

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

FRIDAY, THE 6TH DAY OF MARCH 2015/15TH PHALGUNA, 1936

WP(C).No. 5954 of 2012 (T)

PETITIONER(S):

**THE CHAIRMAN, COCHIN PORT TRUST
WILLINGDON ISLAND, COCHIN.**

**BY ADVS.SRI.V.ABRAHAM MARKOS
SRI.ABRAHAM JOSEPH MARKOS
SRI.BINU MATHEW
SRI.TOM THOMAS (KAKKUZHIYIL)
SRI.ISAAC THOMAS**

RESPONDENT(S):

**1. THE GENERAL SECRETARY, ERNAKULAM HOTEL THOZHILALI UNION
WILLINGDON ISLAND, COCHIN.682 003.**

**2. THE CENTRAL GOVERNMENT
INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT
ERNAKULAM, 38/377, A-2
KARITHALA LANE, KARSHAKA ROAD, KOCHI-682 016.**

**R1 BY ADV. SRI.A.V.XAVIER
R1 BY ADV. SRI.RINOY JOSEPH
R BY SRI.N. NAGARESH, ASG OF INDIA**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 06-03-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

APPENDIX

PETITIONER(S) EXHIBITS

- EXT.P1- TRUE EXTRACT OF RULES 91 TO 97 OF THE KERALA FACTORIES RULES, 1957.**
- EXT.P2- TRUE COPY OF THE CLAIM STATEMENT DATED 1.12.2009 FILED BY THE 1ST RESPONDENT BEFORE THE 2ND RESPONDENT.**
- EXT.P3- TRUE COPY OF THE WRITTEN STATEMENT DATED 19.01.2010 FILED BY THE PETITIONER I.D.NO.16/2009.**
- EXT.P4- TRUE COPY OF THE AWARD DATED 8.8.2011 PASSED BY THE 2ND RESPONDENT IN I.D.NO.16/2009.**

RESPONDENTS EXHIBITS:

- EXT.R1(a) COPY OF THE TENDER NOTICE NO.A2/WC-CANTEEN/2012-SE DATED 17.03.12.**
- EXT.R1(b) COPY OF THE LETTER AFFIXED WITH THE POSTAL RECEIPT DATED 23.03.2012 SENT BY REGISTERED POST.**
- EXT.R1(c) COPY OF THE NEWS PAPER CUTTING OF THE REPORT IN MATHRU BHOOMI DAILY DATED 22.09.2012.**

// TRUE COPY //

PA to Judge

SB

K. VINOD CHANDRAN, J.

=====

W.P.(C) No.5954 of 2012 - T

=====

Dated this the 6th day of 2015

J U D G M E N T

The regularisation of employees in a statutory canteen established under Section 46 of the Factories Act, 1948, has been canvassed in various hues and colours over the years before the Courts/Tribunals established under the Industrial Disputes Act, 1947 (for brevity, 'the I.D Act'); the High Courts and the Hon'ble Supreme Court. A reading of the various decisions would indicate that, essentially the question would depend upon the facts and there can be no rule of thumb that, if it is a statutory canteen, then necessarily, there should be regularisation. In considering the aforesaid case, first, the law has to be looked into.

2. There is an amount of certainty in that aspect, with the recent decision of the Hon'ble Supreme Court reported in **Balwant Rai Saluja and another v. Air India Limited and others [(2014) 9 SCC 407]**, a welcome

departure from the earlier position, which uncertainty was noticed by a Division Bench of this Court, in the “relentless fight”, as noticed by the Central Government Industrial-Tribunal-Cum Labour Court, Ernakulam, of the workmen herein.

3. The record of the proceedings indicate that, earlier, the workmen were before this Court with an original petition numbered as O.P. No. 7075 of 1992, in which, the issue of regularisation was directed to be considered on the strength of an office memorandum dated 29.01.1992. A writ appeal filed by the management was rejected. The respondents having rejected the claim, again, the issue was raised in O.P. No. 17768 of 2000, which was allowed directing regularisation of the employees, who were the petitioners therein. In writ appeal, the said judgment was overturned.

4. Apposite would be the observations in the said judgment dated 06.03.2006 in W.A No. 48 of 2004. A Division Bench found that, the law on the subject is not

settled as on that date. **Indian Petro Chemicals Corporation Ltd. and another v. Shramik Sena and others [(1999) 6 SC 439]**, **Haldia Refinery Canteen Employees Union and others v. Indian Oil Corporation Ltd. and others [(2005) 5 SCC 51]** was found to be supportive of the case of the management. The decisions in **M.M.R. Khan v. Union of India [1990 (Supp) SCC 191]**, **Parimal Chandra Raha v. LIC of India [1995 (Supp) (2) SCC 611]** and Constitution Bench decision in **Steel Authority of India Ltd. v. National Union Waterfront Workers [(2001) 7 SCC 1]** was found to support the case of the workmen. **State of Karnataka and others v. KGSD Canteen Employees' Welfare Association and others [(2006) 1 SCC 567]** was found to have laid emphasis on the flux in law with respect to the particular issue. Specific reference was made to paragraph 32, wherein it was observed so:-

The law, however, does not appear to be settled as to whether even in a case where the employer is required to run and maintain a canteen in terms of the provisions of the

statute, the employees of the canteen would automatically be held to be the workers of the principal employer for all intent and purport and not for the propose of the Factories Act alone.

5. The issue, as on that date, was held to be unsettled. The Division Bench found that, to decide the question, there should be certain finding on facts. Some of the specific facts to be found, as noticed by the Division Bench were:- (i) whether the contract entered is a bonafide or a sham transaction, (ii) whether the terms of the contract indicate absolute control on the part of the principal employer for the running of the canteen, (iii) whether the principal employer had any role in the recruitment of employees, (iv) whether the principal employer had control over the employees of the canteen and so on and so forth.

6. The Division Bench held that, a decision under Article 226 of the Constitution of India would not be appropriate and hence, the present proceeding before the Tribunal. All the aforesaid decisions noticed by the

Division Bench and other decisions of the Hon'ble Supreme Court were noticed and **Indian Petro Chemicals Corporation Ltd.** (supra) was approved in **Balwant Rai Saluja** (supra). The law on the point now stands settled in paragraph 41, which is extracted hereunder:-

41. We conclude that the question as regards the status of workmen hired by a contractor to work in a statutory canteen established under the provisions of the 1948 Act has been well settled by a catena of decisions of this Court. This Court is in agreement with the principle laid down in Indian Petrochemicals case wherein it was held that : (SCC p.449, para 22)

"22. ... the workmen of a statutory canteen would be the workmen of the establishment for the purpose of the 1948 Act only and not for all other purposes."

We add that the statutory obligation created under Section 46 of the 1948 Act, although establishes certain liability of the principal employer towards the workers employed in the given canteen facility, this must be restricted only to the 1948 Act and it does not govern the rights of employees with reference to appointment, seniority, promotion, dismissal, disciplinary actions, retirement benefits, etc., which are the subject-matter of various other legislations, policies, etc. Therefore, we cannot accept the submission of Shri. Jayant Bushan, learned counsel that the employees of the statutory canteen ipso facto become the employees of the principal employer.

7. The learned Counsel for the Union would contend that, the said decision is not applicable in the present case. The facts indicate that, the contractor therein, was a subsidiary company and in the present case, the contractor being an individual and in the earlier years, a club and welfare society, the contract was only a sham. There is no identity of facts, is the contention.

8. This Court is unable to concede to such arguments since, the principle with respect to the regularisation of employees in a statutory canteen has been clearly laid down in the aforesaid case and the test to be applied also is very evident. This Court is inclined to respectfully hold that, the decision applies on all fours, and brings clarity to the position.

9. That the canteen is a statutory canteen established under Section 46 of the Factories Act, moots no controversy. An examination of the facts, on the perspective of the law declared, is highly necessary. The Labour Court found that, there is no dispute that

irrespective of the change in contractors, the workers were continued without any break in service. The decisions aforecited were profusely quoted from by the Tribunal and reliance was mainly placed on **Indian Petro Chemicals Corporation Ltd.** (supra) to uphold the contentions of the workmen. It was noticed that, the well accepted proposition of law was that, the employees in a statutory canteen would not ipso facto become the employees of the principal employer.

10. The Tribunal found the evidence establishing the following facts:-

- (a) Canteen has been in existence since 1961.
- (b) The workmen have been employed with the approval of the management for long years with unbreakable service despite the change of contractors.
- (c) Age limit for the employment of the workman is prescribed by the management.
- (d) Appointment of the workman is only with the approval of the management.

(e) Premises, furniture, fixtures, fuel, electricity, utensils etc. have been provided for by the management.

(f) Subsidy of an amount of Rs. 1,39,000/- per mensem being paid to the contractor.

(g) Supervision and control on the canteen is exercised by the management through the Managing Committee and other authorised officers.

(h) The contractor is nothing but a Manager who works completely under the supervision, control and direction of the management.

(i) Entry and movement of the workmen is regulated by the management.

(j) The canteen is situated in the premises of the management.

11. Though no re-appreciation of evidence is permissible, this Court under Article 226 has to look at whether the conclusions, so arrived at by the Tribunal, is one emanating from the evidence recorded, before the Tribunal. The canteen has been in existence from 1961

onwards. Though many of the workers, whose cause was espoused by the Union in the present proceeding was present in the earlier proceedings also, not all were included. The workmen now seeking regularisation are 12 in number, who claim to have been appointed in various years from 1978 to 1986. Hence, when O.P No. 7075 of 1992 all ought to have been in employment. Sri. T.P. Rajendran was not one of the 17 petitioners therein. In O.P No. 17768 of 2000, Sri. T.P. Rajendran was included in the party array among the 13 petitioners. But, for specifying the year, there is absolutely no evidence to show the date on which appointments were made and that the management made such appointments.

12. The evidence of WW1, Sri. Murukan, one of the workers, regarding the appointment and continuance is as vague as possible. It is merely stated that, the employees in the list from 2 to 14 were employed for 6 to 31 years under the management. There is no whisper as to how such appointment was made or the specific date on

which it was made. In cross-examination, the witness also admitted that, there were various contractors who carried on the running of the canteen. Hence, there is nothing on record to indicate that, the appointment of the employees were by the management and that they were continued under a contractor. There was also no evidence that the contractor was only an agent of the management.

13. The Division Bench in the earlier proceedings, while relegating the workmen to the remedy under the I.D Act had specifically noticed that, the principal employer's role in the recruitment of the employees, is an important aspect, which has to be found on the facts. There is nothing on record to show that the employees were appointed by the management. The consistent case of the management was that, there was a contractor through out.

14. With respect to the control and supervision, it is to be emphasised that, the canteen is within the Port premises and the management is an authority under the

Major Port Trust Act. The premises of the Port being secured premises; no free entry or exist is possible. What weighed with the Tribunal in finding absolute control on the management in addition to the issuance of such passes was the supervision and control of the canteen by the Managing Committee and the premises, furniture, fixtures, fuel, electricity, utensils etc. being provided by the management. The contractor was found to be only an agent as found in **Indian Petro Chemicals Corporation Ltd.** (supra).

15. **Balwant Rai Saluja** (supra) also followed the principle in **Indian Petro Chemicals Corporation Ltd.** (supra). In **Indian Petro Chemicals Corporation Ltd.** (supra), the specific finding was that, the continuity of employment of the employees, was due to an order made by the Industrial Court and the management had incorporated appropriate clauses in the contract to ensure the continuity of employment of the workmen. It was on this fundamental aspect that the Hon'ble Supreme Court

found that, the inception of the canteen, from a distant past, coupled with continued employment for long years, and the premises, furniture etc. belonging to the management, wages being reimbursed by the management, supervision and control by an authorised officer of the management; together indicated that, the contractor is a mere agent or manager.

16. The fundamental aspect as found in **Indian Petro Chemicals Corporation Ltd.** (supra) is absent, in the above case. An agreement has been produced as Ext.M3, which this Court has perused from the records of the case. The tender document and general conditions of contract inter alia are part of the agreement. The tender conditions does not disclose any condition in which the contractor is obliged to employ a specified individual. The contract condition also does not indicate any reimbursement of wages to be paid by the contractor to the workmen. The agreement only speaks of a subsidy to be paid to the contractor. The mere prescription of the

age of the employees, who could be engaged cannot indicate that the management itself had control over the recruitment of the employees. The finding of the Tribunal that, the appointment of the workmen is only with the approval of the management does not emanate from the evidence.

17. A reading of the general conditions of contract would indicate that the premises, furniture and utensils were supplied by the management to the contractor and the contractor was made responsible for the safe custody and upkeep of the same. A pre-employment medical examination was directed, for appointing canteen staff with periodic medical examination, atleast once in six months; which was the obligation of the contractor (clause 9). Clause 15 provided that, the contractor should ensure that the workmen are neatly and properly dressed in uniform, which uniform had to be provided by the contractor in two sets. The canteen workers were specifically indicated as being under the

control of the contractor under clause 20 and the only prescription was that, no worker below the age of 18 or above 60 should be engaged. The conduct and behavior of the employees of the contractor was his responsibility, as per clause 20.13. The statutory compulsions regarding the engagement of employees was of the contractor, as per clause 20.9. The prior permission or approval of the management in engaging workers, as indicated in clause 20.14, is for the purpose of granting entry/exist pass, for enabling entry into the secured premises of the Port (clause 20.14). Under clause 20.15 any contract employee desirous of going out of the premises, during working hours had to be directed by the contractor to the Welfare Officer or Mechanical Superintendent for an out pass. The contractor was obliged to remove his workmen after the termination of contract as per clause 20.17. It was the contractor's responsibility under clause 20.23 to ensure the safety of the workmen. The aforesaid terms clearly indicate that, the employees were engaged by the

contractor and that at no point of time, the management had issued any direction to continue the very same employees.

18. If by extraneous compulsion, the very same employees were employed by the subsequent contractors, that cannot result in the consequence of regularisation. There can be no compulsion on the principal employer to regularise such employees of the contractor. The aforesaid facts clearly distinguish the present case, from that in **Indian Petro Chemicals Corporation Ltd.** (supra).

19. The aspect of control, was further emphasised by the fact that, the canteen employees were given entry and exit passes by the management, definitely intended only for access to the secured premises of the Port. Such passes are essential and it only high-lights the security concerns and not a direct employer-employee relationship between the management and the canteen employees. Further as has been noticed by **Balwant Rai Saluja** (supra) definitely the control of the canteen would

be on the Managing Committee, in which the workmen of the factory will also be a part. The statutory canteen established under Section 46 of the Factories Act is a welfare measure intended at providing clean hygienic food at subsidized cost to the workmen of a factory. The cost of food supplied, the menu of such food and the manner in which, and the time at which such supply has to be made would be under the control of the Managing Committee. That again cannot establish an employer-employee relationship. The control has to be looked at in the aspect of the choice of employees as has been laid down in **Balwant Rai Saluja** (supra) from paragraphs 61 to 65.

20. True the 12 workmen indicated in the present case have been employed continuously, under different contractors. However, that being not a condition of the contract and nothing having been placed on record to indicate that, such continuous employment was on the compulsion of the management, no employer-employee relationship could be found. Definitely, as was held by the

Hon'ble Supreme Court, the canteen employees, for the purpose of Section 46 of the Factories Act, would be employees of the principal employer. For all other purposes, including for the purpose of considering regularisation, they would have to satisfy the test of employer-employee relationship. The test laid down is extracted herein:-

65. Thus, it can be concluded that the relevant factors to be taken into consideration to establish an employer-employee relationship would include, inter alia:

- (i) who appoints the workers;
- (ii) who pays the salary/remuneration;
- (iii) who has the authority to dismiss;
- (iv) who can take disciplinary action;
- (v) whether there is continuity of service; and
- (vi) extent of control and supervision i.e. whether there exists complete control and supervision.

As regards extent of control and supervision, we have already taken note of the observations in Bengal Nagpur Cotton Mills case¹⁴, International Airport Authority of India case¹⁵ and Nalco case¹⁶.

21. Looking at the evidence laid, on the basis of the above principle, this Court cannot but find that, the evidence falls short of such test being satisfied. There is

nothing to indicate that, the management appointed the workers directly. No evidence is on record to prove payment of salary or remuneration by the management. There is no instance of a dismissal made by the management or a disciplinary action taken by the management against the canteen employees. The general conditions of the contract, indicate the control of the workers to be on the contractor. The only departure is insofar as the age of such workers being specified as between 18 and 60 and prior approval being taken from the management for the purpose of issuing entry/exit pass; which by itself cannot establish an employer-employee relationship. The continuity of service though not seriously disputed, the same is not under the compulsion of the terms of the contract or on the dictate of the management.

22. The extent of control and supervision as has been dilated upon by the Hon'ble Supreme Court, applied to the facts in the above case, indicate that, the choice of workmen is of the contractor. It is also to be specifically

noticed that, none of the contractors were impleaded. There is in fact no contention that, the contract is a sham one. The only contention is that, under different contractors, the same workmen were employed and that would indicate the employer-employee relationship between the principal employer and the canteen employee.

23. This Court is unable to sustain the award of the Tribunal, since, the Tribunal has completely misdirected itself and has not applied the law correctly to the evidence available. The Tribunal has also failed to look into the relevant evidence available on record. This Court on the above reasoning would set aside the award of the Tribunal.

The writ petition is allowed answering the reference on the issue of regularisation against the Union. Parties to suffer their respective costs.

Sd/-
K. VINOD CHANDRAN,
JUDGE

SB

// true copy //

P.A to Judge