

(2017) 07 GUJ CK 0045
In the Gujarat High Court
Case No : 3099 of 2014

JAYESHKUMAR J BHATT

APPELLANT

Vs

STATE OF GUJARAT & ORS.

RESPONDENT

Date of Decision : 06-07-2017

Acts Referred:

Constitution of India, Article 14, Article 21, Article 226, Article 23 - Appointment of Commission to inquire into and report on the administration of autonomous districts and autonomous regions - Amendment of the Schedule - Power of High Courts to Issue certain writs - Prohibition of traffic in human beings and forced labour

Citation : (2017) 07 GUJ CK 0045

Hon'ble Judges : Bela M. Trivedi

Bench : Single Bench

Advocate : SHALIN MEHTA, ?VIDHI J BHATT,?UTKARSH SHARMA

Final Decision : Dismissed

Judgement

1. The batch of petitions involving common question of law and facts, was heard together with the consent of learned advocates for the parties, and is being decided by this common judgment.
2. For the sake of convenience, the facts of Special Civil Application No. 3099 of 2014, being a lead case, are taken for consideration.
3. The petitioner in the said Special Civil Application has prayed for the directions against the respondent authorities to consider the case of the petitioner for regularization and grant him all the benefits granted to the regular employees in the establishment of the respondent No. 2 - Company, and to declare that action of the respondent No. 2 - Company making the petitioner's work on contractual basis, was violative of petitioner's fundamental rights guaranteed under Article 14, 21 and 23 of the Constitution of India. Similar prayers have been prayed for by the other petitioners in the other petitions.

4. As per the case of the petitioner, the respondent No. 2 - Company came to be incorporated on 25.10.1999 under the Companies Act, 1956 with the main object of promoting, executing, operating and maintaining the drinking water supply schemes including water purification and treatment in the State of Gujarat, and also in the other states and the other parts of the Country. The respondent No. 2 - Company therefore is an instrumentality and agency of the State subject to the writ jurisdiction under Article 226 of the Constitution of India. According to the petitioner, the respondent No. 2 - Company never undertook the regular recruitment process to fill up the sanctioned posts in its establishment, and took the managerial staff from the Gujarat Water Supply and Sewerage Board and hired the staff of Class-III and Class-IV employees on contract basis. Accordingly, the petitioner was appointed on 01.09.1999 in the respondent No. 2 - Company as a daily wage driver. In the year 2001, he received monthly wages. From the year 2002, the respondent No. 2 - Company started appointing employees on contract or outsourcing basis. The petitioner therefore came to be appointed through Radiant Enterprises, Ahmedabad to work as Driver in the respondent No. 2 - Company on a fixed pay of Rs. 2,850/- per month from 24.08.2002 as per Annexure "D". The petitioner thereafter was appointed by one Fortune Consultancy, Gandhinagar to work as Driver with the respondent No. 2 - Company on fixed pay of Rs. 2,850/- per month during the period from 16.06.2004 to 30.11.2007. Later from 01.12.2007 to 04.11.2012, the petitioner was appointed by the respondent No. 2 - Company on contractual basis mostly for a period of 11 months on a fixed pay basis. According to the petitioner, the contract was renewed from time to time. One of such contracts for the period from 05.12.2011 to 04.11.2012 is produced at Annexure "E". It is further case of the petitioner that the petitioner was again appointed on 08.11.2012 as a Driver on fixed pay of Rs. 6,500/- per month through the respondent No.3 Prescott Infosys, the Contractor of the respondent No. 2 - Company. Thus, according to the petitioner, he is in continuous service with the respondent - Company for more than 12 years, and therefore, is entitled to be regularized in service and is entitled to get all the benefits as are granted to the regular employees.

5. The respondent No. 2 - Company has resisted the petition by filing the affidavit-in-reply raising preliminary objections as to the maintainability to the petition. Pressing into service Clause 22 of the agreement dated 05.12.2011, it is stated that in view of the arbitration clause in the agreement, the dispute has to be referred to the Arbitrator and the petition under Article 226 would not be maintainable. In further affidavit-in-reply, filed by the respondent No. 2 - Company, it has been denied that the petitioner was working with the said respondent for more than 12 years as stated by him. According to this respondent, there being disputed questions of facts involved in the petition, the petitioner was required to be directed to approach the Industrial Tribunal or

the Labour Court, as the case may be. The petitioner having worked with the private agency since 1999, except for a period of 11 months with the

respondent No. 2 - Company on contractual basis, no prayer for regularization could be granted. The respondent No. 2 - Company has also filed further affidavit placing on record certain documents. Similar affidavits-in-reply have been filed by the respondent No.2 in other petitions disputing the service details furnished by the petitioners.

6. The petitioner has filed affidavit-in-rejoinder reiterating the averments made in the petition and further contending inter alia that the petitioner had worked with the respondent No. 2 - Company since 1999 to 2013, and not for 11 months only and that the respondent No.3 - Prescott Infosys and outsourcing agency was recently introduced by the respondent No. 2 - Company with a view to change the service conditions of the petitioner and other similar situated employees, in brazen violation of Article 23 of the Constitution of India. Nobody appears for the respondent No. 3 - Company.

7. The learned Senior Advocate Mr. Shalin Mehta for the petitioners in all the petitions, relying upon the decision of Supreme Court in the case of M/s. Ram Barai Singh & Company versus State of Bihar & Others reported in 2014 (14) SCALE 230, vehemently submitted that the arbitration clause in the agreement between the parties cannot ipso facto render a writ petition

not maintainable. Relying upon the decision of Supreme Court in the case of Secretary, State of Karnataka and others versus Uma Devi (3) and Others reported in (2006) 4 SCC 1, he submitted that the petitioners in all the petitions having completed 10 years of service without the protection of Court's order, they were entitled to be regularized on the basis of one time regularization scheme. Mr. Mehta also invoking the constitutional ethos and condemning the practice of the respondent No.2 Company to appoint its employees on temporary, ad-hoc and contractual basis, submitted that such unfair practice as adopted by the respondent No.2 with a view to deprive the petitioners of their rights to get regularisation on the sanctioned posts, is violative of Article 21 read with the Director Principles of State Policy as contained in Articles 39, 41 and 42 of the Constitution of India. Regular recruitment is the rule, and the State or its instrumentalities cannot engage the employees on ad-hoc or contractual basis for years together. In the instant case, though the respondent No. 2 - Company had sanctioned posts, kept on appointing the employees on contractual basis with a view to deprive them the benefits of the permanent employees, which action was in utter violation of the fundamental rights guaranteed to the petitioners under the Constitution of India. The respondent No. 2 - Company's pattern of employing persons on contractual basis, runs the submissions of Mr. Mehta, smacks of slavery and bonded labour, which has been strongly deprecated by the Supreme Court in various decisions.

The work of the petitioners being of perennial nature, the respondent No. 2 - Company should not be permitted to get the work done through outsourcing. Lastly reliance is placed on the latest decision of Supreme Court in the case of State of Punjab and Others versus Jagjit Singh and Others reported in (2017) 1

SCC 148 to submit that the petitioners working on sanctioned posts are entitled to the pay scale and other allowances on the principle of equal pay for equal work.

8. However, Mr. R.C. Jani for the respondent No.2 raising the preliminary objection as to the maintainability of the petition, has relied upon the decisions of Supreme Court in the case of Branch Manager, M/s. Magma Leasing & Finance Ltd. versus Potluri Madhavilata reported in AIR 2010 SC 488, and in the case of the Rajasthan State Industrial Development and Investment Corporation versus Diamond & Gem Development Corporation reported in AIR 2013 SC 1241, to submit that clause 22 of the contract entered into with the petitioners provided for referring the disputes between the parties to the Arbitrator of the Company and the petitioners without resorting to the said arbitration clause could not have filed the writ petition directly in the High Court. Mr. Jani also raised objection against entertaining the petitions on the ground that the petitioners have an alternative efficacious remedy available under various statutes like Industrial Disputes Act, Contract Labour (Regulation and Abolition) Act.

9. The learned advocate Mr. R.C. Jani has seriously disputed the details of employment given by the petitioners in their respective petitions, and submitted that the petitions involving disputed questions of facts should not be entertained by the High Court. He relying upon the latest decision of Supreme Court in the case of State of Jammu and Kashmir and Others versus District Bar Association, Bandipora reported in AIR 2017 SC 11, submitted that the regularization is not the source of recruitment, nor is it intended to confer permanency upon the appointments made without following the due process of law, which might have been made in genuine and legitimate administrative exigencies. According to Mr. Jani, the petitioners being the employees of the respondent No. 3 - Contractor, the respondent No.3 was obliged to meet with the statutory requirements like maintaining provident funds accounts, gratuity, etc., and that the respondent No. 2 - Company could not be directed to regularize the services of the petitioners. He also submitted that there are no rules, regulations, policies or legal provisions, under which, services of the petitioner could be regularized. He also submitted that recently this Court in the case of Prajapati Hitesh Mohanlal and Others versus State of Gujarat and Others in Special Civil Application No. 13621 of 2014 and allied matters decided on 01.07.2016, had elaborately considered the similar issues and dismissed the same.

10. So far as the preliminary objection raised by Mr. Jani as regards the non-maintainability of the petition on the ground that there was an arbitration clause in the agreement, is concerned, it is required to be noted that the petitioners have not filed the petitions for the enforcement of any contractual rights arising out of such agreements entered into between the petitioners and the respondent Company. The petitioners have claimed regularization on the basis of their alleged continuous services with the respondent Company for

more than 10 to 12 years in different capacities. Hence, the existence of arbitration clause in such agreement itself would not bar the petitioners from approaching this Court under Article 226 of the Constitution of India. The arbitration clause in such agreement alone could not ipso facto render the petitions not maintainable, as held by the Supreme Court in the case of M/s. Ram Barai Singh & Company versus State of Bihar & Others (supra) relied upon by Mr. Mehta, learned counsel for the petitioners.

11. However, the Court finds substance in the other objection raised by Mr. R.C. Jani with regard to the existence of an alternative remedy. Its axiomatic that if an alternative efficacious remedy is available, High Court would normally not exercise its jurisdiction under Article 226 of the Constitution. Of course, existence of alternative remedy itself would not be a bar to entertain the petition to enforce the fundamental rights, however, when the

statutory Forums are created by law for redressal of grievances, the petitions should not be entertained ignoring the statutory dispensation. If the petitioners had any grievance against the respondent No.3 Contractor or the respondent No.2 Company, they could have approached the authorities created under the Contract Labour (Regulation and Abolition) Act, 1970 or Industrial Disputes Act, seeking redressal of their grievances. The petitioners could not be permitted to undermine the statutory authorities specially created under the special statutes and invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, under the guise that there was violation of the fundamental rights.

12. As regards prayer of regularisation, it deserves to be noted that respondent Company has seriously disputed the details of petitioners' employment in the petitions and resisted their claims for regularisation. Even if the facts stated in the petitions are believed to be true, then also it appears that the petitioners were appointed either on daily wage basis or contractual basis or through contractors, and that at the time of filing of the petitions, the petitioners were the employees of the respondent No.3 Contractor. None of the petitioners was even employed by the respondent No.2 after following the regularisation process. In the case of Maharashtra State Road Transport Corporation and Another versus Casteribe Rajya Parivahan Karmchari

Sanghatana, reported in (2009) 8 SCC 556, the Supreme Court has categorically held that the High Courts under Article 226 should not issue directions for absorption or regularization unless the recruitment itself was made in terms of the constitutional scheme.

13. At this juncture, a very pertinent observations made by the Constitutional Bench of the Supreme Court in the case of Secretary, State of Karnataka and others versus Uma Devi (3) and Others (supra), are required to be reproduced in which while dealing with such issues of regularisation or absorption, it has been held in para 43 as under : -

"43..... Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of

appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme."

14. In the latest decision in case of State of Jammu and Kashmir and Others versus District Bar Association, Bandipora (supra), the Supreme Court after elaborately discussing the issues involved in the aforesaid case of Uma Devi (supra), has held as under : -

"The principles will have to be formulated bearing in mind the position set out in the above judgments. Regularisation is not a source of recruitment nor is it intended to confer permanency upon appointments which have been made without following the due process envisaged by Articles 14 and 16 of the Constitution. Essentially a scheme for regularisation, in order to be held to be legally valid, must be one which is aimed at validating certain irregular appointments which may have come to be made in genuine and legitimate

administrative exigencies. In all such cases it may be left open to Courts to lift the veil to enquire whether the scheme is aimed at achieving the above objective and is a genuine attempt at validating irregular appointments. The State and its instrumentalities cannot be permitted to use this window to validate illegal appointments. The second rider which must necessarily be placed is that the principle as formulated above is not meant to create or invest

in a temporary or ad hoc employee the right to seek a writ commanding the State to frame a scheme for regularisation. Otherwise, this would simply reinvigorate a class of claims which has been shut out permanently by Uma Devi. Ultimately, it would have to be left to the State and its instrumentalities to consider whether the circumstances warrant such a scheme being formulated. The formulation of such a scheme cannot be accorded the status of an enforceable right. It would perhaps be prudent to leave it to a claimant to establish whether he or she falls within the exceptions carved out in paragraph 53 and falls within the ambit of a scheme that may be formulated by the State. Subject to the riders referred to above, a scheme of regularisation could fall within the permissible limits of Uma Devi and be upheld."

15. In view of the above, there remains no shadow of doubt that the High Court exercising writ jurisdiction under Article 226 of the Constitution of India, could not direct the respondent authorities to regularize the services of the persons appointed on ad-hoc, temporary or contractual basis nor such temporary or ad-hoc employees have any right to seek a writ commanding the State to frame the scheme for regularisation. The reliance placed by Mr. Mehta on

the decision of Supreme Court in case of State of Punjab and Others versus Jagjit Singh and Others (supra), would also not be helpful to the petitioners. In the said case, it was not disputed that the temporary employees were appointed against the regular posts, and during the course of their employment, they were randomly deputed to discharge duties and responsibilities which were assigned to the regular employees. Whereas in the instant petitions, the service details furnished by the petitioners show that the petitioners were initially appointed by the respondent No.2 on daily wages basis or contractual basis, and thereafter were appointed by the contractor named Radiant Enterprises. At the time of institution of the petitions, all the petitioners were employed by the respondent No.3 Contractor. There was no regular recruitment process undertaken by the respondent No.2 giving opportunity to the qualified persons to compete for the posts in question, adhering to the rule of equality in public employment. Under the circumstances, it is difficult to issue any writ or direction for regularization or granting them the benefits of regular employees as prayed for in the petitions.

16. Of course, such practice of the respondent No.2 in employing the persons on ad-hoc or contractual basis for years together on the sanctioned posts, deserves to be strongly deprecated, being violative of the constitutional ethos, nonetheless, the High Court under Article 226 of the Constitution, could not direct regularization of the petitioners' services in view of the aforesaid legal position settled by the Supreme Court.

17. In that view of the matter, all the petitions being devoid of merits, are dismissed. Notices are discharged. Interim relief, if any, granted earlier shall stand vacated forthwith in all the petitions.

At this juncture, learned Senior Advocate Mr. Mehta for the petitioner requests the Court to extend the interim relief of maintaining status-quo for approaching the higher Forum. The said request is opposed by the learned advocate Mr. R.C. Jani for the respondent No.2.

Having regard to the facts and circumstances of the case, the interim relief is continued till 20.07.2017.