

2012 P L C (C.S.) 681

[Islamabad High Court]

Before Shaukat Aziz Siddiqui, J

RIZWAN AHMED BHATTI

Versus

FEDERATION OF PAKISTAN and 3 others through Secretary Privatization Commission

Writ Petition No.2959 of 2006, decided on 10th February, 2012.

Constitution of Pakistan---

----Art. 199---Constitutional petition---Civil service---Termination of service of contract employee---Petitioner/employee, whose service was terminated, was accepted by employer/company in pursuance of open ended contract---Status of the petitioner, in circumstances, was of contract employee---Rules governing a discipline/terms and conditions of the company, were non-statutory---No writ, in circumstances, could be issued against the company---Even otherwise, contractual liabilities/obligations, could not be enforced through constitutional petition---Proper course for the petitioner/employee would have been to agitate his grievance before the court of competent jurisdiction---High Court could not enter into disputed questions, which required recording of evidence and interpretation of the contract---Constitutional petition was dismissed.

Dr. Aslam v. QAU 2010 SCMR 253; EDO v. Faisal Sultan 2011 PLC (C.S.) 419 and Arshad Jamal v. N.-W.F.P. and others 2004 SCMR 468 distinguished.

Executive Council AIOU v. M. Tufail Hashmi 2010 SCMR 1484; Pakistan Telecommunication Company v. Iqbal Nasir and others PLD 2011 SC 132 and Ejaz Ali Bughti v. PTCL and others 2011 SCMR 333 rel.

Muhammad Akram Sheikh and Barrister Sharjeel Sheharyar for Petitioner.

Syed Naeem Bukhari for Respondents.

Date of hearing: 25th January, 2012.

JUDGMENT

SHAUKAT AZIZ SIDDIQUI; J.--- Brief facts glean out from the instant writ petition are that petitioner, Rizwan Ahmed Bhatti, joined PTCL on 29-7-2002 as General Manager (Marketing and Customer Care) BPS-20, under an open ended contract. He also performed duties of General Manager (project department) w.e.f. 1-8-2005 to 17-10-2006 from where his services were terminated. In November, 2003, by the orders of the then Minister for Information and Technology the services of petitioner were terminated by the then Chairman, PTCL, however, this order was set aside by the Hon'ble Federal Service Tribunal in March, 2004 declaring the same as illegal. The PTCL went in appeal against said order but subsequently withdrew the same and petitioner continued to perform his duties in the respondent company. During his service in the respondent company he showed outstanding performance and rated as outstanding/exceptional and recommended for promotion by the authorities.

2. In the process of privatization of State Enterprises, Government of Pakistan entered into a Share Purchase Agreement with Messrs Etisalat International Pakistan LLC on 12th of March, 2006 relating to the sale and purchase of 1,306,000,000 B ordinary shares of respondent No.1 followed by a Share Holders Agreement dated 12-4-2006 whereby Messrs Etisalat assumed the management of the respondent No.3. According to clause 4.3 of the Share Holders Agreement the Government of Pakistan agreed to the right of the investor Messrs Etisalat to nominate majority of the Directors of the Board in addition to some positions in respondent company including the position of the Chief Executive Officer who was also to be the President of respondent No.3. The terms and conditions of service of the employees were protected/safeguarded and in this regard following provisions were made in the share Holders Agreement:---

"16. Employees

16.1 The investor undertakes to GOP to procure that:

(a) all existing benefits of the employees of the Company shall not be changed, varied or discontinued to the detriment of employees, for a period of one year from 30 June, 2005 and thereafter only in accordance with the provisions of applicable laws and contracts of the employees and such terms and conditions as are approved by the Board from time to time. For the avoidance of doubt, nothing in this sub-clause shall prevent the Company from transferring the service of employees to contracts of employment by mutual consent.

(b) the employees of the Company shall not, for a period of two years from 30 June, 2005, be terminated, laid-off or made to resign from the Company except by way of dismissal on account of misconduct or otherwise "with cause" within applicable laws.

16.2 The investor and the GOP acknowledge and agree that the rights and benefits and terms and conditions of service granted to the "Transferred Employees" under section 36 of the Pakistan Telecommunication (Re-organization) Act, 1996 will not be prejudiced or affected by this Agreement."

3. Learned Counsel for the petitioner argued that, according to the provisions of the agreements the employees of the Company (respondent No.3) were given protection for a period of 2 years from 30th June, 2005 against termination lay-off or forcible resignation from the Company except by way of dismissal on account of misconduct or otherwise "with cause" within applicable laws. That clause 13 and clause 29 of the Share Purchase Agreement and the Share Holders Agreement, respectively provided that the provisions of the agreements would be governed by the laws of Pakistan. That according to clause 10 of original contract of appointment of the petitioner, the service of petitioner could be terminated by three months' notice or salary equal to three months in lieu thereof by either side but because of above mentioned provisions of the Share Purchase Agreement and the Shareholders Agreement this provision could not be operated till 30th June, 2007.

4. The learned counsel for the petitioner further contended that to deprive a person from the right of his livelihood without adopting just and fair procedure is unfair and not tenable in the eye of law. He further submitted that "Open ended contract" does not allow the respondent company, therefore, termination letter dated 17-10-2006 may be declared as coram non judice, without jurisdiction and lawful authority and by setting aside the same, reinstate the petitioner in service from the date of his termination. In support of his contentions, learned counsel placed reliance on

the case-law, reported as 2010 SCMR 253 (Dr. Aslam v. QAU) 2011 PLC (C.S.) 419 (EDO v. Faisal Sultan) and 2004 SCMR 468 (Arshad Jamal v. N.-W.F.P. and others).

5. On the other hand, stance of the respondent is that, respondent company is not performing any functions in connection with the affairs of the federation or a province or a local authority. PTCL is incorporated under the Companies Ordinance, 1984 as a listed public limited company with its share quoted on all the stock exchange of Pakistan. PTCL had not privatized with management control handed over and the majority in the Board of Directors, nominated by the strategic investors. PTCL pays all taxes like any other revenue earning organization, therefore, same is not amenable to writ jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. Moreover, no writ is maintainable from violation of any contractual obligations is alleged, particularly in respect of a contract employee. The learned counsel for the respondent submits that petitioner in fact seeks specific performance of agreements to which he is not a party, which exercise cannot be carried out under Article 199 of the constitution. Learned counsel referred to clause 9.6 of the agreement which reads as under:---

"A person who is not a party to this Agreement may not enforce any of its terms."

6. Learned counsel further adds that if violation or non-fulfillment of agreement is alleged, comprehensive arbitration clause is there and in case of a dispute as to interpretation and any meaning, the issue will be decided through arbitration, but subject to the condition that the dispute has been referred to the arbitrator either by the Government of Pakistan or Etisalat International. The learned counsel maintains that contractual stipulations cannot be immune in constitutional jurisdiction and even if termination of the petitioner was in violation of a contractual stipulation, the remedy lies before some other forum and not in the constitutional jurisdiction before this court. The learned counsel for the respondent placed reliance on the case-law reported as 2010 SCMR 1484 (Executive Council AIOU v. M. Tufail Hashmi) PLD 2011 SC 132 (Pakistan Telecommunication Company v. Iqbal Nasir and others) 2011 SCR 333 (Ejaz Ali Bughti v. PTCL and others) and latest judgments pronounced by the court of apex in Civil Petitions Nos.28 to 34 of 2011 and Civil Appeals Nos.239 to 241 of 2011.

I have heard, the learned counsel and through their able assistance perused the documents appended with the petition.

7. It is an admitted fact that petitioner was accepted by respondent No.3 i.e. PTCL in pursuance of open ended contract dated 29-7-2002. The status of the petitioner was of contract employee, obviously on different pedestal than the regular employees, more particularly who initially joined the T&T. It is also an admitted fact that rules governing discipline/terms and conditions of PTCL are non-statutory, therefore, no writ can be issued against PTCL. The case-law relied by the learned

counsel for the respondent is strictly applicable on the issue whereas, judgments referred by the learned counsel for the petitioner does not come to the rescue of petitioner. The latest pronouncement of court of apex on the question of maintainability of writ petition before High Court, with regard to those organizations having non-statutory rules are not only lightship on the issue, but binding for this court. In the case of Pakistan Telecommunication Co. Ltd. v. Iqbal Nasir and others, the Hon'ble Supreme Court, while allowing the appeal gave following findings:---

"Pakistan Telecommunication Corporation Limited was a person within meaning of Art.199(5) of the Constitution---If the absence of statutory rules, principle of "Master and servant" was applicable and respondents were entitled to seek remedy permissible before court of competent jurisdiction---Employees of Pakistan Telecommunication Corporation Limited were governed by principle of "Master and servant" and in absence of statutory rules, constitutional petitions filed by employees were not maintainable".

In case of Executive Council AIOU v. M. Tufail Hashmi, while dilating upon the employees of organization having non-statutory rules, the Hon'ble Supreme Court held as under:---

"Employees of non-statutory corporations, who approached Service Tribunal for redressal of their grievance were not enjoying the protection of statutory rules, therefore, Service Tribunal had no jurisdiction to adjudicate upon such matters and they would be governed by the principle of Master and Servant----Supreme Court converted petition for leave to appeal into appeal and set aside the judgment passed by Service Tribunal."

In the case of Ejaz Ali Bughti v. PTCL and others, the Hon'ble Supreme Court determined the status of the employees of PTCL by declaring that they are not civil servant:---

"Pakistan Telecommunication Company to which petitioner was transferred had no statutory rules--Petitioner, in circumstances could not be said to be civil servant---Service Tribunal had rightly declined to grant relief to the petitioner".

While deciding Civil Petitions Nos.28 to 34 of 2011, the Hon'ble Supreme Court while discussing all case-law on the subject held as under:---

"Thus, for the foregoing reasons, we are of the opinion that the judgment in Writ Petition No.2140 of 2006 relied upon by the Peshawar High Court is not holding the field. In view of the judgment in the case of Iqbal Nasir (ibid), whereby the constitutional petition has been found not

maintainable on behalf of daily wagers working in PTCL, who were not governed by the statutory rules.

The petitions are converted into appeals and allowed. Consequently, the impugned judgment is set aside."

And through judgment given in Civil Appeals Nos.239 to 241 of 2011, the Hon'ble Supreme Court has further clarified the issue by holding as under:---

"It is important, at this point, to draw a distinction between employees who stood transferred to PTCL by virtue of section 35 *ibid*, and the Vesting Order, on the one hand and those employees, who joined PTCL after 1-1-1996. The protection under the Federal Government guarantee would not be available to the latter category whose terms and conditions of service would be contractual in nature and would, therefore, be non-statutory."

Another aspect is that contractual liabilities/obligations cannot be enforced through writ petition and proper course for petitioner would have been to agitate his grievance before the court of competent jurisdiction, as this court cannot enter into disputed questions, which require recording of evidence and interpretation of the contract, pasting of responsibility of its violation. Open Ended Contract does not immune employee from any legal action.

In this view of the matter, instant writ petition is dismissed with no orders as to costs.

H.B.T./45/IsI.

Petition dismissed.