IN THE CENTRAL ADMINISTRATIVE TRIAUNAL
AHMEDABAD BENCH

O.A. No. 681/93
T.A. No.

DATE OF DECISION 30-11-94

Shri Aswar Rajnikant Karsanbhai Petitioner

Shri P.H. Pathak Advocate for the Petitioner(s)

Versus

Union of India and Others Respondent

Shri Akil Kureshi Advocate for the Respondent(s)

CORAM :

The Hon'ble Mr. V. Radhakrishnan Member (A)

The Hon'ble Dr. R.K. Saxena Member (J)

1. Whether Reporters of local papers may be allowed to see the Judgement ? Yes
2. To be referred to the Reporter or not ? Yes
3. Whether their Lordships wish to see the fair copy of the Judgement ? Yes
4. Whether it needs to be circulated to other Benches of the Tribunal ? Yes

Aswar Rajnikant Karsanbhai
Nr. Vijay Tailor, Rabaripara
Dwarka, Dist. Jamnagar. Applicant.

Advocate : Mr. P.H. Pathak

Versus

1. Union of India
Notice to be served through
Director, Doordarshan Kendraa
Thaltej, Ahmedabad.

2. Station Engineer or
Asstt. Engineer
HPT, Doordarshan Kendra
Dwarka Respondents

Advocate Mr. Akil Kureshi

JUDGMENT

In

O.A. 681/ 1993

Date: 30-11-94

Per Hon'ble Dr. R.K. Saxena Member (J)

The applicant Shri Aswar Rajnikant Karsanbhai approached this Tribunal seeking relief by way of declaration that the practice adopted by the respondents for engaging the applicant on contract basis ~~by~~ paying lesser salary" is arbitrary, illegal and violative of Articles 14, 16 and 21 of the Constitution of India. The relief claimed is also that

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the applicant be allowed the grade of Rs. 750 -940 from initial date of appointment with interest of 18%. The direction is also sought to treat the applicant as regular employee from the initial date of appointment and to grant all consequen--tial benefits.

2. The brief facts of the case are that the applicant was initially engaged as Casual Labourer with effect from 25-11-1987. The respondents on the other hand gave this date prior to May 1986. According to the applicant, he continued as casual labourer for some time but his services were termin--ated without assigning any reason from 1-6-1988. He was, however taken back on 21-8-1988, but he was engaged as a contracted labour after getting a contract executed. The contract was for one year with fixed monthly emoluments of Rs.600/-. In the subsequent years i.e. from 1989 to 1992, he was given emolument of Rs. 705/-per month but from 1-12-1992 emoluments were raised to Rs. 800/- per month. The respondents got agreement executed afresh for every month. The proforma of the agreement has been brought on record through, Annexure A-1. This agreement discloses the nature of work required to be performed by the applicant and according to the agreement the work required is operating water pumps, supplying water to office premises and Staff Quarters (two times), maintaining garden, watering plants, carrying daily Dak, newspaper from the town and the work of Office Peon and other miscellaneous duties

as and when assigned. The case of the applicant, therefore, is that he is performing all the duties of Class IV for Rs. 800/- per month in the guise of contracted-labour whereas on regular side persons employed to discharge the same duties of Peon or of Class IV employees are given pay scale of Rs. 750-940, i.e. total monthly emolument of Rs. 1600/- In this way, the applicant has been engaged by the respondents on half the emoluments which are usually given to the regular employees. His case accordingly is that the respondents are exploiting the applicant in the name of keeping him as contracted labour and therefore this practice should be declared illegal and the services rendered by him as contracted Labourer, be treated towards regularisation and payment of regular pay scale to be given to him.

3. The respondents submitted written reply raising several questions which may be specified. The first question is of jurisdiction of the Tribunal because the applicant was not holding any civil post and thus neither the applicant could move any application to the Tribunal nor could the Tribunal exercise jurisdiction thereon. It is also contended that the applicant did not quote order against which he was seeking the redress and thus the application was not maintainable.

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It is also the case of the respondents that the application in any case was time-barred. It is also pointed out that the applicant has not exhausted all the Departmental remedies available to him.

4. On the factual aspect of the case, the respondents came with the plea that the applicant was engaged as Casual labourer prior to May 1986 and payment was made on the basis of daily wages. The details of the applicant being engaged as casual labourer, are given in Annexure R-2. It is, however, now denied that the applicant was working as ~~casual~~ labourer even after 1986. He was engaged on contract basis for one year. He was given this contract on the basis of the lowest rate quoted by him for carrying out the miscellaneous works as are mentioned in Annexure R-1. These quotations had been invited by the Head of the Station and the person who offered lowest rate was engaged as Contracted Labour every month and payment of wages were made on the basis of the rates offered by him. The respondents also disclosed in para. VI.9 of the written statement that the present system of awarding contract was resorted to because there was no sanctioned post for the said work and whatever duties were performed by the applicant, were only of part-time occupation. It is, therefore, contended that the application is liable to be rejected.

5. We have heard the learned counsel for the applicant and the respondents and have gone through the

record.

6. We shall first decide as to whether this Tribunal could entertain the application moved by the applicant and could exercise its jurisdiction over the matter. In this connection, it will have to be looked into whether the applicant was holding any civil post or the applicant was in any manner connected with the affairs of the Union of India. So far as the question of jurisdiction is concerned, reference may be had to section 14 of the Administrative Tribunals Act, 1985. It reads:

> "14. Jurisdiction powers and authority of the Central Administrative Tribunal. — (1) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall exercise, on and from the appointed day, all the juris--diction, powers and authority exercisable immed--iately before that day by all courts (except the Supreme Court) in relation to —
>
> (a) recruitment and matters concerning recruitment, to any All-India Service or to any civil service of the Union or a civil post under the Union or to a post connected with defence or in the defence services, being, in either case, a post filled by a civilia;
>
> (b) all service matters concerning —
>
> (i) a member of any All India Service ; or
>
> (ii) a person (not being a member of an All India Service or a person referred to in clause (c)) appointed to any civil service of the Union or any civil post under the Union; or

(iii) a civilian (not being a member of an All-India Service or a person referred to in clause (c)) appointed to any defence service or a post connected with defence;

and pertaining to the service of such member person or civilian in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation (or society) owned or controlled by the Government;

(c) all service matters pertaining to service in connection with the affairs of the Union concerning a person appointed to any service or post referred to in sub-clause (ii) or sub-clause(iii) of clause (b), being a person whose services have been placed by a State Government or any local or other authority or any corporation (or society) or other body, at the disposal of the Central Government for such appointment.

(Explanation. For the removal of doubts, it is hereby declared that reference to "Union" in this sub-section shall be construed as including references also to a Union-territory.)"

The perusal of the aforesaid section indicates that any question relating to recruitment and matters concerning recruitment to any civil service of Union or to a civil post under the Union or to a post connected with defence or any defence services being in either case a post filled by a civilian or of service matters pertaining to the service in connection with the affairs of the Union, may be looked into

by the Tribunal. Even if we do not go to the facts as are disclosed in the application and go by the facts as are narrated in the written reply of the respondents, it leads to the conclusion that the applicant was in the service of the respondents ~~prior to~~ from before May 1986. Admittedly, he was engaged as casual labourer and he continued in service without break from time to time with the respon--dents but the mode of recruitment was changed by adopting the devise of contract labour. On the dispute being raised by the applicant about the manner of recruitment and connected matters therewith, the Tribunal can entertain the appli--cation and exercise its jurisdiction under section 14 of the Act.

7. So far as the question whether the applicant was having the civil post or not, is a matter connected with the ascertainment of the fact; if he was at all serving with the respondents either in the shape of casual labourer or contracted labour and shall be taken together and disposed of accordingly. There is no denial, as is pointed out earlier, that the applicant was working with the respondents even from before May 1986. Prior to May 1986, he was designated as casual labourer but thereafter the designation was changed to contracted labour and the reasons given by the respondents at page 6 of para VI.9 was that there was no sanctioned post and devise of keeping the applicant on contract, was evolved, and the work of Class IV employees, i.e. of Peon was taken.

8. Before we deal with this matter at length, we would like to go through the mandate of Article 309 of the Constitution of India. It reads:

> 309. Recruitment and conditions of service of persons serving the Union ar a State — Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regu - -late the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union of or of any State:
>
> Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connect- -ion with the affairs of the Union, and for the Governor of a State or such a person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.

9. Under Article 309, appropriate Legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts connected with the affairs of the Union or of any State. The President or the Governor of the State were deemed competent to make rules regulating the recruitment and the conditions of service of persons appointed until the provisions in that behalf ~~is~~ are made by the appropriate Legislature. It means that the rules about recruitment are to be

made either by the Legislature or by the Executive . The learned counsel for the respondents admitted that the respondents have framed Rules for regular employees and these Rules were required by the Tribunal to be perused but they could not be produced even upto this stage. It is, however, clear according to the submission made by the learned counsel for the respondents that the Rules for recruitment were made. What particular mode for filling up the post is adopted could be disclosed only by going through these Rules. The learned counsel for the respondents, however, admitted that the mode of engaging any person on contract is not given there--under. There is no doubt that keeping any person on contract-a mode, must be one of the modes and such modes must be prescribed either in the Rules or by some executive order. Their lordships of Supreme Court in the case Dr. B.N.Sahay Vs. State of Bihar 1972 SLR 315 made it clear and held that what particular mode would finally be adopted for filling up the post in the absence of any Rules or Circular on the point, is for the state to decide. Therefore, it is obligatory on the part of the State to have taken decision as to what particular mode of recruit--ment shall be adopted. If we again go through the written reply filed by the respondents disclosing that the mode of recruitment on contract was resorted to in the absence of the sanctioned post, it makes clear that this mode of taking persons in employment connected with the affairs of the Union, was a decision taken. This fact in itself belies the contention of the respondents that the applicant was not engaged on the post connected with the affairs of the Union of India.

10. The question again arises if different modes of recruitment are adopted, could the State and for that matter the Union of India in this case, adopt different yard-sticks about the service conditions of the employees engaged through different modes. Generally those employees who may be classed as regular employees are governed by the Rules and regulations framed for recruitment. They are selected through a prescribed procedure on having a requisite qualification, are given a prescribed pay-scale, have got chance of promotion, and also have a definite tenure of service when they reach the age of super-annuation. Whether these parameters have been adopted in the second mode of recruitment i.e. by way of contract, is to be seen from the copy of the contract, Annexure A-1, filed by the applicant. This copy of contract does not speak anything about qualifi--cations nor does it say about the procedure of selection. What has been averred by the respondents is that the tenders are invited and who-ever offers lowest rate, is appointed. It means that regular pay-scale is not given and other conditions applicable to regular employees, have not been followed. As is observed, recruitment could be made through various sources but there should not be any difference in their conditions. More so in the wages and the chances of going up in the hierarchy. The learned counsel for the respondents urged that the mode of contract is open to all and who-ever offers the lowest rate, the

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employer may give him the work. This argument could have been valid in the 19th century when the general rule was freedom of contract.This rule$ was given full play in the nineteenth century on the ground that the parties were the best judges of their own interests and if they freely and voluntarily entered into a contract, they could do it and the only function of the Court was to enforce the said contract. It was then immaterial if one party was economically in a stronger bargaining position than the other, and if such party introduced qualifications and exceptions to his liability in clauses which are these days known as exemption clause and the other party accepted them then full effect would be given to what the parties agreed.This feature of the freedom of contract was considered by the Courtsof Equity and they interfered in many cases of harsh or unconscionable bargains. The freedom of contract is a reasonable social ideal only to the extent when there exists equality of bargaining power between the contracting parties.It also sees that no injury is done to the economic interests of the community at large. Freedom of contract is of little value when one party has no alternative between accepting the set of terms proposed by the other or doing with the goods or services offered. This view was offered by Chitty in his book "Chitty on Contracts" Twenty-fifth Edition Volume I and was approved by their Lordships of Supreme Court in

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the case Central Inland Water Transport Corporation Ltd.Vs. Brojo Nath AIR 1986 SC 1571 (at page 1604). The result, therefore, is that the concept of freedom of contract which was valid in nineteenth century, looses its sanctity in this century when conscionability of the contract has become a focus point. Both the courts and the Parliament have provided greater protection for weeker parties from harsh contracts. In several jurisdictions, this included a general power to grant relief from unconscionable contracts thereby providing a launching point from which the courts have the opportunity to develop a mordern doctrine of unconscionability.

11. Their Lordships of Supreme Court considered another jurisprudential concept of "comparatively mordern origin which has also affected the law of contracts and is the theorey of "distributive justice". In the case Lingappa Pochanna Appelwar Vs. State of Maharashtra (AIR 1985 SC 389) was explained the distributive justice and held applicable in the filed of Contracts through Court. The concept of distributive justice in the sphere of law-making connotes, inter alia, the removal of economic inequalities and rectifying the injustice resulting from the dealings or transactions between unequals in the society. Law should be used as an instrument of distributive justice to achieve the fair division of wealth among the members of the society based upon the

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principle :'From each according to his capacity, to each according to his needs'. Distributive Justice comprehends more than achieving lessening of inequalities by differential taxation, giving debt relief or distribution of property owned by one to many who have none by imposing ceiling on holdings both agricultural and urban, or by direct regulation of contractual transactions by forbidding certain transactions and perhaps by requiring others. It also means that those who have been deprived of their properties by unconscionable bargains, should be restored to their property. All such laws may take the form of forced redistribution of wealth as a means of achieving a fair division of material resources among the members of society or there may be legislative control of unfair agreements."

12. Inequality of bargaining power was considered by Lord Denning in the case Llyods Bank Ltd Vs. Bundy (1974) 3 ALL ER 757 in which it was held that "there are cases in our books in which the courts will set aside a contract or a transfer of property, when the parties had not met on equal terms, when the one is so strong in bargaining power and the other so weak that, as a matter of common fairness, it was not right that the strong should be allowed to push the weak to the wall." Such matters of inequality of bargaining power merit the intervention of the Courts. This principle of Lord Denning was taken with approval by their Lordships of Supreme Court in the Central Inland Water Transport Corporation case (Supra).

The debate continued and the Lord Diplock in the case A. Schroeder Music Publishing Co. Ltd Vs. Macaulay (formerly Instone) (1974) (1) WLR 1308 observed; ~~that~~ "It is in my view, salutary to acknowledge that in refusing to enforce provisions of a contract whereby one party agrees for the benefit of the other party to exploit or to refrain from exploiting his own earning power, the public policy which the Court is implementing is not some 19th century economic theory about the benefit to the general public of freedom of trade, but the protection to those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable." Their Lordships of Supreme Court in the case Central Inland Water Transport Corpn. Ltd Vs. Brojonath (supra) adopted this principle with approval and observed," the constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussion on this part of the case is in conso - -nance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Art. 14. This principle is that the Courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power."

13. Their lordships of Supreme Court while considering such contracts along with the provisions of Indian Contract Act further held that " 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. To say that such contract is only voidable would be to compel each person with whom the party with superior bargaining power had contracted to go to Court to have the contract adjudged voidable. This would only result in multiplicity of litigations which no court should encourage and would also not be in the public interest. Such contract or such clause in contract ought, therefore, to be adjudged void."

14. The result of the above discussion, therefore, is that if there is any contract or any clause of such contract which is unconscionable then such contract or clause of such contract, shall be void because it was against public policy. When we examine the form of contract, Annexure A-1, we find very clearly that the parties to the contract ~~that the parties to the contract~~ were unequal. On the one hand was the mighty State, giver of employment to several lacs of persons and on the other hand was the poor applicant with meagre resources and possibly in need of wages so that he may be able to meet both ends in these hard days. This contract has

fixed an amount of Rs. 800/- only for the nature of works given thereunder. The learned counsel for the applicant argued that the work which was assigned to the applicant is required to be done by a Class IV employees whose salary is in the Grade of 750-940 with consolidated amount of Rs.1600/- By no strecth of imagination, we can call this contract between the parties having equal bargaining power. It ~~has~~ is transpired from the facts given by the applicant and to some extent admitted by the respondents that he was initially engaged by the respondents as casual labourer and he continued for sufficiently long period as such but because of either non--availability of sanctioned post or because of the judicial pronouncements in various cases about casual labourers or daily wagers or employees on ad-hoc basis ~~should~~ to be regularised by the State, this device was evolved to declare the employees, like the applicant, as having not offered any appointment. No doubt, the respondents are giving it the name as contracted labour but the facts and circumstances clearly show that the applicant was actually regarded as casual labourer and was engaged for the work related to the affairs of the State and such work which is generally done by the regular employees of the State. At the cost of repetition, we may reiterate that the respondents have ~~more~~ very cleraly mentioned in Para VI.9 that the system which is in dispute before us, was resorted to because no sanctioned post was available. The matter does not end even at this stage.

The respondents have written paper, Annexure A-2, in which the behaviour, conduct and character of the applicant was discussed. It would be proper to quote in the same words; " His behaviour and character is found good. He is honest and hard working as per my knowledge". This language which is generally adopted while recording confidential annual remarks about the employee, is used. In case the applicant was pure and simple contracted labourer and was in no way considered as casual labourer or ad-hoc employee like others, there was no necessity of writing such remarks. It suggests that it is a camouflage for treating the applicant as contracted labouter whereas his services are actually taken as a regular employee. For these reasons, the averment made by the respondents that the applicant was only a contract-labour for a limited period, cannot be accepted. It leads to the formation of view that the applicant was a casual labourer for sufficiently long period and the mode of showing as contracted labour was adppted for certain compulsion. However, the existing present shape of mode of engaging labourers on contract being against public policy, is illegal. In this light, the contention of the applicant that he should be allowed equal pay for equal work appears to have got some merit. No doubt, the learned counsel for the respondents argued that there is no order and therefore no relief can be granted. We are unable to agree with this argument beauase the order of engaging the applicant as contracted-labourer which is held to be an order engaging him as casual labourer, is very much there and therefore it becomes basis along with other facts, to consider the grievance of the applicant and to award suitable relief to him. It shall not be out of place to mention that

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The respondents had also taken the plea that the application was time-barred and the applicant had not exhausted departmental remedies. The applicant has brought on record the paper, Annexure A-2, which was taken to be the paper of recording confidential remarks. In this paper, it has been written by Shri L.N. Kewalramani, Assistant Engineer, that Shri Rajnikant K. Ashwar had been doing peon work for the last three years. The language of this letter has given unfailing impression that the applicant was then working with the respondents, since he had apprehended that his engagement in the service may be terminated because there. The Tribunal then granted interim injunction on 25-11-1993. In this way, we find that the application was not in any manner time-barred.

15. So far as the question of non-availing of the departmental remedies is concerned, it is a contradictory averment on behalf of the respondents. On the one hand, it is contended by the respondents that the applicant was not holding any civil post and was not on the regular employment of the department or on muster roll, and on the other hand, it is contended that the departmental remedies were not availed of. It could not be shown on behalf of the respon-dents as to what these departmental remedies were available

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to the applicant. The mode of employment was chosen by way of contract but that contract did not specify any such remedies. It is for these reasons, we hold that the recruitment through contract is not averse to the public policy provided all those safeguards which are available to regular employees, are given to the employees ~~taken~~ & through contract. Not only this, there should be equality in bargaining power. We clearly mean by this bargaining power a power which is not based on any mischief by any of the parties to & the contract directed either ~~to~~ against & the society at large or ~~to~~ against an individual — a party to such contract. Such bargaining power, in our view, should base on dignity and human values. Anyway, objection raised by the respondents that the applicant has not exhausted the departmental remedies, is not tenable and is rejected.

16. On the consideration of above facts and legal position, we come to the conclusion that the basis of recruitment of the applicant through contract, as is envisaged in, Annexure A-1, is illegal and violative of Article 14 of the Constitution of India and is therefore, quashed. We hold that the applicant shall be deemed to have been engaged as casual labourer to discharge the same duties which are also discharged by the regular employees. He is, therefore, entitled for ~~x~~ regularisation & for the same pay scale which is available to similarly situated casual labourers or the employees on regular side. We, therefore,

direct that the applicant shall be regularised with the department of the respondent within a period of three months on the basis of the Rules meant for the purpose. If there are no Rules, the regularisation shall be made on the basis of the guide-lines which have been prescribed by the Hon'ble Supreme Court in the case State of Haryana and Others Vs. Piara Singh and Others (1992)4 SCC 118. Here we would also like to direct the respondents about the payment of wages as are given to the regular employees. We shall base our conclusion in this respect on the formula adopted by the Hon'ble Supreme Court in the case R.K.Panda and Others Vs. Steel Authority of India 1994 SCC (L&S) 1078. In this case, the question of absorption and of payment of wages of the contracted labourers, was involved. Their Lordships directed that all such labourers should be absorbed but they would not be entitled to the difference in their contractual and regular wages till the date of their absorption. It was, however, held that after absorption as regular employees they should be paid wages, allowances etc on par with their counter-parts working as regular employees with the respondents. We accordingly direct that the wages of the applicant shall be given from the date of absorption/regularisation and he shall not be entitled to the difference of his contractual and regular wages till such date of absorption.

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17. The interim injunction which was granted on 25-11-1993, stands vacated. The application is disposed of accordingly . No order as to costs.

(Dr. R.K. Saxena)
Member (J)

(V. Radhakrishnan)
Member (A)

*AS.