

(2003) 04 RAJ CK 0047

In the Rajasthan High Court

Case No : Civil Special Appeal (Writ) No. 448 of 1997

State of Rajasthan and Another

APPELLANT

Vs

Suresh Chandra and Another

RESPONDENT

Date of Decision : 07-04-2003

Acts Referred:

Rajasthan Subordinate Offices Ministerial Staff Service Rules, 1957 — Rule 10

Citation : (2003) 4 RLW 2157

Hon'ble Judges : Anil Dev Singh, C.J.;H.R. Panwar, J

Bench : Division Bench

Advocate : Sangeet Lodha, for the Appellant; M.S. Singhvi, J.P. Joshi, G.K. Vyas, T. Gupta and S.P. Arora, for the Respondent

Final Decision : Dismissed

Judgement

Panwar, J.—These four appeals involve common questions of law and facts, therefore, they were heard together and are being disposed of by a common judgment.

2. Respondent writ petitioners, viz., Suresh Chandra filed S.B. Civil Writ Petition No. 4053/94; Badri Narain Vyas and four others S.B. Civil Writ Petition No. 2941/91, Umesh Kankariya S.B. Civil Writ Petition No. 2840/96 and Fateh Singh S.B. Civil Writ Petition No. 2440/94 seeking direction not to terminate their services; for payment of salary in the regular pay scale of Lower Division Clerk (for short "L.D.C.") with all consequential benefits, to regularise the services and payment of arrears of salary etc. By order dated 16.1.97 passed in S.B. Civil Writ Petition No. 4053/94 filed by Suresh Chandra, learned Single Judge allowed the writ petition. S.B. Civil Writ Petition No. 2941/91 filed by Badri Narain Vyas was allowed by the learned Single Judge vide order dated 16.1.97 almost by an identical order as was passed in Writ Petition filed by Suresh Chandra. The petition filed by petitioner Umesh Kankariya was disposed of in terms of the order dated 16.1.97 passed in Writ Petition filed by Badri Narain Vyas and others. Writ Petition No. 2440/94 filed by petitioner Fateh Singh was allowed vide order

dated 16.1.97 almost by a verbatim order passed in Writ Petitions No. 4053/94 and 2941/91. The appellant State of Rajasthan challenged the afore-mentioned orders passed by the learned Single Judge in the aforesaid writ petitions. To comprehend the controversy involved in these appeals; suffice it to refer to the facts in State of Rajasthan and Ors. v. Suresh Chandra and Anr., arising out of the order passed in Writ Petition No. 4053/94 and it is taken as a leading case.

3. Respondent writ petitioner Suresh Chandra averred that he was appointment by the Deputy Commissioner (Administration), Commercial Taxes Department, Udaipur, appellant No. 2, against the existing vacancies on the post of L.D.C. after due interview. Vide letter dated 30.4.90, appellant No. 2 informed the writ petitioner that his name has been sponsored by the Employment Officer, Udaipur, for the post of L.D.C. on daily wages. He was called for interview to be held on 6.12.89. In pursuance of the interview, the writ petitioner was appointed as L.D.C. vide order dated 18.12.89 and was allotted to the office of appellant No. 2. The initial order dated 18.12.1989 was extended vide order dated 30.4.90 and thereafter from time to time. The writ petitioner has also placed on record the orders issued by appellant No. 2 dated 24.4.90, 29.1.91, 19.2.91 and 11.3.91 by which his place of posting was regulated. Claiming himself to be the employee of the principal employer, i.e. the appellants and apprehending termination of his services, the writ petitioner filed writ petition under Article 226 of the Constitution of India before this Court being S.B. Civil Writ Petition No. 4053/1994.

4. A counter was filed by the State/appellant to the writ petition, inter alia, stating therein that the appellant No. 2, by inadvertence, omission and mistake, interviewed the writ petitioner and appointed him on the post of L.D.C. The State sanctioned 12 posts of L.D.Cs. and 12 Guards to be manned on contract basis through the detective agency. A copy of the contract (Ex.R/2) alleged to have been executed between respondent No. 2 Goliath Detectives and appellant No. 2 the Deputy Commissioner (Administration), Commercial Taxes Department dated 11.12.1989 was filed. The said contract was extended upto 31.3.91 vide letter dated 27.3.91 Ex.R/4. It was further averred that Goliath Detectives submitted bill amounting to Rs. 15,681/- for the period from 16th December, 1989 to 28th February, 1990 for rendering and providing services of L.D.Cs. @ Rs. 925/- in the office of appellant No. 2 and the same was paid by the appellants. On these premises, the appellants averred that there existed no relationship of employer and employee between the appellants and the writ petitioner as he was engaged through Goliath Detectives and privity of contract for providing 12 persons was between the appellant No. 2 and Goliath Detectives. The writ petitioner filed a rejoinder to the reply filed by the appellants and reiterated the stand taken in the writ petition and seriously disputed the mention of sham contract between the appellant No. 2 and Goliath Detectives, As the writ petitioner was not party to the alleged contract and, therefore, the genuineness of the said contract was disputed. It was averred that the appellants, in order to deny a regular employment to the writ petitioner,

manipulated various documents noticed above, including the alleged contract Ex.R/2 between the appellant No. 2 and Goliath Detectives. It was further averred that the documents, specially the contract Ex.R/2 executed between the appellant No. 2 and Goliath Detectives dated 11.12.89, which was extended upto 31.1.1991 vide order dated 27.3.91, was created by manipulation subsequent to the appointment of the petitioner as the said contract is neither stamped nor bears inward or outward number of the said Department. It was averred that the writ petitioner has been paid his salary by appellant No. 2 and as such, there exists the relationship of master and servant between the appellants and the writ petitioner. The writ petitioner relied on a notification issued by the State Govt. dated 12.10.1992. It was further averred that though the writ petitioner was appointed on the post of L.D.C. after following the procedure and due selection by the appellant-authority, having his name sponsored by the Employment Officer but suddenly he was informed that the engagement of the writ petitioner is through the agency of Goliath Detectives. According to the writ petitioner, he was appointed on the post of L.D.C. directly by the principal employer, appellant No. 2 and, therefore, the alleged contract with Goliath Detectives is a sham and camouflage. In reality, the writ petitioner was an employee of principal employer the appellant No. 2. It was further averred that the writ petitioner has been discharging the duty of L.D.C. under control of appellant No. 2 and there have been annual performance appraisal reports in respect of the writ petitioner by appellants No. 1 and 2 and, therefore, creating sham intermediate contractor is of no consequence.

5. Writ petitioner filed Annex. 18- a notification issued by the State Govt. dated 12.10.92, purporting to amend Rule 10 of the Rajasthan Subordinate Offices Ministerial Staff Rules, 1957 (for short "the Rules") and claimed regularisation on the basis of said amendment. The said notification is reproduced hereunder :-

"(10) Notwithstanding anything contained in Rule 7, all persons appointed as L.D.Cs. on adhoc basis or on daily wages basis during the period from 1.1.85 to 31.3.90 and are still working as such on the date this amendment comes into force shall be appointed on regular basis on availability of vacancy subject to the condition that they pass a performance test conducted by the head of the department concerned within a period of three years in accordance with the syllabus prescribed in part-IV of Schedule-I. Such persons shall be allowed three chances to pass the said test to be availed within a period of three years.

Provided, that if a person fails to pass the said test in three chances to be availed within a period of three years, he shall be liable to be removed from services."

6. The writ petition filed by respondent writ petitioner Suresh Chandra was allowed by the learned Single Judge by the following order :-

"The petitioners placed heavy reliance on notification dt. 12th October, 1992 according to which they claim that they are entitled to be regularised. Interest of justice would, therefore, be met if these petitioners are allowed and the

respondents are directed not to terminate the services of the petitioners till they duly consider their cases for regularisation in accordance with notification dt. 12th October, 1992 (Annex. 18) page 121 issued by the Government of Rajasthan.

In the result, the petitions thus, succeed and are allowed. There will be no order as to costs."

7. Aggrieved by the orders of the learned Single Judge noticed above, the appellant State of Rajasthan filed the above noticed special appeals.

8. In these appeals, the question which arises for consideration is : whether the respondent writ petitioners are entitled to be regularised by virtue of the notification dated 12.10.92; or the said notification does not apply to the writ petitioners.

9. It is contended by the learned counsel for the appellants that each of the writ petitioners were engaged on contract basis through Goliath Detectives on the consolidated emoluments of Rs. 925/- per month and the emoluments were paid by the appellant State for the persons engaged on contract to Goliath Detectives, as is evident from w Ex. R/2 to Ex. R/15. It was further contended that the writ petitioners had never been appointed by the appellants either on ad hoc basis or on daily wages and the notification dated 12.10.92 applies to those L.D.Cs. who have been appointed by the appellants on ad hoc or daily wages basis and have been working till the date of the notification on ad hoc or daily wages basis. Learned counsel for the appellants further contended that before the learned Single Judge, the writ petitioners had relied on the notification dated 12.10.92 and the orders impugned are solely based on the said notification which, according to him, does not apply to the writ petitioners.

10. Mr. M.S. Singhvi, Learned counsel for the writ petitioners contended that the names of the petitioners were sponsored by the employment officer and they had been directly appointed by the appellant No. 2 and, therefore, Goliath Detectives has nothing to do with the writ petitioners. The writ petitioners are direct appointees of the appellant State as is evident from the interview letters whereby they were asked to appear before the appellant No. 2 on 6.12.89 if they wanted to be appointed on daily wages basis. State Government, vide order dated 18.12.89 sanctioned 12 posts of Clerks, which were to be appointed by appellant No. 2. It was further contended that the writ petitioners have been discharging the duties of L.D.Cs. and work has been assigned to them by the Officers of the Commercial Taxes Department and, therefore, the appellant No. 2 has been exercising entire control over the writ petitioners. Learned counsel for the writ petitioners further contended that the documents Ex.R/2, purporting to be alleged contract with Goliath Detectives, produced by the appellants, is spurious and appears to have been prepared subsequent to the appointment of writ petitioners and hence it is not a genuine document.

11. Mr. Sangeet Lodha, Learned counsel appearing for the appellants, has placed

reliance on the decision of the Supreme Court in *Steel Authority of India Ltd. and Ors. v. National Union Waterfront Workers and Ors.*, and contended that there had been no relationship of master and servant between the appellant State and the writ petitioners as they were engaged on contract through contractor Goliath Detectives.

12. We have heard learned counsel for the parties and perused the record and the orders of the learned Single Judge.

13. By order Ex.R/1 dated 6.11.89 the appellant State created 12 posts each for L.D.Cs. and Guards on daily wages for the period upto 28.2.90. Learned counsel for the appellants heavily relied on Ex.R/2 contract dated 11.12.89 entered into between appellant No. 2 and Goliath Detectives. This contract is with regard to newly created temporary check posts, which were to be manned by 12 Guards through detective agency. It contains the averments that respondent No. 2 would provide 12 Guards @ Rs. 370/- p.m. for each Guard. There is a stipulation in the contract that those Guards would be the employees of Goliath Detectives. The contract dated 11.12.89 was extended vide order Ex.R/4 upto 31.3.91. Ex.R/5 relates to 1.2 security Guards. Communication Annex. R/6 between Goliath Detectives and appellant No. 2 is with reference to the contract Ex.R/2 dated 11.12.89, relating to supply of 12 Guards. Receipt Ex.R/10 does not show on what account the sum mentioned therein was paid to Goliath Detectives. There is a list of L.D.Cs. showing their attendance during the month of September, 1994 whereby the writ petitioners had been shown to be attending the office at least for whole month of September, 1994. There is no mention in the list of these L.D.Cs. that they were attending the office on contract basis. It is pertinent to mention here that as per the appellants, the alleged contract, was extended upto 31.1.1991. Appellants have not produced any document showing contract beyond 31.1.1991 and it is not the case of the appellants that the alleged contract was further extended. From the document placed on record by the appellants, it cannot be said that there existed a valid contract between the appellants and Goliath Detectives for providing the services of writ petitioners on contract basis. The writ petitioners had continuously been discharging the duties of L.D.Cs. right from their initial appointment and, thereafter till the decision of writ petition and even on appeal, by interim order dated 14.5.97 appellants were restrained from terminating their services till the disposal of the appeals. The appellant State, vide notification No. F(56)DOP/P-2/84 dated 12.10.92, (Annex. 18) amended Rule 10 of the Rules whereby all persons appointed as L.D.Cs. on adhoc basis or on daily wages basis during the period from 1.1.85 to 31.3.90 and were still working as such on the date of this notification, were entitled to be appointed on regular basis on availability of vacancy subject to the condition that they pass a performance test conducted by the head of the department concerned within a period of three years in accordance with the syllabus prescribed in part IV of Schedule I. Undisputably, the writ petitioners were appointed as L.D.Cs. vide order dated 18.12.89 and thus, as on 31.3.90 they were working on daily wages basis and also continued to work on the date of the

notification dated 12.10.92 and, therefore, the notification dated 12.10.92, amending Rule 10 of the Rules, is fully applicable to the writ petitioners.

14. In *Steel Authority of India Ltd. and Ors. v. National Union Waterfront Workers and Ors.* (supra), the matter was on the interpretation of expression "Appropriate Government" as defined in Section 2(1)(a) of the Contract Labour (Regulation and Abolition) Act, 1970 (for short "the CLRA Act"). The Apex Court held that; (1) 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 u/s 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 of the services of a contractor and the court held the contract labour would indeed be the employees of the principal employer. The Apex Court while considering the judgment of the Patna High Court in LPA No. 214 of 1999, declined to interfere with the order under challenge, which arose out of the award passed by the Central Govt. Industrial Tribunal directing the appellant therein to absorb the contract labour. The Tribunal, on appreciation of the evidence, found that the contract labourers were not regularised with a view to deprive them from the due wages and other benefits at par with the regular employees under sham paperwork by virtue of the sham transaction. In that case, it was pointed out that workmen in other coal washery were regularised. The claim of the appellant therein that the washery was given to the purchaser, was not accepted as being a sham transaction to camouflage the real facts. The learned Single Judge and the Division Bench of the Patna High Court declined to interfere with the order of the Tribunal and so also the Apex Court. In para No. 125(6), the Apex Court held as under :-

"If the contract is found to be genuine and prohibition notification u/s 10(1) of the CLRA Act in respect of the establishment concerned has been issued by the appropriate Government, prohibiting employment of contract labour in any process, operation or other work of any establishment and where in such process, operation or other work of the establishment the principal employer intends to employ regular workmen, he shall give preference to the found suitable and, if necessary, by relaxing the condition as to maximum age appropriately, taking into consideration the age of the workers at the time of their initial employment by the contractor and also relaxing the condition as to academic qualifications other than technical qualifications."

15. The law laid down by the Hon''ble Apex Court in that case renders no help to the appellants on the facts of the instant cases, rather supports their cause.

16. Mr. M.S. Singhvi, learned counsel appearing for writ petitioners has relied on judgments of the Apex Court in *Hussainbhai v. The Alath Factory Tezhilali Union and Ors.*, *R.K. Panda and Ors. v. Steel Authority of India and Ors.*, and *Jacob M. Puthuparambil and Ors. v. Kerala Water Authority and Ors.*. In *Hussainbhai (supra)*, the Apex Court observed as under :-

"The true test may, with brevity, be indicated once again. Where a worker or group of workers labours to produce 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 contractual is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, we discern the naked truth, though draped 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 restored 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 the mischief and achieve the purpose of the law and not be misled by the maya of legal appearances."

17. In *R.K. Panda (supra)*, the Hon''ble Supreme Court, while considering the case of labourers employed through contractors at Rourkela Plant of the Steel Authority of India, who claimed parity in pay with regular employees and also regularisation in the employment of the said Authority, directed that such of the contract labourers, who were continuing in respondent's employment for the last 10 years in spite of change of contractors and had not crossed the age of superannuation and were medically fit, should be absorbed as regular employee.

18. In *Jacob M. Puthuparambil (supra)*, the Apex Court observed that once the appointments continued for long, the services had to be regularised if the incumbent possessed the requisite qualifications as was done by Sub-rule (e). The employees who have been working on the establishment since long and who possess the requisite qualifications for the job prevalent on the date of their employment, must be, allowed to continue on their jobs and their services should be regularised. It is unfair and unreasonable to remove people who have been rendering service since sometime as such removal has serious consequences. The family of the employees, which has settled down and accommodated its needs to the emoluments down and accommodated its needs to the emoluments received by the bread-winner, will face economic ruination if the job is suddenly taken away. Besides, the precious period of early life, devoted in the service of the establishment, will be wholly wasted and the incumbent may be rendered

"age barred" for securing a job elsewhere. It is indeed unfair to use him, generate hope and a feeling of security in him, attune his family to live within his earnings and then suddenly to throw him out of job. Such behaviour would be an affront to the concept of job security and would run counter to the Constitutional philosophy, particularly the concept of right to work enshrined in Article 41 of the Constitution.

19. In the instant cases, as many as 15 vacancies of L.D.Cs. existed as on February, 2002. The appellant No. 2, by letter Ex. 13 dated 26.4.99 informed that as many as 9 vacancies of L.D.Cs. were existing subsequent thereto. By order Annex. 13 dated 5.3.2002, vacancies in Pay Scale Nos. 1 to 11 as on February, 2002, were intimated, showing 15 vacancies of L.D.Cs. Thus, there exist vacancies of as many as 15 L.D.Cs. The Notification dated 12.10.92 makes it clear that all persons appointed as L.D.Cs. on ad hoc or daily wages basis during the period from 1.1.85 to 31.3.90 and still working as such on the date this amendment came into force, shall be appointed on regular basis on availability of vacancy subject to the condition that they pass the performance test conducted by the Head of Department. Thus, as per this notification, the appointment on regular basis is subject to availability of vacancies. The writ petitioners, on affidavit, supported by the orders Annexures 12 and 13, have established that there exist as many as 15 vacancies on the post of L.D.Cs. with appellant No. 2.

20. As it is evident from the letter Ex.3 dated 13.11.89 issued by appellant No. 2, by which the writ petitioner was informed that his name had been sponsored by the Employment Officer for the post of L.D.C. on daily wages and he was called for interview held on 6.12.89, After holding interview, appellant No. 2 appointed him on the post of L.D.C. vide order dated 18.12.89. Thus, he was duly appointed by appellant No. 2 and since then the writ petitioner has been continuously working with the Taxation Department, appellant No. 2. In these orders, there is no mention that the writ petitioner is sought to be appointed on contract basis. Goliath Detectives, inspite of service, neither appeared before the learned Single Judge nor before this Court. There is nothing on record to suggest that there was any contract between the writ petitioners and Goliath Detectives. In absence of any such valid contract, it cannot be inferred that , initially there had been a contract between the writ petitioners and Goliath Detectives and subsequent thereto any valid contract had been entered into between appellant No. 2 and Goliath Detectives. Moreso Ex.R/2, the alleged contract dated 11.12.89 between appellant No. 2 and Goliath Detectives pertains to providing 12 Guards and as such, Ex.R/2 and subsequent communication Ex.R/4, R/5 and R/6 are of no consequence.

21. In this view of the matter, from the material on record, it is established that the writ petitioners were engaged on daily wages basis by appellant No. 2 after having their names sponsored by the Employment Officer, Udaipur and holding the proper interviews. Thus, the initial appointments of the writ petitioners were

by way of direct selection by appellant No. 2 and subsequent thereto if any contract was. created, it was with a view to deprive them the other benefits at par with the regularly appointed employees under a sham and nominal, rather a camouflage, contract and the writ petitioners, under such a sham alleged contract, cannot be deprived of their due wages and other benefits as are being provided to the regularly appointed employees.

22. Moreso, before the learned Single Judge, no such argument was raised by the appellant and rightly so in view of the facts discussed above. Under these circumstances, the contentions raised by the learned counsel for the appellants with regard to appointment of writ petitioners on contract basis, are unsustainable and cannot be accepted.

23. The writ petitioners are continuing in appellant's employment for last more than 12 years and by now they might have crossed the maximum age for fresh appointment under the State. Rule 10 came to be amended by the notification Annex. 10 dated 12.10.92, which, in clear terms, provides that L.D.Cs. on ad hoc basis or daily wages basis appointed during the period from 1.1.85 to 31.3.90 and are still working as such on the date this amendment came into force, shall be appointed on regular basis on availability of vacancies subject to the condition mentioned therein. For the intervening period from 1.1.85 to 31.3.90, the writ petitioners were appointed and were continuously working till the date of the notification dated 12.10.92 and thus, they are entitled to be granted the status of regular employees on availability of vacancies subject to the condition mentioned in the said Notification. In this view of the matter, the cases of the writ petitioners are fully covered by the notification dated 12.10.92. The learned Single Judge, relying on the notification dated 12.10.92, allowed the writ petitions filed by the writ petitioners.

24. In view of the aforesaid, we do not find any error or illegality in the orders of the learned Single Judge.

25. Consequently, these appeals fail and are hereby dismissed. However, it is made clear that the regular appointments of the writ petitioners would be from the date the vacancy became available, however, subject to other conditions provided in the amended Rule 10 of the Rules. There shall be no order as to costs.