

CASE NO.:
Appeal (civil) 933 of 2006

PETITIONER:
Union Public Service Commission

RESPONDENT:
Girish Jayanti Lal Vaghela & others

DATE OF JUDGMENT: 02/02/2006

BENCH:
K.G. BALAKRISHNAN & G.P. MATHUR

JUDGMENT:
J U D G M E N T
(Arising out of S.L.P. (Civil) No. 15714 of 2003)

G.P. Mathur, J.

Leave granted.

2. This appeal, by special leave, has been filed challenging the judgment and order dated 13.12.2002 of the Bombay High Court by which the writ petition filed by respondent no.1, Girish Jayanti Lal Vaghela was allowed.

3. Respondent no.1, Girish Jayanti Lal Vaghela was appointed as Drugs Inspector on 11.3.1996 on short term contract basis on a fixed salary for a period of six months from the date of joining or till the date the candidate selected by Union Public Service Commission (UPSC) joined duty on regular basis, whichever was earlier. The appointment of respondent no.1 was renewed after every six months with short breaks and it continued for over five years. An advertisement was issued by the UPSC on 24.3.2001 for making regular selection on the post of Drugs Inspector. Under the relevant recruitment rules made in exercise of powers conferred by proviso to Article 309 of the Constitution, the upper age limit for making direct recruitment is 30 years, which is relaxable for Government servants upto five years in accordance with the instructions or orders issued by the Central Government. Respondent No.1 had become over-age by two years at the time when the advertisement was issued and consequently he submitted an application to the Administrator, Union Territory of Daman and Diu (for short "Administrator") for issuing him an age relaxation certificate. Since there was no response, respondent no.1 filed an Original Application on 16.7.2001 before the Central Administrative Tribunal, Bombay (for short "Tribunal") praying that a direction be issued to the Administrator to issue him an age relaxation certificate. The Tribunal vide its order dated 17.7.2001 directed the Administrator to decide the representation made by respondent no.1. Meanwhile, respondent no.1 was provisionally allowed to appear in the interview. On account of refusal of the Administrator to grant age relaxation certificate, respondent no.1 filed second Original Application before the Tribunal which passed an interim order to the effect that any appointment made on the post of Drugs Inspector would be subject to the outcome of the Original Application. Nearly 5 months after the interview, the UPSC cancelled the candidature of respondent no.1 and recommended the name of respondent no.4, Naresh Sharma for the post of Drugs Inspector. The contract appointment given to respondent no.1 came to an end on 30.9.2002 and it was not extended any further. The second Original Application was dismissed by the Tribunal vide order dated 21.6.2002 on the finding that the appointment of respondent no.1 was made only on short term contract

basis and he had not been appointed by following the recruitment rules and further that the intention of the Government was to provide relaxation in age only to regular Government servants and not to those who have been appointed on ad hoc basis de hors the rules. Feeling aggrieved by the aforesaid decision of the Tribunal, respondent no.1 filed a writ petition before the Bombay High Court which was allowed by the order dated 13.12.2002 and the Administrator was directed to issue an age relaxation certificate to respondent no.1. A further direction was issued to the appellant U.P.S.C. to consider the claim of respondent no.1 and for making a recommendation to the Administrator for issuing him an offer of appointment as Drugs Inspector.

4. Before examining the contention raised by learned counsel for the parties, it will be convenient to set out the order dated 11.3.1996, by which respondent no.1 was initially appointed on short term contract basis.

"ORDER

The Administrator of Daman and Diu and Dadra and Nagar Haveli is pleased to appoint Shri Vaghela Girish Jantilal to the post of Drugs Inspector on short term contract basis at a fixed monthly rate of Rs.4,720/- (Rupees four thousand seven hundred and twenty only) and to post him in the Primary Health Centre, Daman for a period of six months only from the date of joining or till the date the Union Public Service Commission selected candidate joins his duties on regular basis, whichever is earlier.

Shri Vaghela Girish Jantilal shall stand relieved on expiry of six months from the date of joining or on the date the Union Public Service Commission selected candidate joins his duties on regular basis whichever is earlier.

By order and in the name of the Administrator of Daman & Diu & Dadra & Nagar Haveli."

The aforesaid appointment order was renewed from time to time with short breaks of few days. At the time when the UPSC issued the advertisement on 24.3.2001 for making regular selection on the post of Drugs Inspector, respondent no.1 was working on the said post on contract basis. As already stated, under the relevant recruitment rules for the post of Drugs Inspectors, the upper age limit for direct recruitment is 30 years, which is relaxable for Government servants upto 5 years in accordance with the instructions or orders issued by the Central Government. If respondent no.1 was a Government servant, he would be eligible for relaxation of upper age limit. The Tribunal has held that respondent no.1 was not a Government servant and was, therefore, not eligible for relaxation in upper age limit. This view of the Tribunal has been reversed by the High Court. The crucial question which requires consideration is whether a person working on a short term contract basis can be said to be a Government servant.

5. The problem of defining what is an employer and employee relationship and what is an independent entrepreneurial dealing frequently arises before the courts. Difficulty arises in defining what is a "contract of service" and what is "contract for service". In *Cassidy v. Ministry of Health* (1951) 1 All ER 574, after referring to some earlier decisions, it was held that in a "contract for services" the master can order or require what is to be done, while in the other case (a contract of service) he can not only order or require what is to be done but direct how it shall be done. The House of Lords in *Short v. J. & W. Henderson, Limited* (1946) 174 Law Times 417, laid down the attributes of employer-employee relationship which have been followed in later decisions. In this case the appellant, who was a dock labourer, sustained injuries by accident and claimed compensation against the respondents under the Workmen's Compensation Act, 1925. The respondents contended that the appellant was not a

workman within the meaning of Section 3(1) of the said Act but was a member of a joint stevedoring adventure. The House laid down the following four indicia of contract of service, namely, (a) the master's power of selection of his servant; (b) the master's responsibility of payment of wages or other remuneration; (c) the master's right of suspension or dismissal; and (d) the master's right to control the method of doing the work. It was also observed that a contract of service may still exist if some of these elements are absent altogether, or, present only in an unusual form and that the principal requirement of a contract of service is the right of the master in some reasonable sense to control the method of doing the work, and that this factor of superintendence and control has always been treated as critical and decisive of the legal quality of the relationship.

6. Though in many cases the importance of the factor of superintendence and control has been emphasized but that is not the determining test. In *Morren v. Swinton and Pendlebury Borough Council* (1965) 2 All ER 349, Lord Parker, C.J. held that superintendence and control cannot be the decisive test when one is dealing with a professional man or a man of some particular skill and experience. Instances of that have been given in the form of the master of a ship, an engine driver, a professional architect or a consulting engineer. In such cases there can be no question of the employer telling him how to do work; therefore, the absence of control and direction in that sense can be of little, if any, use as a test. In *Argent v. Minister of Social Security* (1968) 3 All ER 208, it was observed that though in earlier cases it seems to have been suggested that the most important test, if not the all important test, was the extent of control exercised by the employer over the servant but as the development of law in recent times in this field indicates, the emphasis has shifted and no longer rests so strongly on the question of control. Control is obviously an important factor. In some cases it may still be the decisive factor, but it is wrong to say that in every case it is the decisive factor.

7. Rule 2(h) of Central Civil Service (Classification, Control and Appeal) Rules, define a Government servant and it reads as under :

"2(h) "Government servant" means a person who \026
(i) is a member of a Service or holds a civil post under the Union, and includes any such person on foreign service or whose services are temporarily placed at the disposal of a State Government, or a local or other authority;
(ii) is a member of a Service or holds a civil post under a State Government and whose services are temporarily placed at the disposal of the Central Government;
(iii) is in the service of a local or other authority and whose services are temporarily placed at the disposal of the Central Government."

It will be noticed that under sub-rule (i), a person who is a member of service or holds a civil post under the Union is a Government servant. Similarly, under sub-rule (ii), a person who is a member of a service or holds a civil post under the State Government is a Government servant. Therefore, it is a holder of a civil post whether under the Union or State Government, who will be a Government servant for the purposes of the Central Civil Services (Classification, Control and Appeal) Rules. We are not concerned here with sub rule (iii) whereunder a person in the service of a local or other authority and whose services are temporarily placed at the disposal of the Central Government gets the status of a Government Servant.

8. There are several decisions of this Court wherein the concept of civil post has been explained and the first decision on the point is *State of Assam v. Kanak Chandra Dutta* AIR 1967 SC 884. In this case the respondent who was a Mauzadar in the Assam Valley was dismissed from service in disregard of the provisions of Article 311(2). It was held that "having regard to the existing system of his

recruitment, employment and functions", he was "a servant and a holder of a civil post under the State", and therefore entitled to the protection of Article 311(2). This Court observed :

"..... A post is a service or employment. A person holding a post under a State is a person serving or employed under the State, see the marginal notes to Articles 309, 310 and 311. The heading and the sub-heading of Part XIV and Chapter I emphasize the element of service. There is a relationship of master and servant between the State and a person said to be holding a post under it. The existence of this relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages or remuneration. A relationship of master and servant may be established by the presence of all or some of these indicia, in conjunction with other circumstances and it is a question of fact in each case whether there is such a relation between the State and the alleged holder of a post."

9. The question as to who can be said to be holder of civil post under the Government was examined by a Constitution Bench in State of Gujarat v. Raman Lal Keshav Lal AIR 1984 SC 161 and after review of several earlier decisions the Bench recorded its conclusions as under :

".....We do not propose and indeed it is neither politic nor possible to lay down any definitive test to determine when a person may be said to hold a civil post under the Government. Several factors may indicate the relationship of master and servant. None may be conclusive. On the other hand, no single factor may be considered absolutely essential. The presence of all or some of the factors, such as, the right to select for appointment, the right to appoint, the right to terminate the employment, the right to take other disciplinary action, the right to prescribe the conditions of service, the nature of the duties performed by the employee, the right to control the employee's manner and method of the work, the right to issue directions and the right to determine and the source from which wages or salary are paid and a host of such circumstances, may have to be considered to determine the existence of the relationship of master and servant. In each case, it is a question of fact whether a person is a servant of the State or not."

10. Article 16 which finds place in Part III of the Constitution relating to fundamental rights provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The main object of Article 16 is to create a constitutional right to equality of opportunity and employment in public offices. The words "employment" or "appointment" cover not merely the initial appointment but also other attributes of service like promotion and age of superannuation etc. The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made. A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner which may in some cases include inviting applications from the employment exchange where

eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution. (See B.S. Minhas vs. Indian Statistical Institute and others AIR 1984 SC 363).

11. Article 309 lays down that subject to the provisions of the Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State. The proviso to this Article confers power upon the President or the Governor, as the case may be, to make rules regulating the recruitment and the conditions of service of persons appointed to services and posts in connection with the affairs of the Union or the State. Article 311 affords several protections to persons employed in civil capacities under the Union or a State. In view of clause (2) of this Article, holder of a civil post under the Union or a State cannot be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and he is given a reasonable opportunity of being heard in respect of those charges.

12. A private employer in India enjoys almost a complete freedom to select and appoint anyone he likes and there is no statutory provision mandating advertisement of the post or selection being made strictly on merit, even where some kind of competitive examination is held. A private employer has absolute liberty to appoint a less meritorious person. Except those who are covered by the definition of "workman" and are governed by the provisions of Industrial Disputes Act or any such allied enactment, an employee working in a private establishment normally does not enjoy any statutory protection regarding his tenure of service.

13. Though in State of Assam v. Kanak Chandra Dutta (supra) and in the Constitution Bench decision in State of Gujarat v. Raman Lal Keshav Lal (supra) the decision of House of Lords in Short vs. J & W Henderson and other English cases were not referred to but it appears that this Court adopted almost the same test for ascertaining whether a person holds a civil post under the Union or a State. But in England these tests were adopted in order to find out whether there was a relationship of master and servant and particularly in the context of private employment. In our country there is a substantial difference between an employee working in a private establishment and a Government servant on account of the aforesaid constitutional provisions. Therefore, the indicia laid down in State of Assam v. Kanak Chandra Dutta (supra) and State of Gujarat v. Raman Lal Keshav Lal (supra) cannot be the only tests for determining whether a person is holder of a civil post under the Union or the State. In the case of a regular Government servant there is undoubtedly a relationship of master and servant but on account of constitutional provisions like Articles 16, 309 and 311 his position is quite different from a private employment.

14. The nature of right possessed by a Government servant and also his status after his appointment to a post under the Government was considered by a Constitution Bench in Roshan Lal Tandon v. Union of India AIR 1967 SC 1889 and it was held as under in para 6 of the reports :

"6. It is true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. In other words, the legal position of a Government servant is more one of status than of contract. The hall-mark of status is the attachment to a legal relationship of

rights and duties imposed by the public law and not by mere agreement of the parties. The emolument of the Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee. It is true that Article 311 imposes constitutional restrictions upon the power of removal granted to the President and the Governor under Article 310. But it is obvious that the relationship between the Government and its servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties. The duties of status are fixed by the law and in the enforcement of these duties society has an interest. In the language of jurisprudence status is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned. The matter is clearly stated by Salmond and Williams on Contracts as follows :

"So we may find both contractual and status-obligations produced by the same transaction. The one transaction may result in the creation not only of obligations defined by the parties and so pertaining to the sphere of contract but also and concurrently of obligation defined by the law itself, and so pertaining to the sphere of status. A contract of service between employer and employee, while for the most part pertaining exclusively to the sphere of contract, pertains also to that of status so far as the law itself has seen fit to attach to this relation compulsory incidents, such as liability to pay compensation for accidents. The extent to which the law is content to leave matters within the domain of contract to be determined by the exercise of the autonomous authority of the parties themselves, or thinks fit to bring the matter within the sphere of status by authoritatively determining for itself the contents of the relationship, is a matter depending on considerations of public policy. In such contracts as those of service the tendency in modern times is to withdraw the matter more and more from the domain of contract into that of status." (Salmond and Williams on Contracts, 2nd edition, p.12)"

15. In *Dinesh Chandra v. State of Assam* AIR 1978 SC 17 the contention that the relationship between the Government servant and the Government is contractual in nature was not accepted and was specifically repelled. It will be useful to reproduce para 11 of the reports where the conclusions were recorded :

"11. Mr. Niren De submits that Article 310(2) supports his submission that the relationship between the Government servant and the Government is contractual. Sub-article (2) of Article 310 provides that "notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or, as the case may be, of the Governor of the State, any contract under which a person, not being a member of a defence service or of an all-India service or of a civil service of the Union or a State, is appointed under this Constitution to hold such a post may, if the President or the Governor, as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an

agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post". The above is a special provision which deals with a special situation where a contract is entered into between the Government and a person appointed under the Constitution to hold a civil post. But simply because there may be, in a given case, a contractual employment, as envisaged under Article 310(2) of the Constitution, the relationship of all other Government servants, as a class, and the Government, cannot be said to be contractual. It is well-settled that except in the case of a person who has been appointed under a written contract, employment under the Government is a matter of status and not of contract even though it may be said to have started, initially, by a contract in the sense that the offer of appointment is accepted by the employee."

Again in para 12 the Court said as under :

"12. It goes without saying that in many employments, whether of private limited companies or public companies, contracts of employment are executed containing a term for termination of employment by notice. Such cases of contractual employment are different from those of Government employees whose employment is a matter of status and not of ordinary contract. The conditions of service of a Government servant are regulated by statute or statutory rules made under Article 309 of the Constitution."

It, therefore, follows that employment under the Government is a matter of status and not a contract even though the acquisition of such a status may be preceded by a contract, namely, an offer of appointment is accepted by the employee. The rights and obligations are not determined by the contract of the two parties but by statutory rules which are framed by the Government in exercise of power conferred by Article 309 of the Constitution and the service rules can be unilaterally altered by the rule making authority, namely, the Government.

16. There is no dispute that respondent no.1 was engaged or hired on contract to work as Drugs Inspector for a period of six months from the date of joining or till a candidate selected by UPSC joined on regular basis, whichever was earlier. The contract further stipulated that even if a regularly selected candidate did not join, respondent no.1 shall stand relieved on the expiry of six months. In *Director, Institute of Management Development v. Pushpa Srivastava* AIR 1992 SC 2070 it was held that where the appointment is purely on ad hoc basis and is contractual and by efflux of time the appointment comes to an end, the person holding such post can have no right to continue in the post. It was further held that this is so even if the person is continued from time to time on ad hoc basis for more than a year. In *State of Haryana v. Surinder Kumar* 1997(3) SCC 633 the respondents were appointed as clerks on contract basis. They filed a writ petition in the High Court for their regularisation which was allowed and a direction was issued for payment of wages on the principle of 'equal pay for equal work' and also regularisation of their services. In appeal this Court reversed the judgment of the High Court holding that as the respondents' recruitment was not made in accordance with the rules and they were appointed on contract basis on daily wages, they cannot have any right to the post as such until they are duly selected and appointed. This decision was followed by a three-Judge Bench in *State of Haryana v. Charanjit Singh & Ors.* JT 2005 (12) 475 and it was held that where a person is employed under a contract, it is the contract which will govern the terms of contract of service and not the rules framed under Article 309 of the Constitution governing the conditions of service to the post on which he is employed. It is,

therefore, clear that respondent No. 1 did not have any right to continue as Drugs Inspector after expiry of the six months period for which he had been appointed.

17. It is neither pleaded nor there is any material to show that the appointment of respondent no.1 had been made after issuing public advertisement or the body authorized under the relevant rules governing the conditions of service of Drugs Inspectors in the Union Territory of Daman and Diu had selected him. His contractual appointment for six months was de hors the rules. The appointment was not made in a manner which could even remotely be said to be compliant of Article 16 of the Constitution. The appointment being purely contractual, the stage of acquiring the status of a Government servant had not arrived. While working as a contractual employee respondent no.1 was not governed by the relevant service rules applicable to Drugs Inspector. He did not enjoy the privilege of availing casual or earned leave. He was not entitled to avail the benefit of general provident fund nor was entitled to any pension which are normal incidents of a Government service. Similarly he could neither be placed under suspension entitling him to a suspension allowance nor he could be transferred. Some of the minor penalties which can be inflicted on a Government servant while they continue to be in Government service could not be imposed upon him nor he was entitled to any protection under Article 311 of the Constitution. In view of these features it is not possible to hold that respondent no.1 was a Government servant.

18. The situation here is somewhat similar to that considered by this Court in Phool Badan Tiwari v. Union of India 2003(9) SCC 304. In this case the appellants who were appointed by railway authorities as supervisors in Handicap Centres filed an Original Application before Central Administrative Tribunal for claiming regularisation of their services and for declaring them as railway servants and further for payment of regular pay scales. The claim of the appellants was repelled by the Tribunal and also by the High Court in the writ petition and the appeal filed by them was dismissed by this Court mainly on the ground that the appellants had not been appointed in pursuant to or under any recruitment rules but were appointed under a beneficial scheme intended to help the wives and daughters of the railway servants, where they were given an opportunity to work as Supervisors.

19. Shri K. Ramamurthy, learned counsel for the contesting respondent has contended that in view of the principle laid down in State of Assam v. Kanak Chand Dutta AIR 1967 SC 884 the respondent No. 1 should be held to be a Government servant. As mentioned earlier the question in this case was whether a Mauzadar in Assam Valley holds a civil post under the State of Assam and is entitled to the protection of Article 311(2) of the Constitution. This decision was considered and referred to in State of Gujarat v. Raman Lal Keshav Lal Soni AIR 1984 SC 161 to which we have already referred to earlier and also in Supdt. of Post Offices v. P.K. Rajamma 1977 (3) SCC 94. The principle laid down therein do not advance the case of respondent no.1 in any manner as certain other factors like the process of recruitment in accordance with relevant service rules was not followed and certain other incidents of service like transfer, disciplinary action, pension and the facility of general provident fund are absent in his case. The other case relied upon by the learned counsel is Purshottam Dhingra v. Union of India AIR 1958 SC 36 which again is of no assistance to respondent no.1 as the main controversy here was whether a temporary Government servant was entitled to the protection of Article 311 of the Constitution. Shri Ramamurthy has also referred State of UP v. Chandra Prakash Pandey 2001(4) SCC 78 where the question was whether the Kurk Amins appointed on commission basis by Collectors for realization of outstanding dues of various cooperative societies as arrears of land revenue can be treated to be employees of the State Government holding civil post within the meaning of Article 311 of the

Constitution. The Kurk Amins had not been appointed on contract basis as is the case of respondent no.1 whereunder his appointment came to an automatic end after expiry of the period of contract. Thus, there being a fundamental difference between the nature of employment of respondent no.1, the principle laid down in the aforesaid authority cited by the learned counsel can have no application here.

20. For the reasons discussed above, we are clearly of the opinion that respondent no.1 cannot be said to be a Government servant as he was working on contract basis and, therefore, he was not eligible for any relaxation in upper age limit. The view taken by the High Court is clearly erroneous in law and is liable to be set aside.

21. The appeal is accordingly allowed and the judgment and order dated 13.12.2002 of the High Court is set aside and the writ petition filed by respondent no.1 is dismissed. No costs.

JUDIS