

IN THE HIGH COURT OF SINDH AT KARACHI

Before:

Mr. Justice Salahuddin Panhwar

Mr. Justice Adnan-ul-Karim Memon

Constitutional Petition No. D– 6261 of 2020

M/s. Sui Southern Gas Company Limited

Versus

The Registrar of Trade Unions and 07 others

Date of hearing : 12.08.2021

Date of announcement : 16.08.2021

M/s. Asim Iqbal and Farmanullah Khan, advocates for the petitioner.

Mr. Ahmed Ali Ghumro, advocate for respondents No.3 Union.

Syed Shoa-un-Nabi, advocate for respondent No.4 Union.

Mr. Muhammad Nishat Warsi, Deputy Attorney General for Pakistan alongwith

Mr. Azhar Rafiq Sanjrani, Deputy Registrar, National Industrial Commission, Karachi Branch.

JUDGMENT

ADNAN-UL-KARIM MEMON, J. – In principle, through the instant petition, the Petitioner- M/s. Sui Southern Gas Company Limited ("SSGC"), has sought enforcement of the guidelines provided by the Honourable Supreme Court of Pakistan in its order dated 11.03.2020 passed in Civil Petition for Leave to Appeal No.4450/2019 (M/s Sui Southern Gas Company Ltd. Karachi v. The Registrar Trade Unions, C/o National Industrial Relations Commission, Islamabad, and others), to the Registrar, National Industrial Relations Commission (NIRC), for conducting the referendum with respect of determination of Collective Bargaining Agent (CBA) for the workmen employed in Petitioner-SSGC as provided under the Industrial Relations Act, 2012.

2. Basic grievance of the petitioner-SSGC is that in October 2020, a meeting of all contesting unions including the management of the petitioner-company was convened by the Deputy Registrar NIRC in connection with the referendum for determination of CBA in petitioner-SSGC. Petitioner's case is that the Deputy Registrar handed over the list of 7359 voters to all union representatives including the petitioner-SSGC, for the aforesaid purpose, which was strongly objected by the petitioner's management on the premise that they had already submitted a list of 40135 workmen working in petitioner-company as stood on 18.9.2020 along with a copy of the order dated 11.03.2020 passed by the Hon'ble Supreme Court as discussed supra. However, the same was not considered by the Deputy Registrar, NIRC; and, initiated the referendum

proceedings, in complete disregard to the rights of the petitioner-company, compelling them to approach this Court for direction to the respondent-Registrar of Trade Unions to remove the names of the persons, who have no ticket number, name of department, designation; and those strangers, who have nothing to do with the petitioner-company; and, conduct the referendum based on a list provided by the petitioner-company, strictly following the order dated 11.3.2020 passed by the Hon'ble Supreme Court in the aforesaid Petition.

3. At this stage, we reminded the learned Counsel for the petitioner-company that the present proceedings have been initiated under Article 199 of the Constitution and not under Article 187(2) of the Constitution, and the powers of this court are limited to the extent of enforcement of the Judgment of the Hon'ble Supreme Court only, whereas the Honorable Supreme Court vide order dated 07.01.2020 passed in Constitution Petition No.449/2019 has already dealt with the subject issue, presently involved in the matter at hand; and, there is no need to make further deliberation on the subject issue. Besides above, by consent of the parties, elections were held by the direction of this Court vide order dated 11.12.2020; and after its outcome, if any party is aggrieved by the said result, they may avail their remedy as provided under the law. An excerpt of the order dated 11.12.2020 is reproduced as under:

“M/S Mansoor Akhtar and Zahid Hussain Rajper advocates file power as well as comments on behalf of respondents 3 and 5, which are taken on record.

Azhar Rafiq Sanjirani, Deputy Registrar/Election Commissioner, NIRC, is present on behalf of respondent No.1. He states he is the Election Commissioner and the subject elections are being conducted and held under his supervision. After hearing learned counsel for the petitioner, respondents No. 3 and 5 as well as the above named Election Commissioner it appears that there is a serious dispute with regard to the number of voters registered for the purpose of the subject elections. Learned counsel and parties present today agree that the Election Commissioner shall exercise his discretion as to which of the voters shall be entitled to cast vote, however, the final result of the subject elections shall not be announced by him without permission of this Court. He shall submit a complete list of registered voters and the voters whose names have been deleted by him, before this Court on the next date of hearing with advance copies to all concerned. By consent, adjourned to 20.01.2021.”

4. Mr. Asim Iqbal, learned counsel for the petitioner-SSGC referred to the Order of the Honorable Supreme Court as discussed supra and various documents attached with the Memo of Petition and argued that this matter needs to be looked into in terms of the aforesaid order of the Honorable Supreme Court. He has also raised the question of the validity of the referendum conducted by the Deputy Registrar NIRC and has pointed out that the Deputy Registrar has erroneously allowed the other employees of the third party contractor/strangers to cast vote in the subject referendum for CBA in

violation of Section 19 of the Industrial Relations Act. Learned counsel explained that workmen at an establishment may be employed through a contractor or contractors may be engaged who bring their workmen. However, a voter in the referendum or election of CBA must necessarily be employed by the employer. It follows from section 19(3) of the Act which imposes a condition that a voter should possess a ticket number issued by the employer. The referendum or election is conducted between competitor trade unions. Additionally, only those members of the trade union could cast vote if they satisfy the condition of being employed with the employer for a period exceeding three months as provided under the Industrial Relations Act. He further pointed out that the status of such a member should be declared by the trade union under Section 22 of the Act to be an employee for deduction of a check-off. Further, on the aforesaid proposition, he has averred that the Hon'ble Supreme Court in Civil Petition No.4450/2019 has elaborated on the subject issue and directed that the regularized employees shall be treated as voters, with direction to the petitioner-SSGC to submit a list of its employees/workmen to the Registrar under Section 19(4) of the Act for completing the process under Section 19(5) of the Act to settle a list of voters in the referendum/election, which has been done by the petitioner-SSGC, however, the respondent-Registrar NIRC has completely failed and neglected the command of the Hon'ble Supreme Court as contained in the order dated 11.3.2020 in its letter and spirit.

5. Per learned counsel, the entire exercise conducted by the Registrar NIRC is illegal, unlawful, and without legal sanctity; that the Registrar NIRC failed to consider the objections submitted on behalf of the petitioner-SSGC, as well as the order passed by the Hon'ble Supreme Court in the aforesaid proceedings whereby serious anomalies were pointed out i.e. (i) Ticket number of casual are missing (ii) Ticket numbers mentioned against casual workers, are self-created (iii) CNIC numbers of few casuals are missing (iv) Date of joining of all casuals is not mentioned in the list (v) Department of most casuals is not mentioned in the list. Learned counsel has further emphasized that the voter list prepared by respondent-Registrar by including those persons who have no ticket number, even name of their department and designations are missing, which proves that they are strangers in the petitioner-SSGC, thus were not entitled to cast vote in the subject referendum and only those workers were/are eligible to cast vote, whose list was provided by the petitioner-company. Learned counsel has further averred that the respondent-Registrar has failed to appreciate that the list provided by the unions is fictitious, which ought not to have been acted upon by the registrar as strangers have been allowed to participate in the referendum for determination of CBA of the petitioner-SSGC. He lastly prayed for allowing the instant petition.

6. Mr. Ahmed Ali Ghumro, learned counsel representing respondent No.3 has adopted the arguments of Mr. Asim Iqbal, learned counsel for petitioner-SSGC.

7. Syed Shoa-un-Nabi, learned counsel for respondent No.4, has supported the impugned action of the Registrar NIRC who has acted in accordance with law by conducting the referendum proceedings by the direction of this court; and the result of the same is still awaited. He has argued that this petition is not maintainable inter alia, on the grounds that the employer has no role whatsoever in the referendum proceedings and has no locus-standi to file the instant petition. He has further argued that the issue of employees of third-party contractors has already been set at rest by the Honorable Supreme Court vide order dated 07.01.2020 passed in Constitution Petition No.449/2019, and the petitioner-company is avoiding to comply with the said order which was also endorsed by another order dated 11.3.2020 passed by the Hon'ble Supreme Court; besides that, the matter involves adjudication of factual controversy which cannot be decided in the exercise of Constitutional jurisdiction. He prayed for dismissal of the instant petition.

8. Learned DAG has supported the stance of respondent-Registrar/Election Commissioner NIRC, however, he has emphasized that on the subject issue the law is well settled that every person whose name is entered in this voter list is entitled to vote at the election to which the roll relates unless there be some personal disqualification, which is not the case in hand. He emphasized that as far as the entries of the names of voters in the voter list prepared by the Registrar of NIRC are concerned, this court cannot call into question the validity of the voter list after the elections were held by the direction of this Court vide order dated 11.12.2020; and after its outcome, if any party is aggrieved by the said result, they may avail their remedy as provided under the law.

9. The Deputy Registrar NIRC, who is also present in the Court and has placed on record a copy of the order dated 07.12.2020 passed by him in Case No.2(29)/2016, whereby he rejected the objections raised by the petitioner-company. He also pointed out in the order that representative of respondent-Jafakash Union, as well as the management of petitioner-SSGC, had malafidely, intentionally, not allowed employee number, designation, date of joining to deprive them of the right to cast vote. He further pointed out that during the process of referendum, the management of petitioner-SSGC had filed Review Petition bearing No.175/2020 before the Hon'ble Supreme Court of Pakistan in the aforesaid proceedings, which was also dismissed vide order dated

06.10.2020. He further averred that plenty of time was provided to the management for a physical recheck of the tentative voter list with their all sub-offices in Sindh and Baluchistan. Lastly, he rejected the objections raised by the management of petitioner-SSGC in the voter list having no locus standi by finalizing the total voters' list as 7658 as required under Section 19(5) of IRA, 2012. Prima facie, this order was not assailed by the petitioner-company or any of the contesting unions before the appellate forum under the law, which has attained finality. At this stage, learned counsel for the petitioner-SSGC pointed out that the copy of the order was not provided to them, as such no sanctity could be attached to the said order. Be that as it may, we are only concerned about the maintainability of the instant petition.

10. We have heard learned counsel for the parties as well as Deputy Registrar, NIRC, and perused the material available on record.

11. Firstly, we take up the issue of maintainability of the captioned Constitutional petition raised by learned counsel for respondent No.4 by referring to Article 199(1) of the Constitution of the Islamic Republic of Pakistan, 1973. The above-referred Article lays down the first and foremost condition of absence of adequate remedy available under the law to the aggrieved person/party invoking constitutional jurisdiction of this Court. Therefore, the petitioner-company must fulfill the said condition to establish locus standi. Besides above, Article 199 of the Constitution, inter alia, provides that the High Court may exercise its powers thereunder only "if it is satisfied that no other adequate remedy is provided by law". It is well-settled that if there is any other adequate remedy available to the aggrieved person, he must avail and exhaust such remedy before invoking the constitutional jurisdiction of the High Court, whether such remedy suits him or not. In our view, the doctrine of exhaustion of the remedy envisaged in Article 199 prevents unnecessary litigation before the High Court.

12. In the present case, we have noticed that the referendum for determination of Collective Bargain Agent (CBA) for the workmen employed in Petitioner-SSGC has already taken place by the direction of this Court vide order dated 11.12.2020; and after its outcome, if any party is aggrieved by the said result, they could avail their remedy as provided under the IRA 2012, thus the writ jurisdiction cannot be invoked, ignoring the statutory dispensation, as this Court is not a statutory forum of appeal in Industrial Relations hierarchy.

13. Primarily this is one of the reasons for introducing the doctrine of alternate remedy was to avoid and to reduce the number of cases that used to be filed directly before this Court and at the same time to follow the prescribed

lower forum to exercise its jurisdiction freely under the law. Moreover, if a person moves this Court without exhausting the remedy available to him under the law at a lower forum, not only would the purpose of establishing that forum be completely defeated, but such person will also lose the remedy and the right of appeal available to him under the law. Under Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973, for the determination of civil rights and obligations or in any criminal charge against him, every citizen is entitled to a fair trial and due process, therefore, it follows that fair trial and due process are possible only when the Court/forum exercises the jurisdiction strictly under the law. It further follows that this fundamental right of fair trial and due process in cases before this Court is possible when this Court exercises jurisdiction only in cases that are to be heard and decided by this Court and not in such cases where the remedy and jurisdiction to lie before some other forum. If the cases falling under the latter category are allowed to be entertained by this Court, the valuable fundamental right of fair trial and due process of the persons/cases falling under the formal category certainly be jeopardized.

14. Prima-facie, the case of petitioner-company appears to be premature at this point; and, the instant petition is not maintainable because the petitioner-company has approached this Court for the relief(s) as discussed supra in its writ jurisdiction without first availing and exhausting the remedy provided to them by law, after the announcement of the result of the referendum which is yet to be announced by the Registrar NIRC.

15. There is a misconception and trend that in any of the situations discussed above, Article 199 of the Constitution can be invoked without availing and exhausting remedy provided by law on the ground of violation of fundamental rights guaranteed by the Constitution.

16. Coming to the instant case, we have noticed that the petitioner has a remedy available under the Industrial Relations Act, 2012 before the learned NIRC Bench, after the announcement of the result of Referendum by the Registrar; and, the same remedy firstly is required to be availed and exhausted. In view of the above, learned counsel for the petitioner-company has failed to satisfy that how the instant petition is maintainable. We are of the considered view that under Industrial Relations Act, 2012, the referendum of respondent-Unions for Collective Bargaining Agent in Petitioner-Establishment was/is required to be conducted under the law and the parameters provided by the Honorable Supreme Court in the aforesaid proceedings, and if any violation, as pointed out by the learned counsel for the petitioner-company, has taken place, the same shall be looked into by the competent forum in appropriate proceedings under law. Since the referendum/election has been conducted as

per direction of this court vide order dated 11.12.2020; and after its outcome, if the petitioner-company is aggrieved by the outcome of the result, they may avail their remedy as per law by agitating all the legal pleas as raised in the present proceedings.

17. Adverting to the main question involved in this matter as to whether the employees of a labour contractor can be considered as the employees of the establishment where they work through labour contractor. Dealing with the aforesaid proposition, we seek guidance from the decision of the Honorable Supreme Court in the case of Fauji Fertilizer Company Ltd. through Factory Manager v. National Industrial Relations Commission through Chairman and others (2013 SCMR 1253). The by the Honorable Supreme Court in the case of Messrs. Sui Southern Gas Company Limited vs. Registrar Trade Unions and others, (2020 SCMR 638), has held that the workers enlisted as voters are performing their duties and functions for the benefit of the petitioner's establishment and are admittedly so serving for many years. The purported arrangement/contract between the petitioner and their purported labour contractors cannot be allowed to be used as a device to deprive the said workers of their legitimate and fundamental right of forming a union and or becoming a part thereof.

18. Reverting to the second point raised by the petitioner-SSGC that the Deputy Registrar was under obligation to comply with the direction contained in the order dated 11.03.2020 passed by the Hon'ble Supreme Court in Civil Petition No.4450/2019, suffice it to say, the Hon'ble Supreme Court in its order dated 11.03.2020 has held in paragraphs 2, 3 & 4 as under:-

"2. Learned counsel for the respondents has relied on the judgment dated 07.01.2020 passed in C.P. No.449 of 2019 titled M/s. Sui Southern Gas Company Limited Vs. Registrar of Trade Union & others. It deals with the aforementioned question before us and has held section 19(5) of the Act to be the decisive provision for resolution of the controversy. We agree with the view expressed in that judgment but add that the process undertaken by a Registrar for verification of the names of workmen who are eligible as voters in a referendum or an election of the C.B.A., is based upon a comparison of the lists provided by the union under section 19(3) of the Act with the list provided under section 19(4) of the Act by the management/employer. That exercise necessarily involves the process of eliminating the names of such workmen who do not qualify to be the voters under the criteria laid down in the aforesaid statutory provisions or such employees who are not even workmen. Presently, by a recent judgment of this Court delivered on 04.03.2020 in C.P. No.3977 of 2019 titled Sui Southern Company Ltd. Karachi vs. Rao Muhammad Gulzar & others, a number of employees who have been working for several years in the establishment of the petitioner through contractors have been directed to be considered for regularization. However, the ruling by the learned High Court has been slightly modified by the grant of a further time of six months to the petitioner employer for completing the process of scrutiny and vetting of the claimants of employee status.

3. Learned counsel for the petitioner states that the persons who are regularized according to the said process shall be entitled to be treated as

employees of the employers. However, for lack of three months of regular service, they may not qualify as voters in the referendum or election. Learned counsel for the respondents has opposed that stance. Regularization of the eligible workmen shall be given by the petitioner after years of service by the claimants. They are therefore entitled to the immediate status of voters upon being regularized. We agree.

4. Therefore to that extent we direct that the regularized employees shall be treated as voters. Accordingly, we also direct the petitioner to complete the said exercise within the time allowed in the afore-noted judgment dated 04.03.2020 and submit a list of its employees/workmen to the Registrar under section 19(4) of the Act for completing the process under section 19(5) of the Act to settle a list of voters in the referendum/election. The purpose of such exercise by the Registrar as well as the directions already issued on this behalf by the judgments noted above and presently by this judgment is to safeguard the interests of the workers. We are informed that the tenure of the present C.B.A. has expired since 2017 and thereafter, without any election, it is continuing in office. We consider that a fresh election in accordance with law is necessary; for that purpose the settlement of the voters' list is essential. Accordingly, the Registrar is directed to complete the exercise of verification mandated by the law expeditiously to accomplish the referendum/election of C.B.A. before the end of this calendar year. The verification process shall be conducted vis-à-vis within the terms of sections 19(3) and 19(4) of the Act. Disposed of in the above terms."(Emphasis Added)

19. Besides above, the Honorable Supreme Court in the case of M/s. Sui Southern Gas Company Limited Vs. Registrar of Trade Union & others as discussed supra has further clarified the proposition in terms of section 19(4)(a) of the Industrial Relations Act, 2012, and held that every employer, on being required by the Registrar, is obliged to submit a list of all the workmen employed in his establishment, except those whose period of employment is less than three months, whereas Section 19(5) of IRA, 2012, requires the Registrar to include in the voter list the name of every workman, whose period of employment, computed under Sub-section (4) is not less than three months and is also not a member of any contesting trade union. It can thus be seen that the only requirement for the membership of a union, is being a workman, and for being registered as a voter, the period of employment of such workman in the establishment should not be less than three months. Whereas the term "worker" and "workman" has been defined by section 2(xxxiii) of the I.R.A., 2012, as a person not falling within the definition of employer, who is employed in an establishment, or industry for hire or reward, either directly or through a contractor. It can therefore be seen that for an employee to fall under the definition of a worker or workman, it is wholly irrelevant whether he has been employed directly or through a contractor, and since in view of the relevant provisions of the I.R.A., 2012, as noted above, there remains no ambiguity that the only requirement for an employee in an establishment to become a voter, is his being a worker or a workman, in such establishment for not less than three months and nothing more, therefore to say that since the workmen under discussion were engaged in the petitioner's establishment through some labour

contractors, their registration/ enlistment as voters is violative of IRA, is wholly misconceived and untenable.

20. In the light of the above facts and circumstances of the case and dicta laid down by the Hon'ble Supreme Court of Pakistan in the case of Messrs. Sui Southern Gas Company Limited vs. Registrar Trade Unions and others, (2020 SCMR 638), we direct the Deputy Registrar NIRC to announce the result of the referendum for determination of Collective Bargaining Agent (CBA) for the workmen employed in Petitioner-SSGC. However, it is made clear that, if any of the parties in the proceedings is aggrieved by the outcome of the result of the referendum, they are at liberty to avail and exhaust their respective remedies in accordance with law.

21. The petition is accordingly dismissed along with the listed application(s) with no order as to costs.

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