

(2022) 04 RAJ CK 0007

In the Rajasthan High Court

Case No : S.B. Civil Writ Petition No. 8704 Of 2009

Managing Committee And Others

APPELLANT

Vs

Rajasthan Non Government Educational Institution Tribunal,
Jaipur And Others

RESPONDENT

Date of Decision : 01-04-2022

Acts Referred:

Constitution Of India, 1950 — Article 14, 38, 39, 39(a), 41, 226
Rajasthan Non Government Educational Institutions (Recognition Grant In Aid And Service Conditions Etc.) Rules, 1993 — Rule 2(i), 33, 39
Rajasthan Non Government Educational Institutions Act, 1989 — Section 18, 20
Contract Act, 1872 — Section 16(1), 23

Citation : (2022) 04 RAJ CK 0007

Hon'ble Judges : Sameer Jain, J

Bench : Single Bench

Advocate : N.K. Maloo, Ajeet Maloo, D.P. Sharma

Final Decision : Allowed

Judgement

Sameer Jain, J

1. The present writ petition has been filed invoking Article 226 of the Constitution of India against order dated 25.09.2008 passed by Rajasthan Non-Government Educational Institution Tribunal, Jaipur (hereinafter referred to as 'Tribunal') whereby the appeal no. 69/2005 filed by respondent No. 2 against the petitioners was allowed.

2. It is submitted by the petitioner that it is an unaided institution with only temporary affiliation and has issued an advertisement (Annexure-2) dated 20.06.2003 whereby it was advertised at serial no. 9 that a Clerk (Lipic) is required on contractual basis.

3. On 25.06.2003, a letter of consent was issued in favour of respondent No.2 for a part-time Clerk for a specified period from 03.07.2003 to 15.05.2004 under a contract, which was duly accepted on the said terms and conditions by

respondent No.2 and thereafter consent and joining was given on 03.07.2003. On expiry of the tenure, the application for extension was filed by the respondent and consent/agreement was issued by petitioner vide letter dated 10.06.2004. On 14.05.2005 order of relieving on expiry of terms was issued against which the respondent preferred an appeal before the Tribunal which directed reinstatement with full salary after considering the provisions of law and the facts of the case. Aggrieved by order of Tribunal in appeal, present writ petition has been filed.

4. Per contra, counsel for the respondents have submitted that the Rajasthan Non-Government Educational Institutions Act, 1989 (hereinafter referred to as 'Act of 1989'), the Rajasthan Non-Government Educational Institutions (Recognition, Grant-in-Aid and service Conditions etc.) Rules, 1993 (hereinafter referred to as 'Rules of 1993') and the settled position of law recognized substantive appointment, if the selection of the candidate is made upon issuance of advertisement and after consideration of all candidates. He submits that the respondent in question is an employee in terms of Section 2(i) of the Act of 1993, and by virtue of Section 20 any contract between a recognized institute and an employee, if takes away any right conferred upon such persons by or under the Act of 1993, is null and void. He submits that once a substantive appointment is made then by virtue of Section 18, without giving six months notice or salary and the consent of Director of Education and resolution by managing committee, the employee cannot be removed, dismissed or reduced in rank. He further submits that as per settled position of law in R.S. Rawat Vs. State of Rajasthan reported in 1993 (1) WLC 79 (Para 15) reproduced below:-

"15. It cannot be ignored that in our country the doctrine of Lassaize Faire has not been accepted and the employer does not have an absolute freedom in the matter of laying down the terms and conditions of employment. Even if the employer settles terms and conditions of employment which are unfair, arbitrary or opposed to public policy, the same are not binding on the employee. Such terms and conditions cannot be enforced against the employee. The employee can seek a declaration of invalidity against such terms and conditions on the ground that the conditions are arbitrary and unreasonable. In Central Inland Water Transport Corporation v. Brojo Nath Ganguli, (1986(3) S.C.C. 156) their Lordships of the Supreme Court gave a new dimension to the powers of the Court to strike down the terms and conditions of a contract of employment on the ground that the same is unconscionable or unfair. After making a lucid analysis of Articles 14, 39(a) and 41 of the Constitution of India and Section 23 of the Contract Act, 1872, the Supreme Court held:

"An unconscionable bargain or contract is one which is irreconcilable with what is right or reasonable or the terms of which are so unfair and unreasonable that they shock the conscience of the Court.

The doctrine of distributive justice is another jurisprudential concept which has affected the law of contracts. According to this doctrine, distributive fairness and justice in the possession of wealth and property can be achieved not only by

taxation but also by regulatory control of private and contractual transactions even though this might involve some sacrifice of individual liberty. This doctrine has found constitutional recognition through the Preamble and Articles 38 and 39.

The test of reasonableness or fairness as a clause in a contract where there is inequality of bargaining power is another theory recognised in the sphere of law of contracts. The Courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or a clause in a contract entered into between parties who are not equal in bargaining power. Lord Diplock in *A. Schroeder Music Publishing Co.* case has given the test of fairness thus: 'Whether the restrictions are both reasonably necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promisor under the contract. For the purpose of this test all the provisions of the contract must be taken into consideration.' This is in consonance with right and, reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. There can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The Court must judge each case on its own facts and circumstances. The above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties or where the inequality is the result of circumstances, whether of the creation of the parties or not or where the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them or where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. However, these are only illustrations as it is difficult to give an exhaustive list of all bargains of this type.

The contracts of the types to which the principle formulated above applies are not contracts which are tainted with illegality but are contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the court. In the vast majority of cases such contracts are entered into by the weaker party under pressure of circumstances, generally economic, which results in inequality of bargaining power. Such contracts will not fall within the four corners of the definition of "undue influence" given in Section 16(1) of the Contract Act, even though at times they are between parties one of whom holds a real or apparent authority over the other. Contracts is prescribed or standard forms or which embody a set of rules as part of the contract or entered into by the party with superior bargaining power it a large number of persons who have

far less bargaining power or no bargaining power at all. Such contracts which affect a large number of persons or a group or groups of persons, if they are unconscionable, unfair and unreasonable, are injurious to the public interest. Such a contract or its clause should be adjudged void under Section 23 of the Contract Act on ground of being opposed to public policy."

5. In DBCSA No.860/2008 titled as Bhopalwala Arya Higher Secondary School Vs. Mr. Nand Lal & Ors., it was held that no employee can be relieved/terminated without following the mandate under Section 18 and even the contractual employees once appointed under advertisement after due selection cannot be removed unilaterally in violation of Section 18. The respondent's counsel has also relied upon Rules 33 and 39 of the Rules of 1993, and according to Rule 33, temporary vacancy can be filled for a period not exceeding six months and if it is more than that, provisions under the Act more particularly Section 18 has to be followed. He supported the view taken by the Tribunal and requested for dismissal of the present writ petition.

6. This Court has considered the submissions advanced by the respective counsels, the judgments cited at Bar and perused the record of the writ petition. The central issue in the lis in question pertains to the fact that whether a candidate appointed under a contract on a part-time basis, being paid consolidated amount at given terms and conditions can be considered as an employee, and whether the provisions of Section 18 will be applicable upon him. To decide the issue in question, it is apposite to reproduce certain provisions of the Act of 1989 as under:-

"Section 2(i) "employee" includes a teacher and every other employee working in a recognized institution."

Section 18. Removal, dismissal or reduction in rank of employees - Subject to any rules that may be made in this behalf, no employee of a recognized institution shall be removed, dismissed or reduced in rank unless he has been given by the management a reasonable opportunity of being heard against the action proposed to be taken:

Provided that no final order in this regard shall be passed unless prior approval of the Director of Education or an officer authorized by him in this behalf has been obtained:

Provided further that this section shall not apply,-

(i) to a person who is dismissed or removed on the ground of conduct which led to his conviction on a criminal charge, or

(ii) where it is not practicable or expedient to give that employee an opportunity of showing cause, the consent of Director of Education has been obtained in writing before the action is taken, or

(iii) Where the managing committee is of unanimous opinion that the services of

an employee can not be continued without prejudice to the interest of the institution, the services of such employee are terminated after giving him six months notice or salary in lieu thereof and the consent of the Director of Education is obtained in writing.

Section 20. Contracts by employees – A contract between a recognized institution and an employee, whether made before or after the commencement of this Act, shall, to the extent that it takes away any right conferred on such person by or under this Act, be null and void.

Rule 33 of 1993. Urgent temporary appointment- A vacancy in the institution, which cannot be filled in immediately by procedure laid down in these rules, may be filled in by the Selection Committee by urgent temporary appointment for a period not exceeding six months.”

7. On analyzing above provisions and the facts of case, it is crystal clear and moreso an admitted position that by virtue of advertisement dated 20.06.2003 whereby at serial no. 9 respondent no. 2 was appointed on contractual basis, it was a contract for service and no employer-employee relationship existed. This is also evident from the agreement/consent letter signed and acknowledged by the respondent wherein he agreed to the fact that it was a part-time job, for a consolidated amount of Rs. 2,000/- for a fixed/defined tenure and an appropriate deduction was permissible on any leave taken. Neither any vested right was ever created, nor indication of regularization was reflected in the same. The letter of extension after expiry of contracted period bears testimony to the fact that the appointment was for a limited period and it was extended and re-contracted by agreement dated 10.06.2004.

8. On perusal of Section 20, it is absolutely clear that any contract can be entered into between the recognized institution and an employee as per the provisions of the Act of 1989. Those contracts that take away the rights conferred by or under this act shall be null and void, to such extent.

9. In the given case, when there is no instance of employer-employee relationship, the contract is for part-time job and for a fixed amount, there is no right conferred upon such persons. In the agreement in between the petitioner and respondent, there is no reflection of regularization. The provisions of Section 18 only comes into play when there is an employer-employee relationship and a permanent appointment. In the given case, when it is admitted position that it was a part-time job, for a fixed period, for a fixed amount and duly acknowledged, the provisions of Sections 18 and 20 of the Act of 1989 do not come into play.

10. In this regard, judgments cited by the petitioner in SBCWP No.3103/2014 dated 04.05.2016 titled as Dr. Sadhana Godika Vs. Managing Committee and Ors. has categorically held that when its a discontinuation of contract/fixed term employment, the same is permitted under the Act of 1989 and the Rules of 1993. The Coordinate Bench has even considered the judgment of Secretary,

State of Karnataka & Ors. Vs. Umadevi & Ors. rendered by Hon'ble Apex Court reported in (2006) 4 SCC 1. The contents of the relied upon portion of the said judgment is reproduced below:-

"It will also now be well to consider the further argument of the counsel for the petitioner that in view of Rule 33 of the Rules of 1993, the maximum limit permitted for an urgent temporary appointment being six months, the petitioner having continued in that capacity for a period of about 7 years, her appointment ought to be treated as regular. I am of the considered view that the petitioner's appointment did not even relate to Rule 33 and was absolutely de-hors the Act of 1989 and Rules of 1993 for the reason that albeit appointed on temporary basis for a period of one year and thereafter extended from time to time, the petitioner's appointment admittedly was not made by the Selection Committee as mandated by Rule 33 of the Rules of 1993. The petitioner has indeed continued on the post of Principal for a period of about seven years. But mere period of contractual/temporary/fixed term appointment even when extended cannot allow circumvention of the operative law – in the instant case the Act of 1989 and the Rules of 1993. I also do not find force in the contention of the petitioner's counsel that the order dated 17.01.2014 issued by the Secretary, Managing Committee of Agarwal Shikshak Prashikshan Mahavidhyalaya, Jaipur is a stigmatic/punitive order. The order dated 17.07.2014 only entails mere discontinuation at the end of the contract/fixed term employment – Uma Devi (Supra) permits it. The resolution of the Board with regard to the petitioner having secured 52.88% marks and not 55% marks at the Master Level at the time of joining service on 2007 as required under the UGC Regulations, 2000 regarding Minimum Qualifications for Appointment and Career Advancement of Teachers in Universities and Colleges is a mere statement of an undisputable fact and cannot be said to be condemnatory of the petitioner's conduct or holding her unsuitable for employment on a post for which she was otherwise qualified. No prejudice flows to the petitioner even remotely therefrom."

11. The petitioner has also placed reliance upon Division Bench judgment of this Court in SAW No.1041/2011 titled as Dr. Daya Shankar Sharma and Ors. Vs. Rajasthan Non-Govt. Educational Institutions Tribunal and Ors. wherein it was held that under the Act of 1989 and Rules of 1993 when the appointment was made on contractual basis, the petitioners were not required to follow the procedure contained under the Act and Rules. The said Rules and the Act apply only when the appointments are made on temporary/permanent basis. The relevant portion of the said judgment is reproduced below:-

"Having regard to the submissions made by the learned advocate for the appellants and the documents on record, more particularly, the order passed by the Tribunal as well as by the learned Single Judge, it clearly transpires that none of the petitioners was appointed either on temporary or regular basis, nor any regular recruitment procedure was followed for their appointment. Even the public advertisement was also not issued. The said position has not been

disputed by the appellants. It has also not been disputed by the appellants that the respondent-institution have not issued any appointment letter to them appointing them on the said post of lecturer. The only contention raised by the learned advocate for the appellants is that the respondent-institution, before terminating the services of the appellants, did not follow the procedure contained in Section 18 of the said Act read with Rule 39 of the Rules made thereunder. However, there is no substance in the said contention raised by learned counsel for the appellants, inasmuch as Rule 39 of the said Rules would apply only to the employees appointed on temporary. So far as the facts of the present cases are concerned, as rightly held by the learned Single Judge, there was no advertisement issued nor any appointment order was given to any of the appellants. There was no material placed on the record before the learned Single Judge from which it could be inferred about the relationship between the appellants and the respondent-institution being that of employees and employer. It further transpires that the respondent-institution right from the beginning had taken up the contention that the appellants were appointed on contractual basis and, therefore, the respondents were not required to follow the procedure contained under the Act and the Rules, which apply only to the persons appointed on temporary basis."

12. The petitioners have also submitted that the respondent is estopped to converse from the accepted terms and conditions and is not entitled to turn around the contract and hence, has no right to the post.

13. In this regard reliance was placed upon (2006) 12 SCC 482 titled *Vidyavardhaka Sangha and Anr. Vs. Y.D. Deshpande and Ors.* and 1999 SCC (L&S) 631 titled as *Ramnayan Shukla Vs. District Basic Education Officer and Ors.* Further, reliance was placed upon *Ganesh Chandra Vs. Union of India & Ors.* reported in 2015 SCC Online (Raj). 3222 in DBCWP No.3055/2013.

14. Per contra, the respondent has submitted that the Act of 1989 does not recognize contractual appointments which is clear from provisions of Section 18 wherein six months notice, resolution of management and consent from Director of Education is mandatory. The respondent's counsel has further submitted that any terms and conditions in violation of the Act is null and void and the respondent in the present matter is an employee as per the definition provided under Section 2(i) of the Act of 1989. He has also relied upon the judgments (*supra*) and in addition, on *Janta Balika Senior Secondary School & Ors. Vs. Smt. Manju Sharma and Ors.* reported in 2012 WLC 696.

15. The reliance placed by respondent's counsel is not tenable for the reasons that the advertisement dated 20.06.2003 has categorically highlighted that the part time job will be on contractual basis for a fixed amount and for a fixed period which was accepted by the respondent upon which he cannot take a somersault and he is estopped by his own actions. As per provisions of the Indian Contract Act, 1872, a contract is an agreement wherein one party offers and other accepts for a given consideration and a consensus is drawn on the

terms and conditions. The provisions of Section 20 of the Act of 1989 do recognize formation of contract under the Act which goes to show that other than employer-employee relationship, contract for service can be entered into provided it should not be in contradiction to the provisions of the Act.

16. In the case in hand, there is no violation of Sections 18 and 20 of the Act of 1989 as it was a part time job on a contractual basis for a fixed period, duly accepted by the respondent without any pressure, without any influence. The reasoning given by the learned Tribunal is erroneous and therefore, looking to the judgments cited by the petitioners, the petition deserves to be allowed.

17. Accordingly, the petition is allowed and the order dated 25.09.2008 passed by the Tribunal is set aside.