

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.3224 of 2015

Date of Decision: 16.11.2016

Rinki

... Petitioner

Versus

State of Haryana and others

... Respondents

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. Sunil Polist, Advocate,
for the petitioner.

Mr. Hitesh Pandit, Addl. AG, Haryana.

RAJIV NARAIN RAINA, J.

1. The backdrop of the dispute has been condensed in the interim order dated February 23, 2015 while issuing notice of motion to the respondents the learned Single Judge directed that one post of Clerk at Government College, Safidon as per public advertisement dated February 19, 2015 would not be filled up ad interim. The petitioner has approached this Court against the advertisement which became a threat to her continued employment as a Clerk on contractual basis. A few basic facts are noticed. The petitioner was appointed as a contractual Clerk on October 10, 2013 in the College. A service agreement was executed between the petitioner and the Principal of the College upon which the petitioner joined the post. The advertisement offered the position of Clerk against sanctioned and vacant post purely on contractual basis initially for a period not exceeding six months or till regularly selected candidates are available whichever is

earlier. Remuneration was according to wages fixed by the Deputy Commissioner under the Minimum Wages Act. The appointment came on the strength of a policy on contractual service permitted by the State on expiry of the period under the first service agreement. A fresh one was executed on June 02, 2014 for a further period of six months w.e.f. April 15, 2014 vide Annex P-3. The period would expire on or about October 14, 2015. Midway, the Principal vide order dated October 09, 2014 relieved the petitioner of her duty. The six months have expired. The petitioner claims that the period between the two service agreements was continuous despite the notional gap between the two, which is of little consequence.

2. Feeling aggrieved by the relieving order, the petitioner made a representation on the date of relieving. The representation at Annex P-6 remains pending.

3. Before the present cause of action accrued bringing the petitioner to court, the Principal of the respondent College had proposed to call names of candidates for filling up on contractual basis the post of Clerk, among other posts in the non-teaching staff, against which action the petitioner approached this Court in previous petition CWP No.22485 of 2014 apprehending that she will be replaced by another person by the same arrangement the law being in her favour against arbitrary replacement by a regular recruit in terms of the advertisements by which she came into contractual service, which condition was stipulated in the two service agreements binding both the parties. That petition had been filed on an apprehension of a proposed advertisement and, therefore, she withdrew the petition on November 04, 2015. She has come to this Court again with the

impugned advertisement published in the Dainik Bhaskar newspaper in its issue dated February 19, 2015.

4. While the advertisement was published on February 19, 2015 an interim stay order came four days thereafter on February 23, 2015 in the present petition and one post of Clerk was kept reserved and obviously has not been filled till today. The advertisement notified candidates to step forward for selection through walk-in-interviews. Among other posts, two posts of Clerk have been advertised for filling on contractual basis for six months on DC rates with the date of interview fixed to be held on February 25, 2015 by which time the interim order had come into operation which prohibited respondents from filling up of one post of Clerk. The factual position obtaining is that the petitioner was relieved from service on October 09, 2014 and was not in service thereafter.

5. The question is: What relief can she have? She would first have to be reinstated to her original position which would mean virtually extending the contract of agreement beyond the stipulated date by a Court order. Is that permissible? She would not only have to be reinstated but granted continuity from October 09, 2014 and then conferred benefit of the law in Hargurpartap Singh v. State of Punjab and others; [2007] 13 SCC 292 by making further orders that she will not be replaced till regular candidates are available to join the post of Clerk kept reserved for her. The argument to say the least is built on a hypothesis. The admitted position is that regular recruitment has not been made and the advertisement Annex P-7 is in the same arrangement as the one the petitioner came from.

6. What does the State say about this? The State has put in its

written statement contesting the case. The State suggests that the prayer for quashing advertisement dated February 19, 2015 partially is not permissible in law since the petitioner has no right to claim her appointment by way of reinstatement as per the terms and conditions of the service agreement in turn dependent on the terms of Government policies on the subject matter dated September 01, 2006 and refurbished in subsequent policy dated February 16, 2009.

7. The policy dated September 01, 2006 is for outsourcing of services/activities for management in Government departments on grounds of expediency. The policy declares that it aims to give effect to one of the recommendations of the 5th Pay Commission regarding outsourcing of auxiliary services under the State. The policy was born out of the previous Haryana Government Notification dated October 01, 2003 which provided for regularization of services of Group-C and D employees working on ad hoc/contract or daily wage basis and Government decided not to make any appointment of such categories of employees in the future. This was done with a view to curb the tendency of appointment on ad hoc/contract/daily wages. The prohibition imposed in 2003 give rise to the policy dated August 16, 2004 to meet emergent requirements of staff caused due to death, resignation, retirement, promotion and leave etc. by these fresh instructions allowed departments to engage persons on contract basis pending approval of a durable regular contract policy. This is how the contract policy dated September 01, 2006 came into existence with the clarification that person so engaged shall not have a legal right to claim regularization of services etc. in the departments where they have been engaged. The policy came into force

w.e.f. August 01, 2006. The previous instructions issued from August 16, 2004 onward till July 07, 2006 was superseded by the new policy on August 01, 2006.

8. The terms and conditions of the outsourcing policy dated September 01, 2006 (Annex R-1) are detailed in the Appendix to the policy. This policy proposes to strengthen the delivery of services to the people, keeping in view the emergence of new areas in the field of governance and due to technological advancements resort to this method of appointment can be had. It was an endeavour to outsource services/activities that are auxiliary or of supporting nature to their proper functioning. The policy provided a framework for outsourcing such services/activities as well as being the guidelines on the subject for the better and efficient delivery of services. Part-A of the 2006 policy deals with cases where regular posts do not exist. Part-A does not apply to this case because the advertisement by way of which the petitioner was appointed as a Clerk was against sanctioned and vacant post of Clerk and, therefore, it could not be said that post was of an auxiliary or supporting nature to the functioning of the respondent-College.

9. Part-B, Appendix to the policy Annex R-1 deals with cases where regular posts exist where the case of the petitioner would fall in proper perspective. The right to appoint is given to the departments in emergent cases involving public interest where posts exist, engagement can be made as per policy for a period not exceeding six months on payment of wages fixed by the DC under the Minimum Wages Act, 1948 for which no approval of Finance Department shall be required. If however, it is proposed to pay higher wages, then approval of Finance Department will be obtained,

giving proper justification. The mandate was that during the six months the department will endeavour to make regular appointments. First proviso to sub-Clause (ii) of Part-B makes it incumbent that if for any reason, the process of recruitment cannot be completed within six months then approval of FD shall be obtained; giving justifications for term engagement for a further period of six months. Clause (iv) of Part-B provides that whenever a term engagement is resorted to, whether against a sanctioned vacant post, or otherwise, the department should enter into an agreement, signed by both the parties, which should unambiguously state that it is an engagement for a fixed term and shall automatically cease on the expiry of the term without providing any claim to the persons so engaged to any regularization of service or any consequential benefits. A model agreement was appended as Annex 'B' to the Appendix.

10. A cursory reading of the policy presents a picture that outsourcing policy against sanctioned posts is justified up to six months or further after obtaining permissions from FD by furnishing proper justification that regular recruitment will be made during the period and at least an “endeavour” will be made by the department to fill up on regular basis posts by following due procedure.

11. Lamentably, the written statement filed by the State is silent on these larger aspects but very material all the same. The fresh advertisement refutes the claim that any such endeavour was made of steps taken towards regular recruitment. The policy itself gives right to a contractual employee to continue till regular recruitment is made by the simple logic that the policy does not explain what results after expiry of the period of six months

of contractual service and any short term extensions by signing fresh service agreements by the parties, one replacing the other. In this case, the petitioner has had the benefit of two service agreements totalling one year. She has been relieved on the expiry of a second extension on October 09, 2014 [the effective litigation starting in early 2015] and a fresh advertisement has been published on the same lines, to continue the same arrangement in the same manner without even initiating steps for regular recruitment against sanctioned post/s. This is also not a case falling in Part-B of policy dated September 01, 2006 since the petitioner was not appointed to a highly technical post or a post of a professional nature and after regular failed to bear fruit for reasons of non-availability of suitable persons for regular appointment compelling a term engagement to be made in due course of administration. Had the petitioner fallen in Part-B of the Policy, 2006 she would have no case to assert. It is not necessary to refer to the other provisions of the policy or Annex A which are procedural in character and have no bearing on this case.

12. A few words on the policy for engaging/outsourcing of services/activities existing in the subsequent policy dated February 16, 2009 which received the concurrence of the Finance Department on December 19, 2008 reconsidered the policy dated September 01, 2006 and was partially modified by the State Government after due approvals. This was the prevailing policy when the petitioner was inducted on contractual basis in a short term arrangement in 2013. The policy seeks to define cases where outsourcing is to be partly or completely resorted to by the departments where the posts have not been sanctioned for instance, cleaning of premises,

horticultural work, housekeeping services, maintenance of buildings, transport services, courier services, information and communication technology related services, highly technical and professional services etc. The above services/activities are only illustrative and not an exhaustive list of activities which the departments can apply this policy for outsourcing for other kind of services on the basis of their need and span of services/activities. The policy dated September 01, 2006 has not been superseded and continues to operate by virtue of the policy dated February 16, 2009. The new policy only reconsidered and partially modified the earlier one and, therefore, it is only the areas of divergence and convergence that are meaningful. Where both the policies converge and make no change the policy of 2006 holds the field. This policy [2009] opens doors for open tendering and inviting service providers through competitive bidding process. The middle man is introduced in this policy but only for activities falling in para.1 of Part-1 of the Policy-2009 (Annex R-2). The services for which the petitioner was engaged as a Clerk do not fall in Part-1 which enumerates activities where outsourcing is permissible but these are, as said earlier, only illustrative and not exhaustive and by no stretch of imagination would the case of the petitioner fall in the modified policy. As I read the two policies together I am more than convinced that the appointment scheme in both are the same in their short term arrangements and what I have noticed in the discussion while dealing with the 2006 policy is also the relevant consideration in this case. As I re-read both the policies they leave sufficient room to accommodate the principles in the Supreme Court decision in *Hargurpartap Singh* [affirming the view of this Court] which makeshift law

is time tested part of a large body of law that a contractual engagement should not be replaced by a contractual engagement unless work and conduct is found unsatisfactory. The right inheres in a contractual appointee limited by time/short term to continue even after the expiry of the period provided a regular recruit is not available. This was the condition stipulated in the advertisement by which the petitioner was appointed reciting that the appointment was for six months or till such time as regular recruit was available [whichever is earlier] and, therefore, it is best to reproduce the appointment letter of the petitioner dated October 10, 2013 signed by the Principal of the College for a better understanding of the rights pressed:-

“Appointment letter

*Sh. /Smt/ Kum **Rinki D/o Vinod Kumar** a candidate appeared for the interview and selected by the Selection committee is hereby appointed as **Clerk** against the sanction and vacant post purely on contractual basis initially for a period not exceeding 6 months or till the regularly selected candidate are appointed whichever is earlier on wages fixed by the D.C. under the minimum wages Act. Other reams and conditions are as per the current C.S. Policy. It the terms and conditions are acceptable to you. You may join your duties within seven days from the date of receipt of this letter. You will have to submit service agreement as per Annexure-A of latest C.S. Policy on joining of duty.*

10/10/2013

Sd/-

*Principal Govt. (P.G.) College
Safidon”*

13. Since one is dealing with a case governed by law of contract the presence of service agreement which is relied upon by the State, it would serve useful purpose to incorporate Appendix -B in this order which is the

model service agreement attached with the Policy-2006. The same reads as follows:-

“ANNEXURE-B

SERVICE AGREEMENT

THIS AGREEMENT is made on this _____ day of _____ 2006 between the Governors of the State of Haryana acting through _____ Department, Governor of Haryana (hereinafter referred to as the “Department”, which expression shall, unless excluded by or repugnant to the context, be deemed to include its successors in office and assignees) of the first part and Sh. _____ S/o Shri _____ resident of _____ District _____ (hereinafter referred to as “person” of the second part.

WHEREAS the services of the person are required for _____

AND WHEREAS the person has expressed his keen desire for rendering the services to the Department as desired under this agreement;

AND WHEREAS the parties hereby enter into this agreement on the terms and conditions appearing hereinafter;

NOW, THEREFORE, THIS AGREEMENT WITNESSETH AND IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES AS UNDER:-

- 1. The services of a person engaged by the Department shall be for a period not exceeding six months;*
- 2. The person shall be engaged for a fixed monthly remuneration not less than a prescribed in the Minimum Wages Act, 1948 (Act XI of 1948) or as may be fixed by the Deputy Commissioner under the said Act;*
- 3. The services of the person so engaged shall hereafter cease on the expiry of the term without providing him any claim for the regularization of*

services or any other consequential benefits;

4. *The person so engaged shall not have any legal right claiming regularization of his service etc. in the Department where he has been engaged;*

5. *The Department shall issue Identity Card on its own name to the person engaged for rendering services. The Department may refuse the entry into its premises of the person not bearing the said Identity Card and not being properly dressed.*

6. *The services rendered by the person engaged by the Department shall be under the close supervision of the Department.*

7. *It is understood between the parties hereto that only the Department shall have the right to take disciplinary action against the person so engaged.*

8. *The Department shall under no circumstances be deemed or treated as the employer of the person engaged for any purpose, whatsoever or any such person*

9. *In case of the death of a person, his remuneration shall be paid to his legal heirs.*

IN WITNESS WHEREOF THE DEPARTMENT AND THE PERSON ABOVE SAID HAVE HEREUNTO SUBSCRIBE THEIR HANDS ON THE DAY, MONTH AND YEAR FIRST MENTIONED ABOVE IN THE PRESENCE OF FOLLOWING WITNESSES;

- | | | |
|----|---------------------|--------------------------------|
| 1. | <i>Signature:</i> | <i>Signature:</i> |
| | <i>Name:</i> | <i>Name:</i> |
| | <i>Date:</i> | <i>Date:</i> |
| | <i>Designation:</i> | <i>Designation:</i> |
| | | <i>For and on behalf of</i> |
| | | <i>the Governor of Haryana</i> |
-
- | | |
|----|-----------------------|
| 2. | <i>Signature:</i> |
| | <i>Name:</i> |
| | <i>Date:</i> |
| | <i>Designation: ”</i> |

14. It remains to be considered as to what is the meaning and effect of the words “whichever is earlier” used in the appointment letter dated October 10, 2013 (Annex P-1) when the expression refers to the period of contract then does it foreclose the contract even before regular appointment comes. Left alone, the expression may appear to be a sunset clause in the appointment letter. But a rational and closer look at the appointment letter between the lines discloses that the word “initially” has been used (underlined for emphasis in the reproduction, supra). I find that the word “initially” is not a word used in the Annex 'B' (Service Agreement). The word initially suggests continuation and has to be read in conjunction with the expression “whichever is earlier”. Therefore, I am inclined to think that when the expressions are used together i.e. “initially” and “whichever is earlier” the right to continue in the arrangement is not exhausted by efflux of time in the first service agreement drawn between the parties. The controlling factor still remains “to await regular selection”. The second service agreement supports the interpretation especially when no material has been placed on record by the respondents that Finance Department had discontinued the arrangement or had refused to grant permission for a third extension and so on and so forth till a candidate from the open market was available after due selection to join the post which was held by the petitioner till the date she was relieved.

15. In view of the above discussion, I hold that the relieving order was bad in law in aborting the engagement without regular recruits standing by waiting to join. The petitioner had a right to be offered a third service agreement to be continued from time to time till suitable replacement was

found through direct recruitment unless her work and conduct was not found up to the mark.

16. The law appears to be in favour of the petitioner but does she still have a right to the relief claimed. This is the troublesome area for the petitioner to overcome in view of the disclosure in the written statement filed by the Principal on behalf of the respondents in Para.5 of the preliminary submissions. The following averments have been made in para.5 of the preliminary submissions against the petitioner. Para.5 reads as follows:-

“5. The petitioner has not come to the Hon'ble Court with clean hands. She misused her power as she was deputed in the work of Admission for the session 2014-15. She admitted an student Mr. Amit Kumar vide Receipt No.24573/97 on dated 16-07-2014 allotting him Roll No.1129 of B.A. Part-I without the permission of the admission Committee and the Principal. (Annexure R-V). She concealed this fact from the Principal and Admission Committee. This fact came to the knowledge of the Principal after relieving her from the service.”

17. The petitioner has filed a replication to the written statement and has tried to explain the allegations made by the State against her. In response she has this to say:-

“5. That the contentions of this para are wrong and denied. It is wrong to say that the present petitioner has misused her power because experience certificates have also been issued by the then Principal on dated 29/10/2014 and 02/03/2015, a true and correct copy of all experience certificates is attached herewith as Annexure P-8, for the kind consideration of this Hon'ble Court. It is also pertinent to mention here that the said Amit Kumar was deserved for that admission and he is studying in the college as per the information of the petitioner.”

18. This is not a good defence. It is an overreach by a subordinate in assumption of power by a contractual clerk overriding the authority of her superior and daring to comment that candidate Amit Kumar deserved admission and expressing personal opinion on the experience certificates issued by the Principal so she thought there is nothing wrong in what she did. The Principal's authority is challenged. She did not realize that she was a contractual employee and not a permanent Government servant. She acted beyond her call of duty. It was not for her to judge who was deserving and who was not since that decision was a managerial function provided to the Principal of the College and she could not usurp jurisdiction and take the law into her own hands by granting admission to a student without permission of the Admission Committee and the approval of the Principal of the College. She did not mention the episode in the writ petition which is a rather unsavoury thing to do in withholding information which may tilt the balance of the case against her. She could be non-suited for suppression of material facts. She does not say in the replication that the incident did not occurred and has been surprised with this new fact after being relieved from service. She does not canvass that even the Principal was not cognizant of the episode before relieving her from service and, therefore, the relieving order is bad as it is not based on such consideration while foreclosing service contract on the expiry of the period stipulated therein. Even if the last sentence of para.5 is taken against the Principal and the State even then it would not justify relief of reinstatement to service on contractual basis and it is for this reason that I am disinclined to interfere in this matter in exercise of equitable jurisdiction and would, therefore, commend the dismissal of the

petition on this ground even though the legal position has been declared in her favour as it was pressed for opinion and for these reasons forthcoming from the reply she has rendered herself worthy of being non-suited on facts. Even grave and serious suspicion in performance of duties attached to the post in a contractual relationship is relevant consideration and I am convinced of this hurdle in view of the tone and tenor of the material paragraph 5 of the replication and the explanation contained therein which all said and done does not redound to her credit in the position she served in a Government College regulated by law. It was not her business as a Clerk on contract to admit a student and then defend her action. This is mostly unpardonable behaviour which destroys her case on facts alas having almost reached the point of relief in law.

19. Accordingly, this petition warrants no interference under Article 226 of the Constitution and stands dismissed.

(RAJIV NARAIN RAINA)
JUDGE

16.11.2016
manju

Whether speaking/reasoned Yes

Whether reportable Yes