IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&
THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

MONDAY, THE 19TH DAY OF OCTOBER 2015/27TH ASWINA, 1937

WA.No. 1759 of 2013 IN WP(C).32100/2011
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AGAINST THE JUDGMENT IN WP(C) 32100/2011 DATED 12-09-2013

APPELLANTS/PETITIONERS:
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1. INDIAN NAVAL CANTEEN SERVICE EMPLOYEES UNION,
   (REG NO 07-62 OF 90)
   REPRESENTED BY ITS GENERAL SECRETARY, THOMAS K.E
   SENIOR NAVAL CANTEEN SERVICE, NAVAL BASE, KOCHI 4

2. M.K. PRAKASAN,
   ASSISTANT MANAGER 9ACCOUNTS)
   INDIAN NAVAL CANTEEN SERVICE, NAVAL BASE, KOCHI 4

3. G. RADHAKRISHNAN,
   SENIOR RETAIL EXECUTOVE (ACCOUNTS)
   INDIAN NAVAL CANTEEN SERVICE, NAVAL BASE, KOCHI 4

4. P.A. ALEXANDER,
   SENIOR RETAIL EXECUTIVE (ACCOUNTS) INDIAN
   NAVAL CANTEEN SERVICE
   NAVAL BASE, KOCHI 4

BY ADVS.SRI.S.RADHAKRISHNAN
SRI.S.RAJ MOHAN

RESPONDENTS/RESPONDENTS:
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1. UNION OF INDIA,
   REPRESENTED BY SECRETARY, GOVT OF INDIA
   MINISTRY OF DEFENCE, NEW DELHI 110011

2. THE CHIEF OF NAVAL STAFF,
   INTEGRATED HEAD QUARTERS, MINISTRY OF DEFENCE
   SENA BHAVAN, NEW DELHI 110011

3. THE CHAIRMAN,
   INCCB, INTEGRATED HEAD QUARTERS, SENA BHAVAN
   NEW DELHI 110011

4. THE GENERAL MANAGER,
INDIAN NAVAL CANTEEN SERVICE, NAVAY NAGAR, COLABA
MIMBAI 400005

5. THE REGIONAL MANAGER,
INDIAN NAVAL CANTEEN SERVICE, NAVAL BASE, KOCHI 682004

R1-R5 BY ADV. SRI.T.SANJAY, CGC

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 05-10-2015, THE COURT ON 19-10-2015 DELIVERED THE FOLLOWING:

**THOTTATHIL B.RADHAKRISHNAN &**
**ANU SIVARAMAN, JJ.**

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**Writ Appeal No.1759 of 2013**

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Dated this the 19th day of October, 2015

JUDGMENT

**Anu Sivaraman,J.**

1. The appellants 2 to 5 are employees of the Indian Naval Canteen Service ('INCS' for short). The first appellant is a registered employees union. In the writ petition, they had sought a declaration that they are entitled to receive salary and other pecuniary benefits in accordance with the recommendation of the sixth Central Pay Commission Report as also to revise the pay structure and pay scales of INCS employees in tune with Part A, Section 1 of the First Schedule to the Central Civil Service (Revised Pay) Rules, 2008 with effect from 01.01.2006 with all consequential benefits. There was a further prayer to restore the incentive for small family which was granted to them from 1984 to 2010 continuously.

2. The contention of the appellants was that the INCS was established by the Government of India and is directly controlled by the Naval Head Quarters and is being operated by the Government and carrying on governmental functions of a public nature. The

organization, service conditions and all other administrative matters of the INCS are regulated by rules, regulations and orders issued by the Government or the Naval Head Quarters. The Indian Naval Canteen Control Board ( for short 'INCCB' ) which is the controlling body in respect of the canteens had implemented the third, fourth and fifth Central Pay Commission Reports to the employees of the INCS on all India basis and the employees were enjoying parity of pay with Central Government Employees. However, in the year 2008, the INCCB had decided to formulate their own pay structure by denying the benefits contemplated in the Central Civil Service (Revised Pay) Rules 2008. In the above circumstances the appellants urged before the learned Single Judge that INCCB answered the definition of State under Article 12 of the Constitution of India and was liable to be directed to implement the sixth Central Pay Commission recommendations also to the employees.

3. The learned single Judge held, accepting the contentions of the respondents, that the INCCB is not a State or other authority under Article 12 of the Constitution of India and it does not carry on any public function in order to be amenable to the writ jurisdiction of this Court. It was further held that employees of INCCB are not

Government employees and they cannot claim pay parity with the Central Government employees. It was held that INCS is an autonomous organization formed at the instance of the Government of India for the purpose of sale of commodities to the Naval staff. In that view of the matter, the writ petition was dismissed.

4. Heard Sri.S.Radhakrishnan, learned counsel appearing for the appellants, Sri.T.Sanjay, learned Central Government Standing Counsel appearing for the respondents. It is contended that the employees of the INCS were granted all the benefits of pay revisions at par with Government employees. Revision of rates of D.A as well as all allowances and benefits available to Government employees were also made applicable to them. It is further contended that the benefits of the sixth Central Pay Commission is made applicable to employees of quasi Government organisation and statutory bodies whose pay structure is identical to Central Government employees by Ext.P15 office memorandum. Relying on a decision of the learned single Judge of this Court in **Rajan Nair v. Indian Naval Canteen Service** (1985 KHC 270) as upheld by the Division Bench in W.A.No.58/1985 by judgment dated 18.03.1985 and affirmed in SLP No.8284/1985, the learned counsel appearing for the appellant would submit that the finding entered by the

learned Single Judge that INCCB is not amenable to writ jurisdiction as it is not a State under Article 12 of the Constitution of India is unfounded. It is further contended that the INCS clearly comes within the definition of Naval establishment as contained in Section 3(12A) of the Indian Navy Act and therefore the employees are clearly entitled to be treated on par with central Government employees.

5. The learned counsel appearing for the respondents submits that in view of the decision of the Apex Court in **R.R.Pillai v. Southern Air Commandant, Indian Air Force** (2009 (13) SCC 311), the employees of INCS are not entitled to claim parity with Government servants since the the Supreme Court has held that employees of Unit Run Canteens are not Government employees. It is further contended that the declaration to the effect that INCCB is State under Article 12 of the Constitution of India and Naval establishment under the provisions of the Navy Act would have unforeseen far reaching consequences and such a finding is not warranted. It is further urged that the formation of INCS was by executive orders for the benefit of Naval Employees and Officers alone and no public duty was being carried out by them. In the above circumstances, they are not amenable to the writ jurisdiction

of this Court, it is urged. It is further contended that the employees of the INCS not being Central Government employees, they can raise no claim for being granted the benefits of the sixth Central Pay Commission report.

6. Having considered the rival contentions and the materials and precedents relied upon, we are of the opinion that the finding that the INCCB is not State under Article 12 of the Constitution of India cannot be sustained. Admittedly INCS was formed by a Navy instruction in year 1947. It is directly controlled by the Naval Head quarters through a Board appointed by the Chief of Naval Staff. The INCS regulations formulated by the Government governs the appointments, recruitment, promotion and conditions of service of employees. In **R.R.Pillai v. Southern Air Commandant, Indian Air Force** (supra), the Apex Court had held that employees of Unit Run Canteens of the armed forces are not Government employees. However, the question whether a Unit Run Canteen can be treated as an instrumentality of the State was specifically left open by the Supreme Court as the said aspect had not been considered by the High Court or the C.A.T.

7. A learned single Judge of this Court in **Rajan Nair v. INCS** (supra) specifically held that the INCS is an establishment directly under the

control of the Indian Navy and hence is a part of the Defence Department of the Central Government. The Indian Naval Canteen Service accordingly is a State within the meaning of Article 12. This was affirmed in W.A.No.58/1985 by judgment dated 18.03.85 The S.L.P taken against W.A.No.58/1985 as S.L.P.No.8284/1985 was disposed of on agreement between parties limiting back wages to 50%.

8. It is not in dispute that the Indian Naval Canteen Service is an establishment substantially controlled by the Indian Navy. Section 3 (12A) of the Navy Act, 1957 defines naval establishment as "an establishment belonging to or under the control of the Indian Navy whether within or without India". Only because of the fact that the funds for meeting the salary and other expenses are not drawn from the Naval fund, it cannot be said that the canteen services are completely outside the purview of Article 12 of the Constitution of India. The INCS owes its existence to an order passed by the Government. The functions performed by them are, on the admission by the respondents themselves in their counter affidavit, the supply of household items to ships and establishments, defence personnel and their families including ex-service men and civilians paid from the defence estimates. It is stated by the respondents

that the INCS is a non-public fund organisation under the control of the Indian Navy. It cannot be disputed that the functions carried out by the INCS as stated above are part of the functions which are essential for the smooth functioning of the naval establishment and intended for the convenience and welfare of the staff. The INCS having been specifically brought into existence for fulfilling these functions which were found by the Indian Navy and the Government to be an essential requirement, we do not think that it is open to the respondents now to contend that only because the organization does not utilize Government fund, it cannot be considered as an instrumentality of the State or other authority under Article 12 of the Constitution of India.

9. It is trite law that the tests for determination whether a body or organization answers the definition of State for the purpose of Article 12 of the Constitution of India cannot be limited into a straitjacket formula. The concept of instrumentality or agency is not confined to creatures of statute or orders, but would depend upon of one or more of relevant factors depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power. This has been held by the Apex Court in **Mysore Paper Mills v. Mysore Paper Mills Officers'**

**Assn.** [(2002) 2 SCC 167]. In the instant case, it is not in dispute that the INCS is a creature of an order of the Central Government. All its activities are regulated by the Government and the Naval Head Quarters. From the consideration of the materials placed before us, it is clear that the continued existence of the services is also dependent on the orders of the Government and the Naval Head Quarters and therefore the real source of governing power is undoubtedly with the Government in the Defence Department and in the Naval Head Quarters. The Hon'ble Supreme Court has held that where there is deep and pervasive state control, financial, functional and administrative, over the functions and administration of an organization, the said organization can be considered to be a State under Article 12 and would then be undoubtedly amenable to the writ jurisdiction of this Court. Hence, the inescapable finding is that INCS answers the definition of State or other authority under Article 12 of the Constitution of India.

10. The contention raised by the learned counsel for the respondent that the finding that the INCCB is State under Article 12 of the Constitution of India will amount to bestowing the status of Government servants on the petitioners appears to be misconceived. The status of the INCCB as State under Article 12 of the Constitution

of India, would not, in our opinion, automatically amount to bestowing of status of Government employees on the employees of the INCS. The Hon'ble Supreme Court has in **State of Assam v. Barak Upatyaka D.U.Karmachari Sanstha** (2009 (5) SCC 694) held that an entity which answers the definition of State under the category “other authorities” does not make it “State Government”. We agree with the finding of the learned single Judge that the appellants are not Central Government employees under Article 309 of the Constitution of India and the recommendations of sixth Central Pay Commission are not automatically applicable to them, especially in view of the provisions of the INCS regulations. However, since the petitioners are also found to be employees of a service which answers the definition of a Naval establishment in terms of the Navy Act, we are of the opinion that this is a fit case where the Central Government, in its Ministry of Defence or appropriate department, in its wisdom, should be directed to consider the question of applicability of the sixth Central Pay Commission report to its employees as well. Since they have been treated at par with Central Government employees till the issuance of the orders with regard to the acceptance of the sixth Central Pay Commission recommendations, it is directed that the question should be approached in a fair and reasonable manner by the Government.

11.In the above view of the matter, the finding of the learned single Judge that INCCB does not answer definition of State under Article 12 of the Constitution of India cannot be sustained and is vacated. The Union Government in its appropriate department is directed to take up the question of grant of benefits under the sixth Central Pay Commission to the employees of INCS w.e.f. 01.01.2006 in the light of the fact that they have been receiving the benefits of the third, fourth and fifth Central Pay Commission Reports as accepted by the Central Government. The appellants or their authorised representatives as well as representatives of INCCB shall be heard before orders are so passed by the Government. Orders as directed above shall be issued within a period of four months from the date of receipt of a copy of the judgment.

The Writ Appeal ordered accordingly.

**Thottathil B. Radhakrishnan, Judge**

**Anu Sivaraman, Judge**

sj