

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Adnan-ul-Karim Memon

C.P. No. D- 5649 of 2018

Rao Muhammad Gulzar & others,

Petitioners through:

Malik Naeem Iqbal, advocate a/w M/s.
Faizan Memon, Muhammad Nasir and
Muhammad Saleem Khaskheli, advocates.

Respondent No.1

Through:

Mr. Muhammad Nishat Warsi, DAG.

Respondents No.2&3

Through:

Mr. Asim Iqbal, advocate.

Date of hearing:

23.09.2019

Date of judgment:

30.09.2019

J U D G M E N T

ADNAN-UL-KARIM MEMON, J: - Primarily the petitioners through this petition have sought direction to the Respondent-Sui Southern Gas Company Limited [SSGC] to treat them at par with similarly placed contract employees and consider them for absorption.

2. Facts of the case, as per pleadings of the parties are that the Petitioners are working for the Sui Southern Gas Company Limited against different posts, some of them since 1995 and onwards. Per the Petitioners, they were initially appointed on Daily Wages and subsequently their status was changed to Human Resource Contract/Casual Workers and since then they have been continuously working without any interruption and/or break. The Petitioners have claimed that after conversion of their status, the SSGC created a pretense that they (the petitioners) are out-sourced personnel of third-party contractors and for these reasons their requests for permanent appointment/absorption/regularization have been ignored. On the contrary, similarly placed employees working on Human Resource Contract were regularized /absorbed and for the purposes of enforcement of their fundamental right to life particularly Articles 9 and 25 of the Constitution, they have approached this court on 02.08.2018, for redress of their grievances.

3. Malik Naeem Iqbal, learned Counsel for the petitioners, argued that failure of Respondents No.2 and 3 in treating the Petitioners at par with similarly placed employees in SSGC, who have been absorbed is not a just and lawful action; but, discriminatory and in violation of fundamentals rights and principles of policy so also Article 25 of the Constitution. Learned Counsel for the Petitioner next averred that the Petitioners have been rendering service with the Respondents since 1995 and onwards, hence are entitled to be absorbed; that the status of the petitioners as employees of Respondent-company into third-party contractors ought not to have been changed; learned Counsel referred to the comments of the Respondent-company and argued that the regularization of the employees is not a part of the terms and conditions of service of the employees for which there need to be some statutory rules but it depends upon the length of service and in terms of equity that a person who has given his prime life and youth to a department is always kept in dark and his services were taken in a very explorative manner. So it is on the principle of the above that they have approached this Court for regularization of their service, therefore, the objection about the maintainability of the instant petition has no force; that the question that the petitioners are not the employees of the Respondent-company but the third party contractors, it is a normal practice on behalf of the Respondent-company to create such a pretense to outsource the aforesaid posts which are of permanent nature and it is a matter of the record that some of the petitioners have been in service starting from as far back as 1995; that this all seems to be a sham or pretense and therefore, it being not a case of any disputed fact and no evidence is required to be recorded as agitated in the comments or statement.

4. Conversely, Mr. Asim Iqbal, learned counsel for Respondent No.2, argued that Respondent-SSGC is a Public Limited Company, incorporated under the Companies Act, 1913 (now the Companies Ordinance, 2017) and is engaged in the business of transmission and distribution of natural gas in the Province of Sindh and Baluchistan and its affairs are managed by a Board of

Directors for policy guidelines and overall control under the provisions of Companies Ordinance and has its own Memorandum and Articles of Association. He next contended that Respondent-Company does not perform functions connected with the affairs of the Federation, Province and Local Authority. According to him, the disputed facts involved in the instant Petition require recording of evidence and cannot be settled through a Constitutional Petition. He added that SSGCL Service Rules are not statutory, as such, the relationship between “SSGCL” and the Petitioners is that of “Master and Servant”; that Petitioners have no right to agitate their service grievances before this Court under Article 199 of the Constitution of Pakistan, 1973, hence, the petition is not maintainable; that the contractual obligations cannot be enforced through constitutional petition; that there is/was no relationships between the Petitioners and Respondent-company; that the management of the Respondent-Company has nothing to do with the terms and conditions of the petitioners, who are basically employees of third party contractor, thus they cannot ask for regularization of their service in the company; that the documents attached with the petition are forged and manipulated, thus cannot be relied upon; that the reasons for tampering these documents are to achieve illegal gains/benefits, as such, the petitioners are not entitled to relief claimed until and unless they/the petitioners do not appear in the witness box and prove their contention, including the documents attached to the petition; that SSGC has outsourced its various non-operational services and the petitioners’ services fall under the third-party service agreement for which SSGC pays remuneration to the respective service providers. The learned Counsel heavily relied upon an unreported order dated 20.06.2018 passed in Civil Petition No.425-L of 2014 by the Hon’ble Supreme Court of Pakistan and argued that the Hon’ble Supreme Court has specifically laid down that this Court is not competent to decide the question of regularization of third party contractors employees in its extraordinary Constitutional jurisdiction. He further argued that the contractor was not only the person who had employed the petitioners who

had the power of hiring and firing the employees, assigning works to be taken from them etc. are employees of the contractor; that the question of relationship between the owners of company and the persons employed by its contractors, had already been decided by the learned Five Member Bench of the Honorable Supreme Court in the case of Mian Munir Ahmad v. The State (1985 SCMR 257), therefore, the claim made by the petitioners is not tenable in law. He lastly prayed for dismissal of the instant petition with cost.

5. The learned Deputy Attorney General, representing Respondent No.1, adopted the arguments of the learned Counsel for the Respondent-SSGC.

6. We have heard the learned Counsel for the parties at length and have perused the material available on record.

7. Firstly, the issue of maintainability is to be resolved, in our view this petition is maintainable and can be heard and decided on merits on the ratio of recent judgment passed by the Honorable Supreme Court in the case of Messrs.' State Oil Company Limited vs. Bakht Siddiq and others (2018 SCMR 1181).

8. Having decided the aforesaid proposition, the main crux of the arguments of the learned Counsel for the Respondent-company is that the petitioners are not its employees but are of the employees of 3rd Party Contractor and disputed the documents attached with the memo of petition.

9. As regards the question that the petitioners are/were not the employees of the Respondent-company, but of the contractor, suffice it to say that it is a normal practice on behalf of such companies to create a pretense and on that pretense to outsource the employment against permanent posts and it is on the record that the petitioners have been in service starting from as far back as 1995. This all seems to be sham pretense and therefore it is not a case of any disputed fact and no evidence is required to record finding on the issue. Moreover, we have seen from the para-wise comments filed on behalf of respondent-SSGC and the documents attached therewith, which shows that the petitioners are employees of the 3rd Party Contractor and are being paid their salaries from the account of Respondent-

Company. The Honorable Supreme Court in the case of FAUJI FERTILIZER COMPANY LTD. through Factory Manager Versus NATIONAL INDUSTRIAL RELATIONS COMMISSION through Chairman and others (2013 SCMR 1253) has considered the case of Mian Munir Ahmad supra and held that normally, the relationship of employer and employee does not exist between a company and the workers employed by the Contractor; however, in the case where an employer retains or assumes control over the means and method by which the work of a Contractor is to be done, it may be said that the relationship of employer and employee exists between him and the employees of the contractor. Further, an employee who is involved in the running of the affairs of the company; under the direct supervision and control of the company; working within the premises of the company, involved directly or indirectly in the manufacturing process, shall be deemed to be employees of the company'. In the instant case, the employees of the contractor were involved in running the affairs of the Respondent-company such as driver, helper office assistant etc.; therefore, for all intents and purposes, they are employees of the company through the contractor and the aforesaid judgment of the honourable supreme court fully applies to the case in hand

10. Keeping in view the rule of parity and equity, all the petitioners even if considered to be the employees of the contractor, which is not correct position, they having been performing duties of permanent nature ought to have been regularized on the basis of strength of their respective service. similar issue came under consideration before the Honorable Supreme Court in Civil Appeal No.1549/2014 vide order dated 24.5.2019 has observed that 'the above arrangement, in the facts and circumstances of the case, is merely a vehicle of oppression and exploitation of the poor helpless employees, who on account of widespread unemployment, economic and social disparities and for their bare survival, are compelled to accept the job offered to them suiting the organization'.

11. We have noticed that the review was sought in the aforesaid order and the Hon'ble Supreme Court in Civil Review Petition No.276 of 2016 in Civil

Petition No.1549 of 2014 vide order dated 23.01.2017 dismissed the petition as being frivolous and directed the Petitioner-Bank to deposit a cost of Rs.15000/- within a period of 15 days. We have noticed that the Honorable Supreme Court vide order dated 29.10.2018 in Civil Petitions No.4609 to 4614 of 2017 has already settled the issue of outsourced employees. The similar view was also taken into the consideration by the Honorable Supreme Court in the case of M/s. State Oil Company Limited vs. Bakht Siddiq and others (2018 SCMR 1181); therefore the stance of the Respondent-company cannot be taken into consideration in the light of findings of the Honorable Supreme Court in the aforesaid judgments.

12. On the issue of parity, we are of the considered view that Petitioners are entitled to similar treatment as given to their similarly placed colleagues for their regularization and absorption and the Respondent-Company cannot act in whimsical and arbitrary manner and make fresh appointments against the posts already held by the Petitioners even through third party contractors. As per record nothing adverse against them in terms of qualifications, character and performance in their respective fields was observed by the Competent Authority of the Respondent-Company through their contractors, during their entire period of service.

13. Looking at the issues of employment through third-party contractors and regularization in service that has already been resolved by the learned Three Members Bench of the Hon'ble Supreme Court in its various pronouncements, therefore, no further elaboration is required on our part.

14. The Government of Pakistan, Cabinet Secretariat/Establishment Division vide Office Memorandum dated 11th May, 2017 issued in pursuance of the decision of the Cabinet Sub-Committee for Regularization of Service directed Ministries/ Divisions / Sub-ordinate Offices / Autonomous / Semi-Autonomous Bodies / Corporations / Companies / Authorities, to regularize contract employees, who have rendered a minimum of one year of continuous service as on 01.01.2017.

15. We are of the view that the Petitioners are entitled to the benefit allowed vide the aforesaid Office Memorandum, because they are in continuous service in the Respondent-Company for long time and are paid salary as well.

16. On the issue of regularization in service, the case of the Petitioners is fully covered by the Judgments rendered by the Honorable Supreme Court in the cases of Pir Imran Sajid and others Vs. Managing Director/General Manager (Manager Finance), Telephone Industries of Pakistan and others (2015 SCMR 1257), Government of Khyber Pakhtunkhwa and others vs. Adnanullah and others (2016 SCMR 1375), Board of Intermediate and Secondary Education, D.G. Khan and another Versus Muhammad Altaf and other (2018 S C M R 325), Abdul Ghafoor and others versus the President National Bank of Pakistan and others (2018 SCMR 157) and Board of Intermediate and Secondary Education, Multan through Chairman and another Versus Muhammad Sajid and others (2019 SCMR 233).

17. On the similar issue between the parties, this Court vide common judgment dated 19.1.2018 passed in Constitutional Petitions No.D-3759 & 4422 of 2017 disposed of the same directing the respondent-Company to consider the cases of Petitioners for regularization of their service in accordance with law. The aforesaid judgment was assailed before the Hon'ble Supreme Court in Civil Petitions No.67-K and 68-K of 2018. The learned Two Member Bench of the Hon'ble Supreme Court vide order dated 12.3.2018 observed as under:-

“2. Learned ASC for the petitioner contends that in number of judgments, this Court has held that contractual employees have no right to be regularized in the service unless and until there is a law provided to that effect. Per counsel the contract employees have to serve till the pleasure of their master and in case of any wrongful termination they cannot seek their reinstatement but at the best have the right to seek compensation for their wrongful termination in accordance with law. It was, therefore, contended that directing the petitioner to consider the regularization of the contract employees through the impugned judgment is not in consonance with law laid down by this Court.

3. However, the learned ASC has frankly conceded that the petitioner has framed a policy for regularizing the service of the contract employees and almost all such employees who have cleared the prescribed test were regularized. The respondents however, could not clear the test prescribed for the regularization, therefore, they were denied regularization. In the circumstances, when the petitioner-Company has itself framed a Policy to regularize the services of the contract employees, the only question which needs to be seen is as to whether the respondents have been treated alike.

4. Mr. Azim Iqbal, ASC while referring to the Uniform Recruitment and Promotion Policy submitted that only those contract employees who could obtain 60% marks in the prescribed test were regularized and since the respondents could not achieve the targeted percentile, therefore, their services were not regularized. It was submitted that policy prescribed for regularization comprised of 35% PMS rating 35% aptitude test 20% interview evaluation and 10% service tenure and a successful candidate had to obtain 60% marks. Counsel further referred to the Summary of NTS results showing that none of the respondents have attained 60 marks. However, perusal of NTS result sheet reflects that except Muhammad Sumair Gul Ansari, all the respondents had achieved more than 35% marks in the aptitude test conducted by NTS. So far as PMS rating, interview evaluation, service tenure respectively having 35, 20 and 10 marks, nothing has been placed before us to show that the respondents could not achieve the targeted percentile.

5. In the circumstances, no case for interference is made out. These petitions, as a consequence, are dismissed and leave declined.”

18. On the issue of employment by third party, recently the Hon’ble Supreme Court vide order dated 20.6.2018 in Civil Petition No.425-L of 2014 set aside the judgment dated 23.1.2014 passed by the learned Division bench of the Lahore High Court and held as under:-

“In the present case, there is a dispute that the Respondent is not an employee of the petitioner-Bank. The Bank has categorically and unequivocally denied any such relationship at all stages of the litigation. In the circumstances, this disputed question of fact going to the root of the matter was not open to determination by either of the learned High Court. In any event, writ was not a competent remedy when it involved a disputed question of fact which needed to be resolved through recording evidence. Accordingly, without causing any prejudice to the case of the Respondent on facts we hold that the writ petition was not competent in the facts and circumstances of the case. Therefore, the finding of reinstatement and regularization in service given in favour of the Respondent by the High Court was unfounded. The Respondent may however approach a Court of plenary jurisdiction for pursuing his grievance against the petitioner-Bank is so inclined.”

19. Prima-facie, the judgment passed by the learned three Members Bench of the Honourable Supreme Court in the case of Messrs.’ State Oil Company Limited vs. Bakht Siddique and others (2018 SCMR 1181) was not cited to assist the Honourable Supreme Court in the aforesaid matter.

20. In the present case also, the Respondent-Company cannot be allowed to continue in its similar practice and planning to exploit its workers and to defeat the spirit and purpose of the judgments of the Honorable Supreme Court as discussed supra, by describing the employment of the petitioners as employees of third party contractor, who basically have been performing their duties with third-party contractors, specially for Respondent-company and are being paid by the Respondent-Company. This pretense is just to avoid regularization of their service. We do not appreciate this practice, which

amounts to circumvent the law and the judgments of the Honorable Supreme Court.

21. In our view, Petitioners served the Respondent-Company for considerable period of time through the third party contractors as per details given by the Respondent-company in their para-wise comments at Annexure-`R3`. The said period of service is more than sufficient to acquire expertise in respective fields. Therefore, considering others while ignoring the Petitioners, who are basically paid by the Respondent-company through 3rd Party Contractor vide letters dated 02nd July, 2018, 03rd July, 2018, 10th July, 2018 and 11th July, 2018 (Annexure-`R-3`) is unjustified and against the principles of natural justice and equity.

22. In the light of facts and circumstances of the case discussed above and decisions rendered by the Honorable Supreme Court in the aforesaid cases, the instant Petition is hereby disposed of with direction to the Managing Director/Competent Authority of Respondent-Company to consider case of the Petitioners for regularization of their service, more particularly in the same analogy as decided by the Hon'ble Supreme Court of Pakistan in the case of Messrs State Oil Company Limited vs. Bakht Siddique and others (2018 SCMR 1181). The aforesaid exercise shall be undertaken within a period of two months from the date of receipt of this judgment and compliance report be submitted through MIT-II of this Court.

JUDGE

JUDGE

Nadir