

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No. 2000 of 2016

Date of Decision: 12.05.2017

Gulshan

... Petitioner

Versus

... Respondents

The Presiding Officer Industrial Tribunal-cum
Labour Court Hisar and others

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

Present: Mr. Mohit Rathee, Advocate,
for the petitioner.

Mr. Vishal Garg, Addl. AG, Haryana.

RAJIV NARAIN RAINA, J.

1. This petition is directed against the award dated October 16, 2015 passed by the Presiding Officer, Labour Court, Hisar. The reference has unfortunately been turned down and the petitioner deprived of the triumvirate relief prayed. The petitioner has lost her case to the outsourcing policy of the Government of Haryana and a gullible court accepting the defence of the department and falling prey to it.

2. If the outsourcing of manpower theory is to be believed or discarded then the positive evidence of the outsourcing agencies set up by the respondent; in their solemn depositions made before the labour court as witnesses speak plainly against the management. An outsourcing agency can come into the picture in a department of Government for supply of labour ordinarily by way of a written deal, coupled with the compliances of

the Contract Labour (Regulation & Abolition) Act, 1970 etc. A mere pleading or bald statement made is not enough legal evidence to discredit the assertion of direct relationship of employment by the unsuccessful petitioner.

3. The admitted position on facts is that the petitioner served as a Clerk on DC rates for 89 days extended orally from time to time running over a period of about five years. The outsourcing agencies M/s Jai Hind Security & Hari Om Security Service were respondents 4 & 5 before the Tribunal. The outsourcing agencies were produced as witnesses and their depositions make the case of the respondent-department fall to the ground. Owner of M/s Jai Hind Security has taken the stand as witness that the employee was directly appointed by the officers of the department at Loharu Water Services, Circle Bhiwani and her services were also terminated by them. Respondent 4 testified, his was only an agency for paying wages and it was the respondents 1 to 3 who used to disburse wages to the petitioner and other workers. Respondent 5 - Hari Om Security Service deposed similarly. The management did not produce contracts entered by it with respondents 4 and 5 for anyone to guess what the terms were. If the terms of engagement are not defined with sufficient precision, then all are at sea to form their own conclusions and express personal opinions on the subject matter. In such a situation, the Court is left with hardly any option but to lift the veil to know the real nature of the employment relationship, whether it was direct or indirect or disguised and on this slender branch the case rests.

4. Needless to say, the Court has to conclude by an award judiciously, fairly and reasonably upon the evidence led by the parties. The

Labour Court believed the theory of outsourcing and dismissed the reference but from where such an inference has come is to the knowledge of the Labour Court and, therefore, it can be said that it has proceeded on the basis of assumptions and surmises. The finding that the petitioner was employed by the respondent through a contractor on DC rates does not appear to be a reasonable conclusion on Ex.W-2 and Ex.W-3 which are sanction orders to engage Clerk for the period September 10, 2014 to December 07, 2014 on 89 days basis on DC rates. If she was appointed through 'outsource' policy without documented middleman enjoying legal status as employer then the scheme of employment adopted is a camouflage. The veil would have to be lifted to know the true nature of the relationship. If the private agencies supplied names of labour alone then the appointment actually came from the department for their own work by wages directly paid. In this situation, respondents 4 and 5 were really only commission agents and not suppliers of contract labour. Besides, the management did not place on record any licence and registration of the contractors under the Contract Labour (Regulation & Abolition) Act, 1970. The period September 10, 2014 to December 07, 2014 is not a sufficient indicator to establish relationship from October 16, 2009 to December 04, 2014 asserted by the claimant worker.

5. I have read the written statement filed by the department before the Labour Court. All it adds up to is recantation of the outsourcing policy of the Government of Haryana. They appear not to have even cared to have placed that policy on record for the consideration of the Labour Court.

Merely trumpeting this defence will not supply proper legal foundation.

6. The Labour Court erred in blindly accepting the outsourcing policy as an agent to non-suit the petitioner and bringing in the outsourcing agencies, the ostensible contractors as agents of change, to unfold the truth, dismissed the reference without even dealing with the testimonies of respondents 4 & 5 to see how much water they stood in. That was also legal evidence to be reckoned, considered and dealt with. If the defence set up by the State rings a note of untruth, then there is no harmony in the defence.

7. Going by the preponderance of probabilities on the evidence available on file and the absence of best evidence, then, I inclined to think, that the award is not correctly reasoned and the same deserves to be set aside. When the agent is removed from the scene for all practical purposes the theory of outsourcing falls and the issue of compliance of the provisions of Section 25-F, 25-G and 25-H of the Industrial Disputes Act, 1947 ("1947 Act") arises especially looking to the length of service spent in the nature of the job of Clerk.

8. There is a clear admission in the written statement filed before this Court by Pawan Kumar Verma, Executive Engineer, Loharu Water Services Division, Bhiwani that the petitioner was engaged as a Clerk on October 16, 2009 on contract basis on DC rates serving upto February 28, 2010. Thereafter, policy decision was taken by the Government of Haryana introducing the outsourcing policy- Part-II dated February 16, 2009 shifting services of contractual employees by providing those will be through service providers according to the terms of the policy. The policy has been placed on record as Annex R/1 for the first time. This means that the petitioner was appointed by the department pre-policy, then it can

reasonably be argued that her conditions of service ought not to have been changed without notice, and which alleged contract was renewed several times till the service provider was changed w.e.f. June 01, 2011 to December 31, 2011 when respondent 6 stepped in as the the authorized service provider. The officer has admitted that petitioner worked as Clerk up to December 05, 2014. Thereafter, according to the reply the petitioner left her job on her own without informing the answering respondent. This is clearly an add-on from the written statement filed before the Labour Court and is liable to be ruled out for consideration by the Writ Court.

9. The letter dated July 23, 2014 written by the Superintending Engineer, Loharu Water Services Circle, Bhiwani to the Engineer-in-Chief, Irrigation & Water Resources Department, Haryana, Panchkula intimating that '3 No. Clerks' are working in the respondent office through 'outsource policy' in which the name of the petitioner figures at Sr. No.3 with the date from which she is working is described as from March 01, 2010. This letter was Mark 'D' before the Labour Court and could not be treated as legal evidence. The same has been placed as Annex P-1 at p.14 of the paper-book. Mode of proof of document is not met and the same cannot be treated as legal evidence in the eyes of law. If State is lackadaisical in producing its evidence through proper means then the writ court can be of no help.

10. The onus of proof must rest with the workman. There is sufficient evidence to conclude in her favour. Merely recording in Mark 'D' that Gulshan was one of the three persons working on outsourcing policy is not enough evidence of indirect employment through contractor, when contractor denied relationship and payments of wages were made directly by

the officers of the department. We cannot relieve the department of the liability towards Gulshan even when the employment relationship continued for five years without direct evidence of employment status with M/s Jai Hind Security & Hari Om Security Service who were arrayed as respondents 4 & 5 in the reference made to the Labour Court. Thus, I have no option except to hold that the petitioner Gulshan was an employee of the department in disguise. The only legal tool to unfathom the controversy in the present case is to lift the veil and find out the true character of the employment status which was one of employer-employee within the meaning of the 1947 Act.

11. Once this conclusion is arrived at, the only meaningful result of the discussion above would lead to relief.

12. Accordingly, this petition is allowed. The impugned award is set aside as legally unsustainable. The petitioner would be reinstated to service with continuity and back wages restricted from the date of demand notice.

(RAJIV NARAIN RAINA)
JUDGE

12.05.2017
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<i>Whether speaking/reasoned</i>	<i>Yes</i>
<i>Whether reportable</i>	<i>No</i>