

IN THE HIGH COURT OF SINDH AT KARACHI

BEFORE:
Mr. Justice Muhammad Shafi Siddiqui

C.P. No. S-149 and 150 of 2013

National Refinery Ltd.

Versus

Mst. Farida Begum & others

Date of Hearing: 12.12.2017

Petitioner: Through Mr. Jawed Asghar Advocate

Respondent No.1: Through Mr. Muhammad Nishat Warsi Advocate

Respondent No.2: Through Mr. Shahid Iqbal Rana Advocate.

Respondent No.3&4: Nemo

J U D G M E N T

Muhammad Shafi Siddiqui, J.- These petitions involve a limited question as to the powers and authority in reviewing and modifying the order after dismissal of a review application.

An application for claim of dues including the group insurance was filed by the legal heirs of one Muhammad Ilyas who was providing security services at the premises of M/s National Refinery Limited, as claimed by the petitioner. There appears to be an agreement between the petitioner and respondent No.2 for providing security services. The application under section 10(B) of Industrial & Commercial Employment (Standing Order) Ordinance, 1968 was filed against the petitioner who on receipt of notice filed an application under I rule 10 CPC to implead M/s Crown Security Services (Pvt.) Limited/respondent No.2.

On consideration of the facts and grounds the application to implead the security company was allowed on 14.05.2011 however respondent No.2 was impleaded in place of petitioner, which was beyond the prayer made in the application. Thereafter on 28.05.2011 an

application for setting aside order dated 14.05.2011 was filed to which counter-affidavit was filed by the petitioner and comments were also filed by respondent No.2 i.e. M/s Crown Security Services (Pvt.) Ltd. As against these comments reply was also filed by petitioner/National Refinery Limited. The Commissioner for Workmen's Compensation & Authority under Payment of Wages Act before whom the original application for claim was pending, disallowed the application on 05.01.2012.

It was also observed by the Commissioner that despite order whereby the application under order I rule 10 CPC was allowed and being well aware of the date he (representative of respondent) remained absent and has already availed last chance when the order was passed.

With this background, despite dismissal of the application it is urged that Commissioner set aside order dated 14.05.2011 passed on application under order I rule 10 CPC belatedly on 17.01.2013, which is impugned here.

I have heard the learned counsel for parties and perused the material available on record.

The question not only involve jurisdiction of Commissioner but also involve contractual rights of respondent which may have been overlapped or complexed in view of "orders" passed by Commissioner and hence it is a question that penetrates the jurisdiction of the trial Court.

Apart from embarking upon the question raised by petitioner it is also necessary to scrutinize the maintainability of this petition on the touchstone that an interlocutory order which does not determine the substantial relief has been challenged.

Once an application under order I rule 10 CPC was filed, respondent No.3/Commissioner assumes the jurisdiction to pass order under the law. Any order that transgresses its authority and jurisdiction is then to be tested on the touchstone of principle whether a substantial relief likely to be granted to the respondent No.1, has been impaired. Not only the petitioner was allegedly deleted but at an interim stage declaration has been made that petitioner is not the employer which is beyond the principle laid down in the case of Fauji Fertilizer Company Ltd. v. National Industrial Relations Commission reported in 2013 SCMR 1253. So if its authority and jurisdiction is to be analyzed on such touchstone it looks transgressed. By scoring off petitioner from the pleading it exercised jurisdiction not vested in him as in trial the determination was yet to be made. Scoring of petitioner from trial before trial is an act exercised with material irregularity. Presiding Officer held security company responsible and swap them and the intention was reflected in the order, (one comes in and other goes out). Besides this, such an option of reviewing the order was attempted to be exercised when an application under order IX rule 9 read with section 151 CPC was filed to set aside order dated 14.05.2011 which also met its conclusive dismissal on 05.01.2012 and the matter thereafter was fixed for framing of issues.

The first order was passed on 14.05.2011 by Mr. Najeebuddin Narejo whereby application under order I rule 10 CPC was allowed and petitioner was replaced with respondent No.2 followed by dismissal of an application under order IX rule 9 CPC vide order dated 05.01.2012, as referred above, by Mr. Abdul Aziz Memon who after almost more than a year i.e. 17.01.2013 realized that the jurisdiction was not exercised properly while disposing off both the applications. The authority/commissioner further stated to have realized that M/s Crown

Security Services (Pvt.) Limited was required to be impleaded but the petitioner is not required to be deleted. He further realized that there was no prayer for deletion of their name.

I am in agreement with the limited reasoning of the Presiding Officer/Commissioner for Workmen's Compensation & Authority under the Payment of Wages Act that the previous Presiding Officer overlooked the fact that petitioner was not required to be deleted and it was only a question of impleading M/s Crown Security Services (Pvt.) Ltd. as respondent No.2 but the same jurisdictional defect was exercised when an application for setting it aside was disallowed.

While passing interlocutory order on 14.05.2011 the Commissioner for Workmen's Compensation & Authority under Payment of Wages Act has gone to the extent that M/s Crown Security is the employer of the respondent No.1's deceased husband whereas it is yet to be determined in terms of test prescribed by the Hon'ble Supreme Court. On an application to set aside the order under order IX rule 9 CPC the observation of the Commissioner was that the case is still pending and hence there was no applicability of Order IX rule 9 CPC however he failed to realize the effect of such order and failed to realize that wrong provision of law cannot oust the respondent from availing remedy available under the law. It is not only incorrect order but an order that transgressed its jurisdiction.

The order dated 14.05.2011 has no application of mind as it does not even talk about non-impleading of petitioner. It says:

"By this order I intend to dispose of the application under order I rule 10 CPC filed by respondent and prayed to in plead/make M/s Crown Security Services (Pvt) Limited, contractor as respondent, who is actual employer of the applicant husband namely Muhammad Ilyas and is necessary and proper party in the matter.

The copy of application supplied to the applicant representative on 20.04.2011 and the case was fixed on 14.05.2011 for objections and hearing.

Case called on 14.05.2011 the applicant representative failed to file any objection in the matter, the respondent counsel present and argued the matter/application.

I am fully convinced with arguments heard by the respondent counsel, therefore, I allow the application under order I rule 10 of respondent, the Crown Security Service (Pvt) Limited may be impleaded as respondent in the above case who is the actual employer of deceased Muhammad Ilyas, the husband of the applicant, the present respondent is hereby non/deleted from the present case No.143/2011 and 40/2011, notice may be issued to Crown Security Services.”

It may be read as deleted or non-deleted as it has to be read with reference to application on which order was passed, which was without such prayer. An order without manifested authority and jurisdiction was reviewed as it cannot be subjected to rigors of limitation.

The Presiding Officer/Commissioner under the law has powers and jurisdiction to pass a correct order in accordance with law and not otherwise in derogation of the mandate of law and procedure. An application which was purely filed to implead a party does not even call for non-impleading of petitioner who was otherwise contesting the application of an employer on merit as provided in the case of Fauji Fertilizer Company Ltd. v. National Industrial Relations Commission reported in 2013 SCMR 1253. The Hon’ble Supreme Court in the said matter while deliberating the provisions of Sections 2(c), (f) and (h) of Industrial & Commercial Employment (Standing Orders) Ordinance (VI of 1969) observed as under:-

“The control test and the organization test, therefore, are not the only factors which can be said to be decisive. With a view to elicit the answer, the court is required to consider several factors which would have a bearing on the result:-

- (a) who is the appointing authority;*
- (b) who is the paymaster;*
- (c) who can dismiss;*
- (d) how long alternative service lasts;*
- (e) the extent of control and supervision;*
- (f) the nature of the job e.g. whether it is professional or skilled work;*

- (g) nature of establishment;
- (h) the right to reject."

16. *The crux of the above case-law is that:--*

- (a) *the word 'employed by the factory' are wide enough to include workmen employed by the contractors of the company;*
- (b) *the employees of the contractor shall be the employees of the company if the contractor engaged the workers for running of the affairs of the company and not for some other independent work which has no concern with the production of the company;*
- (c) *if the employees are working in a department of the company which constituted one of the principle organs of the company, the machines belong to the company, the raw material is supplied by the company and the said department is controlled by the supervisors of the company, the employees of the contractor shall be the employees of the company;*
- (d) *the employees, engaged directly or through a contractor, would be deemed to be the employees of the company for whose benefit they perform functions;*
- (e) *even though 'control' test is an important test, it is not the sole test; a multiple pragmatic approach weighing up all the factors for and against the employment has to be adopted, including an ""integration" test; and*
- (f) *if the contract is found to be not genuine and a device to deprive the employees from their legitimate rights/benefits, the so called contract employees will have to be treated as employee of the company.*

17. *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."*

Now considering the test prescribed by the Hon'ble Supreme Court the Presiding Officer had no jurisdiction to summarily delete or

non-implead the company for whose alleged benefit the security staff was deployed and the test is yet to be applied.

In view of the above the petitioner has not pointed out as to what contractual or constitutional rights have been violated on the touchstone of the above referred judgment.

In the similar situation, the Lahore High Court in the case of Ghulam Yasin v. District Judge reported in 2002 YLR 1580 has observed as under:-

“The duty of the Court to be aware of the law and to follow the same also calls for no over-emphasizing. It is the duty of the Court to pass correct and legal orders. It may even, in certain circumstances be persuaded to rectify its own erroneous orders to obviate the hardship of a party.”

Any order passed with material irregularity and without mandate of law, is an order passed without jurisdiction as the jurisdiction is vested to pass order in accordance with law and not otherwise. The impugned order is even otherwise an interim/interlocutory order which may be assailed with the final order, if required, as no substantial right of the petitioner has been snatched except that it is required to face the trial/proceedings.

I, therefore, while exercising jurisdiction under article 199 of the Constitution of Pakistan to save the litigation from further complication as it has already undergone, maintain the order whereby the order to the extent of deleting the petitioner was revised. The question as to who is responsible for payment of claim under Wages Act is yet to be determined and decided and it would only be possible if trial commenced in presence of the parties including petitioner and respondent No.2 which trial could only determine the relationship of respondent No.1 with petitioner and respondent No.2. Petition is dismissed. Let the R & Ps be sent to the concerned Court.

Dated: 20.12.2017

Judge