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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 5073/2017 and C.M. No.21761/2017**

**UNION OF INDIA AND ORS**

..... Petitioners

Through: Mr. Sanjib Kumar Mohanty &  
Ms.P.S. Chandralekha, Advocates.

versus

**SHIKHA JAIN AND ORS**

..... Respondents

Through: Mr. K. Venkatraman, Advocate for  
respondents No.1 & 3 to 6.  
Mr. M.C. Kashyap, Advocate for  
respondent No.2.

**CORAM:**

**HON'BLE MR. JUSTICE VIPIN SANGHI**

**HON'BLE MS. JUSTICE REKHA PALLI**

**ORDER**

**27.07.2017**

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1. We have heard learned counsels and proceed to judgment.
2. The petitioner Union of India and Others have challenged the order dated 12.08.2016 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (the Tribunal) in O.A. No.100/2149/2016, whereby the Tribunal has allowed the Original Application preferred by the respondents/applicants and directed the petitioners to continue the services of the respondent applicants on the same terms & conditions as long as there is work, or till the vacancies are filled up on regular basis.
3. The respondent applicants, who are eight in number, were working as

Programme Assistant on contract basis in the National Aids Control Organisation (NACO) of the Ministry of Health & Family Welfare. They were aggrieved by the fact that the petitioners were not extending their respective contracts beyond 30.06.2016 on the ground that the petitioners had decided to hire the support staff through the Domestic Budgetary Support through an outsourced agency.

4. The Tribunal, while allowing the Original Application, has given the following reasons in the impugned order:

*“9. Admittedly, it is not the case of the respondents that there is no work available after 30.06.2016. On the other hand, it is specifically stated that they will hire the support staff through an outsourced agency. That means that the respondents are intending to replace the applicants, who are working on contract basis, for the last few years, with another set of contract employees, may be, through outsourced agencies. The said action of replacing one set of contract employees with another set of contract employees is clearly against to the settled principles of law. Even the aforesaid decision of the Hon’ble High Court is to the same effect.*

*10. However, in so far as the prayer for direction for framing of a Scheme and for regularization of the services of the applicants against the existing vacancies, if any, is concerned, this Tribunal cannot issue any directions in view of the constitution bench decision of the Hon’ble Apex Court in Secretary, State of Karnataka & Others v. Uma Devi (3) & Others, (2006) 4 SCC 1.*

*11. In B.C.Mylarappa Alias Dr. Chikkamylarappa v. Dr. Venktasubbaiah and Others, (2008) 14 SCC 306, on which the learned counsel for the respondents placed reliance, the facts are different and hence, will have no application to the present case.”*

5. The submission of learned counsel for the petitioners is that the petitioners had placed reliance on the office memorandum dated 29.12.2015 issued by the Department of Economic Affairs, Ministry of Finance on the subject of “*Engagement of Consultants by Ministries/ Departments from bilateral partners in multilateral organisations – guidelines*”. The said memorandum, inter alia, provides for engagement of Consultants for a tenure of one year at a time. Any extension beyond one year has to be approved by the Screening Committee afresh and evaluation of the Consultant’s performance has to be placed before the Screening Committee by the Ministry. It provides that the maximum tenure of any Consultant in Government of India for a particular assignment cannot exceed three years in any case.

6. Learned counsel submits that this memorandum was clarified vide OM dated 07.06.2016. He submits that in the counter-affidavit filed before the Tribunal, the petitioners had specifically referred to the aforesaid memoranda. However, the Tribunal did not deal with the same in the impugned order. He further submits that there was no challenge raised by the respondents to the said office memorandum before the Tribunal.

7. On the other hand, learned counsel for the respondents submits that the said office memoranda have no relevance qua the respondents. He points out that the respondents were initially appointed by way of selection through open advertisement to the posts of Programme Assistant, and since their appointment, the respondents were working on the same posts to the entire satisfaction of their seniors. The dates of appointment of each of the respondents disclosed in the Original Application are as follows:

| <i>S. No.</i> | <i>Name of applicant</i>    | <i>Date of appointment</i> |
|---------------|-----------------------------|----------------------------|
| <i>1</i>      | <i>Ms. Shikha Jain</i>      | <i>12.9.2005</i>           |
| <i>2</i>      | <i>Ms.Sapna</i>             | <i>2.6.2006</i>            |
| <i>3</i>      | <i>Ms.Rachna</i>            | <i>7.5.2007</i>            |
| <i>4</i>      | <i>Ms. Anita Guliyani</i>   | <i>7.5.2007</i>            |
| <i>5</i>      | <i>Ms.Surender Singh</i>    | <i>7.5.2007</i>            |
| <i>6</i>      | <i>Ms.Surjit Kaur</i>       | <i>21.5.2007</i>           |
| <i>7</i>      | <i>Ms.Meena Arya</i>        | <i>1.10.2008</i>           |
| <i>8</i>      | <i>Pramod Kumar Jaiswal</i> | <i>1.10.2008</i>           |

8. Learned counsel points out that in response to paragraph 4.2 of the Original Application, in their reply, the petitioners did not dispute the fact that the respondents/ applicants had been appointed on contract basis. In response to paragraph 4.2 of the Original Application, the petitioners herein stated as follows:

*“4.2 The applicants were appointed purely on contract basis. The contract of the applicants has been renewed periodically from time to time and not more than a year at any point of time. It has been explicitly mentioned in the contract agreement that they shall have the status of contractual employee and shall not be considered in any respect as regular staff of NACO.”* (emphasis supplied)

Thus, the respondents were always treated as “employees” and not Consultants.

9. On a query by the Court as to how the respondents were being

considered as “Consultants/ Advisors”, learned counsel for the petitioners has drawn our attention to a communication dated 03.02.2016 issued by the Ministry of Health and Family Welfare. Along with the said communication, a format of the Ministry of Finance, Department of Expenditure on the subject “*Domestic Consultants engaged for more than six months by Ministries/ Departments*” is also enclosed. In the said format at columns 4 & 9, information is required to be provided regarding the level at which the Consultants are working, which includes, LDC, UDC, Assistant, Section Officer, Under Secretary, Deputy Secretary. On this basis, learned counsel submits that the respondents, who were appointed as Programme Assistants, also qualify as Consultants.

10. We find absolutely no merit in the aforesaid submission of the petitioners. Firstly, the appointment of the respondents took place between the years 2005 to 2008, when there was no question of appointment of Consultants by the petitioners. The appointment of the respondents had been made after advertising the posts through a selection process. The respondents have been serving since then as employees, as admitted by the petitioners in its counter-reply filed before the Tribunal.

11. The use of the expression “Consultants/ Advisors” in the office memorandum – which came into existence after 8 to 10 years of the engagement of the respondents, cannot define the nature of appointment of the respondents. They were appointed on contractual basis as employees and not as Consultants.

12. Similarly, reliance placed on the aforesaid format by the petitioners is

also misplaced. In column 4 of the said format, information is sought in relation to the “level on which” the Consultants are working. Thus, first and foremost, the position should be beyond dispute that the format is being filled in respect of a Consultant. The format is merely to ascertain the level of work and the responsibility being discharged by the Consultant. It does not mean that LDCs, UDCs, Assistants, Section Officers, Under Secretaries, Deputy Secretaries lose their status as “employees” and become “Consultants”.

13. The Tribunal has placed reliance on the decision of this Court in ***Narinder Singh Ahuja and Others Vs. The Secretary, Ministry of Health And Family Welfare & Others***, W.P. (C.) No. 1741/2014 decided on 03.11.2014. In paragraph 15 of this decision, the Division Bench held as follows:

*“15. In the opinion of this Court, since the respondents nowhere dispute that there is need for the performance of the work that the petitioners were discharging all along and there is also no dispute that the project and funding (for the project) would continue till 2017, the decision to discontinue the petitioners’ engagement is based only on the policy to outsource the contractual employment to a third party. The petitioners are not insisting on regularization, given the nature of the employment or engagement, which is project based. However apart from the decision to “outsource” engagement of contract employment to a third agency, there is no rationale to discontinue the petitioners’ contracts. The justification that the employees engaged through the contractor are paid lower wages is arbitrary, because the “outsourced” or outsourcing agency would have to be paid its service charges. The lower wages paid, therefore, is, in effect, because of the charges/fees paid to the contractor/outsourced agency. The facts of this case*

*clearly reveal that even though the work is to be performed by contractual employees, the reason for discontinuance of the petitioners' employment is not their replacement with regular appointees, but instead, with another set of contractual employees. The state/respondents cannot, in the circumstances of this case, say that discontinuance of such employment cannot be gone into by the Court because the petitioners were aware that their contracts ended."*

14. The aforesaid decision has been relied upon by the Tribunal in the impugned order, since the endeavour of the petitioners is to replace the respondents with an outsourcing agency on contract basis. Learned counsel for the respondents has pointed out that the said decision has been affirmed by the Supreme Court with the dismissal of the Special Leave Petition on 27.03.2015 vide Special Leave Petition (Civil) No.8706/2015.

15. In these circumstances, we find absolutely no merit in this petition. The same is, accordingly, dismissed.

**VIPIN SANGHI, J**

**REKHA PALLI, J**

**JULY 27, 2017**

*B.S. Rohella*