CASE NO.:
Appeal (civil) 7731 of 1997

PETITIONER:
HARI SHANKAR SHARMA & ORS.

Vs.

RESPONDENT:
M/S ARTIFICIAL LIMBS MANUFACTURING CORPN. & ORS.

DATE OF JUDGMENT: 26/11/2001

BENCH:
S. Rajendra Babu & Ruma Pal

JUDGMENT:

RUMA PAL, J.

The respondent No. 1 is a Government of India undertaking. It was incorporated under the Companies Act, 1956 on 30th November 1972. One of the main objects for which the respondent No. 1 was established was to promote, encourage and develop the availability, use, supply and distribution at reasonable cost in the country of artificial limbs to needy persons particularly disabled defence personnel. For this purpose the respondent No. 1 set up a factory where more than 700 persons are employed. The respondent No. 1 also set up a canteen for its employees. From time to time agreements were entered into between the respondent No. 1 and different contractors by which the contractor agreed to prepare and serve food stuffs and other refreshments at the canteen. At the relevant time the concerned contractor was Aditya Shukla, the respondent No.2 herein.

According to the appellants, they were employed by several of the contractors and had been serving in the canteen for several years. During the pendency of the contract with the respondent No.2, the appellants raised an industrial dispute claiming to be regular workmen of the respondent No. 1. The dispute was referred by the State Government to the Labour Court. The Labour Court considered the evidence, both oral and documentary, and by an award dated 10th May 1996, came to the conclusion that the appellants were not the employees of respondent No. 1 but were employees of respondent No. 2. Being aggrieved with the award, the appellants filed a writ petition before the High Court at Allahabad. The High Court was of the view that the appellants claim was primarily for abolition of contract labour in canteens and consequent absorption of the contract labourers as employees of the principal employer, in this case the respondent No. 1. The High Court rejected the submission and dismissed the writ petition.

Before us learned counsel for the appellant submitted that the High Court had wholly misdirected itself. According

to the appellants, the issue was not whether the Labour Court could have directed abolition of contract labour but the issue was whether the Labour Court was bound, on the basis of the decision of this Court in Parimal Chandra Raha and others v. Life Insurance Corporation of India and Others 1995 Supp (2) SCC 611, to hold that the appellants were in fact regular employees of the respondent No.1. It was submitted that the respondent No.1 was bound by Section 46 of the Factories Act, 1948 to set up the canteen. It was also submitted that the State Government had by notification specified the factory of the respondent No.1 under the provisions of Section 46(1) of the Factories Act. It was contended that since the respondent No.1 was statutorily obliged to provide and maintain a canteen for the use of its employees, the canteen was part of the respondent No.1s establishment and therefore the appellants who were employed in such canteen were the employees of the respondent No.1. It is the appellants case that the various terms in the contract between the contractor and the respondent No.1 clearly showed that the appellants were under the direct supervision and control of respondent No.1. This, together with the fact that the appellants had continued to be employed in the canteen despite several changes of contractors, showed that the appellants were in fact the respondent No.1s employees.

Learned counsel for the respondent No.1 submitted that the appellants had never challenged the contract between the respondent No.1 and the contractor as being a sham document to camouflage the fact that the appellants were really the respondent No.1s employees. It was contended that in the absence of such a challenge, there was no scope for the appellants to claim to be regular employees of the respondent no.1. Furthermore, according to the respondent No.1, the Labour Court had duly considered the terms of the contract and the oral and documentary evidence adduced including the evidence of the contractor himself, and had come to a categorical finding that the appellants were not the employees of the respondent No.1. Finally, it was submitted that in any event the facts on record clearly showed that the appellants were the employees of the contractor and that the respondent No.1 exercised no control over the appointment, continuation or dismissal from service of the appellants.

The submission of the appellants that because the canteen had been set up pursuant to a statutory obligation under Section 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 appellants either before the Labour Court or the High Court. Second, 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 to discharge its obligation of setting up a canteen either by way of direct recruitment or by employment of a contractor, it cannot be postulated that in the latter event, the persons working 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.

The observations in Parimal Chandra Rahas case relied on by the appellants which might have supported the submission of the appellants have been explained by a larger bench in Indian Petrochemicals Corporation Ltd. vs. Shramik Sena and Others (1999) 6 SCC 439 where it was held, after considering the provisions of the Factories Act and the previous decisions on the issue, that the workmen of a statutory canteen would be the workmen of the establishment only for the purpose of the Factories Act and not for all other purposes unless it was otherwise proved that the establishment exercised complete administrative control over the employees serving in the canteen. (See also Barat Fritz Werner Ltd. V. State of Karnatka 2001 (4) SCC 498, 504)
It may be, and has been often so found, that the employees of a contractor are de facto employees of the establishment despite the existence of a written agreement between the contractor and the establishment. To this end our attention was drawn to the agreement between the contractor and the respondent No.1. From a scrutiny of the agreement, it is clear that although the respondent No.1 had agreed to provide the contractor with the basic infrastructure, the actual running of the canteen was the responsibility of the contractor alone. For example, the respondent No.1 was to give the furnishings, dining tables, chairs, curtains, water coolers etc., but the contractor was liable to indemnify the respondent No.1 for any loss or damage caused to these items due to any act of omission or commission by the contractor or his employees. The cost of repairing and maintaining all the equipment was also the contractors. It was also the contractors obligation to provide the raw-material and ensure that such raw- material was free from adulteration, contamination and was wholesome and fit for human consumption.

Under Clause 21, the contractor was obliged to provide all the facilities available to the workers under various labour laws applicable to the respondent No. 1. The Contractor was also required to abide by all the provision of labour laws as applicable from time to time and was liable for financial obligations under various labour laws as amended from time to time. In case the contractor contravened any provisions of those laws and the respondent No. 1 suffered any damage, loss or harm due to any act of commission or omission of the contractor, the contractor was bound to indemnify the respondent No. 1. Similarly, clause 31 of the agreement provided The Contractor shall be responsible for discharge of legal liabilities towards his employees and also for observing all Laws and Government Rules relating to Labour viz. EPF Act, ESI Act, Payment of Wages Act, Minimum Wages Act and health in so far as they relate to the canteen.

It is true that under clause 33, the respondent No. 1

agreed to pay to the contractor service charges of Rs.73,372.48 per month upto 700 employees with the following break up:

a) Rs.30,895.48 Salary and other statutory expenses
b) Rs.42,477.00 for neutrilising the price hike of the raw material.

but this may have only ensured that the margin of profit of the contractor was reasonable and fixed on relevant considerations. Besides the agreement must be construed in the background of the rules framed by the State Government under Section 46 (2) of the Factories Act, 1948. Under Section 46 (2) itself State Government is empowered to lay down inter-alia : the standard in respect of construction, accommodation , furniture and other equipment of the canteen; and the foodstuffs to be served therein and the charges which may be made therefor. Merely because there is compliance with the rules by the respondent No.1 (assuming that the rules applied) by providing the equipment and for the rate at which the foodstuffs would be sold at the canteen by the contractor would not necessarily mean that the employer was running the canteen through the agency of the contractor. There must be something more.

Directly relevant to the crux of the matter is clause 43 of the agreement whereby the contractor was given the discretion to employ the workers already working in the canteen (like the appellants) but it was made clear that the contractor could take action against the canteen workers. It is noteworthy that the respondent No. 1 had no say as to who should be employed by the contractor nor the method of recruitment to be followed by the contractor. There was no obligation on the contractor to employ the persons who had served under earlier contractors. Even if the agreement had contained a condition that the contractor must retain the old employees, it would not necessarily mean that those employees were the employees of the establishment. As was said in R.K. Panda v. Steel Authority of India Ltd. (1994) 5 SCC 304:

Such a clause in the contract which is benevolently inserted in the contract to protect the continuance of the source of livelihood of the contract labour cannot by itself give rise to a right to regularisation in the employment of the principal employer. Whether the contract labourers have become the employees of the principal employer in course of time and whether the engagement and employment of labourers through a contractor is a mere camouflage and a smokescreen, as has been urged in this case, is a question of fact and has to be established by the contract labourers on the basis of the requisite material. It is not possible for the High Court or this court, while exercising writ jurisdiction or jurisdiction under Article 136 to decide such

questions, only on the basis of the affidavits.

The issue is, therefore, primarily and ultimately one of fact to be determined by a fact finding tribunal . In the case before us, the terms of the agreement are inconclusive.

Before the Labour Court the contractor stated in cross-examination that he used to supervise and control his employees and pay their salaries. Even the witnesses for the appellants stated that their salaries were paid by the contractor. The appellants witnesses also said that the respondent No. 2 brought the raw material. The respondent No. 1s witnesses said that the respondent No. 1 had no hand in the selection of the employees of the canteen. The prescribed procedure for appointing employees of the respondent No. 1 was not applied to them. The respondent No. 1 did not record their attendance nor paid them their salaries. The Labour Court also noted that the appellants witnesses were unable to identify or name any officer of the respondent No. 1 who they claimed supervised their work. The Labour Court found that the appellants were unable to prove that the respondent No. 1 exercised any control or supervision over the employees of the contractor. After a detailed analysis of the evidence, the Labour Court concluded that the appellants were not the employees of respondent No. 1. The finding cannot be termed to be perverse. Given this, it would have been inappropriate for the High Court under Article 226 to re-appreciate the evidence and come to a different factual conclusion. The High court did not do that nor do we propose to do so under Article 136.

We accordingly dismiss the appeal but without any order as to costs.

J.
(S. Rajendra Babu)

J.
(Ruma Pal)

November 26, 2001

See: Indian Petrochemicals Corporation Ltd. vs. Shramik Sena and Others 1999 (6) SCC 439

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