State Of Karnataka & Ors vs Kgsd Canteen Employees Welfare ... on 3 January, 2006

Equivalent citations: AIR 2006 SUPREME COURT 845, 2006 AIR SCW 212, 2006 LAB. I. C. 865, 2006 (1) AIR JHAR R 683, 2006 (2) AIR KANT HCR 82, 2006 (2) SERVLJ 129 SC, 2006 (1) UPLBEC 1061, (2006) 2 SERVLJ 129, (2006) 5 ALL WC 4461, (2006) 1 CTC 414 (SC), (2006) 3 ALLMR 238 (SC), 2006 (2) SRJ 427, 2006 (1) SCC 567, 2006 (1) CTC 414, 2006 (1) SCALE 85, (2006) ILR (KANT) 814, 2006 (2) KCCR 72 SN, (2006) 1 SCJ 712, (2006) 1 SUPREME 63, (2006) 2 KANT LJ 1, (2006) 1 LABLJ 691, (2006) 1 LAB LN 860, (2006) 2 PAT LJR 37, (2006) 2 RAJ LW 1156, (2006) 1 SCT 323, (2006) 1 UPLBEC 1061, (2006) 1 SCALE 85, (2006) 2 JLJR 113, (2006) 109 FACLR 18, (2006) 1 CURLR 407, MANU/SC/18/2006, 2006 (2) KCCR SN 81 (KAR)

Author: S.B. Sinha

Bench: S.B. Sinha, P.P. Naolekar

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           CASE NO.:
Appeal (civil)  224-226 of 2003

PETITIONER:
State of Karnataka & Ors.

RESPONDENT:
KGSD Canteen Employees Welfare Association & Ors.

DATE OF JUDGMENT: 03/01/2006

BENCH:
S.B. Sinha & P.P. Naolekar

JUDGMENT:
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J U D G M E N T W I T H CIVIL APPEAL NOS. 449-468 OF 2003 & 4180-82 OF 2003 S.B. SINHA, J:

Both the State of Karnataka and K.G.S.D. Canteen Employees Welfare Association are in appeal before us aggrieved by and dissatisfied with the judgments and orders dated 29.05.2002 and 30.50.2002 passed by a Division Bench of the Karnataka High Court in Writ Appeal Nos.5690-5692 of 2000 and 4613-32 of 2000.

WRIT PROCEEDINGS The First Respondent herein is an Association of the

employees of the Karnataka Government Secretariat Departmental Canteen. The Respondent Nos.2 and 3 are its members. They filed a writ petition before the Karnataka High Court, inter alia, contending that the said canteen having been run by the State Government for the benefit of the secretariat employees and 74 employees working therein having completed more than 10 years of service were in effect and substance the employees of the State Government itself, although they were termed as 'employees of the canteen'. Further contention of the respondents herein was that their wages were absolutely meagre being little more than the minimum wages, but despite several representations made by them, they were not paid the same salary as was payable to the employees of the State who were similarly situated.

The Appellant herein rejected their request for grant of scale of pay and other service benefits applicable to the Government servants, inter alia, on the premise that they were not its employees.

HIGH COURT A learned Single Judge of the High Court opined that the canteen can be equated to the Government Hospitality Organization where the canteen facilities are made available and consequently directed the Appellant to implement the notification dated 22.6.1996 which was applicable in relation to the Government Hospitality Organization, as far as possible to the said canteen employees with such revisions as are permissible under law as on the said date.

The learned Single Judge opining that the employees of the canteen are employees of the State Government directed :

"The second prayer of the petitioners is to declare them as Government Servants. In this regard I deem it proper to modify the relief by issuing a direction to the Government to regularize the services of the petitioners in the following manner :

Government is directed to regularize the services of such of those petitioners who have put in ten years of service subject to the Government satisfaction of qualification if any for the post held by them and keeping in view the long services rendered by them.

It is declared that the petitioners are the employees of the Government and are entitled for pay parity as per Annexure-O with revision from time to time.

The petitioners have approached this Court in the year 1996 and the petition is heard and disposed of in the year 2000. Petitioners have been provided some increase in the wages from time to time. In these circumstances, I deem it proper that the petitioners are not to be given any arrears for the past period and the direction is to with effect from 1.1.2000 and not for the earlier period. The arrears from 1.1.2000 is to be made available to the petitioners within three months from the date of receipt

of this order."

Appeals having been preferred by the State thereagainst, a Division Bench of the High Court disposed of the appeals modifying the judgment of the learned Single Judge as regard the date of regularization of their services as also payment of back wages, directing :

> "(i) The effective date from which the pay-scales and other service benefits should be extended to the employees of KGSD Canteen by regularizing their service is changed from 01.01.2000 to 29.05.2002."

The learned Single Judge as also the Division Bench despite the fact that the Appellant herein had denied and disputed the relationship of employer and employee between it and the employees of the canteen, proceeded to determine the said question on the basis of various documents produced before it.

PRESENT APPEALS The State of Karnataka has filed Civil Appeal Nos.224-226 of 2003 and 449-468 of 2003, questioning the impugned judgment in its entirety whereas the K.G.S.D. Canteen Employees Welfare Association preferred Civil Appeal Nos.4180-82 of 2003 questioning that part of the judgment whereby the judgment and order of the learned Single Judge was modified restricting the benefit of regularization from the date of the judgment and back wages from 29.05.2002 instead of 01.01.2000.

CONTENTIONS OF THE PARTIES Mr. P.P. Rao, the learned Senior Counsel appearing on behalf of the Appellants, would, inter alia, submit that the High Court committed a serious error in passing the impugned judgment insofar as it misconstrued and misinterpreted various Government orders as regard establishment and management of the canteen issued in their proper perspective. The High Court, Mr. Rao urged, furthermore misdirected itself in passing the impugned judgment insofar as it failed to take into consideration that the canteen was not required to be run by the State Government in terms of any statute or otherwise.

Mr. Naveen R. Nath, the learned counsel appearing on behalf of the respondents herein, on the other hand, would support the judgment of the High Court contending that a finding of fact has been arrived at by the High Court that there existed a relationship of employer and employee between the State and the concerned employees as the State exercised total control over them and, therefore, this Court should not interfere therewith.

It was contended that the employees of the canteen in view of Article 14 of the Constitution of India, were entitled to parity in wages with that of the employees of the State Government for the period they had worked and, furthermore, they having been in such employment for a long time their services have rightly been directed to be regularized.

SCHEME The canteen was being run by private contractors for a long time. In the year 1974, the State of Karnataka intended to run the canteen by a committee, consisting of ten persons, six of them representing the Government and the remaining four representing the Association as

mentioned in order bearing No. GAD 106 DBM dated 19th November, 1974. Amenities and facilities, e.g., premises, furniture, cooking utensils, crockery, cutlery etc. for running the canteen were to be provided by the State only for a period of one year. Some of the relevant provisions laid down in the Scheme for running the said canteen were as under :

> "An outright grant of Rs. 25,000 (Rs. Twenty five thousand only) is sanctioned towards working expenses, namely, initial purchase of provisions, salaries of staff to be appointed like cooks, services, etc The grant of Rs.25,000 (Rupees Twenty five thousand only) will be debited to the new sub-heard "IV Grant to the Karnataka Govt., Secretariat Canteen (Non Plan)"
>
> "under the major, minor, and Group sub-Head" "288- Social Security and Welfare-E-Other social Security and Welfare Programmes & Others "Programmes-C. Welfare of Government Employees" pending re-appropriation of savings under the above major head.
>
> The Chairman of the Committee is requested to take action to start the canteen.
>
> The working of the Canteen under the above arrangement would be reviewed at the end of the one year and then the future set up shall be decided."

The State by reason thereof, thus, made a provision for grant of Rs.25,000/-. In terms of the said scheme, all the furniture and equipments which were handed over to the committee were required to be accounted for and returned to the Government upon the closure of the canteen. The employees were appointed, indisputably, by the committee on an ad hoc basis/daily wages.

It, furthermore, appears that the Government had sanctioned grant in aid from time to time. The management of the said canteen was handed over to the Respondent Association. Constitution of the Managing Committee was being changed on a regular basis. In the order dated 27.7.2000 issued by the Government of Karnataka, it was stated :

> " This canteen is running under constant loss for the past few years and consequently Government had to sanction Grant-in-aid a few times. These Grant-in-aids were sanctioned keeping in view the welfare of the Secretariat Employees. In this background, all the members of the Management Committee have tendered their resignation to Government with a request to make alternate arrangements in view of the fact that they are unable to run the canteen on "No Profit No Loss" basis and also considering the fact that Government has not agreed to give further Grant-in-aid to the Managing Committee. In this background, a meeting was convened under the chairmanship of Additional Chief Secretary to Government to consider making alternate arrangements for running the canteen. Finally in a meeting convened on 23.2.2000 under the chairmanship of Secretary to Department of Personnel & Administrative Reforms, it was decided to handover the Management of the canteen to Karnataka Government Secretariat Employees Association

> temporarily for a period of one year commencing from 6.4.2000 and it is also proposed to continue the existing Grant-in-aid and other facilities to Karnataka Government Secretariat Employees Association for running the canteen. Apart from this, it is also proposed to provide the services of six secretariat employees (Junior assistants & assistants) for supervising the affairs of the canteen by treating them as "on other duty" for a period of one year. These proposals were examined and accordingly order was issued as given below :
>
> ORDER NO. DPAR 5 DSW 2000, BANGALORE, DATED : 27.7.2000 Keeping in view the interest/welfare of Karnataka Government Secretariat Employees, sanction is accorded to handover the Management of the Karnataka Government Secretariat Canteen to Karnataka Government Secretariat Employees Association w.e.f. 4.8.2000 temporarily for a period of one year, from the Management Committee constituted by the Government "

The facilities and terms and conditions were also stated therein, some of which are as under :

> "6) While taking over the Management of the Canteen, the Karnataka Government Secretariat Employees Association should prepare a list of furnitures, utensils, L.P.G. etc. and receive a proper acknowledgement from the Management Committee and submit a copy to the Government.
>
> 7) It is the responsibility of the Karnataka Government Secretariat Employees Association to keep all the assets of the canteen like furnitures, utensils, gas etc. safe and secure.
>
> 8) Karnataka Government Secretariat Employees Association can take the assistance of DPAR (Executive-A) section for maintenance and repair of canteen building."

In an affidavit filed before us, it is stated that the Karnataka Government Secretariat Employees Association which was running the canteen from 04.08.2000 to 31.03.2003 by a letter dated 10.03.2003, expressed its inability to run the canteen beyond 31.03.2003 and, thus, the canteen services were closed from 01.04.2003. It is further stated that the State Government demolished the main canteen building pursuant to the Government Note dated 04.08.2003. Certain litigations had thereafter been initiated before several authorities. A writ petition had also been filed by the Association before the High Court, which was marked as Writ Petition No.41207 of 2004 seeking direction to make the balance payment of LIC premium and contribution towards EPF for the period from 01.01.2003 to 31.03.2003.

This Court evidently is not concerned with the pending litigation but we have noticed the said fact only for the purpose of showing that the State intended to run the canteen departmentally through a committee, but according to the State, the committee has a distinct and different existence or different entity than the Government.

The fact situation obtaining in this case already suggests that the State had no intention to run and maintain the canteen as a department. Had the intention of the State been to run the said canteen as one of its departments, the question of giving any grant or for that matter making of a provision for return of the furniture and equipments would not have arisen.

EMPLOYEES OF A CANTEEN - STATUS The question as to whether the employees of the canteen are employees of the State or whether their services should be directed to be regularized or not, in view of several decisions of this Court would be dependent upon the issues as to whether the canteens are required to be made in terms of the provisions of a statute or otherwise. Admittedly, the State had no statutory compulsion to run and maintain any canteen for its employees.

In The Saraspur Mills Co. Ltd. v. Ramanlal Chimanlal and Others [(1974) 3 SCC 66] where the Management was under a statutory obligation in terms of Section 46 of the Factories Act and the rules made thereunder to maintain the canteen for the workers which was being run by a Co-operative Society wherewith the Management had nothing to do. This Court relied upon its earlier decision in Basti Sugar Mills Ltd. v. Ram Ujagar [(1964) 2 SCR 838] holding:

> "The above case was treated as an authority for the proposition that an employee engaged in a work or operation which was incidentally connected with the main industry was a workman if other requirements of the statute were satisfied and that the malis in that case were workers. It was pointed out that the bungalows and gardens on which the malis in that case worked were a kind of amenity supplied by the mills to its officers and on this reasoning the malis were held to be engaged in operation incidentally connected with the main industry carried out by the employer. The High Court in Ahmedabad Mfg. & Calico Printing Co. Ltd. v. Workmen had relied on the above ratio and come to the conclusion that the workers in order to come within the definition of an "employee" need not necessarily be directly connected with the manufacture of textile fabrics. The decision in Basti Sugar Mills case1 was treated as binding in the former case."

In Parimal Chandra Raha and Others v. Life Insurance Corporation of India and Others [1995 Supp (2) SCC 611], relying upon a large number of decisions of this Court including M.M.R. Khan v. Union of India [1990 Supp SCC 191], in the peculiar facts and circumstances, it was held that the canteen which was being run by a Co-operative Society became a part of the establishment of the Corporation. The said decision was arrived at upon lifting the corporate veil of the cooperative society. In that case, although there was no statutory liability on the part of the Respondent therein, to maintain a canteen for their employees, this Court observed:

> "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, the number of employees employed in the establishment and the number of employees who avail 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. [Emphasis supplied] The said decision, however, was distinguished by a 3-Judge Bench of this Court in Employees in relation to the Management of Reserve Bank of India v. Workmen [(1996) 3 SCC 267] stating that M.M.R. Khan (supra) was decided on the facts of that case. Although, a question was raised therein that the propositions 3 and 4 laid down in Parimal Chandra Raha (supra) are very wide and require reconsideration and appropriate modification, this Court refused to go thereinto holding that it was not required to do so therein as the Tribunal had proceeded to follow M.M.R. Khan (supra) only, holding:

" 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 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."

[Emphasis supplied] A new gloss to the question, however, was given by this Court in Indian Petrochemicals Corporation Ltd. v. Shramik Sena and Others [(1999) 6 SCC 439]. This Court following the judgment M.M.R. Khan (supra) and Reserve Bank of India (supra) opined that the ratio sought to be laid down in Parimal Chandra Raha (supra) that "the workers employed in such canteen are the employees of the Management" is not correct and further opined 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] However, in Indian Overseas Bank v. I.O.B. Staff Canteen Workers' Union and Another [(2000) 4 SCC 245] whereupon the High Court relied upon, in the peculiar facts and circumstances of the said case, this Court relied on M.M.R. Khan (supra) and Parimal Chandra Raha (supra) and distinguished Indian Petrochemicals Corporation Ltd. (supra) holding:

> " A cumulative consideration of a few or more of them, by themselves or in combination with any other relevant aspects, may also serve to be a safe and effective method to ultimately decide this often agitated question. Expecting similarity or identity of facts in all such variety or class of cases involving different type of establishments and in dealing with different employers would mean seeking for things, which are only impossible to find.
>
> The decision in Indian Petrochemical case does not, in our view, lay down any different criteria than those declared in the other decisions for adjudging the issue, except that it had also considered specifically the further question as to the effect of a declaration, that the workers of a particular canteen, statutorily obligated to be run render no more than to deem them to be workers for the limited purpose of the Factories Act and not for all purposes. In the case before us, the claim is not that there was any such statutory obligation and the entire consideration proceeded only on the footing that it is a non-statutory recognised canteen falling within the second of the three categories envisaged in the earlier decisions and the Tribunal as well as the Division Bench of the High Court endeavoured to find out whether the obligation to run was explicit or implicit, on the facts proved in this case."

A Constitution Bench of this Court in Steel Authority of India Ltd. and Ors. v. National Union Waterfront Workers and Ors. [(2001) 7 SCC 1] noticed the following circumstances under which contract labour could be held to be the workman of the principal employer:

> "An analysis of the cases, discussed above, shows that they fall in three classes: (i) where contract labour is engaged in or in connection with the work of an establishment and employment of contract labour is prohibited either because the industrial adjudicator/court ordered abolition of contract labour or because the appropriate Government issued notification under Section 10(1) of the CLRA Act, no

> automatic absorption of the contract labour working in the establishment was ordered; (ii) where the contract was found to be a sham and nominal, rather a camouflage, in which case the contract labour working in the establishment of the principal employer were held, in fact and in reality, the employees of the principal employer himself. Indeed, such cases do not relate to abolition of contract labour but present instances wherein the Court pierced the veil and declared the correct position as a fact at the stage after employment of contract labour stood prohibited;
>
> (iii) where in discharge of a statutory obligation of maintaining a canteen in an establishment the principal employer availed the services of a contractor the courts have held that the contract labour would indeed be the employees of the principal employer.

Such observation, however, was made in the light of the provisions contained in Contract Labour (Regulation and Abolition) Act, 1970.

Rajendra Babu, J., as the learned Chief Justice then was, speaking for a Division Bench of this Court in Barat Fritz Werner Ltd. v. State of Karnataka [(2001) 4 SCC 498] observed:

> " Of course, in Indian Petrochemicals Corpn. Ltd. v. Shramik Sena a new gloss was given to this decision by stating that the presumption arising under the Factories Act in relation to such workers is available only for the purpose of the Act and no further. However, in Employers of Reserve Bank of India v. Workmen this Court struck a different note. Again this Court in Indian Overseas Bank v. I.O.B. Staff Canteen Workers' Union considered the effect of the decisions in M.M.R. Khan, Parimal Chandra Raha, Reserve Bank of India and Indian Petrochemicals Corpn. Ltd. v. Shramik Sena and it was made clear that the workers of a particular canteen statutorily obligated to be run render no more than to deem them to be workers for limited purpose of the Factories Act and not for all purposes and in cases where it is a non- statutory recognised canteen the court should find out whether the obligation to run was implicit or explicit on the facts proved in that case and the ordinary test of control, supervision and the nature of facilities provided were taken note of to find out whether the employees therein are those of the main establishment "

However, in that case, the court was only concerned with a notification abolishing contract labour under Contract Labour (Regulation and Abolition) Act.

Yet again in Hari Shankar Sharma and Others v. Artificial Limbs Manufacturing Corpn. and Others [(2002) 1 SCC 337], this Court, following Barat Fritz Werner Ltd (supra) opined:

> "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 1, is unacceptable. First, Respondent 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 Respondent 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 is 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 establishment concerned 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 Respondent 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 1."

In National Thermal Power Corporation Ltd. v. Karri Pothuraju and Others [(2003) 7 SCC 384], Rajendra Babu, J., speaking for himself and Raju, J., however, held that in view of a catena of decisions of this Court it is aptly clear that where in discharge of a statutory obligation of maintaining a canteen in an establishment the principal employer availed the services of a contractor the contract labour would indeed be the employees of the principal employer.

The same bench in Mishra Dhatu Nigam Ltd. and Others v. M. Venkataiah and Others [(2003) 7 SCC 488], having regard to the provisions contained in Rules 65 and 71 of Andhra Pradesh Factories Rules, 1950, reiterated the same view.

In Haldia Refinery Canteen Employees Union and Others v. Indian Oil Corporation Ltd. and Others [(2005) 5 SCC 51], Ashok Bhan, J., speaking for a Division Bench of this Court, distinguished Indian Petrochemicals Corporation Ltd. (supra) opining:

> " The management unlike in Indian Petrochemicals Corpn. Ltd. case 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."

It was specifically noticed that the workmen of the Canteen and the contractor had entered into independent settlements without impleading the owner or occupier of the factory as a party therein which also went to show that the workmen were treating themselves the workmen of the contractor and not that of the owners.

We have referred to the aforementioned decisions in order to show that in each of the aforementioned cases the industrial adjudicator was required to apply the relevant tests laid down by this Court in the fact situation obtaining therein. Most of the cases referred to hereinbefore were considered by this Court in the peculiar facts and circumstances obtaining therein and, thus, it is even not proper for the industrial adjudicator to apply the ratio of one decision to the exclusion of other without considering the facts and circumstances involved therein. The law, however, does not appear to be settled as to whether even in a case where the employer is required to run and maintain a canteen in terms of the provisions of the statute, the employees of the canteen would automatically be held to be the workers of the principal employer for all intent and purport and not for the purpose of the Factories Act alone. We, however, are not concerned with the said question in this matter and refrain ourselves from making any observation in respect thereof.

We, however, intend to point out that in a case of this nature even an industrial adjudicator may have some difficulty in coming to the conclusion that employees of a canteen for all intent and purport are employees of the principal employer.

Question of issuance of direction to regularize the services of the employees stand absolutely on a different footing to which we shall advert to a little later.

MAINTAINABILITY OF THE WRIT PETITION In a case of this nature, where serious disputed questions fact were raised, in our opinion, it was not proper for the High Court for embark thereupon an exercise under Article 226 of the Constitution. The High Court in its judgment relied upon a large number of decisions of this Court, inter alia, in Reserve Bank of India (supra) and State Bank of India & Ors. v. State Bank of India Canteen Employees' Union (Bengal Circle) and Ors. [AIR 2000 SC 1518] ignoring the fact that all such disputes were adjudicated in an industrial adjudication.

The High Court arrived at a finding that the Committee was merely a cloak of the Government and an arm of the State. When allegations are made that a body is a cloak and/or smoke screen or a camouflage, the adjudication of such a disputed question should be left to the Industrial Court. In Steel Authority of India Ltd. (supra), as noticed hereinbefore, this Court analysed the decision of this Court to say that they fall in three classes. It was observed :

> "We have quoted the definitions of these terms above and elucidated their import. The word "workman" is defined in wide terms. It is a generic term of which contract labour is a species. It is true that a combined reading of the terms "establishment" and "workman"

shows that a workman engaged in an establishment would have direct relationship with the principal employer as a servant of master. But what is true of a workman could not be correct of contract labour. The circumstances under which contract labour could be treated as direct workman of the principal employer have already been pointed out above."

The legal position was reiterated in Rourkela Shramik Sangh v. Steel Authority of India Ltd. and Another [(2003) 4 SCC 317] stating:

> "There cannot, thus, be any doubt whatsoever that the appellants were fully aware of the fact that they were required to approach the Industrial Tribunal in terms of the provisions of the Industrial Disputes Act for ventilating their grievances. The submission of Mr Shanti Bhushan to the effect that the High Court acts as an authority while exercising its power under Article 226 of the Constitution of India cannot be countenanced. The order of this Court dated 16-10-1995, as quoted supra, is absolutely clear and unambiguous. The term "authority" used in this Court's order dated 16-10-1995 must be read in the context in which it was used. The appellant in terms thereof could seek a reference which would mean a reference in terms of Section 10 of the Industrial Disputes Act. It could also approach "the authority in accordance with law" which would mean authority under a statute. The High Court, by no stretch of imagination, can be an authority under a statute."

It was, furthermore, reiterated that a disputed question of fact normally would not be entertained in a writ proceeding.

To the same effect is the decision of this Court in Workmen of Nilgiri Coop. Mkt. Society Ltd. v. State of T.N. and Others [(2004) 3 SCC 514] wherein this Court considered in detail the relevant factors for determining the relationship of employer and workman. It was held that the burden of proof was upon the workman. In what circumstances, control test taken recourse to by the High Court can inter alia be applicable for determining a disputed question of relation of employer and employee has also been considered therein at some details. It was firmly laid down that whether a contract is a sham or camouflage is not a question of law but of fact. Hussainbhai, Calicut v. The Alath Factory Thezhilali Union, Kozhikode and Others [(1978) 4 SCC 257], whereupon the High Court has placed strong reliance, was held to be falling under Class (ii) envisaged in Steel Authority of India Ltd. (supra).

We may, moreover, notice that in Workmen of the Canteen of Coates of India Ltd. v. Coates of India Ltd. and Others [(2004) 3 SCC 547], a Division Bench of this Court observed:

> "Learned counsel for the appellant strenuously urged that the respondent Company has the statutory obligation 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. Learned counsel referred to certain decisions for this purpose. It is sufficient for us to state that some requirement under the Factories Act of providing a canteen in the industrial establishment, is by itself not decisive of the question or sufficient to determine the status of the persons employed in the canteen. The effect, if any, relating to compliance with the provisions of the Factories Act is a different matter which does not arise for consideration in the present case, for which reason we express no opinion on any such question. It is sufficient for us to say that the finding recorded by the learned Single Judge also leaves no escape from the conclusion that these workmen cannot be held to be workmen employed by the respondent Company."

Albeit in a different context, this Court in U.P. State Bridge Corporation Ltd. and Others v. U.P. Rajya Setu Nigam S. Karamchari Sangh [(2004) 4 SCC 268] emphasised the need of adjudication of a disputed question of fact before Industrial Court stating:

> "The only reason given by the High Court to finally dispose of the issues in its writ jurisdiction which appears to be sustainable, is the factor of delay, on the part of the High Court in disposing of the dispute. Doubtless the issue of alternative remedy should be raised and decided at the earliest opportunity so that a litigant is not prejudiced by the action of the Court since the objection is one in the nature of a demurrer. Nevertheless even when there has been such a delay where the issue raised requires the resolution of factual controversies, the High Court should not, even when there is a delay, short-circuit the process for effectively determining the facts. Indeed the factual controversies which have arisen in this case remain unresolved. They must be resolved in a manner which is just and fair to both the parties. The High Court was not the appropriate forum for the enforcement of the right and the learned Single Judge in Anand Prakash case had correctly refused to entertain the writ petition for such relief."

Yet recently, this Court in Rajasthan State Road Transport Corpn. And Others v. Zakir Hussain [(2005) 7 SCC 447] in the context of the jurisdiction of the Industrial Court vis-`-vis the Civil Court highlighted the object of the Industrial Disputes Act stating:

> "The object of the Industrial Disputes Act, as its preamble indicates, is to make provision for the investigation and settlement of industrial disputes, which means adjudication of such disputes also. The Act envisages collective bargaining, contracts between union representing the workmen and the management, a matter which is outside the realm of the common law or the Indian law of contract "

Keeping in view of the facts and circumstances of this case as also the principle of law enunciated in the above referred decisions of this Court, we are, thus, of the opinion that recourse to writ remedy

was not apposite in this case.

REGULARISATION The question which now arises for consideration is as to whether the High Court was justified in directing regularization of the services of the Respondents. It was evidently not. In a large number of decisions, this Court has categorically held that it is not open to a High Court to exercise its discretion under Article 226 of the Constitution of India either to frame a scheme by itself or to direct the State to frame a scheme for regularising the services of ad hoc employees or daily wages employees who had not been appointed in terms of the extant service rules framed either under a statute or under the proviso to Article 309 of the Constitution of India. Such a scheme, even if framed by the State, would not meet the requirements of law as the executive order made under Article 162 of the Constitution of India cannot prevail over a statute or statutory rules framed under proviso to Article 309 thereof. The State is obligated to make appointments only in fulfilment of its constitutional obligation as laid down in Articles 14, 15 and 16 of the Constitution of India and not by way of any regularization scheme. In our constitutional schemes, all eligible persons similarly situated must be given opportunity to apply for and receive considerations for appointments at the hands of the authorities of the State. Denial of such a claim by some officers of the State times and again had been deprecated by this Court. In any view, in our democratic polity, an authority howsoever high it may be cannot act in breach of an existing statute or the rules which hold the field.

It is not necessary for us to dilate further on the issue as recently in State of U.P. v. Neeraj Awasthi and Ors. [2005 (10) SCALE 286], it has been clearly held that the High Court has no jurisdiction to frame a scheme by itself or direct framing of such a scheme by the State.

In Mahendra L. Jain and Others v. Indore Development Authority and Others [(2005) 1 SCC 639], it was categorically held:

> "The question, therefore, which arises for consideration is as to whether they could lay a valid claim for regularisation of their services. The answer thereto must be rendered in the negative. Regularisation cannot be claimed as a matter of right. An illegal appointment cannot be legalised by taking recourse to regularisation. What can be regularised is an irregularity and not an illegality. The constitutional scheme which the country has adopted does not contemplate any back-door appointment. A State before offering public service to a person must comply with the constitutional requirements of Articles 14 and 16 of the Constitution. All actions of the State must conform to the constitutional requirements. A daily-wager in the absence of a statutory provision in this behalf would not be entitled to regularisation. (See State of U.P. v. Ajay Kumar and Jawaharlal Nehru Krishi Vishwa Vidyalaya v. Bal Kishan Soni.)"

In Zakir Hussain (supra), even in relation to the temporary employee, it was stated:

> "The respondent is a temporary employee of the Corporation and a probationer and not a government servant and, therefore, is not entitled for any protection under

> Article 311 of the Constitution. He was a party to the contract. In view of the fact that the respondent was appointed on probation and the services were terminated during the period of probation simpliciter as the same were not found to be satisfactory, the appellant Corporation is not obliged to hold an enquiry before terminating the services. The respondent being a probationer has got no substantive right to hold the post and was not entitled to a decree of declaration as erroneously granted by the lower courts and also of the High Court."

PARITY IN THE SCALE OF PAY The contention that at least for the period they have worked they were entitled to the remuneration in the scale of pay as that of the government employees cannot be accepted for more than one reason. They did not hold any post. No post for the canteen was sanctioned by the State. According to the State, they were not its employees. Salary on a regular scale of pay, it is trite, is payable to an employee only when he holds a status. [See Mahendra L. Jain and Others (supra)] The High Court was, thus, not correct in holding that the members of the First Respondent could be treated at par with the Hospitality Organization of the State of Karnataka. Such equation is impermissible in law. In the Hospitality Organization of the State, the posts might have been sanctioned. Only because, food is prepared and served, the same would not mean that a canteen run by a Committee can be equated thereto.

SUBSEQUENT EVENT Subsequent events which had taken place is also worth taking note of. The fact remains that the canteen now is closed. The judgment and order of the High Court, thus, otherwise also cannot be implemented. The employees concerned, therefore, cannot be directed to be reinstated in service. We have noticed, hereinbefore, that other proceedings have been initiated by them. The said proceedings may be disposed of in accordance with law.

CONCLUSION For the reasons aforementioned, we are of the opinion that the impugned judgment cannot be sustained, which is set aside accordingly. Consequently the appeals filed by the State Government being Civil Appeal Nos. 224-226 of 2003 and 449-468 of 2003 are allowed and that of the First Respondent being Civil Appeal Nos. 4180-82 of 2003 are dismissed. However, in the facts and circumstances of this case, the parties shall bear their own costs.