

(2019) 07 UK CK 0264

In the Uttarakhand High Court

Case No : Writ Petition (S/S) No. 2501, 2500, 2502 Of 2017

Subodh Kumar Sharma

APPELLANT

Vs

G.B. Pant University Of Agriculture And Technology, Pant
Nagar & Others

RESPONDENT

Date of Decision : 31-07-2019

Acts Referred:

Constitution Of India, 1950 — Article 38, 39, 42, 43, 43A

Citation : (2019) 07 UK CK 0264

Hon'ble Judges : Sudhanshu Dhulia, J

Bench : Single Bench

Advocate : Tahir Ashraf Siddiqui, Paresh Tripathi, V.D. Bisen

Final Decision : Allowed

Judgement

Sudhanshu Dhulia, J

1. The point raised by the learned counsel for the petitioners is all these writ petitions are common and hence these writ petitions are being decided by a common order.

2. In these three writ petitions, the petitioners are the employees of a State University i.e. G.B. Pant University of Agriculture and Technology, Pant Nagar (from hereinafter referred to as the "University"). Their employment ostensibly is not a direct employment in the University as of now, but is through what is now, however, called a "resource provider". Since their initial appointment, many resource providers have changed hands, but the petitioners have continued to be employed in the same University in similar capacity. The University though disowns them as their employees and calls them the employees of the contractor or the service provider.

3. In all these petitions before this Court, the petitioners have been employed in the University continuously now for the last more than fifteen years. They claim regularization of their service. The University has declined this request and the

main reason behind this denial is that the petitioners are simply not their employees.

4. Whereas in Writ Petition (S/S) No. 2501 of 2017, the petitioner has been working in the University since 01.01.2001, petitioners in Writ Petition (S/S) Nos. 2502 of 2017 and 2500 of 2017 have been working in the University since 11.07.2002 and October, 2002, respectively.

5. According to the petitioners, they were initially appointed directly by the University against a regular vacant post as they fulfilled all the eligibility criteria for the post, and they have been continuously working on these posts from the date of their appointment. However, later the petitioners were being engaged through a service provider called "Sybex Computer System Private Limited", and thereafter other service providers.

6. The University has filed its counter affidavit denying the fact that the petitioners were appointed on a regular vacant post. The stand taken by the University is that the petitioners were on the pay-roll of the private manpower contractors, and they are his employee and are receiving their salary from the manpower contractors only, not directly by the University.

7. These resource providers have been changing in the University. It has not remained the same. The name of these contractors or service providers in the period from which the petitioners have worked is as follows:-

(a) Sybex Computer System Private Limited, 45 Hari Nagar Ashram, New Delhi-110014 (year 2003-2006)

(b) Tarai Mazdoor Evame Gramin Utthan Samiti, House No. 4/941, Pantnagar-263145 (2006-2011)

(c) Chaudhary Enterprises EOWOS, 53/2, Awas Vikas, Rudrapur, Udham Singh Nagar, Uttarakhand (2011-2012)

(d) Aura Facilities Management Pvt. Ltd. 002, B Wing, Duplex Height, Parsurampur Tower No.6, Millat Nagar, Near Oshiwara, Andheri West, Mumbai-400053, (2012-2014)

(e) Believe Solution Services Private Limited, Z-1, Near Palam Vihar, Maya Complex, Old Delhi Gurgaon Rd, Sector 21, Dundaheera, Gurugram, Haryana 122016 (Respondent No. 7 and the current contractor)

8. The petitioners, all of them, though have continued to be in employment all throughout. What has not changed is their employment, nature of work or the place of work.

9. The case of the petitioner in Writ Petition (S/S) No.2501 of 2017 is that he was initially appointed on a daily wage basis against the vacant regular post of Field Assistant in the Department of Entomology, College of Agriculture in the respondent-university w.e.f. 01.01.2001. Since then he has been working in the

University without any break of his service. However, in May, 2003 the petitioner and other similarly situated persons were engaged through a private contractor, namely, Sybex Computer System Private Limited, although ostensibly their nature of job in the University continued to remain the same.

10. The case of the petitioner in Writ Petition (S/S) No.2500 of 2017 is that he was initially appointed for lab-work in the University against the vacant regular post in October, 2002. Thereafter from 01.03.2004 to 16.08.2009, he worked against the regular vacant post of Data Processing Analyst and thereafter he has been continuously working on the post of Data Processing Assistant/Data Analyst from 16.08.2009. According to the petitioner in Writ Petition (S/S) No. 2500 of 2017, he has been working in the University without any break since October, 2002. However, in May, 2003 the petitioner and other similarly situated persons were engaged through a private contractor, namely, Sybex Computer System Private Limited, although ostensibly their nature of job in the University continued to remain the same.

11. In Writ Petition (S/S) No.2502 of 2017, the petitioner was initially appointed as Lab Assistant against the vacant regular post in the University on 11.07.2002 and since then he has been working in the University without any break. However, in May, 2003 the petitioner and other similarly situated persons were engaged through a private contractor, namely, Sybex Computer System Private Limited, although ostensibly their nature of job in the University continued to remain the same.

12. It has been specifically alleged by the petitioners that this change of engagement through a contractor was done with a motive to deny them the benefits which would otherwise accrue to a direct employee, which would include the benefit of regularization of their services. Although for all practical purposes, the employer and the controlling authority of the petitioners continued to be the University.

13. The fact that the job of the petitioners is perennial and permanent in nature is reflected from the fact that although these service providers have been changing since 2003 to 2017, but the petitioners continued to be employed in the University, though ostensibly through different service providers. A list of the contractors who have been providing such services to the University since 2003 has already been given above. The petitioners allege that their initial direct employment with the University to a change with a service provider was simply a transfer and since the petitioners were never in a bargaining capacity, the petitioners had no other option but to accept the same. It was a question of their survival.

14. In the year 2011, the Government of Uttarakhand framed regularization Rules, known as "Regularization Rules, 2011", which are for the temporary, ad-hoc, daily wagers, fixed wages, part-time workers who had been appointed as workers before 01.11.2011 and had completed 10 years of service till

01.11.2011 against a sanctioned and vacant post and on fulfillment of the conditions, they were liable to be regularized. Thereafter, in the year 2013, the Government of Uttarakhand, framed another regularization Rules i.e. "Regularization Rules of 2013", where the temporary, ad-hoc, daily wagers, fixed wages, part-time workers were liable to be regularized in service after they had completed 5 years of service. The petitioners therefore claim regularization under the Regularization Rules of 2013. However, it must be stated at the very outset that reliance on Regularization Rules of 2013 would not be proper inasmuch as it is in violation of the law laid down by the Hon'ble Apex Court in the case of Uma Devi as the Constitution Bench of the Hon'ble Apex Court as in the said case an exception was carved out for one time regularization of such employees who had completed 10 years of regular service. The 2013 Rules have cut short this period to 5 years. In any case this Court has been informed that 2013 Rules are not being enforced anyway.

15. As to the claim of the petitioners for regularization under the 2011 Rules, the objection of the University is that the since the petitioners are working through an outsourcing agent, they cannot claim regularization as a person who has been engaged through outsourcing cannot be said to be employee of the establishment and barring the petitioner in WPSS No. 2501 of 2017, the other two have not even completed 10 years of service on the cut-off date.

16. The petitioners had earlier filed writ petitions before this Court for their regularization of service, which were disposed of by a Coordinate Bench of this Court vide order dated 17.04.2017 directing the respondents to consider the case of the petitioners for regularization strictly in accordance with law. In compliance of the said order, the petitioners submitted the copy of the said order and their representation before the concerned authority, which has been dismissed vide order dated 27.06.2017 as the petitioners have not been found eligible for regularization for two reasons. Firstly they are not directly employed by the University but through a service provider and secondly they are not working on vacant posts. Aggrieved, the petitioners have filed the present writ petitions before this Court.

17. Learned counsel for the respondent-university Sri Paresh Tripathi has filed the reply to the writ petition and submits that most of the legal submissions of the petitioners are based on the rulings of the Hon'ble Apex Court which arise out of Industrial Disputes and strictly speaking they will not be applicable in the present case.

18. Although the University has grudgingly admitted that as far as petitioner in Writ Petition (S/S) No. 2501 of 2017 is concerned, he has completed 10 years of service, but for the remaining two petitioners i.e. petitioners in Writ Petition (S/S) Nos. 2500 of 2017 and 2502 of 2017 have not even completed 10 years of service as cut-off date for completing the 10 years of service would be from 01.11.2001.

19. Apparently it seems that the petitioners are working on Class III posts. Whereas in the case of petitioner in Writ Petition (S/S) No. 2501 of 2017, he was initially engaged by the University on a vacant post but in any case in all the three cases, one fact is absolutely clear which is that all the petitioners since their initial appointment (which in the case of petitioner in Writ Petition (S/S) No. 2501 of 2017 is 2001 and in Writ Petition (S/S) Nos. 2500 of 2017 and 2502 of 2017 is 2002), is that they are continuously working on their posts without any break in service.

20. The introduction of a service provider between the petitioners and the University is of no consequence. This buffer has been introduced by the principal employer i.e. the University apparently for no other purpose but to be relieved of any liability of taking the petitioners in regular service in future. In such cases, the veil has to be lifted and the real nature of relationship has to be determined. The petitioners principal employer is and always be the G.B. Pant University of Agriculture and Technology.

21. Here I would like to refer to a judgment of Hon'ble Apex Court passed in the case of Hussainbhai, Calicut vs. The Alath Factory Thezhilali Union, Kozhikode and others, reported in (1978) 4 SCC 257 (authored by Justice Krishna Iyer). A judgment which has been cited before this Court by the learned counsel for the petitioners Sri Tahir Ashraf Siddiqui, and which also sums up the situation at hand. Paragraph nos. 3, 4 and 5 of the said judgment read as under:-

"3. Who is an employee, in Labour Law? That is the short, die-hard question raised here but covered by this Court's earlier decisions. Like the High Court, we give short shrift to the contention that the petitioner had entered into agreements with intermediate contractors who had hired the respondent-Union's intermediate workmen and so no direct employer-employee *vinculum juris* existed between the petitioner and the workmen.

4. This argument is impeccable in *laissez faire* economics 'red in tooth and claw' and under the Contract Act rooted in English Common Law. But the human gap of a century yawns between this strict doctrine and industrial jurisprudence. The source and strength of the industrial branch of Third World Jurisprudence is social justice proclaimed in the Preamble to the Constitution. This Court in Ganesh Beedi's case has raised on British and American rulings to hold that mere contracts are not decisive and the complex of considerations relevant to the relationship is different. Indian Justice, beyond Atlantic liberalism, has a rule of law which runs to the aid of the rule of life. And life, in conditions of poverty aplenty, is livelihood, and livelihood is work with wages. Raw societal realities, not fine-spun legal niceties, not competitive market economics but complex protective principles, shape the law when the weaker, working class sector needs succour for livelihood through labour. The conceptual confusion between the classical law of contracts and the special branch of law sensitive to exploitative situations accounts for the submission that the High Court is in error in its holding against the petitioner.

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 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 resorted to when labour legislation casts welfare obligations on the real employer, based on Articles 38, 39, 42, 43 and 43-A 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."

22. The continuation of the petitioners, without any break in their service conclusively establishes two facts. First is that the petitioners are doing the work of a permanent and perennial nature and the University requires the services of the petitioners, and the second that the work done by the petitioners has been satisfactory, as only then they could have continued to remain in employment for the last more than 15 years. It is also true that their entire salary is being paid from the funds of the University, initially directly and later through a service provider. Initially all of them were also appointed directly by the University. Therefore, the contention of the petitioners appears to be correct that the change over from direct employment through a service provider is actually a disguise.

23. All the writ petitions are allowed. The order dated 27.06.2017 is hereby quashed. A mandamus is hereby issued to the respondent authorities to now consider the regularization of the petitioners treating them to be their employees. Let a decision be taken on this within a period of four weeks from the date a certified copy of this order is received by the appropriate authority of the University.