

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Adnan-ul-Karim Memon

C.P No.D-3199 of 2013

Bakht Siddique and 61 others.....Petitioners

Versus

Federation of Pakistan and others.....Respondents

C.P No.D-4605 of 2013

Amanullah Tamimy.....Petitioner

Versus

Federation of Pakistan and another.....Respondents

C.P No.D-5079 of 2013

Syed Farhat Iqbal and 11 others.....Petitioners

Versus

Federation of Pakistan and others.....Respondents

C.P No.D-509 of 2014

Arif Khan and 31 othersPetitioners

Versus

Federation of Pakistan and others.....Respondents

C.P No.D-2034 of 2014

Mir Asghar Ali.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

C.P No.D-1091 of 2015

Zahoor Khan and 101 others.....Petitioners

Versus

Federation of Pakistan and others.....Respondents

Date of hearing: 11.05.2017

Syed Shoa-un-Nabi, Advocate for all the Petitioners.

Mr. Javed Asghar Awan, Advocate for M/s Pakistan State Oil Company Ltd. /Respondent No.2.

Mr. Ghulam Murtaza Saryo, Advocate for Respondent No 2 in C.P No.4605/2013.

Mr. Chaudhary Muhammad Ashraf Khan, Advocate for M/s HSRG Outsourcing (Pvt) Ltd. / Respondent No.3

Mr. Muhammad Aslam Butt, DAG.

J U D G M E N T

ADNAN-UL-KARIM MEMON,J:- In all the captioned Petitions similar points of law and facts are involved, hence the same are disposed of by this common judgment.

2. Petitioners have approached this Court for regularization of their service in Pakistan State Oil Company Ltd (hereinafter referred to as "PSO"). Their case is that they were appointed on wages in lower grade in different vacant posts from 1984 to 2013 in different years. They have been performing their duties honestly with due diligence and such Performance Certificates are attached with the Memo of Petitions. Petitioners' further assertion is that they are eligible to be regularized under Office Memorandum dated 29.08.2008 issued by Government of Pakistan, Cabinet Secretariat, Establishment Division but the Respondent-Company is not regularizing them.

3. Syed Shoa-un-Nabi, learned counsel for Petitioners has argued that Petitioners are seeking regularization of their service in Respondent-Company and on identical points, facts and law, this Court vide order dated 11.01.2013 has allowed Constitutional Petition No.D-3882/2011 with directions to Respondent-Company to give benefits as contained in the Office Memorandum dated 29.08.2008. He next contended that Respondent-Company filed Civil Petition for Leave to Appeal No.95-K of 2013 before Hon'ble Supreme Court of Pakistan, which was declined and order of this Court was upheld vide order dated 17.05.2013. He next contended that Petitioners have been continuously working on permanent posts in the Respondent-Company.

4. Mr. Javed Asghar Awan, learned counsel for PSO/Respondent No.2 has argued that instant Petitions are not maintainable against Respondent-Company under Article 199 of the Constitution. He next contended that disputed question of facts are involved in the present

Petitions regarding relationship of employment of Petitioners and Respondent-Company. He next contended that Petitioners have an adequate remedy in the shape of Petition before NIRC, which is not availed. He next contended that some colleagues of Petitioners approached NIRC in Appeal which was disposed of with directions to Respondent-Company not to terminate their service except by due course of law. The said order was challenged before this Court in C.P No.D-3882/2011 which was allowed vide order dated 11.01.2013 and the same was also assailed before Hon'ble Supreme Court. According to him, the case of colleagues of the Petitioners was distinguishable as they directly filed Petition before NIRC, whereas the Petitioners have directly approached this Court. He next contended that Petitioner No.1 and 44 approached NIRC during pendency of the instant Petitions. In support of his arguments, he relied upon the case of Farid Ahmed v. Pakistan Burma Shell and others (1987 SCMR 1463), Syed Ashraf Ali Shah and others v. Pakistan Telecommunication Company Ltd (2008 SCMR 314), Naseer-ud-Din Ghorri v. Federation of Pakistan and others (2010 PLC 323) and PIA and others v. Tanveer-ur-Rehman and others (PLD 2010 SC 676).

5. Mr. Ghulam Murtaza Saryo, learned counsel appearing on behalf of Respondent No 2 in C.P No.4605/2013 has adopted the arguments advanced by Mr. Javed Asghar Awan, learned counsel for the PSO/ Respondent No.2 in other connected Petitions.

6. Mr. Chaudhry Muhammad Ashraf Khan, learned counsel for M/s HRSG Outsourcing Pvt. Ltd/Respondent No.3 has argued that Respondent No.2 and 3 executed an Agreement dated 14.09.2001. In

pursuance of the said Agreement, Respondent No.3 engaged Petitioners to discharge contractual obligations. The salaries and monthly wages are being paid by Respondent No.3 and not by Respondent No.2. He next contended that Respondent No.3 is responsible for salaries, other liabilities and ancillary work. Per learned counsel, the Petitioners are employees of Respondent No.3 (Private Company) and not of Respondent No.2. He next contended that insofar as the Office Memorandum dated 29.08.2008 is concerned, it is not applicable to the case of Petitioners because it relates to the persons appointed on contract basis in different Organizations/Authorities of Government and Semi-Government, and Respondent No.3 is not an Organization controlled by Ministry of Cabinet Division. He next contended that Petitioners have no cause of action to claim regularization of their service in Respondent No.2. He next contended that facts of C.P No.D-3882/2011 and CPLA No.95-K of 2013 are totally different from the facts and circumstances of instant Petitions. He next contended that some of the Petitioners had approached NIRC and order of NIRC was assailed in a Writ Petition on the basis of Identity Cards issued by Respondent No.2. He next contended that only NIRC has jurisdiction to entertain the grievance of Petitioners against Respondent No.2 which is a trans-provincial establishment. He next contended that factual controversy is involved in the instant Petitions hence, the same are not maintainable. He next contended that Petitioners are employees of Respondent No.3 and were appointed from September 2001 till the end of year 2013, therefore, the Petitions are badly hit by principle of latches. Learned counsel for Respondent No.3 has pointed out Identity Cards (from Page No.63 to 183 of file) and Pay Slips (from Page 185 to 303) annexed with respective Memo of Petitions in order to prove that

Petitioners are in the employment of Respondent No.3. He next contended that Petitioners are taking all benefits of increment, salaries insurance, sickness, receiving workers participation fund as employees of contractor. In support of his case, learned counsel has relied upon the case of Mubeen-ul-Islam v. Federation of Pakistan and others (PLD 2006 SC 602).

7. We have heard learned counsel for the Parties and perused the material available on record and case law cited at the bar.

8. In the first place, we examine the issue of maintainability under Article 199 of the Constitution. Perusal of pleadings and arguments advanced by learned counsel for both the Parties establish that PSO is a Company Limited by shares with effect from the date of incorporation with the Securities and Exchange Commission of Pakistan under the Companies Ordinance, 1984 (XLVII of 1984). As per Section 2 (g) of Public Sector Companies, (Corporate Governance) Rules, 2013 'Public Sector Company' is defined as follows:-

(g) *“Public Sector Company” means a company, whether public or private which is directly or indirectly controlled, beneficially owned or not less than fifty percent of the voting securities or voting power of which are held by the Government or any instrumentality or agency of the Government or a statutory body, or in respect of which the Government or any instrumentality or agency of the Government or a statutory body, has*

Otherwise power to elect, nominates or appoint majority of its directors, and includes a public sector association not for profit, licensed under Section 42 of the Ordinance.”

9. A reference may also be made in this regard to the decision of Honorable Supreme Court rendered in the case of Ramna Pipe and

General Mills (Pvt.) Ltd v. Sui Northern Gas Pipe Lines (Pvt.) (2004 SCMR 1274), in which it is settled that a Constitutional Petition against a Public Limited Company is maintainable.

10. In view of facts stated above, the status of PSO can ordinarily be regarded as a 'Person' performing functions in connection with the affairs of the Federation under Article 199 (1) (a) (ii) read with Article 199 (5) of the Constitution. Thus, High Court has jurisdiction to entertain a Constitutional Petition against PSO. As PSO is a Body Corporate and performing functions in connection with the affairs of the State. The functions of Company have element of Public Authority, as such the same will be amenable to the Writ Jurisdiction. Guidance has also been taken from the decision of august Supreme Court in the case of Abdul Wahab and others v. HBL and others (2013 SCMR 1383). In this case, the Honorable Supreme Court has held that two factors are most relevant i.e. the extent of financial interest of the State/Federation in an Institution and the dominance in the controlling affairs thereof. Reference may also be made to the decision of Hon'ble Supreme Court in the case of Salahuddin v. Frontier Sugar Mills and Distillery Ltd. (PLD 1975 SC 244).

11. On merits, the case of Petitioners is that they are working with Respondent No.2 for several years, but are not being regularized in service.

12. We have noted that Office Memorandum dated 29.08.2008 issued by Prime Minister of Pakistan entitles regularization of all contract employees, who are working in Autonomous and Semi-Autonomous

bodies, corporations and were employed upto June 2008. Petitioners are also claiming benefits of the said Office Memorandum.

13. Reverting to the contention of Respondent No. 3 that the Petitioners were employees of contractor (third party) who is engaged by Respondent No.2 to perform various functions. It may be mentioned that this issue has been settled by the Hon'ble Supreme Court in the case of Fouji Fertilizer Company Ltd v. National Industrial Relations Commissions and others (2013 SCMR 1253), the Hon'ble Supreme Court at Paragraph No.17 and 18 has held as follows:-

“17. Normally, the relationship of employer and employee does not exist between a company and the works 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.

18. In the instant case, the employees of the contractor were involved in running the affairs of the company such as filling and loading of urea bag as well as cleaning of machines and floors, therefore, for all intents and purposes, they are employees of the company through the contractor.”

14. It may be observed that in case the Petitioners are continuously performing their duties with the Company/Respondent No.2 from 1984 and other different years, they were paid salaries and issued passes directly at the behest of Respondent No.2, then the Office Memorandum dated 29.08.2008 is fully applicable to the Petitioners.

15. We are of the view that Petitioners are fully entitled to get benefits contained in Office Memorandum dated 29.08.2008 because they are in continuous service from 1984 and other different years respectively and have drawn salary from the Respondent-Company because they are regularly working on the posts of permanent nature. It may be noted that the colleagues of the Petitioners filed Constitutional Petition No.3882/2011 before this Court, which was allowed vide order dated 11.01.2013 and the same was upheld by the Hon'ble Apex Court vide order dated 17.05.2013 in CPLA No. 95-K 2013 M/s PSO v. Ghulam Ali and others, has held as follows:

“Through these proceedings petitioners have challenged the judgment of the Sindh High Court passed on 11.1.2013 for regularization of the respondents in their organization. 2. We have heard the learned counsel for the petitioner company and according to him they outsourced the services of the respondents to a contractor and therefore, the High court of Sindh by impugned judgment was in error to allow the petition of the respondents. 3. We have perused the record, which shows that the respondents were employed by the petitioner and working there since years. Respondents were issued security cards by the Civil Aviation Authority on the recommendation of the petitioner company. The entire material was placed before the High court and the High Court by impugned judgment has recorded correct findings. It is contended that the issue ought to have been raised before the National industrial Relations Commission (“NIRC”). We are not persuaded by the contention of the learned counsel on this score as well. NIRC cannot determine nor can order regularization of the respondents as it has limited scope.

4. For the aforesaid reasons we do not find any infirmity in the impugned judgment, which could warrant interference by this Court. Petition merits dismissal. Leave refused.”

16. Looking through the above perspective and keeping in view the factual position of the case, we hereby infer that the Petitioners ought to

have been considered for regularization by the Respondent-Company in the light of Office Memorandum dated 29.08.2008. The issue in hand is fully covered by the order rendered by Hon'ble Supreme Court in the case of M/s. Pakistan State Oil Company Limited Vs. Ghulam Ali and others (CPLA No. 95-K 2013) and Pir Imran Sajid and others Vs. Managing Director/General Manager (Manager Finance) Telephone Industries of Pakistan and others (2015 SCMR 1257), wherein the Hon'ble Supreme Court has held at Paragraph 13 that:-

“looking through the above constitutional prism and keeping in view the facts that the federal government which owns, controls, manages and finances TIP has directed TIP to regularize the appellants, and that admittedly the appellants have initially been appointed in an open and transparent manner and after the vacancies were advertised in the newspapers, one cannot escape the conclusion that the appellants ought to have been regularized.”

17. We are further fortified with the similar principle referred to by the case law decided by five Member Bench of Hon'ble Supreme Court in the case of Government of Khyber Pakhtunkhwa and others Vs. Adnanullah and others (2016 SCMR 1375), wherein the Hon'ble Supreme Court has held at Paragraph 31 as follows:-

“The record further reveals that the Respondents were appointed on contract basis and were in employment/service for several years and Projects on which they were appointed have also been taken on the regular Budget of the Government, therefore, their status as Project employees has ended once their services were transferred to the different attached Government Departments, in terms of Section 3 of the Act. The Government of KPK was also obliged to treat the Respondents at par, as it cannot adopt a policy of cherry picking to regularize the employees of certain Projects while terminating the services of other similarly placed employees.”

18. We have reached the conclusion that case of Petitioners is also on the same footing as the one decided by the Honorable Supreme Court in the case of M/s. Pakistan State Oil Company Limited Vs. Ghulam Ali and others (CPLA No. 95-K 2013) (supra), Pir Imran Sajid and others (supra) and in the case of Government of Khyber Pakhtunkhwa and others (supra).

19. The case laws cited by learned counsel for Respondents are distinguishable from the facts and circumstances of the present case.

20. In the light of above facts and circumstances, the Petitions are disposed of in the terms whereby Chief Executive Officer of Respondent-Company/Respondent No.2 is directed to consider the case of Petitioners for regularization of their service without discrimination, in accordance with law and the dicta laid down by Hon'ble Supreme Court of Pakistan in the cases referred to hereinabove within a period of two months from the date of receipt of this judgment. The listed application(s) stand disposed of accordingly.

Karachi:-
Dated 01.06.2017

JUDGE

JUDGE