

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH.**

(210)

CWP-1822-2019

Date of Decision: August 19, 2020

Yamin and others

.. Petitioners

Versus

State of Haryana and others

.. Respondents

(Through video conferencing)

CORAM: HON'BLE MR. JUSTICE HARSIMRAN SINGH SETHI

Present: Mr. Ashok Goel, Advocate, for the petitioners.

Ms. Ambika Luthra, Addl. A.G., Haryana.

HARSIMRAN SINGH SETHI, J.(ORAL)

Present petition has been filed seeking the direction to respondent No.3, which is the private co-operative society not to replace the petitioners who are working as Ward Servant, Plumber, Security Guard, Sanitation Worker, Sewer Men, Computer Operator etc. with the further direction that they should be allowed to continue in service.

Before the prayer of the petitioners is considered, the State of Haryana has raised a preliminary objections with regard to the maintainability of the present writ petition. As per the objections raised by the State of Haryana, the State of Haryana is not the employer of the petitioners and therefore, no direction can be issued to the State of Haryana so as to allow the petitioners to continue, in the absence of any master servant relationship.

During the course of hearing, learned counsel for the petitioners very fairly conceded that initially the petitioners were the

employees of M/s S.M. Enterprises, Kaithal, who was engaged as a Contractor for outsourcing the services of employees and later on, after the contract of the said M/s S.M. Enterprises was over, respondent No.3-co-operative society was engaged as a service provider for outsourcing the service of the employees. Learned counsel for the petitioners further concedes that the petitioners are the employees of a private contractor, though working with the Health Department of the Govt. of Haryana on the basis of contractual obligations between the respondent No.1 and the private contractor i.e. respondent No.3.

It is a settled principle of law that a writ can only be issued against the State or any instrumentality of the State. In the present case, the petitioners are praying for a direction to their employer that their services be continued. The said directions can only be issued to the employer of the petitioner and no other and admittedly the employer of the petitioner is respondent No.3, which is a non-State entity.

The only issue which arises before this Court is that once, it is conceded that the employer of the petitioners is the respondent No.3-Society, whether a direction can be issued by this Court to an entity which neither a State nor “any other authority” as envisaged under Article 12 of the Constitution of India, by entertaining the present writ petition.

Nothing has been placed on record to show that respondent No.3 is a Government Society or in any manner funded or administered by the Government so as to bring the same under 'other authority' as envisaged under Article 12 of the Constitution of India making the present writ petition maintainable.

Learned counsel for the petitioners submits that as the petitioners were discharging the duties in a Government hospital, they shall be treated to be employees of the Government of Haryana for all intent and purposes. Though, the said argument has been raised, but nothing has been placed on record to show that the petitioners were ever appointed by the Government of Haryana to discharge the duties with the Government of Haryana rather the conceded position is that the petitioners are the employees of the private contractor, who have been given the contract by the Government of Haryana to provide the manpower by outsourcing.

That being so, the petitioners cannot claim themselves to be the employees of the Government of Haryana so as to claim the benefit of continuity in service especially when there is no master servant relationship.

This Court had an occasion to consider somewhat similar claim of the contractual employees employed through service provider, wherein also claim was raised that contractual employees working through Contractor by way of outsourcing, are to be treated as Government employees. A Co-ordinate Bench of this Court considered this aspect while deciding CWP-18619-2011 titled as 'Nishan Singh and others Vs. State of Punjab', along with other connected cases, vide judgment dated 28.02.2013 and decided as under: -

“A perusal of this policy would show that it is applicable to the employees, who were working as daily wagers/workcharge/contract basis on permanent posts and were appointed by the State of Punjab after fulfilling eligibility criteria as per the proper procedure. Policy dated 18.3.2011 dealt with regularization of the services of not only contractual employees, but the daily wagers/workcharge employees working in different departments of the Government. By this policy dated 17.11.2011, the benefit of regularization of services was extended to the daily wagers/workcharge employees and employees

working on contract basis in different departments, i.e. Boards/Corporations/Cooperative Societies/other Societies and other autonomous bodies. A perusal of both the above policies would clearly spell out that the petitioners who are employees of the Service Providers in the Departments of Revenue and Excise and Taxation, Punjab, in pursuance to the contract entered into between their employer and respondent departments. There is no relationship of employer and employee between the petitioners and respondent-department. In the absence of such a relationship, petitioners cannot claim any right against the respondents. Even the policies of regularization do not contemplate or provide for benefit of regularization of services of the employees who have been deputed by the Service Providers.

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It has been asserted by the petitioners that as a matter of fact, the petitioners are for all intents and purposes employees of the respondent-department and the services providers have been used as a camouflage to deny the petitioners of their right of regularization and others statutory benefits, especially when the petitioners fulfil all the other mandated conditions for regularization of their services except that the petitioners have been appointed directly on contract basis by the respondents. It has further been asserted that in the case of some of the petitioners, their initial appointment was with the principal employer and later on shown through contractor which was with an intention to cover up the claim of the petitioners of they being contract employee of the department. It has further been asserted that the so called service provider/contractor is an unregistered contractor who has not obtained any license under Section 12 of the Contract Labour (Regulation and Abolition Act) 1970 and, therefore, the petitioners will be for all intents and purposes treated to be the employees of the principal employer, i.e. department concerned, entitling them to the claim of regularization as per the policies of the Government of Punjab and, therefore, a direction to that effect be issued. This contention of the counsel for the petitioners cannot be accepted in the light of the latest Full Bench judgment of this Court in CWP No. 13619 of 2012 titled as Union of India and another Versus Ram Pal and others, decided on 22.2.2013, wherein apart from referring to two conflicting judgments passed by the Division Benches of this Court and to resolve the dispute therein, reliance was placed upon the judgment of the Hon'ble Supreme Court in Steel Authority of India

Limited's case (supra) to assert that the question of policy of contract labour could neither be decided by the Labour Court nor the Writ Court and as a fortiori by the Tribunal as held in the said case. It was within the exclusive domain of the appropriate Government under the Labour Contract Prohibition Act. While dealing with this question, this Court held as follows :-

“11. On going through the judgment in SAIL (supra), we are of the view that decision of the Division Bench in Ramesh Singh (supra) is correct view and that of Kiran Pal (supra) would not hold the field, as it is directly opposed to the judgment of the Supreme Court in SAIL (supra). Detailed reasons given by the Division Bench in Ramesh Singh (supra), taking note of all the relevant cases, are reproduced below, as we agree with the said reasoning :-

“The issue whether a workman engaged by the Contractor can be deemed to be an employee of the principal employer in the event of prohibition of engagement of Contract Labour in terms of Contract Labour (Regulation and Abolition) Act, 1970 or where there is no notification prohibiting engagement of contract labour was subject matter of consideration before the Hon'ble Supreme Court in Steel Authority of India's case (supra). The Supreme Court has reversed its earlier judgment in Air India Statutory Corp. Versus United Labour Union (1997) 9 SCC 377 prospectively. It was held that the provisions of the Contract Labour (Regulation and Abolition) Act, 1970 neither expressly or by necessary implication provide for automatic absorption of contract labour on issuing a notification by the appropriate Government prohibiting engagement of contract labour.

In Municipal Corporation of Greater Mumbai Versus K.V. Shramik Sangh and others (2002) 4 SCC 609, it was held by Hon'ble Supreme Court that absorption of contract labour cannot be automatic and is not for the Court to give such direction and the appropriate forum is, to seek remedy before an industrial adjudicator. In A.P. SRTC and others Versus G. Srinivas Reddy and others (2006) 3 SCC 674, there was a dispute whether there was no notification prohibiting engagement of contract labour. The Supreme Court considered its earlier judgment in Air India's case (supra) and Secretary,

Haryana SEB Versus Suresh (1999) 3 SCC 601 and held to the following effect:-

11. In this case, there was no notification under Section 10(1) of the CLRA Act, prohibiting contract labour. There was also neither a contention nor a finding that the contract with the contractor was sham and nominal and the contract labour working in the establishment were, in fact, employees of the principal employer himself. In view of the principles laid down in Steel Authority the High Court could not have directed absorption of the respondents who were held to be contract labour, by assuming that the contract labour system was only a camouflage and that there was a direct relationship of employer and employee between the Corporation and the respondents. If the respondents want the relief of absorption, they will have to approach the Industrial Tribunal/Court and establish that the contract labour system was only ruse/camouflage to avoid labour law benefits to them. The High Court could not, in exercise of its jurisdiction under Article 226, direct absorption of the respondents, on the ground that work for which the respondents were engaged as contract labour, was perennial in nature.

Later on in Steel Authority of India Ltd. Versus Union of India and others (2006) 12 SCC 233, it was reiterated that neither the Labour Court nor the writ Court could determine the question as to whether the contract labour should be abolished or not. The same is within the exclusive domain of the appropriate Government. It was held to the following effect :-

24. When, however, a contention is raised that the contract entered into by and between the management and the contractor is a sham one, in view of the decision of this Court in Steel Authority of India Ltd. an industrial adjudicator would be entitled to determine the said issue. The industrial adjudicator would have jurisdiction to determine the said issue as in the event if it be held that the contract (sic) purportedly awarded by the Management in favour of the contractor was really a camouflage or a sham one, the employees appointed by the contractor would, in effect and

substance, be held to be direct employees of the management.”

12. No doubt at the time when the judgment in Ramesh Singh (supra) was rendered, the SLP of the Union of India in Kiran Pal (supra) was pending in the Supreme Court and that fact was not taken note of. However, ultimately, the said SLP was dismissed in limine without passing any reasoned order. Therefore, the dismissal of the said SLP is not necessarily affirmation of the view taken in Kiran Pal (supra).”

That apart, in the absence of a notification by the Central Government, prohibiting the employment of contract labour, persons so employed would remain the employees of the contractor and not of the department, i.e. the principal employer. Relevant para-16 of the judgment in the case of Gian Singh and others Versus Senior Regional Manager, Food Corporation of India, Punjab Region, Chandigarh, 1991 (1) PLR 1 reads as follows :-

“16. Now let us examine the contentions of the learned counsel for the appellants that if there is violation of the provisions of the Act, to the effect that the principal employer does not get registration as required under Section 7 of the Act and or the contractor does not get the licence under Section 12 of the Act, the persons so appointed by the principal employer through the contractor would be deemed to be the direct employees of the principal employer. We see no such inference deducible from the violation of the provisions of the Act. Section 9 of the Act prohibits the employment through the contractor in case of non-registration. But if a principal employer does employ persons through the contractor in spite of non-registration, the only penal provisions are Sections 23 and 24 of the Act i.e the principal employer can be proceeded against under these sections but the Act nowhere provides that such employees employed through the contractor would become the employees of the principal employer. If such was the interpretation then the Supreme Court in cases of Food Corporation of India Workers' Union's and B.H.E.L. Workers' Association (supra), would have straightaway granted the relief and would have held that the employees employed through the contract labour had become the employees of the principal employer and were entitled to all the benefits which were available to the regular employees, but as seen above the Supreme Court never granted such a prayer. Moreover, it

would be seen from the title of the Act that it is to provide for the abolition of the contract labour and for providing certain facilities to such contract labour. As far as the abolition is concerned, as to whether in a particular establishment such contract labour should be abolished or not, the power has been given to the appropriate Government under Section 10 of the Act. The facilities which are to be provided to such contract labour by the principal employer have been provided under the Act and if such facilities are not provided, the remedies are also provided; but by no stretch of imagination it can be said that the contract labour would become the employees of the principal employer under the provisions of the Act. As far as the Division Bench judgment of this Court in Food Corporation of India, Haryana Region, Sector-17, Chandigarh Versus The Presiding Officer, Central Government Industrial Tribunal, Chandigarh and another, is concerned, it may be noticed that the above mentioned two authorities of the Supreme Court were not noticed by the Division Bench. Otherwise also one of the Judges who was a member of that Division Bench has dismissed the writ petitions against which the present Letters Patent Appeals have been filed and while dealing with the said Division Bench judgment, the learned Single Judge has observed as under :-

“This being the position in law, the facts pleaded by the Corporation in their written statement assume importance, as it has been specifically pleaded that throughout the State of Punjab there is not a single establishment where the labour employed by the contractors has exceeded ten in number. On that basis, the possession of licence by the contractors becomes immaterial under Section 12 of the Act of 1970, as persons engaged by the contractors and deployed by them on food storage as Security Guards shall remain the contract labour of the respective contractors. This precisely is the ratio of the Division Bench judgment of this Court in Food Corporation of India, Haryana Region Versus The Presiding Officer, Central Government Industrial Tribunal, Chandigarh and another.”

The Hon'ble Supreme Court in Dena Nath's case (supra) in para22 of the said judgment held as follows (which has been approved

by Five Judges Bench of the Hon'ble Supreme Court in Steel Authority of India Limited's case (supra) in para 96 thereof :-

“22. It is not for the High Court to inquire into the question and decide whether the employment of contract labour in any process, operation or in any other work in any establishment should be abolished or not. It is a matter for the decision of the government after considering the matter, as required to be considered under Section 10 of the Act. The only consequences provided in the Act where either the principal employer or the labour contractor violates the provision of Sections 9 (sic 7) and 12 respectively is the penal provision, as envisaged under the Act for which reference may be made to Sections 23 and 25 of the Act. We are thus of the firm view that in proceedings under Article 226 of the Constitution merely because contractor or the employer had violated any provision of the Act or the rules, the Court could not issue any mandamus for deeming the contract labour as having become the employees of the principal employer. We would not like to express any view on the decision of the Karnataka High Court or of the Gujarat High Court (supra) since these decisions are under challenge in this Court, but we would place on record that we do not agree with the aforequoted observations of the Madras High Court about the effect of non-registration of the principal employer or the non-licensing of the labour contractor nor with the view of Bombay High Court in the aforesaid case. We are of the view that the decisions of the Kerala High Court and Delhi High Court are correct and we approve the same.”

In the light of the above, petitioners cannot be granted any benefit in the present writ petition as none of the grounds pressed into service by the petitioners carry any weight. The writ petitions being devoid of merit stands dismissed. ”

Thereafter, an appeal was preferred against the said judgment and the Division Bench upheld the judgment of the learned Single Judge, while deciding LPA No.469 of 2013 alongwith other connected appeals and held as under: -

“15. Reverting to the facts of the present case, the question for determination is whether the policy decisions of the Government

dated 18.03.2011 and 17.11.2012 cover the case of the appellants for regularization? The learned Single Judge after elaborate discussion of the law on the point has rightly reached the conclusion that 'the above policy do not apply to the appellants claim and, therefore, right of regularisation pressed by the petitioners (the appellants) cannot be accepted'. Learned counsel for the appellants could not advance any meaningful arguments to impress us to reach a different conclusion. The submissions that the appellants are employees engaged by the respondent Departments and the service provider has been used as a camouflage to deny the appellants their status as Government employees or consequent at regularisation under the Government Policy and other statutory benefit has no substance or legal basis. Learned Single Judge has expansively dealt with the facts and law on this point and we find no cogent or convincing reason to take a contrary view.

16. The State has taken a policy decision for regularisation of services of the contractual employees who were appointed after fulfilling eligibility criteria as per 'proper procedure'. In the case of appellants neither they were selected under the Service Rules applicable to the regular employees of the Punjab State nor there was any advertisement issued by the State under which they applied for their engagement as regular or contractual employee of the State. It was the service provider who entered into an agreement with the State agency to provide work force on certain terms and conditions. The service provider selected the candidates and supplied the same to the Government Department. A service provider is not an agency of the State to make the recruitment against the civil posts. The selection made by the service provider, if taken as appointment made by the State, will have serious repercussions and violates the rights of thousands of more meritorious candidates who might not have applied for engagement by a Service Provider but would definitely be keen to seek 'public employment' under the State. The acceptance of claim of the appellants shall thus amount to back door entry to public employment in total disregard to the mandate of Articles 14 and 16 of the Constitution."

Keeping in view the above, the present writ petition is not maintainable as the relief sought is against a private society, which is the

employer of the petitioners and no writ can be issued against a private person.

The present writ petition is accordingly dismissed as not maintainable.

August 19, 2020
harsha/naresh.k

(HARSIMRAN SINGH SETHI)
JUDGE

Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No