

Reserved Judgment
IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition No. 116 of 2018 (PIL)

Kundan Singh

....Petitioner

Versus

State & others

....Respondents

*Mr. M.C. Pant, Amicus Curiae for the petitioner.
Mr. S.S. Chauhan, Deputy Advocate General for the State.*

Reserved on: 31.10.2018

Decided on: 12.11.2018

Hon'ble Rajiv Sharma, J.

Hon'ble Sharad Kumar Sharma, J.

Per: Hon'ble Rajiv Sharma, J.

Uttarakhand UPNL Savinda Karamchari Sangh through its General Secretary has filed Impleadment Application No.16484 of 2018 highlighting therein the exploitation of the workmen by the State Government as well as local bodies. It is stated in the application that though, the workmen are being paid the honorarium of Rs.8,400/-, however, the GST @18% and 2.5% Service Tax are also deducted from their salary. It is also highlighted that the administrative, disciplinary and financial control on each and every employee is of the establishment, in which, they are working. They are discharging the same duties which are being discharged by their counterparts. There is only a meager increase in their honorarium from time to time.

2. In view of the aforesaid facts, the impleadment application is allowed.

3. The State Government was directed to apprise the Court on the following aspects vide order dated 29.08.2018:-

“i. Whether there is any scheme in contemplation for regularizing the services of the persons employed through UPNL and other agencies.

ii. Whether the persons engaged through UPNL are only paid fixed salary or they are paid Dearness Allowance also taking into consideration the inflationary trends.

iii. Whether the State Government has ever upgraded their honorarium/salary component from time to time as per the labour index.

iv. The State Government is also directed to give exact number of persons employed/deployed through UPNL in various departments of the State in a tabular form and what is the basic pay/salary structure of the persons appointed through UPNL vis-à-vis their regularly appointed counterparts in the government department.

v. The State Government is further directed to give the date of engagement of every employee/workman through UPNL in a tabular form.

vi. The State Government and UPNL are directed to ensure that no displeasure is shown to any person or employee in highlighting the difficulties faced by them.”

4. In sequel to the directions issued by this Court, the State Government has filed the comprehensive affidavit. According to the averments made in the affidavit, the employees have been engaged in the various Government Departments and other institutions/corporations/local bodies etc. through outsource. The Government of Uttarakhand issued G.O. dated 12.06.2013 by which after fixing the categories of the officers/personnel, the honorarium was also fixed for the employees engaged through outsourcing. The honorarium of the personnel sponsored through UPNL was revised on 10.05.2018. The honorarium has been increased to Rs.8,400/-.

5. A copy of Memorandum and Articles of Association was placed on record by learned Amicus Curiae for the petitioners.

6. On 09.06.2016 and 05.07.2016, the Government has taken a decision to sponsor the Ex-Army personnel and their dependants through UPNL only.

7. To the queries raised by the Court, it is stated that the persons engage through UPNL on honorarium basis and who are working in different departments of the State Government and State Government undertakings, the government has not made any plan or scheme to regularize them. The persons sponsored through UPNL are being paid the fixed salary and apart from that they are not being given any dearness allowance. The salary/honorarium of the persons engaged through UPNL has been revised from time to time.

8. In Garhwal Region, total 12118 persons (unskilled, semi-skilled, skilled, highly skilled and officers) are engaged through UPNL, whereas in Kumaon Region 5953 (unskilled, semi-skilled, skilled, highly skilled and officers) have been engaged through UPNL.

9. The Cabinet in its meeting held on 20.09.2018 has discussed the matter and decided that the matter is covered by the judgment of Hon'ble Supreme Court rendered in the case of "State of Karnataka vs. Uma Devi." Thus, the persons engaged through UPNL cannot be regularized.

10. It would be apt at this stage to take into consideration the Memorandum and Articles of Association of Uttarakhand Purv Sainik Kalyan Nigam Limited (as amended vide extraordinary General Meeting held on 01.09.2015). The main objects of the company are to provide employment/self employment to Ex-servicemen and their dependants and in case suitable Ex-servicemen/their dependants are not available, employment can be provided to others to meet the requirements of Principal Employer.

11. Thus, it is evident that it is only when suitable Ex-servicemen/their dependants are not available, then the employment could be provided to others to meet the requirements of Principal Employer.

12. The main object of the company is also to provide financial assistance to the ex-servicemen, their dependants, family members of ex-servicemen including imparting them necessary training.

13. The Contract Labour Abolition and Contract Act, 1970 was in force in the State of Uttar Pradesh. The same is also now in force in the State of Uttarakhand. The State of Uttarakhand has also framed "Uttarakhand Contract Labour (Regulation and Abolition) Rules, 2003." The State Government has appointed Registering Officers from time to time and presently Registering Officers have been appointed vide Government Order dated 24.05.2017. The State Government has appointed Licensing Officer under Section 11 of the Act vide Government Order date 24.05.2017.

14. The provisions of Contract Labour (Regulation and Abolition) Act, 1970 is applicable to the establishment or the contractor who employs more than 20 workmen on any day of the preceding 12 months as Contract Labour.

15. "Establishment" means any office or department of the Government of a local authority or any place where any industry, trade, business, manufacture or occupation is carried out.

16. "Principal employer" means in relation to any office or department of the Government or a local authority, the head of that office or department or such other officer as the Government or the local authority, as the case may be, may specify in that behalf.

17. It is evident from the Memorandum and Articles of Association of UPNL, the UPNL was required to provide employment/self-employment to Ex-servicemen and their dependants and in case suitable Ex-servicemen/their dependants are not available employment can be provided to others to meet the requirements of Principal Employer.

18. The State Government in its own wisdom vide letter dated 09.06.2016 had directed that in future UPNL will sponsor ex-servicemen only and thereafter, vide letter dated 05.07.2016 UPNL has been allowed to sponsor dependants of ex-servicemen also.

19. The UPNL is neither registered under Section 7 of the Act nor it has got license as contractor under Section 12.

20. The UPNL has sponsored the names of thousands of employees for engagement by State Government. The funds are provided by the State Government. The disciplinary control is also of the State Government. The agency of UPNL has been used as intermediary only to deny the benefits of regularization and regular salary to the workmen. The UPNL was never intended to sponsor the names of all employees except ex-servicemen and their dependants and it was only when suitable ex-servicemen/their dependants are not available, the names of other candidates could be sponsored. The persons appointed by the State Government through agency of UPNL are only a camouflage.

21. The moment the veil is lifted, it is evident that the Principal employer is State Government.

22. The workmen employed through agency of UPNL are being paid salary of Rs.8,400/-. The persons appointed

in the corresponding posts are getting regular pay-scale. The dearness allowance is also not being paid to them.

23. The State must act like a Modal employer. Something which cannot be done directly cannot be permitted to be done indirectly. The agreement entered into between the UPNL and its employees is unconstitutional. Thus, violative of Articles 14 and 16 of the Constitution of India. The employees working through agency of UPNL, deployed by the State Government and local bodies are entitled to at least minimum of pay-scale, which is being paid to their counterparts on the principle of “Equal Pay for Equal Work.” The employees sponsored through UPNL are working without being regularized for decades together. It amounts to *begaar*.

24. The State Government while filing the affidavit has overlooked Section 2(i)(iv) and 2(z) of the Industrial Disputes Act, 1947.

25. In **AIR 1964 SC 355**, in the case of “*M/s Basti Sugar Mills Ltd. vs. Ram Ujagar & others*”, the Constitution Bench of Hon’ble Supreme Court has held as under:-

“6. Section 2(i) of the Act contains an inclusive definition of employer. The effect of sub-clause (iv) of Section 2(i) is that where the owner of any industry in the course of or for the purpose of conducting the industry contracts with any person for the execution by or under such person of the whole or any part of any work which is ordinarily a part of the industry, the owner of such industry is an employer within the meaning of the Act. Mr Pathak’s suggestion that the effect of this definition is that the owner of the industry becomes the employer of the contractor is wholly untenable and can even be described as fantastic to deserve serious consideration. The obvious purpose of this extended definition of the word “employer” is to make the owner of the industry, in the circumstances mentioned in the sub-clause, the employer of the workmen engaged in the work which is done through contract. The words used in the sub-clause are clearly sufficient to achieve this purpose.

7. It is true, as pointed out by Mr Pathak, that the definition of the word “workmen” did not contain any words to show that the contract labour was included. That however does not affect the position. The words of the definition of workmen in Section 2(z) to mean “any person (including an apprentice) employed in any industry to do any skilled or unskilled, manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be express or implied” are by themselves sufficiently wide to bring in persons doing work in an industry whether the employment was by the management or by the contractor of the management. Unless

however the definition of the word “employer” included the management of the industry even when the employment was by the contractor the workmen employed by the contractor could not get the benefit of the Act since a dispute between them and the management would not be an industrial dispute between “employer” and workmen. It was with a view to remove this difficulty in the way of workmen employed by contractors that the definition of employer has been extended by sub-clause (iv) of Section 2(i). The position thus is: (a) that the respondents are workmen within the meaning of Section 2(z), being persons employed in the industry to do manual work for reward, and (b) they were employed by a contractor with whom the appellant Company had contracted in the course of conducting the industry for the execution by the said contractor of the work of removal of press-mud which is ordinarily a part of the industry. It follows therefore from Section 2(z) read with sub-clause (iv) of Section 2(i) of the Act that they are workmen of the appellant Company and the appellant Company is their employer. There is no substance therefore in the first point raised by the learned counsel for the appellant.”

26. In the instant case also, the arrangement made by the State Government through UPNL is a sham. The Principal Employer is State Government.

27. In **1985 (3) SCC 545**, in the case of “*Olga Tellis vs. Bombay Municipal Corp.*”, their Lordships of the Hon’ble Supreme Court have held as under:-

“40. Just as a mala fide act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right, in this case the right to life, must conform to the norms of justice and fair play. Procedure, which is unjust or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it. Any action taken by a public authority which is invested with statutory powers has, therefore, to be tested by the application of two standards: the action must be within the scope of the authority conferred by law and secondly, it must be reasonable. If any action, within the scope of the authority conferred by law, is found to be unreasonable, it must mean that the procedure established by law under which that action is taken is itself unreasonable. The substance of the law cannot be divorced from the procedure which it prescribes for, how reasonable the law is, depends upon how fair is the procedure prescribed by it. Sir Raymond Evershed† says that, ‘from the point of view of the ordinary citizen, it is the procedure that will most strongly weigh with him. He will tend to form his judgment of the excellence or otherwise of the legal system from his personal knowledge and experience in seeing the legal machine at work’. Therefore, ‘he that takes the procedural sword shall perish with the sword’‡.”

28. The State Government has wrongly relied upon the ratio of the judgment passed by Hon’ble Supreme Court in Uma Devi case. The State Government in its own has framed the regularization rules from time to time but has not made them applicable qua persons sponsored by UPNL.

In Uma Devi case, their Lordships of the Hon'ble Supreme Court have directed that the Courts cannot issue directions for framing of scheme but State Governments of their own could frame the scheme for regularization.

29. The action of the State Government of not regularizing the employees sponsored through agency of UPNL and to deny them minimum of pay-scale including dearness allowance is arbitrary and unreasonable.

30. The employees have a legitimate, statutory and fundamental rights to be regularized. The workmen are being paid meager honorarium and out of the same, GST and Service Tax are also deducted. Every workman is entitled to living and fair wage to make both ends meet. The UPNL has not obtained the license as Contractor nor has registered under the Act qua most of the departments and local bodies.

31. Salary is the property within the meaning of Article 300-A of the Constitution of India. No GST or Service Tax can be deducted from the salary of the petitioners without any authority of law.

32. It is reiterated that the Principal Employer is the State Government. The master-servant relationship exists between the State Government and its employees, even though sponsored by the UPNL. The employees sponsored by UPNL are discharging similar duties which are being discharged by their counterparts. They are qualified and fulfill other eligible criteria, as per the recruitment and promotion rules.

33. The State Government should make appointments to public posts through agencies of Public Service Commission, Service Selection Boards in conformity with Articles 14 and 16 of the Constitution of India instead

of restricting it to agency which was primarily setup for sponsoring the names of ex-servicemen and their dependants.

34. Accordingly, the writ petition is disposed of with the following directions:

A. The State Government is directed to regularize the employees sponsored through UPNL in a phased manner within a period of one year as per regularization schemes framed from time to time.

B. The State Government is directed to ensure that the employees sponsored by UPNL get minimum of pay-scale with dearness allowance along with arrears to be paid within a period of six months from today.

C. The respondents are directed not to deduct any GST or Service Tax from the salary of the employees sponsored by UPNL.

34. Pending application, if any, also stands disposed of.

(Sharad Kumar Sharma, J.)

(Rajiv Sharma, J.)

NISHANT