

THE HIGH COURT OF SIKKIM: GANGTOK
(Civil Extra Ordinary Jurisdiction)

SINGLE BENCH: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

W.P. (C) No.18 of 2021

Ms. Reena Kumari,
Aged about 36 years,
D/o Shri R.D. Lall,
R/o Bahai's School Road,
Tadong, East Sikkim.

..... Petitioner

Versus

1. The Secretary,
Ministry of AYUSH,
Government of India,
Ministry of AYUSH Bhawan,
B-Block, GPO Complex, INA,
New Delhi- 110 023.
2. Regional Ayurveda Research Institute,
Through it's Director/In charge,
Tadong, Gangtok, East Sikkim-737102.
3. M/s Third Eye Security Guarding (P) Ltd.,
B/E5 Rajarhat Road Jyangra,
P/o Deshbhandhu Nagar,
P/s Rajarhat, Kolkatta,
West Bengal-700059.Respondents

Application under Article 226 of the Constitution of India.

Appearance:

Mr. Jorgay Namka, Senior Advocate with Mr. Simeon Subba and Ms. Adeshna Subba, Advocates for the Petitioner.

Ms. Sangita Pradhan, Deputy Solicitor General of India assisted by Ms. Natasha Pradhan, Advocate for Respondent Nos. 1 and 2.

Mr. Bhusan Nepal, Advocate for Respondent No.3.

Date of hearing : 24.02.2023

Date of Judgment : 03.03.2023

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. Ms. Reena Kumari an outsourced Office Assistant (Hindi) engaged by the Regional Ayurveda Research

Institute (respondent no.2) has preferred this writ petition. The first respondent is the Secretary, Ministry of AYUSH Government of India. The M/s Third Eye Security Guarding (P) Limited having its office in Kolkata, West Bengal, who had contracted with the respondent no.2 to deploy manpower to them, is the respondent no.3.

2. The petitioner challenges Office Order dated 30.04.2020 (impugned office order) terminating the engagement of the petitioner issued by respondent no.2 and communication dated 29.05.2020 (impugned communication) issued by respondent no.3 informing the petitioner that her association with the respondent no.3 is temporarily discontinued due to the expiry of the contractual terms between respondent nos.2 and 3. By this impugned communication the petitioner was also informed that her future association with respondent no.3 was subject to finalization of a new valid agreement. The petitioner seeks an alternative prayer of modification of the two communications issued by respondent nos. 2 and 3.

3. According to the petitioner, who holds a degree in Commerce, she went through a process of selection undertaken by respondent no.2 and was appointed as Office Assistant (Hindi). She reported for duty and started working on and from 01.05.2017. She was later handed over a slip issued by respondent no. 3 which was back

dated to 01.05.2017. This document is a posting order dated 01.05.2017 issued by respondent no.3 to the petitioner. It reflects her date of joining as 01.05.2017 and it directs her to report to the Assistant Director In-charge. According to the petitioner it was much later that she learnt she and the majority of her colleagues were outsourced although the post she was working in was a permanent post and that she was also performing work which was permanent in nature. It is her case that during the period when India suffered COVID-19 pandemic the Ministry of Labour & Employment, Government of India issued an advisory dated 20.03.2020 to all Employer's Association. The advisory was to the effect that all Public/Private Establishments may not terminate their employees, particularly casual or contractual workers from job or reduce their wages to mitigate the hardship that may be caused due to the pandemic. It is the case of the petitioner that throughout the pandemic she continued to do her work as an employee of respondent nos.1 and 2. The petitioner's grievance is that in spite of the aforesaid she was terminated vide impugned office order by the respondent no. 2. It is her case that she reported for duty even thereafter but was not allowed to enter her work place on the ground that her contract had ended on 30.04.2020. The petitioner therefore, sent a protest letter dated

07.05.2020 but in spite of its receipt no corrective action was taken. Instead the impugned communication was issued by the respondent no.3. The petitioner thereafter, wrote a letter dated 03.06.2020 to the respondent no.3 with a copy to the respondent nos.1 and 2 which were followed by a legal notice dated 15.06.2020 and when no action was taken by the respondents the present writ petition was preferred before this court.

4. In the counter-affidavit filed by the respondent nos. 1 and 2 it is submitted that they engage staff from outsourcing agency for functional requirement. That the staff continues to work with them as per nomination and their renewal by the service provider. That the petitioner was engaged by the respondent no.3 as their outsourcing agency for posting with respondent no.2 and therefore, she was an employee of respondent no.3. That the contractual service of the petitioner was not renewed by the respondent no.3 and the respondent nos.1 and 2 are not concerned with it. That service contract is renewed every year and the respondent no.3 is appraised of the guidelines of respondent no.1 and the terms and conditions. The respondent nos. 1 and 2 dispute that the petitioner was selected or appointed by them as claimed. To substantiate their claim the respondent nos. 1 and 2 has filed the monthly master sheet of the year 2017 for the month of

May of the respondent no.3 in which the name of the petitioner features. This reflects the petitioner's attendance for the month of May kept by respondent no.3. The next document relied upon is again an invoice raised by the respondent no.3 on the respondent no.2. In the list of service rendered there is a mention of the post of the petitioner. The third document is an office order for the year 2017-18 issued by the respondent no.2 which reflects that sanction was accorded under a particular budget head for payment of the invoice for May, 2017 in favour of the respondent no.3. Yet another document is dated 25.11.2020 which reflects that the respondent no.3 had issued the identity card in favour of the petitioner. According to the respondent nos. 1 and 2 engagement of manpower through the respondent no.3 is on contractual basis under standard terms and conditions as per rules, which is reflected in the communication of the respondent no.2 dated 25.04.2019 to the respondent no.3. According to the petitioner the annexure mentioned in the communication dated 25.04.2019 are the "*Guidelines for Engagement of Office Assistants, Multi Tasking Attendants in the Ministry of AYUSH*" (guidelines) for Engagement of Office Assistant, Multi Tasking Attendants with the respondent no.1. These guidelines form part of the counter-affidavit filed by them. According to the respondent nos. 1

and 2 the service contract of the petitioner was renewed twice for a period of one year each i.e. w.e.f. 01.05.2018 and w.e.f. 01.05.2019.

5. In the counter-affidavit filed by the respondent no.3 it is submitted that they are registered in West Bengal and have a branch office in Gangtok; that the respondent no.2 issued work order for supply of man power to the respondent no.3 vide its letter dated 02.11.2015 (including the post of Hindi Assistant/translator) pursuant to which the respondent no.3 was empanelled by respondent no.2; that the office of the respondent no.2 issued letter dated 15.05.2017 to respondent no.3 to induct the petitioner and another as outsourced employees in the office of the respondent no.2 through respondent no.3 from the month of May 2017; that the respondent no.3 issued posting order dated 01.05.2017 to the petitioner in the office of respondent no.2; that the service of the petitioner was renewed by another year, on year to year basis, as per the requirement of respondent no.2 and her service condition was governed by guidelines issued by respondent no.1; that the office of respondent no.2 verbally instructed the respondent no.3 not to renew the employment of the petitioner and another for any further period as they had completed three years and that they did not require their services anymore; that in such circumstances the

respondent no.3 did not apply for renewal of services of the petitioner which came to an end on the expiry of the contract period. In support of their contention respondent no.3 has filed a communication dated 02.11.2015 addressed to them by the respondent no.2 which reflects that an agreement was to be made between them before assignment of work. The next relevant document is communication dated 15.05.2017 issued by the respondent no.2 to the respondent no.3 requiring a Hindi typist and instructing them that the petitioner may be inducted in the list.

6. The petitioner has also filed a rejoinder contesting the claim of the respondents.

7. Pursuant to the orders passed by this court additional affidavits have been exchanged between the parties. The petitioner filed her identity card issued by the respondent no.2 to the petitioner by way of additional affidavit dated 08.09.2022. In the additional affidavit dated 26.09.2022 filed by the respondent no.3 it is stated that supply of manpower is done as per guidelines issued by the respondent no.1 which is treated as contract between the respondent nos. 2 and 3. In the additional affidavit filed by respondent nos. 1 and 2 dated 29.09.2022 it was stated that the contract between respondent nos. 2 and 3 was executed on 16.11.2015 and thereafter renewed from time

to time. Copy of the contract as well as the renewal letters were also placed for examination by this court. In affidavit dated 01.12.2022 filed by the respondent nos. 1 and 2 it is stated that they are not privy to the terms of the contract of the outsourced employee with their employer and that three years is the length of the service of the petitioner. In the affidavit dated 20.02.2023 filed by the respondent no.3 it is stated that there is no service contract executed between the respondent no.3 and the petitioner.

8. Heard Mr. Jorgay Namka, learned Senior Counsel, for the petitioner, Ms. Sangita Pradhan, learned Deputy Solicitor General of India and Mr. Bhushan Nepal, learned Counsel for the respondent no.3.

9. The following facts culled out from the pleadings as well as documents filed by the parties are relevant for the determination of this case. The respondent no.2 is an institute under the Central Council for Research in Ayurvedic Sciences (CCRAS) which is an autonomous body administratively controlled by the Ministry of AYUSH, Government of India-the respondent no.1. The respondent no.1 had issued the guidelines. The respondent no.2 entered into an agreement with the respondent no.3 from 05.11.2015 and engaged its services to secure management services at the respondent no.2. As per the agreement the respondent no.3 was to deploy

security personnel and other Multi Tasking Staff as per the initial recommendation of the respondent no.2 at the commencement of the contract which was to be revised from time to time. Amongst the various categories of staff required by the respondent no.2, Office Assistant was also sought for. The contract provided for billing by the respondent no.3 and payment by the respondent no.2 to ensure timely payments of salary to the respondent no.3's staff engaged at the respondent no.2. The contract also provided that the respondent no.2 shall not offer any employment to any of the employees for a period of at least one year, after the termination of the contract. It further provided that if the respondent no.3's employees were directly enrolled within the specified period the respondent no.2 was to be liable to pay the respondent no.3 an amount equivalent to one year gross salary of that individual. In case of termination of the contract, the respondent no.3 was to remove its staff from the respondent no.2 on receipt of their full and final dues. This contract between the respondent nos.2 and 3 seem to have been renewed from time to time. On 15.05.2017 the respondent no.2 wrote to the respondent no.3 stating that they require one Hindi typist and one Data Entry Operator for which the petitioner and one Tengzing Dorje Dechen may be respectively inducted in their list. The letter also specified that their

emoluments may be reflected at Rs.16000/- per month from the month of May, 2017. The respondent no.2 requested the respondent no.3 to include their names in the list of outsourcing employees through respondent no.3. Pursuant to the request of the respondent no.2 the respondent no.3 issued a posting order dated 01.05.2017 to the petitioner, directed her to join on 01.05.2017. It transpires that during this period both the respondent no.2 as well as respondent no.3 issued identity cards to the petitioner reflecting her as their employee. On 31.03.2018 the respondent no.3 wrote to the respondent no.2 referring to their request letter for renewal of the petitioner's contract and stating that its terms were going to expire on 30.04.2018 and should be renewed for a period of one year w.e.f. 01.05.2018. On 16.04.2019, once again, the respondent no.3 responded to the request letter of the respondent no.2 for renewal of contract of the petitioner which was to expire on 30.04.2019 for a further period of one year w.e.f. 01.05.2019. Significantly, these two correspondences for renewal of the petitioner's contract do not reflect that it was communicated to the petitioner. On 30.04.2020 the respondent no.2 vide impugned Office Order addressed to the respondent no.3, with copy to the petitioner, notified that:-

'As per the condition of the council to provide services to the contract workers, Mr. Tengzing Dorje, Office Assistant and Ms. Reena Kumari, Office Assistant (Hindi) who were serving in this institute, have completed three years. And the contract, will be deemed to have ended on 30.04.2020 P.M..

Therefore, you are requested to handover all the materials, etc. in your charge after completing all your task, to the lower division clerk, Ms. Arpana Mothey in the office. In case of any type of irregularity or violation of the contract rules, action will be taken as per rules.'

10. The language in the impugned Office Order was clarified by the respondent nos. 1 and 2 by its affidavit dated 01.12.2022. According to them it was issued to the respondent no.3 marking a copy to the petitioner with the direction to hand over their belongings which were being used by her. It was further clarified that the impugned Office Order was neither issued on the basis of a fixed period of time of engagement nor in reference to completion of three years of contract service. This was contrary to their earlier affidavit. It was stated that the impugned Office Order is in accordance with the guidelines. On 07.05.2020 the petitioner wrote to the Director General of CCRAS complaining about her illegal termination in the middle of COVID-19 pandemic, marking a copy to the respondent no.2 as well. On 29.05.2020 the respondent no.3 intimated the petitioner that her association with the respondent no.3 was *'temporarily discontinued due to the expiry of contractual terms'* between the respondent nos. 2 and 3 w.e.f. 30.04.2020 and that her future association with

respondent no.3 was subject to entering another agreement. On 03.06.2020 the petitioner wrote to the respondent no.3 complaining about her termination. On 15.06.2020 the petitioner issued a legal notice to the respondent no.1 as well as the Director General, CCRAS for reinstatement of service.

11. On a perusal of the affidavits and documents filed before this court it is clear that the petitioner was engaged through an outsourced agency i.e. the respondent no.3 by the respondent no.2 at the instance of respondent no.2. Admittedly, the petitioner worked and provided service to the respondent no.2 during this period of three years before her engagement was terminated by the respondent no.2. Admittedly again, although the respondent no.3 as well as the respondent no.2 claimed that the petitioner's employment was contractual no effort was made during the entire period, by the respondents, to provide a written contract to the petitioner. In fact the record placed makes it clear that the petitioner was kept in the dark about the nature of her employment. Both the respondent nos.2 and 3 referred to the guidelines issued by the respondent no.1 for such employment. A look into this guideline would be necessary. The guidelines provide that the respondent no.1 could engage supporting man power at various levels to assist in the disposal of work and the engagement would

not to be an appointment or job in the Government of India. Further, the engagement of such manpower would be regulated as per the guidelines. According to clause 4.2 of the guidelines the engagement would be through outsourcing agency and would not confer any right for regular appointment in the ministry/organization. Clause 4.3 of the guidelines specifies that the engagement initially would be for a maximum period of one year and the contract may be renewed on year to year basis subject to functional requirements and also subject to performance appraisal. According to clause 11 of the guidelines the respondent no.1 could terminate the service of the staff on various events enumerated therein. Clause 13(ii) of the guidelines reflects that the Outsourcing Agency was required to issue appointment letter at the time of initial appointment as well as letter for renewal of contract to the outsourced employees on renewal.

12. A perusal of the posting order dated 01.05.2017 issued by the respondent no.3 does not reflect that the petitioner was made aware of the guidelines. It does not reflect that any contract was signed with the petitioner although the guidelines suggest that there ought to be one. The records filed by the respondent nos.1 and 2 also do not reflect that they demanded any written contract before the

petitioner was engaged as outsourced staff provided by respondent no.3 to the respondent no.2.

13. From the pleadings as well as the documents on record it is evident that the contract for outsourcing the staff between the respondent nos. 2 and 3 was to be pursuant to the guidelines issued by respondent no.1. It is also clear that the respondent no.3 did not issue any appointment letter specifying the terms and conditions of contract to the petitioner. The record reveals that even the renewal of the petitioner's contract was communicated between the respondent nos. 2 and 3 only, without any information to the petitioner. The record reveals that the petitioner was put in the respondent no.3's list of outsourced employees on the direction of the respondent no.2. The record further reveals that the petitioner was engaged for a further period i.e. 2018-2019 and 2019-2020 by the respondent no.3 on the direction of the respondent no.2. It also suggest that the respondent nos. 1 and 2 did enjoy the power of termination of the outsourced employees under the guidelines even though they were to be issued appointment letters by the respondent no.3. Evidently, the recommendation to employ the petitioner, her salary structure, the renewal of her engagement from time to time, her leave as well as her termination was at the instance of the respondent no.2 and under their direct control. Save

payment of the petitioner's salary through the respondent no.3 from the funds of the respondent no.2, the respondent no.2 enjoyed total control on the engagement of the petitioner.

14. An outsourced employee is normally an individual who is employed by a third party and assigned to work on behalf of another organization. The relationship between the outsourced employee and the company that engages them can however, vary depending on the terms of contract. Generally the outsourced employee is an employee of the third party who is responsible for their salary, benefits and other employment related matters. This is however, dependent on the terms of contract. The terms of contract between the respondent nos. 2 and 3 allowed the respondent no.2 to have direct control over the outsourced employees regarding *inter-alia* her appointment, her work as well as salary, leave and termination. Ideally the respondent no.3 ought to have entered into a written contract with the petitioner as per the guidelines. The respondent no.2 was required to ensure that the respondent no.3 follow these guidelines and further ensure that the petitioner was made aware of the terms and conditions of her contract as an outsourced employee. However, in the facts of the present case the respondent no. 2 after having entered upon the contract with the

respondent no.3 did little nothing except enjoy the benefit of the petitioner's services even during the COVID-19 pandemic and thereafter abruptly terminated her engagement in the middle of the pandemic without following the advice issued by the Ministry of Labour & Employment, Government of India. The facts before the High Court of Punjab & Haryana at Chandigarh in ***Mukesh Kumari & Ors. vs. State of Haryana & Ors.***¹ was completely different than the present one. In that case the petitioner had sought quashing of an order of the respondent no.2 therein to the respondent no.3 stating that there is no requirement of the staff posted by the respondent no.3. The petitioner's argument was that juniors to them have been retained whereas the petitioner's have been sent back to the respondent no.3. The petitioners therein had conceded that they are the employees of the respondent no.3 who had been posted with respondent no.2 keeping in view the contract which the respondent no.2 had with respondent no.3 for providing manpower. The question that was determined was whether a writ petition is maintainable against a private outsourcing agency.

15. A writ may not lie against a private party who is acting only as an outsourced agency. However, the petitioner was

¹ MANU/PH/0264/2021

engaged at the instance of the respondent no.2. The respondent no.2 availed her services for three years without the petitioner being informed, either by the respondent no.2 or the respondent no.3, the terms of her engagement before her services was abruptly terminated by the respondent no.2. The respondent no.2 is definitely amenable to the writ jurisdiction of this court.

16. Keeping all the aforesaid facts in mind this court is of the firm view that the action of the respondent no. 2 is arbitrary, unfair and illegal. There is also a failure on the part of the respondent no.3 to follow the guidelines which they were aware of. The inactions and failures of the respondent nos. 2 and 3 have resulted in complete injustice to the petitioner. Even an outsourced employee is entitled to certain safeguards. The respondent nos.1 and 2 are fully within their rights to engage supporting manpower at various levels to assist in the disposal of work in the ministry through outsourcing agency and such engagement need not be considered as an appointment or job in the Government of India. However, being a State they have a corresponding duty to ensure that the contractual rights of such outsourced staff engaged by them for their purposes is protected. Usually, the writ court is hesitant to interfere in contractual matters. However, this is a case in which, if we hesitate to interfere in spite of such inactions of the

respondents it would lead to perpetuating a series of their wrongs at the cost of the petitioner.

17. The impugned Office Order No.03 2020-21 dated 30.04.2020 issued by the respondent no.2 and impugned communication dated 29.05.2020 issued by respondent no.3 are set-aside.

18. The respondent nos. 1 and 2 are directed to take back the petitioner in her engagement by ensuring that a written contract is entered making its terms absolutely clear to her. Keeping in mind that there is no ceiling on the duration and that the respondent nos. 1 and 2 may renew the outsourced staff's engagement, year to year, as per the guidelines, in the facts of the present case it would be appropriate if the respondent no.2 is directed to engage the petitioner for at least a period of one year from the date of this judgment to mitigate the injustice perpetrated on her. It is accordingly so ordered.

19. The writ petition is allowed to the above extent and disposed of.

(Bhaskar Raj Pradhan)
Judge

Approved for reporting : **Yes**
Internet : **Yes**

to/