
(2013) 07 DEL CK 0526

In the Delhi High Court

Case No : Writ Petition (C) No. 4071 of 2013

Kanishk Sharma and Others

APPELLANT

Vs

University Grant Commission and Others

RESPONDENT

Date of Decision : 02-07-2013

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 16, 21, 24

Contract Labour (Regulation and Abolition) Act, 1970 — Section 16, 17, 18, 19, 20

Citation : (2013) 07 DEL CK 0526

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Surat Singh, Ms. Nupur Agarwal and Ms. Aishwarya Kaushik, for the Appellant; Amitesh Kumar, for R-1, Mr. R.L. Goel, Ms. Anju Gupta for R-3 and Mr. A.S. Rao, Law Officer, DMRC, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—This writ petition is filed by a total of 30 petitioners. The petitioners were employed by respondent no. 2-M/s. JMD Consultants. Respondent no. 2 is a private employer which employs persons for placement with other employers. Petitioners as employees of respondent no. 2 were put at the disposal of the respondent no. 1-UGC. Petitioners claim that the veil of employment be lifted and actually petitioners should be held as employees of the respondent no. 1/UGC. Out of 30 petitioners most of the petitioners have worked as clerks for about 2 to 3 years whereas one or two petitioners have worked for about 5-7 years. The petitioners contend that actually they having worked for the respondent no. 1-UGC and which is basically the Union of India/arm of the State, therefore, they are entitled to benefits as employees of the Union of India/State. Petitioners also contend that as per their contractual employment letters, their services have been renewed for 11 months from 22.1.2013, and therefore, the action of the respondent no. 2 in directing the petitioners to report to DMRC instead of the respondent no. 1 is illegal and violative of law because DMRC is in fact asking for a performance bond of Rs. 25,000/- from each of the petitioners.

It is also argued that the salary which would be paid to the petitioners by DMRC would be lesser than the salary which was being paid to the petitioners when they were placed with the respondent no. 1. During the course of arguments, counsel for the petitioners has placed reliance upon two judgments of the Supreme Court. The first judgment is in the case of People's Union for Democratic Rights and Others Vs. Union of India (UOI) and Others, . Para-10 of this judgment is relied upon for the proposition that even if the workers are employees of a private organization they should in fact be treated as employees of the alleged principal employer/Union of India. Para 10 of the judgment which is relied upon reads as under:-

10. We must then proceed to consider the first limb of the second preliminary objection. It is true that the workmen whose cause has been championed by the petitioners are employees of the contractors but the Union of India, the Delhi Administration and the Delhi Development Authority which have entrusted the construction work of Asiad projects to the contractors cannot escape their obligation for observance of the various labour laws by the contractors. So far as the Contract Labour (Regulation and Abolition) Act 1970 is concerned, it is clear that u/s 20, if any amenity required to be provided under Sections 16, 17, 18 or 19 for the benefit of the workmen employed in an establishment is not provided by the contractor, the obligation to provide such amenity rests on the principal employer and therefore if in the construction work of the Asiad projects, the contractors do not carry out the obligations imposed upon them by any of these sections, the Union of India, the Delhi Administration and the Delhi Development Authority as principal employers would be liable and these obligations would be enforceable against them. The same position obtains in regard to the Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979. In the case of this Act also, Sections 17 and 18 make the principal employer liable to make payment of the wages to the migrant workmen employed by the contractor as also to pay the allowances provided under Sections 14 and 15 and to provide the facilities specified in Section 16 to such migrant workmen, in case the contractor fails to do so and these obligations are also therefore clearly enforceable against the Union of India, the Delhi Administration and the Delhi Development Authority as principal employers. So far as Article 24 of the Constitution is concerned, it embodies a fundamental right which is plainly and indubitably enforceable against every one and by reason of its compulsive mandate, no one can employ a child below the age of 14 years in a hazardous employment and since, as pointed out above, construction work is a hazardous employment, no child below the age of 14 years can be employed in construction work and therefore, not only are the contractors under a constitutional mandate not to employ any child below the age of 14 years, but it is also the duty of the Union of India, the Delhi Administration and the Delhi Development Authority to ensure that this constitutional obligation is obeyed by the contractors to whom they have entrusted the construction work of the various Asiad projects. The Union of India, the Delhi Administration and the Delhi

Development Authority cannot fold their hands in despair and become silent spectators of the breach of a constitutional prohibition being committed by their own contractors. So also with regard to the observance of the provisions of the Equal Remuneration Act 1946, the Union of India, the Delhi Administration and the Delhi Development Authority cannot avoid their obligation to ensure that these provisions are complied with by the contractors. It is the principle of equality embodied in Article 14 of the Constitution which finds expression in the provisions of the Equal Remuneration Act 1946 and if the Union of India, the Delhi Administration or the Delhi Development Authority at any time finds that the provisions of the Equal Remuneration Act 1946 are not observed and the principles of equality before the law enshrined in Article 14 is violated by its own contractors, it cannot ignore such violation and sit quiet by adopting a non-interfering attitude and taking shelter under the executive that the violation is being committed by" the contractors and not by it. If any particular contractor is committing a breach of the provisions of the Equal Remuneration Act 1946 and thus denying equality before the law to the workmen, the Union of India, the Delhi Administration or the Delhi Development Authority as the case may be, would be under an obligation to ensure that the contractor observes the provisions of the Equal Remuneration Act 1946 and does not breach the equality clause enacted in Article 14. The Union of India, the Delhi Administration and the Delhi Development Authority must also ensure that the minimum wage is paid to the workmen as provided under the Minimum Wages Act 1948. The contractors are, of course, liable to pay the minimum wage to the workmen employed by them but the Union of India the Delhi Administration and the Delhi Development Authority who have entrusted the construction work to the contractors would equally be responsible to ensure that the minimum wage is paid to the workmen by their contractors. This obligation which even otherwise rests on the Union of India, the Delhi Administration and the Delhi Development Authority is additionally reinforced by Section 17 of the Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979 in so far as migrant workmen are concerned. It is obvious, therefore, that the Union of India, the Delhi Administration and the Delhi Development Authority cannot escape their obligation to the work men to ensure observance of these labour laws by the contractors and if these labour laws are not complied with by the contractors, the workmen would clearly have a cause of action against the Union of India, the Delhi Administration and the Delhi Development Authority.

2. The second judgment which is relied on behalf of the petitioners is the judgment in the case of Hussainbhai, Calicut Vs. The Alath Factory Thezhilali Union, Kozhikode and Others, . This is a judgment under the Industrial Disputes Act, 1947 and is relied upon for the proposition that once the economic control over the workers" subsistence, skill and continued employment is with a principal-employer, the intermediate contractor-employer is irrelevant and the workers are in fact employees of the principal-employer. Paras 5 to 7 of the judgment are relied upon and the same read as under:-

5. The true test may, with brevity, be indicated once again. Where a worker or group of workers labours to produce goods or services and these goods or services are for the business of another, that other is, in fact, the employer. He has economic control over the workers' subsistence, skill, and continued employment. If he, for any reason, chokes off, the worker is, virtually, laid off. The presence of intermediate contractors with whom alone the workers have immediate or direct relationship *ex contractu* is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, we discern the naked truth, though sniped in different perfect paper arrangement, that the real employer is the Management, not the immediate contractor. Myriad devices, half hidden in fold after fold of legal form depending on the degree of concealment needed, the type of industry, the local conditions and the like, may be resorted to when labour legislation casts welfare obligations on the real employer, based on Articles 38, 39, 42, 43 and 43A of the Constitution. The court must be astute to avoid mischief and achieve the purpose of the law and not be misled by the maya of legal appearances.

6. If the livelihood of the workmen substantially depends on labour rendered to produce goods and services for the benefits and satisfaction of an enterprise, the absence of direct relationship or the presence of dubious intermediaries or the make-believe trappings of detachment from the Management cannot snap the real-life bond. The story may vary but the inference defies ingenuity. The liability cannot be shaken off.

7. Of course, if there is total dissociation in fact between the disowning management and the aggrieved workmen, the employment is, in substance and in real-life terms, by another. The Management's adventitious connections cannot ripen into real employment.

3. Learned counsel for the petitioners, during the course of arguments has submitted a vernacular/Hindi document and which is a response of an RTI query and in which the respondent no. 1 has stated that the petitioners have been directed to be removed from placement with the respondent no. 1 and which is false because petitioners satisfactorily served with respondent no. 1. For completion of narration it may also be stated that the response to the RTI query by the respondent no. 1 states that the petitioners are employees not of the respondent no. 1 but of the respondent no. 2.

4. Before I turn to the ratio of the judgments cited on behalf of the petitioner, it would be relevant in my opinion firstly to refer to the Constitution Bench judgment of the Supreme Court in the case of *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, . The ratio of the judgment of the Supreme Court in the case of *Umadevi* (supra) reads as under:-

(I) The questions to be asked before regularization are:-

(a)(i) Was there a sanctioned post (court cannot order creation of posts because finances of the state may go haywire), (ii) is there a vacancy, (iii) are the

persons qualified persons and (iv) are the appointments through regular recruitment process of calling all possible persons and which process involves inter-se competition among the candidates

(b) A court can condone an irregularity in the appointment procedure only if the irregularity does not go to the root of the matter.

(II) For sanctioned posts having vacancies, such posts have to be filled by regular recruitment process of prescribed procedure otherwise, the constitutional mandate flowing from Articles 14, 16, 309, 315, 320 etc is violated.

(III) In case of existence of necessary circumstances the government has a right to appoint contract employees or casual labour or employees for a project, but, such persons form a class in themselves and they cannot claim equality (except possibly for equal pay for equal work) with regular employees who form a separate class. Such temporary employees cannot claim legitimate expectation of absorption/regularization as they knew when they were appointed that they were temporary inasmuch as the government did not give and nor could have given an assurance of regularization without the regular recruitment process being followed. Such irregularly appointed persons cannot claim to be regularized alleging violation of Article 21. Also the equity in favour of the millions who await public employment through the regular recruitment process outweighs the equity in favour of the limited number of irregularly appointed persons who claim regularization.

(IV) Once there are vacancies in sanctioned posts such vacancies cannot be filled in except without regular recruitment process, and thus neither the court nor the executive can frame a scheme to absorb or regularize persons appointed to such posts without following the regular recruitment process.

(V) At the instance of persons irregularly appointed the process of regular recruitment shall not be stopped. Courts should not pass interim orders to continue employment of such irregularly appointed persons because the same will result in stoppage of recruitment through regular appointment procedure.

(VI) If there are sanctioned posts with vacancies, and qualified persons were appointed without a regular recruitment process, then, such persons who when the judgment of Uma Devi is passed have worked for over 10 years without court orders, such persons be regularized under schemes to be framed by the concerned organization.

(VII) The aforesaid law which applies to the Union and the States will also apply to all instrumentalities of the State governed by Article 12 of the Constitution.

5. The judgment of the Constitution Bench in the case of Umadevi (supra) came to be passed in order to prevent back door entry in public employment. What was happening was that without following the due process of public employment i.e. without their existing of sanctioned posts and without open competition taking place by calling the prospective employees through public advertisement

and employment exchange, adhoc or temporary employment or contractual employment are used to be made and thereafter such persons used to get regularized. The Supreme Court held that the rights in favour of a limited number of persons who have secured employment otherwise than through advertisements in newspaper or through the employment exchange cannot prevail in favour of millions of people who are awaiting public employment through the regular mode. In my opinion, if I accept the writ petition, it would squarely fly in the face of the ratio of the Constitution Bench judgment in the case of Umadevi (Supra) and which states that there cannot be public employment unless there are vacancies in sanctioned post and such vacancies in sanctioned post are sought to be filled in by means of open competition by insertion of advertisements in newspapers and through the employment exchange. The judgments therefore cited on behalf of the petitioner, would have no application after the Constitution Bench judgment in the case of Umadevi (supra) because grant of prayers would be grant of public employment in violation of ratio of Umadevi (supra). Be that as it may I am dealing with each of the two judgments relied upon by the petitioners hereafter.

6. So far as the case of People's Union (supra) is concerned, and para 10 of the judgment which is relied upon, the same only states that when for public projects such as Asian Games, private contractors who are contracted for projects employ workmen and labours for completion of the projects, then such workmen and labours should have the benefit of all the legislative provisions of different statutory enactments pertaining to such workmen and labours. Since the contractors in those projects who were engaged in construction works for the Asian Games of 1982 were not following the relevant legislative provisions, the Supreme Court entertained petition under Article 32 of the Constitution of India and directed compliance of various labour laws and other laws which had to be followed by the contractor. This is not the position in the present case. There are no averments in the writ petition as to which of the labour law or other laws are being violated by the respondent no. 2 and respondent no. 2 therefore should be directed to follow those principles of provisions of statutory enactments. All that is stated is that the petitioners have contractual employment of 11 months and directing the petitioners to report before DMRC instead of the respondent no. 1-UGC will violate this contract. At best therefore there is only a violation of contract which is alleged i.e. there are no averments in the writ petition of violation of any statutory provisions of specific enactments. The judgment of People's Union (supra) thus has no application on the facts of the case, even if we do not apply the ratio of the Constitution Bench in the case of Umadevi (supra).

7. So far as the judgment in the case of Hussainbhai (supra) is concerned, it was a judgment under the Industrial Disputes Act. State/Government was not the employer. There were findings of facts that the employment of the employees by the contractor was a camouflage and the workmen/labours were in fact under the total control and employment of the person with whom they were actually

working and were placed by the contractor. There were findings of facts on disputed issues and conclusions were arrived at to hold that the workmen/labours were the employees of the person with whom they were working and not of the private contractor. In such circumstances, the benefit of the provision of Industrial Disputes Act came to be given to such employees. The present case is not under the Industrial Disputes Act and in any case, I do not find any factual basis to treat the petitioners as employees of the respondent no. 1, much less in the face of the direct ratio of the Constitution Bench judgment in the case of *Umadevi* (supra).

8. So far as the response to the RTI query is concerned, though it may be partially correct because the petitioners were possibly directed to not serve the respondent no. 1 not because the respondent no. 1 found their services unsatisfactory, however, that cannot take the case of the petitioner any further and to grant the petitioners benefit of public employment that they should be treated as employees of the respondent no. 1-UGC and not of the respondent no. 2. There is hence no merit in the writ petition, which is accordingly dismissed, leaving the parties to bear their own costs.