A HALDIA REFINERY CANTEEN EMPS. UNION AND ORS.

v.

M/S. INDIAN OIL CORPORATION LTD. AND ORS.

APRIL 29, 2005

B [ASHOK BHAN AND A.K. MATHUR, JJ.]

Labour Laws :

C *Employees working in statutory canteen run by respondent establishment, through contractor—Absorption of, in respondent establishment—Respondent exercising effective control over the Contractor on certain matters in regard to the running of the canteen, but such control was only to ensure efficient running of the canteen—Respondent not reserving right to appoint or dismiss or remove workers working in the canteen—Contractor paying provident fund* D *and wages to the workers which were not reimbursed by the respondent—Worker's claim for absorption and regularisation in the respondent establishment—Entitlement—Held: Not entitled, as they did not become the workers of the establishment for a purpose other than the Factories Act—Industrial Disputes Act, 1947.*

E **The appellants had been working in the statutory canteen run by the respondent through contractor in its factory at Haldia. Respondent was treating the appellants as the employees of the contractor. The appellants filed Writ petition before High Court for seeking issuance of mandamus to the respondent to absorb the appellants in its service and** F **to regularise them on the ground that the factory of the respondent is governed by Factories Act, 1948 and the canteen where the said workmen are employed is a statutory canteen established by the respondent as required under the provisions of the Act.**

Single Judge held that the appellants were being wrongly treated as G **employees of the contractor and accordingly directed the respondents to absorb the appellants in its service and regularise them. The Division Bench reversed the judgment of the Single Judge and dismissed the writ applications filed by the appellants. Hence the present appeal.**

Dismissing the appeal, the Court

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HELD : 1. The appellants did not become the workers of the management for a purpose other than the Factories Act. [983-G]

2.1. The respondent management is exercising 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 does not mean that the employees working in the canteen have become the employees of the management. [981-H; 982-A]

2.2. The contractor is given a free hand with regard to the engagement of the employees working in the canteen. There is no stipulation in 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 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 of any statutory provisions/obligations are concerned. 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 employees of the contractor, third party or by Central or State Government Authorities. [982-B-E]

2.3. 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 the proper service to the employees of the management. 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. [982-F-H; 983-A-C]

Indian Petrochemicals Corporation Ltd. and Anr. **v.** *Shramik Sena and Ors.*, **[1999] 6 SCC 439, distinguished.**

M.M.R. Khan and Ors. **v.** *Union of India and Ors.*, **[1990] (Supp) SCC 191 and** *Parimal Chandra Raha and Ors.*, **v.** *Life Insurance Corporation of India and Ors.*, **[1995] Supp 2 SCC 611, referred to.**

3. Another fact which goes to show that the appellants are the employees of the canteen contractor is that a settlement was arrived at between the contractor and the workmen of the canteen in the presence of Assistant Labour Commissioner of the area wherein certain terms and conditions were agreed upon between these parties with regard to some labour issues relating to the workmen employed by the contractor. Respondent-management was not a party to either of these two settlements. This clearly goes to show that the workmen were treating themselves to be the employees of the contractor and not that of the management. [983-D-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 658 of 2002.

From the Judgment and Order dated 31.3.2000 of the Calcutta High Court in M.A.T. No. 4310 of 1998.

Jitendra Sharma, P.N Jha and Ms. Minakshi Vij with him for the Appellants.

Ashok Grover, V.N. Koura, Ms. Paramjit Benipal, A. Mariarputham, Ms. Aruna Mathur and Mrs. K.Sarada Devi with him for the Respondents.

The Judgment of the Court was delivered by

BHAN, J. This appeal by grant of leave is directed against the judgment dated 31.03.2000 passed by the Division Bench of the High Court of Calcutta at Calcutta in M.A.T. No. 4310 of 1998. By the impugned order the Division Bench has set aside the judgment and order of the Single Judge of the same High Court in C.O. No. 6266 (W) of 1990 with C.O. No. 6274 (W) of 1990.

The Single Judge had allowed the writ application filed by the appellants and directed the Indian Oil Corporation Limited, Haldia Oil Refinary (hereinafter referred to as "the respondent") to absorb the appellants in its service and regularise their services. Division Bench has set aside the aforesaid direction given by the learned Single Judge and held that the appellants were neither entitled to be absorbed nor regularised in the service of the respondent.

Short facts of the case are as under :-

Two sets of writ applications were filed in the High Court of Calcutta involving common question of law and fact, both of them were taken up together by the Single Judge and disposed of by the common judgment. Admittedly, the appellants are working in the statutory canteen run by the respondent through contractor in its factory at Haldia, District Midnapore, West Bengal. Respondent was treating the appellants as the employees of the contractor. Aggrieved against this, the appellants filed the writ applications in the High Court contending therein that the factory of the respondent where the workmen are employed is governed by the provisions of Indian Factories Act, 1948 (for short "the Factories Act") and the canteen where the said workman are employed is a statutory canteen established by the respondent as required under the provisions of the Act. It is averred in the petition that the canteen is maintained for the benefit of the workmen employed in the factory and the respondent has direct control over them. Contractor though shown as a contractor has no control over the management, administration and functioning of the canteen. That the canteen is a part of the establishment of the management and the workers in the canteen are the employees of the management. That the work carried on is perennial in nature and the canteen is incidental to and is connected with the establishment of the management. It was contended that the appellants were the regular employees of the respondent. The management had refused to grant the status of regular employees to the appellants and treated them as employees of the canteen contractor contrary to the statutory provisions and judicial pronouncements of this Court. Writ applications were filed seeking issuance of mandamus to the respondent to absorb the appellants in its service and to regularise them as such.

Respondents in their written statement denied that the appellants were its employees or they were entitled to be regularised as such. None of the appellants was appointed by the respondents. All of them were appointed by the contractor and therefore, they were the employees of the contractor. Under

A the Factories Act, a factory employing more than 250 workers is required to provide the facility of a canteen. The Factories Act or the Rules framed thereunder do not require that such a canteen should be managed and run by regular employees of the establishment. In law it is open and permissible to the management to entrust the same to a contractor. It was contended that the respondent being a public sector undertaking has devised and put in place
B rigid employment strategies for its core activities based on employment strengths derived on the basis of production and output norms and requirement studies. All recruitment by and within the corporation is made strictly according to those norms on the basis of staff strength and quotas fixed for direct recruitment on the basis of job qualifications, employment norms, reservation
C of posts to be filled by internal promotion pursuant to settlements arrived at by the corporation with its recognised unions and such employment can only be made against existing vacancies. It cannot appoint any person in contravention of the recruitment policy which requires the management to follow the system. Therefore, apart from the fact that the appellants were not in regular employment of the respondent, the absorption or regularisation of
D their services would contravene Article 16(4) of the Constitution as well as the reservation policy which is applicable for recruitment in the establishment managed by it.

The learned Single Judge before whom the writ applications came up
E for hearing relying upon the two judgments of this Court in *M.M.R. Khan and Ors.* v. *Union of India and Ors.*, [1990] Supp SCC 191 and *Parimal Chandra Raha and Ors.* v. *Life Insurance Corporation of India and Ors.*, [1995] Supp 2 SCC 611 held that under the provisions of the Factories Act, it is the statutory obligation of the employer to provide and maintain a canteen for the use of its employees. The canteen becomes a part of the establishment
F and, therefore, the workers employed in such canteen are the employees of the management. After referring to the various provisions including the rules framed under the Factories Act the learned Single Judge came to the conclusion that the respondent exercises a very high degree of control over the contractor who has been given the contract of running the canteen. The obligation to
G provide canteen being statutory the facility became a part of service condition of the employees. It was held that the appellants were in fact the employees of the respondent and were being wrongly treated as employees of the contractor. Accordingly, a direction was given to the respondents to absorb the appellants in its service and regularise them with effect from the date of filing of the writ application.

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Aggrieved against the judgment and order of the Single Judge, the respondent-management filed intra court appeal which has been accepted. The Division Bench relying upon a later Three-Judge Bench judgment of this Court in *Indian Petrochemicals Corporation Ltd. and Anr.* v. *Shramik Sena and Others.*, [1999] 6 SCC 439 reversed the judgment of the Single Judge and dismissed the writ applications filed by the appellants. Aggrieved against the aforesaid judgment of the Division Bench, the present appeal has been filed.

We have carefully considered the submissions made by the learned counsels for the parties. In *Indian Petrochemicals Corporation Ltd. and Another* (supra) 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 Ors.* and *Parimal Chandra Raha and Ors.* cases (supra), 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 Factories Act alone and did not become the employees of the establishment for any other purpose. After referring the arguments advanced it was held :-

> "If the argument of the workmen in regard to the interpretation of *'Raha'* case 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. On this point similar is the view of another three-Judge Bench of this Court in the case of *Reserve Bank of India* v. *Workmen*. Therefore, following the judgment of this Court in the cases of *Khan* and *R.B.I.*, 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."
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> [Emphasis supplied]

Further it was observed :-

> "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

A 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 respondent employees are working. Hence, it is fairly conceded B 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."

C After having gone into the question of worker being declared the employee of the management for the purpose of 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 confine the relationship of employer and the employees to the requirements D of Factories Act alone and does not extend for any other purpose. It was observed as under:-

"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 E 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. F *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]

G After having declared in unequivocal terms the employees working in the canteen can be treated as the employees of the principal employer only for the limited purposes of the Factories Act, the Court went on to examine further as to whether on the basis of material present on the record, the employees could be treated as the employees of the principal employer for all/any other purpose. After noticing the fact that the employees in the said H case were entitled to continue in the employment of the company irrespective

of the change in the contractor in view of an order passed by the Industrial Court and the fact that the management was reimbursing the wages of the canteen workers and certain other peculiar features of the case came to the conclusion that the respondents in that case were in fact the workmen of the management. These factors were summarised as:-

"(a) The canteen has been there since the inception of the appellant's factory.

(b) The workmen have been employed for long years and despite a change of contractors the workers have continued to be employed in the canteen.

(c) The premises, furniture, fixture, fuel, electricity, utensils etc. have been provided for by the appellant.

(d) The wages of the canteen workers have to be reimbursed by the appellant.

(e) The supervision and control on the canteen is exercised by the appellant through its authorised officer, as can be seen from the various clauses of the contract between the appellant and the contractor.

(f) The contractor is nothing but an agent or a manager of the appellant, who works completely under the supervision, control and directions of the appellant.

(g) The workmen have the protection of continuous employment in the establishment."

Considering these factors cumulatively in addition to the fact that the canteen in the establishment of the management is a statutory canteen the workmen were held to be the employees of the management. On the question of fact it was concluded that the contractor in that case was engaged only for the purpose of record and for all other purposes the workers were in fact the workmen of the management. It was observed in para 27 as under:-

"At this stage, it is necessary to note another argument of Mr. Andhyarujina that in view of the fact that there is no abolition of contract labour in the canteen of the appellant's establishment, it is open to the Management to manage its canteen through a contractor. Hence, he contends that by virtue of the contract entered into by the Management with the contractor, the respondent workmen cannot be

A treated as the employees of the Management. This argument would have had some substance if in reality the Management had engaged a contractor who was wholly independent of the Management, but we have come to the conclusion on facts that the contractor in the present case is engaged only for the purpose of record and for all purposes the workmen in this case are in fact the workmen of the Management. In the background of this finding, the last argument of Mr. Andhyarujina should also fail."

The Division Bench with reference to the facts of the present case came to the conclusion that the appellants were not the employees of the management.

During the course of hearing, the learned advocates on both the sides extensively referred to the terms and conditions of the contract between the canteen contractor and the respondent and also to the various statutory provisions of the Factories Act and the rules framed thereunder to point out their respective points of view about the nature of the contract and as to whether the canteen is run by the contractor in his capacity and status of a contractor or that the contractor was merely an agent or servant of the respondent and was functioning merely for the sake of record.

We have gone through the terms and conditions of the contract agreement entered between the parties and in particular the following terms and conditions on which lot of emphasis was laid by the counsel for the appellant to show the extent of control exercised by the management over the contractor in the running of the canteen:-

"5. *CATERING STAFF*:

5.1. The contractor shall at his cost maintain adequate number of catering staff such as Cooks, helpers, service boys, sweepers and other persons for smooth and efficient running of the canteen services. The contractor shall engage required number of persons in the canteen with the explicit permission/approval of the Owner.

5.2. The present man power in the canteen is 119 covering all categories of personnel as mentioned below:

However, if at any time it is decided to increase or decrease the manpower, the contractor shall get proportionate increase or decrease of monetary compensation in this respect provided such

increase or decrease in the manpower should be done only with the express approval of the owner. If any manpower is added without approval of the Owner, it will be at the cost of the contractor and no liability for compensation whatsoever shall accrue on the Owner for such act/acts. No person below the age of 18 years or found to be medically unfit, will be allowed employment in the canteen. Also if, at any time, any canteen employee is found involved in moral turpitude in any court of law, the services of such canteen employee will be immediately terminated by the Contractor and no liability for compensation whatsoever will accrue on the owner for such act/acts.

5.3. The contractor shall maintain a register showing names and addresses of the persons so engaged along with photographs of each person and shall produce the same for inspection on demand by Welfare Officer or such other person so authorised by the owner. The contractor shall not use or allow to be authorised to be used canteen building or any part thereof for dwelling purpose and shall not allow any outsiders to loiter in or around the canteen without valid authority."

With regard to the nature of employment of the employees working in the canteen, stipulation at S.No. 4.6 reads thus:-

"4.6. The contractor, shall be required to employ/engage only that member of employees/workers as may be specifically authorised by the owner from time to time and shall maintain complete records of such employees/workers with regard to their names, address, qualifications, experience and other required details. The owner shall have absolute right to test, interview of otherwise assess or determine skills, knowledge proficiency, capability etc. so as to ensure that such employees/workers are competent, qualified or otherwise suitable for efficiently and safely performing the work covered by this contract. Any employee/worker rejected not authorised by the owner shall not be employed/engaged by the contractor on the work covered by this contract."

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

A of the establishment. This however does not mean that the employees working in the canteen have become the employees of the management.

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 B *Indian Petrochemicals Corporation Ltd. and Anr.* (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* C *Petrochemicals Corporation 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 of any statutory provisions/obligations are D 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 authorities concerned. 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 E 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 employees of the contractor, third party or by Central or State Government Authorities.

F 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 G 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 employee of the management. Such supervisory control is being exercised by the H management to ensure that the workers employed are well qualified and

capable of rendering the proper service to the employees of the management. A

In *Indian Petrochemicals Corporation Ltd.* (supra) this Court after analysing the earlier judgments on the same point has held that the workmen working in the canteen becomes the workers of the establishment for the purposes of Factories Act only and not for any other purpose. They do not become the employees of the management for any other purpose entitling B them for absorption into the service of the principal employer. Factors which persuaded this Court in *Indian Petrochemicals Corporation 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 C 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.

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Another fact which goes to show that the appellants are the employees of the canteen contractor is that a settlement was arrived at between the contractor and the workmen of the canteen in the presence of Assistant Labour Commissioner of the area which was valid for the period from 01.12.1987 to 30.11.1990 wherein certain terms and conditions were agreed upon between these parties with regard to some labour issues relating to the workmen E employed by the contractor. Another settlement between the same parties was also arrived at which was valid upto 01.12.1993 concerning once again the labour issues between the workmen and the contractor. Respondent-management was not a party to either of these two settlements. This clearly goes to show that the workmen were treating themselves to be the employees F of the contractor and not that of the management.

For the reasons stated above, we agree with the view taken by the Division Bench that the appellants did not become the workers of the management for a purpose other than the Factories Act. We do not find any merit in this appeal and dismiss the same with no orders as to costs. G

D.G. Appeal dismissed.