

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

THURSDAY, THE 12TH DAY OF FEBRUARY 2015/23RD MAGHA, 1936

W.P.(C).No.14724 of 2011 (M)

AGAINST THE AWARD IN I.D.NO.6/2005 DATED 15.07.2010
OF THE INDUSTRIAL TRIBUNAL, KOZHIKODE.

PETITIONER(S):-

KERALA STATE BEVARAGES (MANUFACTURING & MARKETING) CORPORATION,
SASTHAMANGALA, THIRUVANANTHAPURAM,
REPRESENTED BY ITS MANAGING DIRECTOR.

BY STANDING COUNSEL SRI.C.S.AJITH PRAKASH.

RESPONDENT(S):

1. THE CANNANORE DISTRICT SHOP ESTABLISHMENT &
GENERAL WORKERS UNION (INTUC), KANNUR, PIN - 670 001,
REPRESENTED BY ITS SECRETARY.
2. THE SECRETARY,
THE CANNANORE DISTRICT SHOP ESTABLISHMENT &
GENERAL WORKERS UNION (INTUC), KANNUR - 670 001.
3. SRI.ASHIK.K.K, S/O.ABDULLA,
VALIYAPAVAKKAL, KAKKAD, KANNUR-670 005.
4. THE INDUSTRIAL TRIBUNAL,KOZHIKODE - 673 100.

* ADDL.R5. KANNUR JILLA BEVERAGE WORKERS UNION,
(13/02/2011), BALLRD ROAD, KANNUR,
REPRESENTED BY ITS PRESIDENT.

* ADDITIONAL 5TH RESPONDENT IS IMPEADED AS PER ORDER
ON I.A.NO.13899 OF 2014 DATED 21.10.2014.

R1 & R2 BY ADV.SRI.K.RAJESH SUKUMARAN.

R3 BY ADVS. SRI.SUNIL NAIR PALAKKAT

SRI.K.N.ABHILASH

SMT.R.LEELA

R4 BY GOVERNMENT PLEADER SRI.R.RANJITH.

R5 BY ADVS. SRI.M.RAMESH CHANDER (SENIOR ADVOCATE)

SRI.ANEESH JOSEPH

SMT.DENNIS VARGHESE

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
12-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:-

APPENDIX

PETITIONER'S EXHIBITS:-

EXT.P1 TRUE COPY OF THE AWARD DATED 15.7.2010 IN
 I.D.NO.6/2005 OF THE INDUSTRIAL TRIBUNAL, KOZHIKODE.

RESPONDENT'S EXHIBITS:-

NIL.

Vku/-

[true copy]

“C.R.”

K. Vinod Chandran, J.

W.P(C) No.14724 of 2011-M

Dated this the 12th day of February, 2015

JUDGMENT

The above writ petition and W.P.(C).Nos.12160 of 2013, 13797 of 2013, 18995 of 2013 and 4570 of 2015 as also O.P. (Labour) No.1663 of 2013, arising from two separate awards were posted together. The present writ petition impugn the award of the Industrial Tribunal, Kozhikode and the other of the Industrial Tribunal, Kollam. They are said to be identical in nature, insofar as it deals with the issue of regularisation of employees engaged by the Kerala State Beverages Corporation [for brevity “the Corporation”] for labelling the bottles of Indian Made Foreign Liquor [for brevity “IMFL”], dealt with by the Corporation as provided under the Foreign Liquor Rules. The Industrial Tribunal, Kozhikode allowed the claim raised by 23 workmen, through their Union, with respect to one of the depots in Kannur. The Industrial Tribunal, Kollam, however, rejected the claim of some others, allegedly similarly placed workmen, in the other award. However, this Court, after hearing the

matter, was convinced that though regularisation is claimed in both, the factual edifice built to raise the claim are substantially different. The varied facts as the evidence indicates; will be noticed. Hence the writ petitions were heard separately and judgment delivered separately.

2. I.D.No.6 of 2005 was referred to the Industrial Tribunal, Kozhikode for adjudication of the following issue:

“Whether the 23 Labeling Workers of Kerala State Beverages Corporation (Kannur Depot) are eligible for permanency in the present category”.

The claim of the 23 Labelling workers was that they were appointed directly by the Depot Manager at Kannur. Some of them, Sl.Nos.1 to 14, in Exhibit W1 list of members; in September, 1984 and Sl.Nos.15 to 23, in August, 2003. They claimed that they were engaged continuously from the date of employment, however, were not granted any benefits due to a permanent employee. The Union canvassed their absorption in the permanent services of the Corporation.

3. The Corporation resisted the claim, on the ground that the workmen; whose cause the Union espouses, were never employed by them directly. The 23 workmen were employed under a contractor and the respondent-Corporation had absolutely no control

as to the persons employed by the contractor, was the specific contention taken. The learned Standing Counsel for the petitioner-Corporation would rely on ***Secretary, State of Karnataka v. Uma Devi* [(2006) 4 SCC 1]** and ***State of Rajasthan and Others v. Daya Lal and Others* [(2011) 2 SCC 429]** to resist the claim of the Union.

4. The learned Standing Counsel would urge that the only claim that could be legitimately raised by the workmen or their Union was under the Contract Labour (Regulation and Abolition) Act, 1970 [for brevity "Contract Labour Abolition Act"]. The fact remains that, even then if the appropriate Government abolishes such contract labour; there would be no automatic absorption of the employees. Definitely the workmen would be entitled to all benefits under the Industrial Disputes Act, 1947 [for brevity "ID Act"]. The pendency of the reference before the Industrial Tribunal is the reason cited for the continuance of the said workmen, in the specific work assigned to them, even after the death of the contractor.

5. While the Corporation would be obliged to continue them and they could claim their benefits under the ID Act; if any severance of their employment by any mode is attempted by the

Corporation; no regularisation as such could be granted, is the contention. If the finding of the Labour Court that the contract was a sham is upheld, even then that can only result in an invocation of the provisions of the Contract Labour Abolition Act, is the alternative plea. The Corporation would also contend that the service rules framed, for the Corporation, does not postulate a post of workman to label the bottles and, hence, ***Uma Devi*** (*supra*) would be squarely applicable for reason of there being an absence of a sanctioned post; which would stand against the regularisation plea raised by the Union.

6. The learned Senior Counsel appearing for the respondent-Union, however, would take this Court through the factual adjudication made by the Industrial Tribunal, to find that the contract projected is a sham. It is urged that there is absolutely no evidence to substantiate such a contract having been validly entered into. The claim of the Union that the 23 workmen were appointed directly and were dealt with directly by the Corporation stood uncontroverted. ***Uma Devi*** (*supra*) cannot at all be applied to the facts of the case, since the Supreme Court itself has drawn a clear distinction in ***Durgapur Casual Workers Union & Others v. Food Corporation of India*** [JT 2014 (13) SC 517]. ***Hussainbhai v. Alath Factory***

Thezhilali Union [(1978) 4 SCC 257] was relied on, to contend that the device employed by the Corporation clearly falls within the mischief, which the Supreme Court found in the aforesaid judgment.

7. Undisputedly the Foreign Liquor Rules, under the Abkari Act [1 of 1077], by Rule 26 prescribes the affixture on the foreign liquor bottles, security labels containing the State Emblem and the fascimile of the signature of the Excise Commissioner. Hence, there is a statutory obligation on the Corporation to affix such security labels on the foreign liquor bottles dealt with by them. If there was a valid contract, then the question would arise as to whether the employment of contract labour in such labelling work; which was one inextricably connected with the business of the Corporation and is of a perennial nature, is proper or not. In that circumstance, the question would have to be considered by the appropriate Government, as to abolition of the contract labour under the Contract Labour Abolition Act. However, as rightly found by the Industrial Tribunal, if the contract itself is found to be a sham, then the Industrial Tribunal, adjudicating on the claim for regularisation, could lift the veil and find the actual employer.

8. The question as to the awardee, being the principal employer and the awarder being the immediate employer; as against

the employees engaged by the contractor, would arise only when there is a valid contract found between the principal employer and the immediate employer. The specific claim raised on this count, by the Corporation was that one V.P.Abdulla was the contractor, who had engaged the workers; whose cause the Union espoused. Exhibits W4 to W6, W13 and W14 and W20 to W22 are communications between the management and the Union, indicating that the discussions were effected with the Union itself to mitigate the grievances of the labelling workmen. By W9, the management attempted a volte-face with the assertion of contract labour under V.P.Abdulla from 1984; which is renewed every three years. Exhibit W10 is the draft of an agreement between the management and the said V.P.Abdulla, in which the latter has been described as the President of the Union and also the contractor. The said draft is attested by the DLO and does not bear the signature of V.P.Abdulla. W12 is an agreement for bonus entered into by the management and one of the workers as Convenor.

9. The management, to substantiate their defence, produced Exhibits M1 to M7, payment vouchers, as also photocopy of agreements executed by the said Abdulla as Exhibits M8 and M9, Exhibit M10 was a Certificate of Registration issued by the Licensing

Authority under the Contract Abolition Act, to V.PAbdulla.

10. It is to be specifically noticed that, to evidence the contract with V.PAbdulla, the management produced the photocopy of two agreements at Exhibit M8 and M9, respectively dated 19.10.1992 and 11.06.1996. The duration of contract in each of the said agreements; is stated to be three years. The production of photocopies is not a correct procedure; and no reliance could be placed on them. Even discounting that, it has to be noticed that the management did not have any substantive document to evidence such contract prior to 1992 and after 1996. Further, the attested copy of Exhibit M8 obtained from the office of the Assistant Labour Officer, Kannur, under the Right to Information Act was produced as Exhibit W10, which indicated that the alleged contractor had not signed the same. The son of the contractor, was impleaded as the supplemental management No.2, after the demise of V.PAbdulla. The supplemental management No.2 expressed ignorance about such a contract and contended that he was an unnecessary party, since he has no connection in the dispute between the Corporation and its workmen.

11. The Union, as has been noticed, produced a number of communications addressed by the management to the Secretary,

Labelling Workers Union, which, according to them, evidenced the engagement of the workers under the Union. The Memorandum of Settlement produced as Exhibit W8 and the agreement at Exhibit W12 were also between the Union and the Management. The various documents produced by the workmen indicated that the management had always been communicating with the Union of workmen and there was no contractor in between.

12. The Industrial Tribunal first examined the issue as to whether the contract projected by the Corporation could be found from the evidence adduced. Exhibits M8 and M9 were found to be insufficient to prove a valid contract between the Corporation and late V.PAbdulla; rightly so. There was never a dispute with respect to the 23 workers having been employed from 1984 and 2003 respectively. The contention of the Corporation that in every three years, the contract stood renewed was found to have been not proved by the Corporation. The sole witness examined on the side of the management admitted that he had no direct knowledge about the dispute. It was also admitted that out of the four depots maintained by the Corporation in Kannur, the labelling workers of the other three depots had been made permanent. From the evidence and the

various documents produced, it is discernible that the payment for the labelling workers was made through the Convenors appointed from amongst the workmen, for disbursement to the individual workmen. The various documents produced by the workmen, referred to earlier; as the communication between the management and the Unions; also makes it plausible to assume that the employment was directly by the management. The transactions were made with a representative of the workmen; for some time the above referred V.P.Abdulla and then one Smt.K.M.Premaja, who was described as the Convenor of the Labelling Workers, in Exhibit W12 settlement between the management and the Labelling Workers.

13. The Industrial Tribunal found that there is no cogent evidence as to the mode of appointment of the Labelling Workers; nor was the concerned Depot Manager examined. The wages were found to have been made to the Convenors for being distributed among the workers themselves. Exhibit W12 was the copy of a settlement entered into between the Manager, Ware House, Kannur and Smt.K.M.Premaja, one of the workers who signed the agreement as Convenor of Labelling Workers. The agreement dealt with an Onam advance for the year 2007-08, which was to be recovered from the

wages of the labelling workers in 100 working days. This, according to the Tribunal, indicated the continuity in employment. Exhibit W18 was the inspection report of the Assistant Labour Officer, Kannur, 1st Circle, who reported that 23 workers in the Kannur depot were continuously working in the establishment for a long period. Based on the aforesaid evidence adduced at the enquiry and the total failure of the Corporation to substantiate its assertion of a contract, the Industrial Tribunal rightly relied on **Hussainbhai** (*supra*) to find that there is no valid and genuine contract and that the employees were directly employed by the Corporation. The employees were, hence, directed to be regularised in the present post.

14. The settlement entered into between the management and the workers revealed that there was no contract at all. The evidence produced by the Union proved the contrary. The Industrial Tribunal found that there is an obligation, on the Corporation, to label the foreign liquor bottles, which are sold by the Corporation in its business. Labelling in every bottle, being mandated by the Foreign Liquor Rules, the inextricable link with the business of the Corporation as also the perennial and permanent nature are clearly revealed. The junction of a contractor, as contended by the Corporation, being not

proved, the employer-employee relationship between the Corporation and the Labelling Workers also stood proved. The Industrial Tribunal found that there was no valid or genuine agreement between the management and the so-called contractor. This Court does not find any reason to differ from the view taken by the Labour Court; on the available evidence.

15. The learned counsel for the Corporation has relied on ***State of Rajasthan & Others v. Daya Lal & Others [(2011) 2 SCC 429]***, to buttress his contention that the workmen of the Union are not entitled to regularisation. The issue that arose in the said case was with respect to temporary appointment of certain persons as Superintendents in an aided hostel. Writ petitions were filed, alleging that they were akin to Superintendents in Government Hospitals; but were discriminated insofar as the salary and the incidence of service. Connected writ petitions were also filed, by Part-time Cooks/ Chowkidars in the Government Hospitals run by Social Welfare Department. Their appointments were made by the Mess Committee through whom the State Government was paying fixed amount of wages as aid to the concerned hostel mess committee. Both claimed regularisation, which was allowed by the High Court.

16. Two different issues were raised before the Hon'ble Supreme Court as to the regularisation claimed by the Superintendents and the Part-time Cooks/Chowkidars. Again the settled principles on which the Hon'ble Supreme Court proceeded was with respect to the power exercised under Article 226 of the Constitution and directions for regularisation/absorption often conflicting with the equality enshrined in Articles 14 and 16 of the Constitution of India. The aided hostels were found to be run by the students themselves and the liability of the Government was restricted to providing aid by way of a grant to the students. The Government was found to be not exercising any control over such hostels; but for prescribing certain standards to enable grant of aid. The claim made by the Superintendents for regularisation as such was declined. The Part-time Cooks and Chowkidars were found to have been employed only for short periods and their continuance was on the basis of the interim orders issued by the Courts. That alone was held to be not an entitlement to claim regularisation at the final disposal of the adjudication. The said decision would stand distinguished along with ***Uma Devi*** (*supra*) as will be noticed shortly.

17. The contention of the Corporation that there could be

no regularisation granted to contract employees and the remedy is under the Contract Labour Abolition Act, confined only to abolition of such contract labour, cannot be sustained on the facts afore-disclosed. If there had been a valid contract, as is noticed above, then the question would be whether such contract labour could be continued legitimately or should be abolished under the Contract Labour Abolition Act. As long as there is no contract found, then the employees would be considered to have been regularly employed under the Corporation itself. The fact that they were not appointed to sanctioned posts would be of no consequence, going by the decision of the Hon'ble Supreme Court in ***Food Corporation of India (supra)***.

18. The Hon'ble Supreme Court in ***Food Corporation of India (supra)*** found that, in ***Uma Devi (supra)*** the Constitution Bench of the Hon'ble Supreme Court was considering the issue of irregular appointments and it was declared that no directions shall be issued for absorption or regularisation or permanent continuance of temporary, contractual, casual, daily wage or *ad hoc* employees by the High Courts under Article 226 or by the Supreme Court under Article 32; unless the recruitment itself was made regularly in terms of

the constitutional scheme. Hence, what was addressed in ***Uma Devi*** (*supra*) was a situation in which persons were appointed through the back-door, to posts which were not sanctioned, but to a cadre which existed in an establishment.

19. Herein, it is not a case of appointing persons to posts which are not sanctioned. To make appointments to posts which are not sanctioned, there should be in existence a cadre in the establishment. Herein, the specific contention of the Corporation is that no such post exists in the service rules of the Corporation. The non-existence of a post where employment, however, is a necessity, is different from appointment to a non-sanctioned post. In the present case the Corporation does not dispute that they need workmen to affix labels on the foreign liquor bottles dealt with by them. The posts in the Corporation which are provided in the service rules and sanctioned by the Government does not take within its ambit the job description of "labelling of foreign liquor bottles". Hence, despite there being a necessity for workmen, to carry on such labelling, there is none in the Corporation designated as "Labelling Workers"; nor is such job assigned to any other sanctioned post. The necessity for carrying on such work, and the need for labour, led to the employment

of these workers. The contention that it was a contractual employment stands dispelled and the very existence of a contract is found against. The 23 workmen, in the above circumstance, should be regularised as directed in the award.

20. In this context, the other contention raised by the learned Senior Counsel for the respondent-Union, that, the present case stands on a different footing from ***Uma Devi*** (*supra*) assumes further significance. As noticed by the ***Food Corporation of India*** (*supra*), powers conferred on a Court or Tribunal carrying on industrial adjudication was not looked into in ***Uma Devi*** (*supra*). Section 2(ra) of the ID Act defines “unfair labour practice” as any of the practices specified in the Fifth Schedule. Item No.10 of the Fifth Schedule is as follows:

“10. To employ workmen as “*badlis*”, casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workmen”.

The present case, hence, would definitely be an unfair labour practice, is the plea advanced by the learned Senior Counsel appearing for the Union.

21. ***Food Corporation of India*** (*supra*) considered a case in which a rice mill of the FCI, had been operated by successive contractors and the 49 contract labourers working under the successive contractors having been employed directly by the FCI after the contract system was terminated. Such engagement directly, was in the nature of casual employment on daily wages, upon which an industrial dispute was raised between the Food Corporation of India and the workmen, the latter of whom claimed regularisation. The Industrial Tribunal found casualisation of service of workmen to be an unfair labour practice as defined in item No.10, Part I of the Fifth Schedule of the ID Act and allowed the plea of absorption into the regular employment. The Union was before the Hon'ble Supreme Court against the concurrent findings of the High Court; the learned Single Judge and the Division Bench, rejecting the claim on the basis of ***Uma Devi*** (*supra*).

22. ***Uma Devi*** (*supra*) was found to be only with respect to regularisation being directed, of back-door appointments, under Article 32 and Article 226 of the Constitution. The decision of the Hon'ble Supreme Court in ***Ajaypal Singh v. Haryana Warehousing Corporation*** in Civil Appeal No.6327 of 2014 decided on 9th July,

2014 was quoted with approval. The following paragraphs were extracted:

"20. The provisions of Industrial Disputes Act and the powers of the Industrial and Labour Courts provided therein were not at all under consideration in Umadevi's case. The issue pertaining to unfair labour practice was neither the subject matter for decision nor was it decided in Umadevi's case.

21. We have noticed that Industrial Disputes Act is made for settlement of industrial disputes and for certain other purposes as mentioned therein. It prohibits unfair labour practice on the part of the employer in engaging employees as casual or temporary employees for a long period without giving them the status and privileges of permanent employees.

22. Section 25F of the Industrial Disputes Act, 1947 stipulates conditions precedent to retrenchment of workmen. A workman employed in any industry who has been in continuous service for not less than one year under an employer is entitled to benefit under said provision if the employer retrenches workman. Such a workman cannot be retrenched until he/she is given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice apart from compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months. It also mandates the employer to serve a notice in the

prescribed manner on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.

If any part of the provisions of Section 25F is violated and the employer thereby, resorts to unfair trade practice with the object to deprive the workman with the privilege as provided under the Act, the employer cannot justify such an action by taking a plea that the initial appointment of the employee was in violation of Articles 14 and 16 of the Constitution of India.

23. Section 25H of the Industrial Disputes Act relates to re-employment of retrenched workmen. Retrenched workmen shall be given preference over other persons if the employee proposes to employ any person.

24. We have held that provisions of Section 25H are in conformity with the Articles 14 and 16 of the Constitution of India, though the aforesaid provisions (Articles 14 and 16) are not attracted in the matter of re-employment of retrenched workmen in a private industrial establishment and undertakings. Without giving any specific reason to that effect at the time of retrenchment, it is not open to the employer of a public industrial establishment and undertaking to take a plea that initial appointment of such workman was made in violation of Articles 14 and 16 of the Constitution of India or the workman was a backdoor appointee.

25. It is always open to the employer to issue an order of "retrenchment" on the ground that the initial appointment of the workman was not in conformity with Articles 14 and 16 of the Constitution of India or in accordance with rules. Even for

retrenchment on such ground, unfair labour practice cannot be resorted and thereby workman cannot be retrenched on such ground without notice, pay and other benefits in terms of Section 25F of the Industrial Disputes Act, 1947, if continued for more than 240 days in a calendar year.

26. However, in other cases, when no such plea is taken by the employer in the order of retrenchment that the workman was appointed in violation of Articles 14 and 16 of the Constitution of India or in violation of any statutory rule or his appointment was a backdoor appointment, while granting relief, the employer cannot take a plea that initial appointment was in violation of Articles 14 and 16 of the Constitution of India, in absence of a reference made by the appropriate Government for determination of question whether the initial appointment of the workman was in violation of Articles 14 and 16 of the Constitution of India or statutory rules. Only if such reference is made, a workman is required to lead evidence to prove that he was appointed by following procedure prescribed under the Rules and his initial appointment was legal”.

23. On facts it was found that the contract labourers were terminated, on the rice mill being closed down and, hence, was entitled to re-employment on resumption of the mill under Section 25H of the ID Act. Section 25H was held to be in conformity with Articles 14 and 16 of the Constitution of India. It was also found that there was

no plea taken by the Food Corporation of India before the Industrial Tribunal or before the High Court that the initial appointment of the workmen were illegal or they were appointed through back-door. The reliance placed on ***Uma Devi*** (*supra*) was found to be unsustainable and the award of the Industrial Tribunal granting absorption was upheld.

24. In the present case also, the 23 ascertained workmen shown in Exhibit W1 list have been continued for long. The claim of the Union was that they were appointed directly in September 1984 and August, 2003 by the Depot Managers. The Corporation had been dealing with the workmen directly through a Convenor, to whom the wages were paid for disbursement to the individual employees. The attendant benefits of service, like bonus, was also paid to the workmen. Negotiations and settlements were made directly with the workmen, again with the junction of the Convenor. The contract with V.PAbdulla was found to be sham and non-existent. According to the workmen, V.PAbdulla was also in the status of a Convenor. Later on; admittedly the Convenor, who is shown in the said status in the various communications and documents produced, was one amongst the workmen.

25. The test laid down for ascertaining an employer-employee relationship was held to include the following, in ***Balwant Rai Saluja v. Air India Ltd.* [(2014) 9 SCC 407]**:

- “(i) who appoints the workers;
- (ii) who pays the salary/remuneration;
- (iii) who has the authority to dismiss;
- (iv) who can take disciplinary action;
- (v) whether there is continuity of service; and
- (vi) extent of control and supervision i.e., whether there exists complete control and supervision”.

All the factors indicated above are in favour of the workmen, as has been found by the Industrial Tribunal from the evidence recorded in the trial.

For all the above reasons, the writ petition is dismissed. The respondent-Corporation, in consultation with the Government as also the representative Union(s), shall provide the workmen with identical reliefs that were provided to the other labelling workers in the other depots of the Corporation within a period of three months from the date of receipt a certified copy of this judgment. Parties are left to suffer their respective costs.

Sd/-
K. Vinod Chandran,
Judge

vku/-

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