
(2022) 03 MP CK 0103
In the Madhya Pradesh High Court
Case No : Writ Petition No. 2350 Of 2022

Abhishek Raghuwanshi & Ors

APPELLANT

Vs

State Of M.P. & Ors

RESPONDENT

Date of Decision : 30-03-2022

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2022) 03 MP CK 0103

Hon'ble Judges : Anand Pathak, J

Bench : Single Bench

Advocate : Suresh Pal Singh Gurjar, Devendra Chaubey

Final Decision : Dismissed

Judgement

Anand Pathak, J

1. By filing this petition under Article 226 of the Constitution of India, the challenge has been made to the order dated 10.12.2021 & 28.12.2021 (Annexure P-1 and P/2 respectively) passed by the respondent No.2; whereby it has been decided to outsource the services through the Outsourcing Agency and has also directed to conduct the fresh selection for appointment on the post of Assistant Grade- III/Data Entry Operator by conducting an open written examination.

2. The brief facts leading to filing of this case are that the respondent no.2 issued directions dated 25.1.2018 by which the procedure for appointment of Assistant Grade-III/Data Entry Operator through the outsourcing agency is envisaged. The petitioners were initially appointed as Assistant Grade-III/Data Entry Operator in their respective schools after appointment on contractual basis through the Outsourcing Agency namely; MPCON Ltd. The petitioners were performing their duties honestly and sincerely and their services were extended from time to time. To the utter surprise of the petitioners, the respondent No.2 issued the impugned order dated 10.12.2021; whereby, the respondent No.3 has been

authorized to outsource the services by conducting fresh selection for appointment of Assistant Grade-III/Data Entry Operator.

3. The learned counsel for petitioners while relying on the judgment delivered by Division Bench of this Court in Writ Appeal No.418/2017 (State of M.P. Vs. Puneet Mohan Khare) contends that in similar set of facts, the Division Bench has held that contractual employees cannot be substituted by another set of contractual employees by State Govt.

4. According to learned counsel for the petitioners they cannot be replaced by another set of employees.

5. On the other hand, learned counsel for the State opposed the prayer and submitted that petitioners herein were never appointed by conducting a regular selection by the State Government. From the beginning itself, they were appointed through outsourcing agency namely MPCON Limited. It is for the Govt. to change the mode of appointment by outsourcing the services as per requirement on contract basis. Aforesaid decision for outsourcing has been taken in the wider interest of economy and efficiency, therefore, this petition is filed merely on the basis of apprehension. Decision relied upon by the learned counsel for the petitioners in the case of State of M.P. Vs. Puneet Mohan Khare, 2018 SCC online MP 78 is not applicable in the facts and circumstances of the instant case as in the said case, petitioners were employed by the State Govt. on different posts such as Managers, Office Assistant-cum- Accountants etc. for the purpose of establishing Kaushal Vikas Kendra in the State in furtherance of the resolution of the Legislative Assembly No.50 for upliftment of vocational education, I.T.I. Institutes or to restructure and upgrade them.

6. According to Govt. Counsel, posts were filled up on contractual basis. Subsequently, when the contract period came to an end, decision was taken to outsource services. In the present case, petitioners were never appointed by the State Govt. or by any of its agencies. He prayed for dismissal of the petition.

7. Heard the learned counsel for parties.

8. On perusal of the record, it can be seen that the petitioners have not filed any appointment order issued by the State Government or its agency appointing them on various posts. Admittedly, they have been appointed through the Outsourcing Agency namely; MPCON Ltd. The salary of the petitioners is also not being paid through the State exchequer but the same is paid through the Contractor, who entered into contract with the State Govt.

9. From the submissions, pleadings and documents submitted and referred, it appears that petitioners are not contractual employees of principal employer (State Govt. herein) because principal employer does not pay the salary, it is being paid by the contractor and it is not the principal employer who controls and supervise the working of employees. In fact, the contractor controls and supervise the working of petitioners.

10. Apex Court in the case of International Airport Authority of India Vs. International Air Cargo Workers' Union and Anr., (2009) 13 SCC 374 has considered this aspect and given guidance as under:-

"20.....For example, if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employer of the principal employer, if the salary is paid by contractor, if the right to regulate employment is with the contractor, and the ultimate supervision and control lies with the contractor. The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise. In short worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor."

11. Later on in the case of General Manager, (OSD), Bengal, Nagpur Cotton Mills Rajnandgaon Vs. Bharat Lal and Ors., (2011) 1 SCC 635, Apex Court clarified the position further by following observation:-

"8. In this case, the Industrial adjudicator has granted relief to the first Respondent in view of its finding that he should be deemed to be a direct employee of the appellant. The question for consideration is whether the said finding was justified. It is now well-settled that if the industrial adjudicator finds that contract between the principal employer and contractor to be sham, nominal or merely a camouflage to deny employment benefits to the employee and that there was in fact a direct employment, it can grant relief to the employee by holding that the workman is the direct employee of the principal employer. Two of the well-recognized tests to find out whether the contract labour are the direct employees of the principal employer are (i) whether the principal employer pays the salary instead of the contractor; and (ii) whether the principal employer controls and supervises the work of the employee. In this case, the Industrial Court answered both questions in the affirmative and as a consequence held that first Respondent is a direct employee of the appellant."

12. If two well recognized tests as referred by the Apex Court are applied in the present set of facts, then it is established that neither the State Government is principal employer which pays the salary to the employees nor the principal employer controls and supervise the working of employee. It is the discretion of contractor (MPCON Ltd.) to place an employee over a certain assignment or to refer him to any other responsibility.

13. Therefore, judgment relied upon by the petitioners in the case of State of

M.P. Vs. Puneet Mohan Khare, 2018 SCC online MP 78 is not applicable in the present set of facts. It was the case in which those writ petitioners were appointed on contract basis on different posts viz. Managers, Office Assistant-cum- Accountants etc. for the purpose of establishing Kaushal Vikas Kendra in the State in furtherance of the resolution of the Legislative Assembly No.50 for upliftment of vocational education, I.T.I. Institutes or to restructure and upgrade them. Initially, the posts in such Skill Development Centre were filled up on contract basis, but subsequently, when the contract period came to an end, then it was decided not to extend the contract period but to invite fresh applications to man these centres.

14. Against such action, those petitions were filed and matter went into writ appeal; wherein, learned Division Bench observed that contractual employee has no right to continue on the post after expiry of the contract period but it is also equally well settled that a contractual employee cannot be substituted by another set of contractual employees. Here the appointment is not made by the State, but by the Contractor.

15. Earlier Division Bench of this Court, at Gwalior in the matter of National Health Mission vs. Ramendra Singh Narwariya & Anr., 2021 (3) MPLJ 465, decided in somewhat in similar manner, held that such contractual employees appointed by contractor are not having employer-employee relationship with State Government and it is service provider's responsibility (contractor herein) to comply the terms and condition of contract between contractor and its employees. Recently, in the case of Sandeep Kumar Pathak & Ors. Vs. State of Madhya Pradesh & Ors., (W.P. No. 28416/2021 decided on 24/2/2022), coordinate Bench of this Court considering the identical factual controversy in detail and considering the judgment passed by Division Bench of this Court in the case of Laxmi Prasad Dubey & Ors. Vs. Union of India & Ors., (W.P.No. 22083/2012 decided on 11/2/2013), dismissed the petition. In the said case, petitioners were also appointed through outsourcing agency and challenged the fresh selection for appointment on the post of Assistant Grade III / Data Entry Operator by conducting an open written examination. This Court also intends to tread on the same path.

16. One more aspect deserves consideration is the legal position that in absence of any employer-employee relationship, service related complications in future may come and if the analogy of petitioners is accepted then it may go contrary to the direction of Apex Court in future because Apex Court in the case of State of Karnataka and Ors. Vs. Uma Devi, (2006) 4 SCC 1 deprecated the practice wherein illegal/irregular appointments are being undertaken by the State Govt. because if the analogy of petitioners is accepted then employees may claim entitlement for absorption, regularization, classification etc. over the posts in future, which are neither raised by the State Govt. in its establishment nor employees entered into it through a proper selection process as approved by law, thus, fall under the back door entry. Therefore, to avoid future complications, it

is imperative that factual position be put into right perspective. On this count also, claim of petitioners pales into oblivion.

17. In cumulative analysis, no case for interference is made out. Petition sans merits. Admission declined. Dismissed accordingly.

Respondent/MPCON Ltd. may proceed in accordance with law.