

(2003) 10 KL CK 0042

High Court Of Kerala

Case No: O.P. No. 17768 of 2000

Gopalakrishnan

APPELLANT

Vs

Cochin Port Trust

RESPONDENT

Date of Decision: Oct. 17, 2003**Citation:** (2003) 3 KLT 981 : (2004) 2 LLJ 277**Hon'ble Judges:** R. Rajendra Babu, J**Bench:** Single Bench

Advocate: N.N. Sugunapalan and George Abraham, for the Appellant; Antony Dominic, E.K. Nandakumar, A.K. Jayasankar Nambiar, Priya Mahesh, Priya Manjooran and Thomas Mathew Nellimmottil, A.C.G.S.C., for the Respondent

Final Decision: Allowed

Judgement

R. Rajendra Babu, J.

Petitioners who were employed in the Canteen established by The Cochin Port Trust filed this petition for directing the respondents, the Cochin Port Trust to grant all benefits to the petitioners as regular staff of the Port Trust including Scale of Pay and other service benefits and for quashing Ext. P7 issued by the Port Trust on 24.3.2000 and also for other reliefs.

2. It was alleged that the petitioners were the employees of the respondent-Cochin Port Trust and were working in the Canteen from 8 to 13 years continuously, that the above canteen was providing services to the workers under the Cochin Port Trust and was a statutory canteen established u/s 46 of the Factories Act. However, for the convenience, the Cochin Port Trust had entrusted the running of the Canteen with Contractors for some time and the contractors were running canteen with the employees permanently engaged by the Port Trust, with the facilities made available by the Port Trust including the building and was providing food at the rate fixed by the Port Trust. It was further alleged that by the judgment of the Supreme Court dated 26.9.1983 it was declared that the canteen workers of non statutory department/Co-operative Canteens/tiffin rooms located in the

Central Government Offices were entitled to the same benefit by treating the employees as Government servants with effect from 1.10.1991 and that the Government had already issued Ext. P2 direction to its departments to treat the canteen employees as Government servants, the petitioners had filed O.P. 7075/92 for directing Cochin Port Trust to treat the petitioners as their employees and to afford all benefits. By Ext. P5 judgment, this Court directed the Port Trust to consider the claim within two months. Though the Port Trust challenged the above judgment, the Writ Appeal was dismissed. Thereafter the Port Trust passed Ext. P7 order in violation of the directions of this Court in Ext. P5 judgment refusing to afford the benefits given to the canteen employees. Hence, the petitioners filed this O.P. for directing the respondents to give all the benefits to the regular staff of the Port Trust including scale of pay to the petitioners.

3. Heard the learned counsel for the petitioners and the Standing Counsel for the Cochin Port Trust.

4. The only point for consideration is whether the employees of the canteen established u/s 46 of the Factories Act in the Cochin Port Trust has to be or can be treated as the employees of the Port Trust.

5. The learned counsel for the petitioners submitted that the petitioners were working in the canteen established by the Port Trust for the last 8-13 years and though the working of the canteen was entrusted with different contractors, the employees remained the same and the ultimate control of the canteen was with the Port Trust. It was further submitted that the Contractor was only running the Canteen with all the infrastructure provided by the Port Trust and also receiving the subsidy and was not having any control over the running of the canteen and as the ultimate control was with the Port Trust and the petitioners who were employees in the canteen were to be treated as employees of the Port Trust. The counter filed by the Cochin Port Trust would reveal that the running of the canteen was entrusted with the contractors on the acceptance of tenders from such contractors and on certain conditions. It was further contended that when certain problems arose, the running of the canteen through contractors had been stopped and the canteen was run by either the Staff Clubs/Welfare Clubs or through their contractors and the employees of the canteen were not appointed by the Port Trust. In this context, it would be relevant to consider some of the conditions for entrusting the running of the canteen with the contractors. Ext. RI(a) is the tender form for entrusting the running of the canteen on contract. The general conditions of the contract at page 4 of Ext. RI(a) would reveal that a subsidy of Rs. 74.000/- shall be given by the Port Trust and the infrastructure facilities like the building, the oven for cooking, furniture, utensils, plates, electricity and water shall be given to the contractor free of rent or cost. The price of meals, tea, coffee and all other items of food shall be fixed by the Port Trust and the price would not be increased without the written permission of the Mechanical Superintendent of the Port Trust. There was a Canteen Advisory Committee to inspect the items of food and to give necessary instructions, and even the menu shall be fixed by them. The contractor shall use milk supplied by Milma or PDDP and the Contractor shall have to

maintain cordial relationship with the customers and in the behaviour of its employees. The contractors also should keep the premises clean, and he cannot employ any person whom the Port Trust objects. Even the Dress of the workers of the Canteen are prescribed by the Port Trust. Clause 21 of the above condition says.

"For the purpose of Workmen's Compensation Act and other Labour Acts, the Contractor shall be treated as an independent employer assuming sole responsibility for the employees working in the canteen".

Clause 32 says that the Mechanical Superintendent, Cochin Port Trust shall have overall control over the functioning of the canteen and his instructions shall be followed by the Contractor. The above conditions in the tender form would reveal that the functioning of the canteen was under the predominant control including the financial control of the Port Trust.

6. Admittedly, the canteen in the Cochin Port Trust was a statutory canteen established u/s 46 of the Factories Act. Though the functioning of the canteen was entrusted with the contractors, the Port Trust was holding the over all control including the financial control over the functioning of the canteen. The petitioners were working in the canteen for the last 8 to 13 years, though there was change of contractors. The learned counsel for the petitioners placed reliance on the decision of the S.C. in *Parimal Chandra Raha & Ors. v. Life Insurance Corporation of India & Ors.* AIR 1995 SC 1666 to substantiate the argument that when there was statutory obligation on the employer to provide and maintain canteen for the use of its employees; u/s 46 of the Factories Act, such canteen would become part of the establishment and therefore, the workers employed in such canteen would be the employees of the management. In the above case SC held that the canteens had become part of the establishment of the Corporation, and the canteen committees, the co-operative society of the employees and the contractors engaged from time to time were in reality the agencies of the Corporation and were only a veil between the Corporation and the canteen workers, and the canteen workers were the employees of the Corporation. In [Indian Overseas Bank Vs. I.O.B. Staff Canteen Workers" Union and Another](#), the Supreme Court took the view that the employees of the canteen run by the contractors were in fact the employees of the Bank, as the financial control over the canteen was with the Bank and that the Bank itself had taken certain welfare measures for the canteen workers. In *Hari Shankar Sharma & Ors. v. Artificial Limbs Manufacturing Corporation & Ors.* 2002 (1) SCC 387 the Supreme Court has taken a different view and held that the employees of a statutory set up, or of any other facility provided, by the establishment in discharge of a statutory mandate need not necessarily be employees of that establishment as Section 46 of the Factories Act leaves it to the discretion of the establishment to resort to direct employment or to employ a contractor and their status depends upon the manner of discharge of the statutory obligations. There it was further held that the condition in the agreement between the contractor and the establishment that the new contractor should retain the employees who had served under the earlier contractors would not necessarily mean that such employees were employees of the

establishment. In [Indian Petrochemicals Corpn. Ltd. and Another Vs. Shramik Sena and Others](#), the SC held that the workmen of the statutory canteen managed by the contractor or of the establishment/concern for all purposes, was a question of fact to be decided on the facts of each case. The Supreme Court in VST Industries Ltd, v. VST Industries Workers" Union & Anr. 2001 (1) SCC 298 held that when the canteen was under the complete control of the establishment, the workers employed through the contractor also would be employee of the management. There it was held:

"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 upto 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 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 facts of the present case are identical with the facts of the case cited supra. In [Mishra Dhatu Nigam Ltd., Vs. M. Venkataiah and Others, etc. etc.](#), the Supreme Court held that since the management was required by the Factories Act, to provide canteen facilities, the workers engaged through the contractors were the employees of the principal employer, and the canteen workers engaged through the contractors were entitled for regularization of their services. Para 10 of the judgment reads:

"Further, the decision of the Division Bench of the Andhra Pradesh High Court dated 27.11.1996 in W. A. No. 430 of 1996 was the subject matter of appeal in the decision reported in VST Industries Ltd., case (supra), which, as pointed out supra, was noticed by the Constitution Bench which rendered the decision in Steel Authority of India Ltd., case (supra) and considered such line of cases not only to stand on a different footing than the one which was the subject matter before the Constitution Bench, but also observed that where in discharge of a statutory obligation of maintaining a canteen in an establishment the principal employer availed the services of a contractor, the Courts have held that the contract labour would indeed be the employees of the principal employer and that such cases do not relate to or depend upon abolition of contract labour. So far as the decision dated 27.11.1996 of the same Division Bench rendered in Writ Appeal No. 385 of 96 is concerned the appeal filed against the same in C.A. No. 5990 of 1997 (National Thermal Power Corporation Ltd. v. Karri Pothuraju & Ors.) was considered separately and by our

judgment separately delivered today has been affirmed and the appeal by the management has been dismissed. This decision also would squarely govern all these cases in favour of the workers. Consequently, we see no merit whatsoever in the submissions made to the contra by way of challenge in all these appeals, wherein the appellants concerned, indisputably are obliged to run the respective canteens in their establishments on account of the obligation cast upon them under the mandatory provisions of the Factories Act, 1948, and the Rules made thereunder".

The test of control had been again approved by the S.C. in *M/s. Bharat Heavy Electrical Ltd. v. State of U.P. & Ors.* AIR 2003 SCW 3469. There the SC held that the gardeners engaged through the contractors, when the work was controlled and supervised by the employee of the management, were employees of the Company (the Management). On a consideration of the above decisions, it can be safely held that when the Port Trust was having control over the management of the Canteen though it was operated by the Contractor or by the workers clubs/workers association, the employees of the canteen were the workers of the establishment namely, the Cochin Port Trust.

7. The learned counsel for the petitioners submitted that it was the policy of the Government to treat the Canteen workers working in Government Departments through Contractors as Government Servants and accordingly Ext. P2 order had been issued. Ext. P2 order would reveal that the employees working in departmental canteens and in co-operative canteens located in Central Government Offices were to be treated as employees of the Department. The decision of the SC in [M.M.R. Khan and others etc. Vs. Union of India and others, etc.](#), would reveal that the employees engaged through contractors by the Railways were treated as Railway employees.

8. The learned counsel for the petitioners submitted that the employees in the statutory canteens in the Port Trust of Calcutta are treated as the employees of the Port Trust, relying on Ext. P4 judgment dated 10.10.1991. That was a case where the Calcutta High Court declared that the employees of the non-statutory canteens in the Calcutta Port Trust working in the Port of Calcutta and Haldies were workers of the Port Trust. The above judgment would further reveal that the canteen workers in the statutory canteens were already treated as employees of the Port Trust and they were given the benefits as employees of the Port Trust. The learned counsel for the petitioner further submitted that the Port Trust of Madras, Bombay and Calcutta have already decided to treat the canteen employees as the employees of the Port Trust and the Cochin Port Trust being a sister concern will have to follow the same. On a consideration of the entire circumstances, it was evident that the control in the running of the Canteen was with the Port Trust and the canteen was being operated through the contractors or workers club/welfare club and they were only agents of the Port Trust. Hence petitioners are to be treated as employees of the Port Trust and they should be given the benefit as the employees under the Port Trust.

9. A contention was raised by the Port Trust that the appointment to the Port Trust was on regular selection process complying with the relevant rules and regulations on the basis of educational qualifications and also observing the directions on reservation and many of the canteen workers were not eligible for appointment for the regular post. The learned counsel for the petitioner submitted that many of the canteen workers are qualified or eligible to be appointed as last grade workers. The S.C. in [Indian Petrochemicals Corpn. Ltd. and Another Vs. Shramik Sena and Others](#), had held that the guidelines issued by the Bombay High Court for absorption in the employment of the management was acceptable and the following guidelines can be adopted :

(1) At the time of initial appointment the workmen should satisfy the prescribed age-limits, health standards, and educational qualifications.

(2) The guidelines regarding reservation also to be followed.

(3) Those not absorbed should be paid retrenchment compensation".

The Port Trust can regularise the employees engaged in the Canteen run by the Port Trust following the above guidelines.

In the result this petition is allowed. The employees of the canteen established by the Cochin Port Trust shall be regularised as observed above. Ext. P7 order shall stand set aside.