(2011) 05 DEL CK 0319

Delhi High Court

Case No: LPA No. 388 of 2010

Balwant Rai Saluja and Others		APPELLANT
	Vs	
Air India Ltd. and Others		RESPONDENT

Date of Decision: May 2, 2011

Acts Referred:

- Constitution of India, 1950 - Article 226, 227, 311
- Contract Labour (Regulation and Abolition) Act, 1970 - Section 33A
- Delhi Factories Rules, 1950 - Rule 65
- Factories Act, 1948 - Section 2, 45, 46

Citation: (2011) 180 DLT 396 : (2011) 4 LLJ 477 : (2011) LLR 739

Hon'ble Judges: Dipak Misra, C.J; Sanjiv Khanna, J

Bench: Division Bench

Advocate: Rudra Kahlon and Vandana Kahlon, for the Appellant; Sandeep Sethi Sangeeta Bharti and Nidhi Minocha for R1 and Meenakshi Sood, for R2 and R3, for the Respondent

Final Decision: Dismissed

Judgement

Dipak Misra, C.J.

In view of the commonality of the controversy involved in this batch of appeals, they were heard together and are being disposed of by a singular order. For the sake of convenience and clarity, the facts from LPA No. 390/2010 arising out of WP(C) No. 14178/2004 are adumbrated herein.

2. The Appellants-workmen claimed to be the deemed employees of the management of Air India Limited and on this basis, disputes were raised and on eventual failure, the Central Government referred the disputes to the Central Government Industrial Tribunal (for short =the tribunal'') for adjudication. It is worth noting that there were three identical references barring the change of names of

the workmen. The terms of reference read as follows:

Whether the demand of workmen S/Shri .... employed by Chefair to provide canteen services at the establishment of Air India is justified that they be treated as deemed employees of the management of Air India? If so, to what relief are the concerned workmen entitled to?

3. It was the case of the workmen before the tribunal that they were engaged on casual basis by the Respondent-management in the Air India Ground Service Department Canteen, Indira Gandhi International Airport, New Delhi through Chefair, flight caterers, which was a unit of the Hotel Corporation of India (HCI), a Government Corporation, the Respondent No. 2 herein. It was urged that the canteen was established and maintained by the Air India under the provisions of Section 46 of the Factories Act, 1948 (for brevity =the 1948 Act'') and by notification dated 21.1.1991, the Lt. Governor of Delhi had directed that Rules 65-70 of the Delhi Factories Rules, 1950 shall apply to the factories specified in the schedule to the said notification and as the Air India Ground Service Department Canteen finds mention at serial No. 9., its workers were deemed to be the employees of Air India. It was asserted before the tribunal that HCI had entered into a contract with the Respondent - Air India to maintain and run the said canteen which was a maladroit device to circumvent various provisions of the Contract Labour (Prohibition and Abolition) Act, 1970 (for short =the 1970 Act'') and that the workmen were performing duties which were permanent, perennial in nature and continuously required by the Air India but were paid wages less than the wages paid to regular employees performing the same duties. On the aforesaid foundation, the workmen claimed regularization of service with back wages. As the employees were disengaged during the pendency of the dispute, the same was also assailed u/s 33A of the Act.

4. The asseverations put forth by the workmen were resisted by the Air India on the ground that there was no employer and employee relationship between the workmen and Air India; that HCI of which Chef air was a unit had independent status and as per its memorandum of association, it was engaged in the business, inter alia, of establishing and running canteens; that the canteen was being run and maintained by the HCI on the basis of fixed subsidy for the employees of Air India which was Rs. 340 per month at the time of reference; that Air India was not aware of the number of employees engaged by the HCI and it had no control over the said employees who were governed by the Rules and Regulations and service conditions of the HCI; that the infrastructure of the canteen was provided by the Air India but the management was entrusted to the HCI which was responsible for providing canteen services to the Air India employees under the contract for running and maintaining the said canteen; that the appointment letters, token numbers, ESI cards, etc. had been issued to the workmen by the HCI and, therefore, under no circumstances the remedy of regularization was tenable against Air India as they

were not employees of Air India.

5. The tribunal, on the basis of the material brought on record, came to hold that the canteen, which was catering to the welfare of more than 2,000 workers of Air India, was a statutory canteen u/s 46 of the Factories Act; that the canteen was situated within the premises of Air India; that the HCI, which ran the canteen and carried the business, acted under the control and supervision of Air India as was evincible from the memorandum and articles of association; that Air India and HCI were not entirely separate and independent entities; that there was inseparable and insegregable nexus between the HCI and Air India and the statutory duty of Air India cannot be said to be an independent act of HCI; that the factual matrix clearly revealed that the canteen was not independently run by the HCI on contract basis but on the contrary, the contract entered into by Air India with the HCI was merely a camouflage since it was obligatory on the part of Air India to establish a canteen; that Air India had constituted a Committee of persons nominated from its employees and the employees of HCI for looking into the problems of service, hygiene, etc. of the canteen; and that the workmen employed to work in the canteen through the agency were deemed to be employees of the owner of the canteen, that is, Air India.

6. Being of this view, the tribunal directed that Air India has to treat the employees of the canteen as its employees and extend the benefits and further, since the workmen were terminated from their services during the pendency of the dispute either before the Conciliation Officer or before the labour court/tribunal, the same was illegal and, therefore, the Appellants were entitled to be reinstated with the consequential benefits of regularization and parity of pay with 50% back wages along with 6% interest.

7. Being dissatisfied with the aforesaid award, the Respondent-employer invoked the inherent jurisdiction of this Court under Articles 226 and 227 of the Constitution of India contending, inter alia, that the tribunal had fallen into error by relying on the decisions in Kanpur Suraksha Karamchari Union (Regd.) Vs. Union of India (UOI) and Others, and M.M.R. Khan and others etc. Vs. Union of India and others, etc., ; that the HCI and Air India cannot be treated to be a singular entity inasmuch HCI was a government corporation having a separate entity; that there was no material on record that Air India exercised any control or supervision or disciplinary authority over the employees; that Air India had no say in the appointment of the employees engaged by the HCI; that providing infrastructure of a canteen cannot be treated to be a decisive test; that the finding of the tribunal that the contract entered into by Air India with the HCI was a sham one to avoid the provisions contained in the 1970 Act is baseless; that in law, a company is altogether distinct from its shareholders and hence, the extent of shareholding of Air India in HCI was totally immaterial to the issue; that merely because Section 46 of the Factories Act provides for establishment of a canteen for the welfare of the workmen, the same does not

make the employees of the canteen employees of the owner of the factory unless other additional factors, which find mention in various decisions of the Apex Court, were satisfied; that the grant of subsidy by Air India to its employees to avail food from the canteen was totally an inconsequential and irrelevant factor; that the constitution of a Committee to look after the hygiene and quality of food was not an aspect to be taken into consideration to determine the status of the employees of the canteen; and that the decision in M.M.R. Khan and Ors. (supra) was totally distinguishable and was not applicable to the factual matrix of the case. The learned Counsel for the management cited various authorities before the learned Single Judge which have also been cited before us to which we shall refer to at a later stage.

8. The stand and stance put forth by the Management was combated by the Respondent-workmen before the learned Single Judge supporting the award passed by the tribunal and relying on the findings and the law laid down in M.M.R. Khan and Ors. (supra).

9. The learned Single Judge accepted the submissions canvassed by the learned Counsel for the management and dislodged the award. Be it noted, the learned Single Judge took note of the fact that no relief was claimed against the HCI before the tribunal.

10. We have heard Mr. Rudra Kahlon, learned Counsel for the Appellants, Mr. Sandeep Sethi, learned senior counsel along with Ms. Sangeeta Bharti and Ms. Nidhi Minocha, learned Counsel for the Respondent No. 1 and Ms. Meenakshi Sood, learned Counsel for the Respondents No. 2 and 3.

11. The core issue that emanates for consideration is whether in the obtaining factual matrix it can be held that the employees of the canteen established by Air India in its premises and run by the HCI be treated as regular employees of the Air India. Before we advert to the factual canvas, we think it appropriate to refer to the citations in the field, cull out the principles and analyse whether they are applicable to the material brought on record.

12. In M.M.R. Khan and Ors. (supra) on which heavy reliance has been placed by the learned Counsel for the Appellants, the Apex Court referred to Section 46 of the 1948 Act, the circulars issued by the Railway Board, the Railway Establishment Manual which deals with canteens and proceeded to state as follows:

Since in terms of the Rules made by the State Governments under S. 46 of the Act, it is obligatory on the Railway Administration to provide a canteen, and the canteens in question have been established pursuant to the said provision there is no difficulty in holding that the canteens are incidental to or connected with the manufacturing process or the subject of the manufacturing process. The provision of the canteen is deemed by the statute as a necessary concomitant of the manufacturing activity. Paragraph 2829 of the Railway Establishment Manual

recognises the obligation on the Railway Administration created by the Act and as pointed out earlier paragraph 2834 makes provision for meeting the cost of the canteens. Paragraph 2832 acknowledges that although the Railway Administration may employ anyone such as a Staff Committee or a Co-operative Society for the management of the canteens, the legal responsibility for the proper management rests not with such agency but solely with the Railway Administration. If the management of the canteen is handed over to a consumer cooperative society the bye-laws of such society have to be amended suitably to provide for an overall control by the Railway Administration.

21. In fact as has been pointed out earlier the Administrative Instructions on departmental canteens in terms state that even those canteens which are not governed by the said Act have to be under a complete administrative control of the concerned Department and the recruitment, service conditions and the disciplinary proceedings to be taken against the employees have to be taken according to the rules made in that behalf by the said Department. In the circumstances, even where the employees are appointed by the Staff Committee/ Cooperative Society it will have to be held that their appointment is made by the Department through the agency of the Committee/Society as the case may be. In addition, as stated earlier, the Railway Board by its circular dated June 8, 1981 had communicated that it was decided to treat the employees of all statutory canteens, as railway servants irrespective of the type and management of the canteens, and to extend to them the conditions of service and emoluments of the railway servants as existed on October 21, 1980, w.e.f. 22nd October 1980. No doubt it was stated in this letter that the said decision would prevail till Government decided otherwise. Subsequently on March 11, 1982, the Board also prescribed the pay-scales, dearness allowance, house rent allowance, city compensatory allowance and productivity bonus, and fixed the age of their superannuation. As also pointed out earlier, this Court in its decision reported in Kanpur Suraksha Karamchari Union (Regd.) Vs. Union of India (UOI) and Others, subsequently directed that for the purpose of calculating pensionary benefits the service rendered by the said employees prior to October 22, 1980 would be computed. What is further, the Ministry of Railways by its letter of May 13, 1983 placed on record the fact that not only the employees of all the statutory canteens but the employees of eleven Delhi based non-statutory canteens had been treated as railway servants with effect from October 22, 1980. It must be remembered in this connection that neither the Railway Ministry nor the Railway Board had stated in their letters/orders that the employees of the statutory canteens and of the eleven Delhi based non-statutory canteens were being treated as railway servants only for the purposes of the Factories Act or that they were to be so treated till further decision of this Court.

After so stating, their Lordships proceeded to deal with the other circulars issued by the Railway Administration and eventually held thus:

Thus the relationship of employer and employee stands created between the Railway Administration and the canteen employees from the very inception. Hence, it cannot be gainsaid that for the purposes of the Factories Act the employees in the statutory canteens are the employees of the Railways. The decisions of the Calcutta and Madras High Courts (supra) on the point, therefore, are both proper and valid.

13. It is worth noting that in the said case, the view that has been expressed by the Apex Court is to the effect that the workers engaged in the statutory canteens as well as those engaged in non-statutory recognized canteens in the Railway Establishments are railway employees and they are entitled to be treated as such.

14. In Employers in relation to the Employers in relation to the Management of Reserve Bank of India Vs. Their Workmen, the issue that emerged was whether the persons working in the various canteens were employees of the Reserve Bank of India. The plea of the Federation on behalf of the workmen was that the Bank was under the statutory obligation to provide canteen facilities to the employees and the same was being done through agencies such as Implementation Committee (Canteen Committee), Cooperative Society and contractor instead of the Bank doing it on its own by employing persons directly. It was also put forth that the entire economic control was with the Bank and so the workmen employed in all these canteens were to be treated as the employees of the Bank. The said stand was resisted by the Bank contending, inter alia, that the Bank did not supervise or control the working of the canteens or the supply of eatables to the employees and the disciplinary control over the persons employed in the canteens did not vest with the Bank. That apart, various other pleas were raised. It is worth noting that the Central Government Industrial Tribunal, placing reliance on the decision rendered in M.M.R. Khan and Ors. (supra), expressed the view that the employees were entitled to the reliefs as prayed for. Their Lordships adverted to the conclusions in M.M.R. Khan and Ors. (supra) in respect of three categories and held thus:
19. Category 1: Statutory Canteens: This Court in Civil Appeal No. 368 of 1978 dated 22.10.1980 had held that the employees in the statutory canteens were railway employees for the purpose of the Factories Act. In the said decision, this Court declined to interfere with the rejection of the demand of the workers for pay and allowances to them as if they were railway employees. As a result of subsequent orders passed by the Government, Railway Board and the decision of this Court and instructions of the Department, it became evident that the Government has complete control over the canteens and the workers employed therein became holders of civil posts within the meaning of Article 311 of the Constitution. Their recruitment and service conditions are governed by the rules applicable to the employees of the government department/office/ establishment to which the canteens are attached. In this background, the Court adverted in detail to the various government orders and circulars of the Railway Board vis-a-vis Section 45 of the Factories Act and held that the employees in the "statutory canteens" of the

railways will have to be treated as "railway servants". It was further observed that the employees in the statutory canteens are entitled to the status of railway employees and they are entitled to succeed in their claim purely on facts peculiar to them discussed in the judgment.

20. Dealing with the second category-"Non-statutory Recognised Canteens", the Court adverted to paras 2831 to 2834 of the Railway Establishment Manual and held that the aforesaid provisions enjoin the Railway Administration to take steps to develop their canteen organisation to the maximum possible extent as a measure of staff welfare preferably by encouraging the development of Canteens for staff on co-operative basis. This mandate was stated to be in addition to the canteens required to be established by the Factories Act. On a review of the various provisions of the Railway Establishment Manual (the details whereof were adverted to in paras 31 to 35 of the judgment) and proceedings of courts, it was held in para 36 of the judgment that there is hardly any difference between the statutory canteens and non-statutory recognised canteens. Detailed provisions of the Railway Establishment Manual were highlighted to show that the obligations of the Board under the Manual are substantially similar to those enjoined under the Factories Act and no distinction can be made between the employees of the two types of canteens - statutory canteens and non-statutory recognised canteens - so far as their service conditions are concerned. So, it was further held that the employees in the non-statutory recognised canteens should be treated on a par, with those employees in the statutory canteens and they should be treated for all purposes as railway servants.

21. Dealing with the category of persons employed in the "non-statutory non-recognised canteens", in para 38 of the judgment, this Court highlighted the fact that they were not started with the prior approval of the Board as required under paragraph 2831 of the Railway Establishment Manual. They are not required to be managed either as per the provisions of the Railway Establishment Manual or the administrative instructions. There is no obligation on the railway administration to provide them with any facility nor are they given any subsidy or loan. The canteens are run by private contractors and there is no continuity either of the contractors or the workers engaged by them. There is further no obligation cast even on the local officers to supervise the working of these canteens, there existed no rules for recruitment of the workers and their service conditions, and the canteens are run on ad hoc basis; and in these circumstances it was held that the workers engaged in these canteens are not entitled to claim the status of the railway servants.

15. We have referred to the aforesaid decisions only to highlight how the decision rendered in M.M.R. Khan and Ors. (supra) was understood in the backdrop of statutory canteens, non-statutory recognized canteens and non-statutory non-recognized canteens.

16. In Indian Petrochemicals Corpn. Ltd. and Another Vs. Shramik Sena and Others, a three-Judge Bench of the Apex Court referred to the definition of Section 2(l) of the Factories Act which defines a =worker''. Thereafter, their Lordships posed the question whether the status of a workman under the Factories Act confines the relationship of the employer and the employees to the requirements of the Factories Act alone or does this definition extend for all other purposes which includes continuity of service, seniority, pension and other benefits which a regular employee enjoys. Their Lordships opined that the employees of a statutory canteen ipso facto do not become the employees of the establishment for all purposes. Their Lordships referred to the decision in Parimal Chandra and Others Vs. Life Insurance Corporation of India and Others, which was based on the decision of M.M.R. Khan and Ors. (supra) and expressed the view as follows:

22. If the argument of the workmen in regard to the interpretation of Parimal Chandra and Others Vs. Life Insurance Corporation of India and Others, 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, 1990 Supp SCC 191. On this point similar is the view of another three-Judge Bench of this Court in the case of Employers in relation to the Management of Reserve Bank of India Vs. Their Workmen, Therefore, following the judgment of this Court in the cases of Khan (supra) and R.B.I. (supra) 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.

After so holding, their Lordships posed a question whether the employees would become employees of the management for all purposes in the obtaining factual scenario. Their Lordships took note of the significant fact which showed the true nature of the employees'' employment and various other facets and eventually came to hold that if all the factors were considered cumulatively, the Respondents were in fact the workmen of the Appellant-management. In Workmen of the Canteen of Coates of India Ltd. v. Coates of India Ltd. and Ors. (2004) 3 SCC 547, the issue arose whether the workmen employed in a canteen, which was run in the premises of Coates of India Ltd., could be regarded as the workmen of the Respondent-company. It was urged before their Lordships that it was the statutory obligation on the part of the company to provide a canteen in the premises and, therefore, the employees of the canteen must be presumed to be the workmen employed by the Respondent-company and no one else. Their Lordships concurred with the view expressed by the High Court which had opined that the canteen employees were neither directly appointed by the company nor the company had any supervisory control over them and hence, they could not be treated as workmen employed by the Respondent-company.

17. In Workmen of Nilgiri Coop. Mkt. Society Ltd. Vs. State of Tamil Nadu and Others, , their Lordships in paragraph 32, while dealing with the factum of determination of relationship, have observed thus -

32. Determination of the vexed questions as to whether a contract is a contract of service or contract for service and whether the concerned employees are employees of the contractors has never been an easy task. No decision of this Court has laid down any hard and fast rule nor it is possible to do so. The question in each case has to be answered having regard to the fact involved therein. No single test - be it control test, be it organisation or any other test - has been held to be the determinative factor for determining the jural relationship of employer and employee.

Thereafter, their Lordships delineated upon the relevant factors which are to be taken into consideration for such determination. We think it apposite to reproduce the same.

37. The control test and the organization test, therefore, are not the only factors which can be said to decisive. With a view of elicit the answer, the Court is required to consider several factors which would have a bearing on the result: (a) who is appointing authority; (b) who is the pay master; (c) who can dismiss; (d) how long alternative service lasts; (e) the extent of control and supervision; (f) the nature of the job, e.g. whether, it is professional or skilled work; (g) nature of establishment; (h) the right to reject.

38. With a view to find out reasonable solution in a problematic case of this nature, what is needed is an integrated approach meaning thereby integration of the relevant tests wherefor it may be necessary to examine as to whether the workman concerned was fully integrated into the employer''s concern meaning thereby independent of the concern although attached therewith to some extent.

18. In Haldia Refinery Canteen Employees Union and Others Vs. Indian Oil Corporation Ltd. and Others, the learned Single Judge relying on the decisions in M.M.R. Khan and Ors. (supra) and Parimal Chandra Raha (supra) had held that the employees were, in fact, the employees of the Respondent-corporation and were being wrongly treated as employees of the contractor. A direction was issued to absorb the workmen and regularize them from the date of filing of the writ petition. In the intra-court appeal, the Division Bench, placing reliance on the decision rendered in Indian Petrochemicals Corporation Ltd. (supra), set aside the order passed by the learned Single Judge. While dealing with the appeal of the trade union, their Lordships referred to the decision in Indian Petrochemicals Corporation Ltd. (supra) and re-stated the principle, which, we think it apposite to reproduce -

6. We have carefully considered the submissions made by the learned Counsel for the parties. In Indian Petrochemicals Corpn. Ltd. and Another Vs. Shramik Sena and Others, this Court while disposing of an identical and similar question of law and fact with regard to the status of the employees working in the canteen and the status of the contractor who was running the canteen on the contract basis elaborately dealt with the scope of Section 46 of the Factories Act, 1948, particularly

with reference to the definition of "worker" as occurring in Section 2(1) of the Factories Act. After elaborate analysis of the earlier two judgments of this Court in M.M.R. Khan and others etc. Vs. Union of India and others, etc., and Parimal Chandra and Others Vs. Life Insurance Corporation of India and Others, cases it was held that what has been held in these cases is that the workmen were the employees of the management for the purposes of the Factories Act alone and did not become the employees of the establishment for any other purpose. After referring to the arguments advanced it was held: (SCC p. 449, para 22)

22. If the argument of the workmen in regard to the interpretation of Parimal Chandra Raha (supra) is to be accepted then the same would run counter to the law laid down by a larger Bench of this Court in M.M.R. Khan and Ors. (supra) case. On this point similar is the view of another three-Judge Bench of this Court in the case of Employers in relation to the Management of Reserve Bank of India Vs. Their Workmen, Therefore, following the judgment of this Court in the cases of M.M.R. Khan and Ors. (supra) and R.B.I. (supra) 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.

(emphasis supplied)

Further it was observed: (SCC p. 447, para 16)

16. It is clear from this definition that a person employed either directly or by or through any contractor in a place where manufacturing process is carried on, is a =workman'' for the purpose of this Act. Section 46 of the Act empowers the State Government to make rules requiring any specified factory wherein more than 250 workers are ordinarily employed to provide and maintain a canteen by the occupier for the use of the workers. It is not in dispute, pursuant to this requirement of law, the management has been providing canteen facilities wherein the Respondents employees are working. Hence, it is fairly conceded by the learned Counsel for the management that the Respondent workmen by virtue of the definition of the =workman'' under the Act, are the employees of the Appellant management for purposes of the Act.

7. After having gone into the question of worker being declared the employee of the management for the purpose of the Factories Act, the Court further analysed the question as to whether such relationship as existed between the worker and the employer under the Factories Act could be extended to wider arenas. It was held that the status of a workman under the Factories Act confines the relationship of employer and employees to the requirements of the Factories Act alone and does not extend for any other purpose. It was observed as under: (SCC p. 448, para 17)

17. The question however is: does this status of a workman under the Factories Act confine the relationship of the employer and the employees to the requirements of the Factories Act alone or does this definition extend for all other purposes which

include continuity of service, seniority, pension and other benefits which a regular employee enjoys. The Factories Act does not govern the rights of employees with reference to recruitment, seniority, promotion, retirement benefits, etc. These are governed by other statutes, rules, contracts or policies. Therefore, the workmen''s contention that employees of a statutory canteen ipso facto become the employees of the establishment for all purposes cannot be accepted.

(emphasis supplied)

Thereafter, their Lordships proceeded to state as follows: -

14. No doubt, the Respondent management does exercise effective control over the contractor on certain matters in regard to the running of the canteen but such control is being exercised to ensure that the canteen is run in an efficient manner and to provide wholesome and healthy food to the workmen of the establishment. This, however, does not mean that the employees working in the canteen have become the employees of the management.

15. A free hand has been given to the contractor with regard to the engagement of the employees working in the canteen. There is no clause in the agreement stipulating that the canteen contractor unlike in the case of Indian Petrochemicals Corpn. Ltd. (supra) shall retain and engage compulsorily the employees who were already working in the canteen under the previous contractor. There is no stipulation of the contract that the employees working in the canteen at the time of the commencement of the contract must be retained by the contractor. The management unlike in Indian Petrochemicals Corpon. Ltd. case (supra) is not reimbursing the wages of the workmen engaged in the canteen. Rather the contractor has been made liable to pay provident fund contribution, leave salary, medical benefits to his employees and to observe statutory working hours. The contractor has also been made responsible for the proper maintenance of registers, records and accounts so far as compliance with any statutory provisions/obligations is concerned. A duty has been cast on the contractor to keep proper records pertaining to payment of wages, etc. and also for depositing the provident fund contributions with the authorities concerned. The contractor has been made liable to defend, indemnify and hold harmless the employer from any liability or penalty which may be imposed by the Central, State or local authorities by reason of any violation by the contractor of such laws, regulations and also from all claims, suits or proceedings that may be brought against the management arising under or incidental to or by reason of the work provided/assigned under the contract brought by the employees of the contractor, third party or by the Central or State Government authorities.

16. The management has kept with it the right to test, interview or otherwise assess or determine the quality of the employees/workers with regard to their level of skills, knowledge, proficiency, capability, etc. so as to ensure that the

employees/workers are competent and qualified and suitable for efficient performance of the work covered under the contract. This control has been kept by the management to keep a check over the quality of service provided to its employees. It has nothing to do with either the appointment or taking disciplinary action or dismissal or removal from service of the workmen working in the canteen. Only because the management exercises such control does not mean that the employees working in the canteen are the employees of the management. Such supervisory control is being exercised by the management to ensure that the workers employed are well qualified and capable of rendering proper service to the employees of the management.

17. In Indian Petrochemicals Corpn. Ltd. (supra) this Court after analyzing the earlier judgments on the same point has held that the workmen working in the canteen become the workers of the establishment for the purposes of the Factories Act only ad not for any other purpose. They do not become the employees of the management ofr any other purpose entitling them to absorption into the service of the principal employer. Factors which persuaded this Court in Indian Petrochemicals Corpn. Ltd. case (supra) to take the view that the workmen in that case were employees of the management are missing in the present case. No power vests in the management either to make the appointment or to take disciplinary action against the erring workmen and their dismissal or removal from service. The management is not reimbursing to the contractor the wages of the workmen. On these facts, it cannot be concluded that the contractor was nothing but an agent or a manager of the Respondent working completely under the supervision and control of the management.

19. In Hari Shankar Sharma and Others Vs. Artificial Limbs Manufacturing Corporation and Others, the Apex Court has opined thus -

5. The submission of the Appellants that because the canteen had been set up pursuant to a statutory obligation u/s 46 of the Factories Act therefore the employees in the canteen were the employees of Respondent No. 1 is unacceptable. First, the Respondent No. 1 has disputed that Section 46 of the Factories Act at all applies to it. Indeed, the High Court has noted that this was never the case of the ap0pellants either before the Labour Court or the High Court. Secondly, assuming that Section 46 of the Factories Act was applicable to the Respondent No. 1, it cannot be said as an absolute proposition of law that whenever in discharge of a statutory mandate, a canteen is set up or other facility provided by an establishment, the employees of the canteen or such other facility become the employees of that establishment. It would depend on how the obligation is discharged by the establishment. It may be carried out wholly or substantially by the establishment itself or the burden may be delegated to an independent contractor. There is nothing in Section 46 of the Factories Act, nor has any provision of any other statute been pointed out to us by the Appellants, which provides for the mode in which the

specified establishment must set up a canteen. Where it is left to the discretion of the concerned establishment or by employment of a contractor, it cannot be postulated that in the canteen would be the employees of the establishment. Therefore even assuming that the Respondent No. 1 is a specified industry within the meaning of Section 46 of the Factories Act, 1946, this by itself would not lead to the inevitable conclusion that the employees in the canteen are the employees of Respondent No. 1.

Be it noted, in the said decision, their Lordships took note of the fact that the decision rendered in Parimal Chandra Raha (supra) has been explained by a larger Bench in Indian Petrochemicals Corporation Ltd. (supra).

20. On the basis of the aforesaid enunciation of law, the factual matrix is required to be tested. As is manifest, there is no material on record to show that the Respondent - Air India had any role in the appointment of the employees in the canteen. No administrative or disciplinary action could be taken by the Respondent against the canteen workers. The Respondent had itself not undertaken the obligation to run the canteen but had only provided facility so that its employees could avail the canteen facilities. It is not a case where the employees of the canteen were enlisted under a welfare fund scheme, provident fund scheme and medical scheme of the Respondent - management. The responsibility to run the canteen was absolutely with the HCI and it was totally a contractual relationship between the two. Air India had no say in the selection or other affairs of the canteen workers.

21. The tribunal, as is noticeable, has treated HCI as a part of Air India and not a separate entity. The learned Single judge has dealt with this aspect in paragraph 17 of the order, which we think appropriate to reproduce:

17. A perusal of the Memorandum and Articles of Association of HCI shows that the general management of business of HCI vests in the Board of Directors of HCI subject to the directions, if any, from time to time of Air India in regard to the finance and conduct of the business and affairs of HCI. The composition of the Board of Directors of HCI is controlled by Air India in consultation with the Government of India. The question which arises is whether for the said reason only it can be said that the employees though employed by HCI are employees of Air India. This stares in the face of the first principles of Corporate Law, dating back to Solomon v. Solomon and Co. Ltd. 1897 ACC 22 where it was held that in law a company is a person altogether different from its shareholders. Air India is nothing but the sole holder of the shares of HCI. However HCI is a legal entity independent of its shareholders. Merely because the shareholder is one, the said fact does not eliminate the difference in the identity of a company as a separate legal identity from its shareholders. Also, merely because the Articles of Association of a company provide that the management or its affairs and business and finances shall be subject to the direction, if any, issued by the sole shareholder, the said fact again does not merge the identity of the shareholder with the company. Neither has the

CGIT returned a finding nor have the Respondent workmen contended that in the exercise of the aforesaid Articles of Association of HCI, Air India has issued a directive as to whom to employ and whom not to employ and is regulating or supervising the terms of employment of any of the employees of HCI. Thus, in my view the mere fact of HCI being a 100% subsidiary of Air India and the aforesaid peculiar Articles of Association would not be decisive of whether the employees aforesaid of HCI and working in the canteen of Air India are to be treated as employees of the Air India or not.

The said view is absolutely correct and there is no warrant to differ with it.

22. It is also the stand of the workmen that the contract was a sham and a camouflage to deprive the workmen from the benefits of regularization and absorption relying on the provisions of the 1970 Act and the decision in Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc. etc., The said decision is not applicable as there was no notification by the appropriate Government abolishing contract labour in the running of canteens. That apart, there is no material on record to come to the conclusion that the contract was a sham or camouflage. In this context, we may refer with profit to the decision in International Airport Authority of India Vs. International Air Cargo Workers'' Union and Another, where there is no abolition of contract labour u/s 10 of the CLRA Act but the contract labour contend that the contract between the principal employer and the contractor is sham and nominal for which the remedy is purely under the Industrial Disputes Act, 1947. Their Lordships have opined that the industrial adjudicator can grant relief if it finds that the contract between the principal employer and the contractor is sham, nominal and merely a camouflage to deny employment benefits to the employees and that there is in fact a direct employment by applying tests like who pays the salary; who has the power to remove/dismiss from service or initiate disciplinary action; who can tell the employee the way in which the work should be done, in short, who gives direction and has control over the employee. In the case at hand, as has been stated earlier, there is absence of all these factors and, therefore, we do not find the award to be sustainable.

23. In view of the aforesaid premised reasons, we do not perceive any error in the order of the learned Single Judge as far as the claim of the workmen to be employees of Air India and their regularization is concerned. However, we may observe that as there has been no advertence on merit, in respect of their rights qua HCI, it is open to the Appellants - workmen to put forth their claim as per law against the HCI. We may further hasten to clarify that as there has been no delineation on merit on the said score either by the tribunal or by this Court, in case the controversy is raised before the industrial adjudicator by taking recourse to the due process of law, the same shall be dealt with and decided in accordance with law.

24. Resultantly, with the aforesaid observations, the appeals stand dismissed without any order as to costs.