(2001) 08 CAL CK 0053

Calcutta High Court

Case No: Writ Petition No. 1414 of 2001

Standard Chartered Bank and Another		APPELLANT
	Vs	
Union of India (UOI)		RESPONDENT

Date of Decision: Aug. 7, 2001

Acts Referred:

- Employees Provident Funds and Miscellaneous Provisions Act, 1952 - Section 7(1)

Citation: (2002) 2 LLJ 754

Hon'ble Judges: D.K. Seth, J

Bench: Single Bench

Advocate: Arunava Ghosh, Sowmen Sen, Susanta Dutta and Sutapa Dutta, for the Appellant;Anil Gupta, for the Respondent

Judgement

D.K. Seth, J.

In this case an order dated May 1, 2001 passed by the Assistant Provident Fund Commissioner being Annexure ''P-12'' to the petition has since been challenged.

2. Mr. Arunava Ghosh, learned counsel for the petitioner, submits that the finding that the canteen employees, were the employees of the bank cannot be entertained by the Provident Fund Commissioner, inasmuch as it is not the forum where such a disputed question of fact can be determined. According to him, the canteen employees are not the employees of the bank since the bank does neither engage them nor has any ultimate control over their employment which is at the hands of the Canteen Committee. It is only by way of a welfare measure the bank reimburses the expenses incurred by the Canteen Committee and makes certain facilities available for such welfare of the employees of the bank. He also contends relying on several decisions of the Apex Court that the canteen employees are not the employees of the employer and that the bank is not the principal employer of such employees.

3. The learned counsel for the workmen submits that an appeal having been provided u/s 7(1) of the Employees'' Provident Fund and Miscellaneous Provisions Act, 1952, the Writ Court should not exercise its jurisdiction and the writ-petition should be dismissed. According to him, this requires the determination of finding of fact which this Court cannot undertake in exercise of writ jurisdiction.

4. Mr. Gupta, learned counsel for the Provident Fund Commissioner, adopts the same submission as made by the learned counsel for the workmen and he relies on several decisions.

5. In reply, Mr. Ghosh has pointed out that alternative remedy is not an absolute bar. He has relied on several decisions to show that when it is the violation of fundamental principle of law or travels beyond the jurisdiction, the writ jurisdiction can be exercised.

6. I have heard the learned counsel appearing for the parties at length. In the present case, it appears from the impugned order contained in Annexure ''F-12'' to the petition that in the said order a statement relating to facts has been mentioned and then, it was recorded that the authority was of the view that the objection raised by the bank had no force and that the employees of the canteen were coverable under the E.P.F. and M.P. Act, 1952. It had also held that from the tripartite settlement it is apparent that the canteen employees were the employees of the bank. It had also found the ultimate control of the bank on the basis of a certificate issued by it and, therefore, it had made a distinction between a real and apparent employer and had held that the bank is the real employer.

7. In the present case, the facts are not in dispute. It is only a substantial question of law, in relation to the facts, required to be applied and on the basis of the admitted facts it has to be examined whether they are the employees of the bank or not.

8. Mr. Ghosh has relied on the tripartite settlement and pointed out that it was a question of reimbursement of the wages and other things incurred by the canteen committee in maintaining the canteen which is maintained pursuant to a welfare policy of the bank. Thus, from the tripartite settlement or other documents it cannot be straightway contended that the employees are the employees of the bank.

9. In the decision in the case of Employers in relation to the Management of Reserve Bank of India Vs. Their Workmen, , the Apex Court has held as follows at pp. 49,50, 51 of LLJ:

"24. Now we have to examine the reasons which persuaded the Tribunal in this case to hold that the instant case falls within the ratio laid down by this Court in M.M.R. Khan case. In all the three different categories of canteens - canteens run by the Implementation Committee (Canteen Committee), Co-operative Societies and contractors - the Bank was making grants by way of subsidy at 95% of the costs incurred by the canteens for payment of salary, PF contribution, gratuity, uniform,

etc. besides providing fuel, water, fixtures, utensils, furniture, electricity, premises, etc. free of charge. We will take up the individual facts highlighted by the Tribunal in respect of the different categories of canteens. When the question between the employers in relation to Reserve Bank of India and their Class III workmen came up before Justice DINGHE on a reference, on an earlier occasion, the bank had submitted that adequate canteen facilities are available to the employees of the bank and that the bank has provided facilities in that regard. Regarding the canteen run by the Implementation Committee (Canteen Committee), out of the 12 representatives 3 of them are from the bank-the Currency Officer, Personnel Officer and the Officer from the Personal Policy Department. The Currency Officer is always the Chairman of the Canteen Committee. The bank relieved four employees who are in the committee, two for full day and two for half day to supervise the day to day affairs of the canteen. The Committee cannot increase the strength of the canteen employees without the permission of the bank. The rates of eatables also cannot be revised without the consent of the Manager. They cannot effect any wage revision without the approval of the bank. The bank is also reimbursing the expenses incurred over the periodical medical checkup of the employees attached to the kitchen and counters. In these circumstances, the Tribunal held that the case clearly falls within the ratio laid down by this Court in M.M.R. Khan case, since the bank exercises ''remote control'' which is as effective as any. As against the above aspects, the fact remains that according to the bank it has only a limited role to play regarding the functioning of the Committee and does not have any control whatsoever on the employees engaged by the Committee so far as taking of disciplinary action against any particular employee is concerned. The bank has further brought out in cross-examination of the employees'' representative that the recruitment of the workers for the canteen is made by the Canteen Committee, and the attendance record as well as the sanctioning of leave to the workers is done by the Committee. It was also brought out in evidence that the only role played by the bank in the running of the canteen was the nomination of the three members to the Committee. It is common ground that the canteen run by the Implementation Committee (Canteen Committee) is not under any legal obligation as was the case in M.M.R. Khan case. Moreover, there is no right in the bank to supervise and control the work done by the persons employed in the Committee nor has the bank any right to direct the manner in which the work shall be done by various persons. The bank has absolutely no right to take any disciplinary action or to direct any canteen employee to do a particular work. Even according to the Tribunal, the bank exercises only a ''remote control''. We are of the view that in the absence of any obligation, statutory or otherwise regarding the running of a canteen by the Bank and the details relating thereto similar to Factories Act or the Railway Establishment Manual, and in the absence of any effective or direct control in the bank to supervise and control the work done by various persons, the workers in the canteen run by the Implementation Committee (Canteen Committee) cannot come within the ratio laid down by this Court in M.M.R. Khan case.

25. We shall now take up the case of canteens run by the Co-operative Societies. Apart from subsidy, and other matters provided free of charge like water, electricity, premises, furniture, etc. the Tribunal has adverted to the fact that the licence renewal charges paid by the Committee are reimbursed by the bank. Neither the strength of the workmen employed, nor the wages can be revised without the prior sanction of the bank and so these canteens are non-statutory recognised canteens and there is direct control exercised by the bank in the form of nominating the representative of the bank. Here again none of the peculiar aspects adverted to by this Court in M.M.R. Khan case regarding the non-statutory recognised canteens are present. The mere fact that the bank nominates its representative to the committee or reimburses the licence renewal charges will not in any way provide any direct control.

26. We will now take up the matter regarding the non-statutory non-recognised canteens. In dealing with this matter, the Tribunal has referred to the various aspects stressed in para 38 of the judgment in M.M.R. Khan case that the workmen therein are not railway servants. The Tribunal has adverted to the agreement executed between the bank and the contractor which, according to it, will show that the distinguishing features mentioned in M.M.R. Khan case are not present in this case. It may be so. That leads us to no positive conclusion regarding the matter at issue. As per the agreement the bank has detailed the subsidy and other facilities afforded by it to run the canteen and has also stipulated certain conditions necessary for conducting the canteen in a good, hygienic and efficient manner like insistence of the quality of food, supply of food, engagement of experienced persons etc. Such conduct cannot in any manner point out any obligation in the bank to provide ''canteen'': as wrongly assumed by the Tribunal. Since the distinguishing features mentioned in M.M.R. Khan case are not present in this case, the Tribunal by a negative process was inclined to hold that though the canteens may be non-statutory and non-recognised in nature, they ''could be said to be'' non-statutory recognised ones and so they will be entitled to get all the benefits like the recognised canteens. This is a wrong: approach to the issue. We have already held that non-statutory recognised canteens in the instant case are not similar to the non-statutory recognised canteens considered in M.M.R. Khan case. If the workers in the non-statutory recognised canteens themselves cannot be considered to be workmen under the bank, by the same token, the workers employed by the contractors, even if they are considered to. be non-statutory recognised canteens as held by the Tribunal, will not be entitled to get any benefit. It is only by holding that the canteens run by contractors are similar to non-statutory recognised canteens, the Tribunal has given the same benefit as was given to the workmen in the recognised canteens. It should also be noticed that the various factors noticed in para 38 of the judgment in M.M.R. Khan case were adverted to by this Court to deny the plea that the canteen workers are not railway servants in the context of the various provisions contained in the Railway Establishment Manual and other

documents. The said decision rested on its own facts.

27. We, therefore, hold that the assumption made by the Tribunal that the instant case clearly falls within the ratio laid down by this Court in M.M.R. Khan case is totally unjustified and incorrect. On the facts of this case, in the absence of any statutory or other legal obligation and in the absence of any right in the bank to supervise and control the work for the details thereof in any manner regarding the canteen workers employed in the three types of canteens, it cannot be said that the relationship of master and servant existed between the bank and the various persons employed in three types of canteens. 166 persons mentioned in the list attached to the reference are not workmen of the Reserve Bank of India and that they are not comparable employees employed in the officers lounge. Therefore, the demand for regularisation is unsustainable and they are not entitled to any relief. We hold that the award passed by the Tribunal is factually and legally unsustainable. *"

10. In State Bank of India and Others Vs. State Bank of India Canteen Employees'' Union (Bengal Circle) and Others, the Apex Court observed as follows at pp. 1451, 1452 of LLJ:

"28. Further, this Handbook is prepared on the basis of agreement reached between the bank and the representatives of the Staff Federation and the Staff Federation has itself settled the dispute by four agreements dated October 31, 1977, September 17, 1984, January 9, 1991 and April 2, 1999 as stated above. This would also indicate that there was no obligation on the part of the bank to provide canteen facilities to its staff, otherwise the Staff Federation would not have settled the appeal against Justice MOIDU''S Award, which was pending before this Court, on the basis of the settlements. Further, it cannot be said that an outsider who is not employed by the bank, but who is working in the canteen run by LIC can claim that he is discriminated. Discrimination between two equals may arise in case where employees are appointed by the bank.

29. Further as there was no statutory, legal or contractual obligation of the bank to run the canteen or provide for canteens in its branches, the Tribunal was right in relying upon the decision in RBI case. In that case, three different categories of canteen (canteens run by the Implementation Committee, Co-operative Societies and contractors) were being run and Reserve Bank of India was making grant by way of subsidy of 95 per cent of the cost incurred by the canteens for payment of salary, PF contribution, gratuity, uniform etc. besides providing fuel, water, fixtures, utensils, furniture, electricity, premises, etc. free of charge. In the canteen run by the Implementation Committee (Canteen Committee), out of the 12 representatives, 3 of them were from the Bank - the Currency Officer, Personnel Officer and the officer from the Personal Policy Department. The Currency Officer is to be appointed as the Chairman of the Canteen Committee. The Bank relieved four employees who were in the Committee, two for full day and two for half day to supervise the

day-to-day affairs of the canteen. Further, the Committee could not increase the strength of the canteen employees without the permission of the bank. The rates of eatables also could not be revised without the consent of the Manager. They could not effect any wage revision without the approval of the bank. The bank was also reimbursing the expenses incurred over the periodical medical check up of the employees attached to the kitchen and counters. In the background of the said facts and after considering the earlier decisions and the contentions, the Court held that:

(a) There is no right in the Bank to supervise and control the work done by the persons employed in the Committee nor has the bank any right to direct the manner in which the work shall be done by various persons. The bank has absolutely no right to take any disciplinary action or to direct any canteen employee to do a particular work.

(b) In the absence of any obligation, statutory or otherwise, regarding the running of a canteen by the bank and the details relating thereto similar to Factories Act or the Railway Establishment Manual, and in the absence of any effective or direct control in the bank to supervise and control the work done by various persons, the workers in the canteen run by the Implementation Committee (Canteen Committee) cannot come within the ratio laid down by this Court in M.M.R. Khan case.

(c) As per the agreement the Bank has detailed the subsidy and other facilities afforded by it to run the canteen and has also stipulated certain conditions necessary for conducting the canteen in a good, hygienic and efficient manner like insistence on the quality of food, supply of food, engagement of experienced persons etc. Such conduct cannot in any manner point out any obligation in the bank to provide ''canteen'' as wrongly assumed by the Tribunal.

(d) On the facts of this case, in the absence of any statutory or other legal obligation and in the absence of any right in the bank to supervise and control the work or the details thereof in any manner regarding the canteen workers employed in three types of canteens, it cannot be said that the relationship of master and servant existed between the Bank and the various persons employed in three types of canteens.

30. In the present case also, the facts are similar. There is no obligation statutory or otherwise to run the canteens by the bank. The scheme as stated above only provides for grant of subsidy, for promoting/running of a canteen and if some more cost is incurred in running the canteen, the members of the staff working in that particular branch are required to bear it. The bank is not employing the canteen workers. The bank is not supervising or controlling the work or the details regarding the canteen or its employees appointed by the Local Implementation Committee. Auditing the work of the Local Implementation Committee - whether subsidy given by it is properly utilised or not, also would not be a ground for holding that the bank is having any control in running the canteen. The bank is not taking any disciplinary

action or directing any canteen employee to do a particular work or for that purpose no scheme is laid down by the bank. Not only this, the other most important aspect is "the recruitment" by the bank is to be made as per the statutory rules framed by it after giving proper advertisement, test and/or interview. As against this, for appointing a canteen employee there are no rules framed by the bank."

11. In the case of Parimal Chandra and Others Vs. Life Insurance Corporation of India and Others, the Apex Court has held as follows at p. 350 of LLJ:

"What emerges from the statute law and the judicial decisions is as follows:

(i) Whereas under the provisions of the Factories Act, it is statutorily obligatory on the employer to provide and maintain canteen for the use of his employees, the canteen becomes a part of the establishment and, therefore, the workers employed in such canteen are the employees of the management.

(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 become a part of the establishment.

(iii) The obligation to provide canteen may be explicit or implicit. Where the obligation is not explicitly accepted by or cast upon the employer either by an agreement or an award, etc., it may be inferred from the circumstances, and the provision of the canteen may be held to have become a part of the service conditions of the employees. 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.

Where to provide canteen services has become a part of the service conditions of the employees, the canteen becomes a part of the establishment and the workers in such canteen become the employees of the management.

(iv) Whether a particular facility or service has become implicitly a part of the service conditions of the employees or not, will depend, among others, on the nature of the service/facility, the contribution the service in question makes to the efficiency of the employees and the establishment, whether the service is available as a matter of right to all the employees in their capacity as employees and nothing more, a number of employees employed in the establishment and the number of employees who availed of the service, the length of time for which the service has been continuously available, the hours during which it is available, the nature and character of management, the interest taken by the employer in providing, maintaining, supervising and controlling the service, the contribution made by the management in the form of infrastructure and funds for making the service

available etc."

12. The question raised in this case is no more res Integra. By reason of the above decisions, now, the law is settled. In order to decide the questions the guidelines have since been laid down. The factors may be summarised as hereafter:

a) Obligation to run a canteen;

i) Whether there is statutory, as under the Factories Act, obligation or other obligation to run the canteen. If so, then the canteen becomes part of the establishment. When it is part of the establishment the employees of the canteen become the employees of the management.

ii) The obligation to run a canteen is distinct from the obligation to provide facilities to run canteen. A canteen run pursuant to the latter obligation does not become part of the establishment.

iii) The obligation may be explicit or implicit. It is to be examined whether it becomes part of the service conditions. It is a question of fact dependant on the facts and circumstances of each case. If it is a part of service conditions the canteen becomes part of the establishment.

b) Ultimate Control:

i) Whether the management has any control over the work done by the employees of the canteen or any right to direct the manner how the work is to be done or to direct a particular employee to do a particular work.

ii) Whether the management has right to appoint or terminate the service of the canteen employee or to take any disciplinary action against such employee or to grant or sanction leave etc.

iii) Agreement to provide facilities, or reimbursement of pay, cost charges or payment of subsidy or providing uniform or arranging medical check up of the employees or bearing the cost therefore or insistence on hygiene, quality, supply of food or engagement of experienced person, are not factors pointing out obligation.

iv) Whether the role of the employer in the management and supervision of the canteen is limited or all pervasive. If the role is limited then it is not part of the establishment.

13. Thus, it appears that if pursuant to a welfare policy a canteen is run by an establishment, the canteen employees may not be the employees of the principal employer. But in order to establish the relationship it has to be looked into from the relation between the parties, particularly with regard to the ultimate control relating to the employment. The other criteria is as to whether there is any statutory obligation or other obligation to run such canteen by the employer as is necessary under the Factories Act.

14. Having regard to the proposition of law as discussed above it appears that there are some substances in the contention of Mr. Ghosh to the extent that the authority while passing the order contained in Annexure P-12 has not addressed itself to the proposition of law which he ought to have done while considering this question having regard to the law that was settled by the Apex Court. It is a question of examination of the said proposition having regard to the facts and circumstances. The imposition of the liability is founded on such finding and as such it is a question which goes to the root of the case. When it is dependent on the root and relates to a fact which gives jurisdiction to the authority, it is a jurisdictional fact and if it is a jurisdictional fact in that event this Court can very well enter into that question, despite alternative remedy being available.

15. Admittedly, there is an alternative remedy available and that is also adequate. Had it been a case of determination of finding of fact, in that event this Court ought not to have undertaken such exercise and one could have been asked to prefer an appeal. But when on the admitted facts it is a question of law that has to be applied on such facts and determination has to be made. If it is found that there has been a violation of the fundamental principle of law or that a fundamental principle of law has not been addressed to, in that event, this Court, despite alternative remedy, can interfere.

16. Mr. Ghosh has relied, to counter such proposition, on J.M. Baxi & Co. Gujarat v. Commissioner of Customs, New Kandla and Anr. 2000(3) AIR SCW 1871, in paragraph 3 whereof it was held as follows:

"3. Normally, the High Court ought not to interfere in exercise of its jurisdiction under Article 226 when adequate alternative remedy is available, but in the special facts of this case when the demand was raised and the same had been challenged on the ground that it was barred by time and where the demand is nearly of 46 lakhs of rupees which will have to be deposited before any appeal can be filed, we are of the opinion that the High Court ought to have exercised its jurisdiction and determined the questions which were raised in the writ petition on merits. In dealing with the contentions raised by the appellant, the High Court would necessarily have to consider the contention of the respondent as well."

17. He then relied upon the decision in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, and relied on paragraphs 14, 15, 20 and 21 wherein it was held that:

"The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. The High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative

remedy has been consistently held by the Supreme Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the fundamental rights or where there has been a violation of the principle of natural justice or where the order or. proceedings are wholly without jurisdiction or the vires of an Act is challenged.

Therefore, the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, inspite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation. Hence, the High Court was not justified in dismissing the writ petition at the initial stage without examining the contention that the show-cause notice issued to the appellant was wholly without jurisdiction and that the Registrar, in the circumstances of the case, was not justified in acting as the "Tribunal"."

18. Mr. Ghosh has also relied on the decision in the case of S. G. Tin Printers Pvt. Ltd. v. R.P.F. Commissioner and Ors., reported in 2001-I-LLJ-628 (Cal-DB), for the same proposition which also supports his contention at p. 631 of LLJ:

"The learned Trial Judge held the writ petition was maintainable. No appeal against the said order has been filed by the respondent and in that view of the matter, it is not permissible for the respondents to contend that the writ application was not maintainable.

It is a well settled principle of law that the writ Court exercises only judicial restraint in the matter of entertaining writ application, when an alternative remedy is available, but the Court usually does not throw out a writ application on the ground of availability of an alternative remedy when a question arises as regards the jurisdiction of the authority to pass an order which is impugned before the writ Court or there has been violation of the principle of natural justice and/or fundamental rights of the petitioner."

19. In the present case, as observed earlier, since it goes to the root of jurisdiction therefore having regard to the facts and circumstances of this case and the decisions as cited above, I am inclined to interfere with the order. The order dated May 1, 2001 is, therefore, set aside. The case is remitted to the authority concerned for fresh decision after giving opportunity to the petitioner and the workmen to substantiate their respective contentions and examine the question on the facts that might emerge and the materials that might be placed before it having regard to the decisions cited above and in the light of the observations made hereinbefore and take a fresh decision within a period of 8 weeks from the date of communication of this order.

20. With, these observations this writ petition is disposed of.

21. No order as to costs.

22. Xerox certified copy of this judgment and order be made available to the parties expeditiously.