artificial Limbs Manufacturing Corporation & Ors. 2001 (8) SCALE 282. Learned counsel for respondents 1 & 2 further referred to the judgement of the Supreme Court in Steel Authority of India Ltd. & Ors. Vs. National Union Waterfront Workers & Ors. (2001) 7 SCC 1 to contend that the Parliament never intended absorption of contract labour on issuance of abolition notification under Section 10 (1) of the Contract

Labour Act as also for the proposition that such matters are to be decided by the industrial adjudicator as it required an inquiry into disputed questions of fact which cannot be conveniently decided by the High Court in exercise of jurisdiction under Article 226 of the Constitution of India. Learned counsel referred to the observations of the Supreme Court in VST Industries Ltd. Vs. VST Industries Workers' Union & Anr. (2001) 1 SCC 298 in para 9 stating that the workmen of statutory canteen would be the workmen of the establishment only for the purposes of Factories Act and thereafter other material on record would have to be considered to show that the workmen are employees of management for all purposes and adopting certain tests as set out therein.

13. A reference is also being made to the judgement of the Supreme Court in Secretary, State of Karnataka & Ors. Vs. Umadevi (3) & Ors. (2006) 4 SCC 1 where certain observations are made in para 43, which read as under:

“43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that

merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because an employee had continued under cover of an order of the court, which we have described as “litigious employment” in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.”

14. Learned counsel, thus, submitted that no direction for regularization could be made in view of the aforesaid observations.
15. Learned counsel also pleaded that the writ petition was predicated on the plea of regularization while the fact remains that no interim orders were passed and the services of the appellants stood terminated. The appellants never even amended the writ petition to challenge their termination and thus no relief beyond what was claimed could be granted.

16. A consideration of the legal principles set out aforesaid leave no manner of doubt that there is unanimity on the aspect that workers in a statutory canteen are employees of the establishment only for the purposes of the Factories Act. The issue whether they are to be otherwise treated as workers of the establishment can be best addressed by the Industrial Tribunal. The findings in respect of the aforesaid especially in Haldia Refinery Canteen Employees' Union & Ors. case (supra) and Indian Petrochemicals Corporation Ltd. & Anr. case (supra) can be usefully referred to.
17. It is also a fact that the services of the appellants stand terminated for a long period of time. It is to be adjudicated whether such termination was in accordance with law or not. A question also arises whether the appellants could be treated as employees of the respondent establishment even for other purposes. All this would require a factual inquiry to be made which cannot be conveniently made in the proceedings under Article 226 of the Constitution of India and as observed by numerous judgements referred to aforesaid of the Supreme Court can be best addressed in proceedings in the Industrial Tribunal. This is exactly what the learned single Judge has directed in terms of the impugned order and we can find no fault with the course of action so adopted.
18. We also find that the only plea of the appellants is seeking regularization and permission to work and it is stated that the termination occurred soon after the writ petition was filed. If the appellants wanted to challenge such a

termination, the first step in the direction ought to have been to amend the writ petition. This was never done. We, thus, find that the correct course of action has been adopted by the learned single Judge.

19. The aspect of the provident fund to be deposited stands addressed by respondent No.3 taking proceedings under Section 7A of the EPF Act. The full amount stands deposited with respondent No.3. It is always open to the appellants to approach respondent No.3 for necessary financial relief by giving details of their period of employment and the consequent provident fund deposited for each of such employee. Such an exercise cannot be carried out in the writ proceedings and the grievance of the appellants really stands redressed in view of the proceedings undertaken under Section 7A of the EPF Act and the consequent deposit of the amount.
20. We find no merit in the appeals, which are dismissed leaving the parties to bear their own costs.

SANJAY KISHAN KAUL, J.

MARCH 25, 2009
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SUDERSHAN KUMAR MISRA, J.