JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.1152/2018
Shell Pakistan Limited
Versus
Registrar Trade Unions and others

Date of Hearing:	26.09.2019
Petitioner by:	Mr. Faisal Mahmood Ghani, Advocate
Respondents by:	Qazi Ahmed Naeem Qureshi, Advocate for respondent No.2 Mr. Mushtaq Hussain Bhatti, Advocate for respondent No.3

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner (Shell Pakistan Limited) impugns the order dated 16.02.2018, passed by respondent No.1 (Registrar Trade Unions, Islamabad) whereby the application filed by respondent No.2 (Shell Labour Union) for its registration as a trade union in the petitioner's establishment was allowed and the petitioner's objections to respondent No.2's said application were dismissed.

2. The facts essential for the disposal of the instant petition are that the petitioner is a public limited company engaged in the marketing of petroleum products. Respondent No.3 (Shell Employees Union) has been registered as a trade union and has also been certified as the Collective Bargaining Agent ("C.B.A."). The petitioner has a Lubricants Oil Blending Plant at Karachi ("L.O.B.P.") The petitioner claims to have outsourced the non-core functions at the said Plant to various service providers, including Al-Haiye (Pvt.) Ltd. and Hussain International and Field Engineering (Pvt.) Ltd.

3. The members of respondent No.2/union are all working at L.O.B.P. These members filed two cases before the National Industrial Relations Commission, Karachi Bench ("N.I.R.C.") against the petitioner and the service providers, praying for *inter-alia* an injunction to restrain the respondents in the said cases from terminating their employment. Vide order dated 12.04.2016, the said cases were dismissed as withdrawn.

Subsequently, the members of respondent No.2/union filed a grievance petition (case No.4B(102)/2016-K) before N.I.R.C., Karachi Bench, seeking a declaration that they were the petitioner's employees with all entitlements under the labour laws. The said petition is still *subjudice.*

4. On 23.12.2015, the members of respondent No.2/union who had filed the grievance petition before N.I.R.C., Karachi Bench, filed an application before respondent No.1 for the registration of respondent No.2/union in the petitioner's establishment. On 02.01.2016, the petitioner filed objections to the said application. The primary ground taken in the said objections was that none of the members of respondent No.2/union were workers or in actual employment of the petitioner. The factum as to the filing of a grievance petition by the members of respondent No.2/union before N.I.R.C., Karachi Bench, was also brought to the notice of respondent No.1. The outsourcing service agreements by virtue of which the members of respondent No.2/union were working at L.O.B.P. were also filed along with the petitioner's objections.

5. Vide impugned order dated 16.02.2018, respondent No.1 spurned the petitioner's objections and held *inter-alia* that respondent No.2/union was entitled to be registered as an industry-wise trade union. It was also directed that the requisite registration certificate be issued to respondent No.2/union. Pursuant to the said order dated 16.02.2018, registration certificate dated 28.02.2018 was issued by N.I.R.C., Islamabad, certifying that respondent No.2/union had been registered under the provisions of the Industrial Relations Act, 2012 ("I.R.A.") in the petitioner's establishment. The said order dated 16.02.2018 and the registration certificate dated 28.02.2018 have been assailed by the petitioner in the instant writ petition.

6. Mr. Faisal Mahmood Ghani, learned counsel for the petitioner, after narrating the facts leading to the filing of the instant petition, submitted that the members of respondent No.2/union are not the petitioner's employees; that there exists no relationship of master and servant or employer and employee between the petitioner and the members of respondent

No.2/union; that the members of respondent No.2/union are the employees of Al-Haiye (Pvt.) Ltd. and Hussain International and Field Engineering (Pvt.) Ltd.; that employment contracts have been executed between the said service providers and the members of respondent No.2/union; that the terms and conditions of the employment of respondent No.2/union's members are not determined by the petitioner but by the said service providers; and that the petitioner has no privity of contract with the members of respondent No.2/union.

7. Learned counsel for the petitioner further submitted that the question as to whether the members of respondent No.2/union are the petitioner's employees is *subjudice* before the N.I.R.C., Karachi Bench, where the members of respondent No.2/union have filed a grievance petition praying for a direction to the petitioner to issue appointment letters to all the petitioners therein confirming their employment as employees of the petitioner; that all the thirty-six applicants before respondent No.1 were the petitioners before N.I.R.C., Karachi Bench; that the relationship between the petitioner and the members of respondent No.2/union is yet to be determined by N.I.R.C., Karachi Bench; that until the said petition is decided *qua* the status of the members of respondent No.2/union, they cannot be considered as employees of the petitioner; that after respondent No.1's order to register respondent No.2 as a trade union in the petitioner's establishment, there is nothing left to be determined by N.I.R.C., Karachi Bench, in the cases filed by the members of respondent No.2/union; and that the judgment relied upon by the learned Registrar Trade Union ("R.T.U.") in allowing respondent No.2/union's application has not been understood in its correct perspective.

8. Learned counsel further submitted that the petitioner had outsourced certain non-core functions, including janitorial, gardening and gate-keeping/security at L.O.B.P. to service providers who had employed the members of respondent No.2/union to perform the said functions; that the members of respondent No.2/union were not engaged in the manufacture of

Lubricants; that if a company outsources its core functions to workers employed by service providers, then such workers are deemed to be workers/employees of the company; that if non-core functions are outsourced, then the workers employed by the service providers cannot be considered as workers/employees of the company; that salary to the members of respondent No.2/union is paid by the service providers and not by the petitioner; that respondent No.1 does not have the jurisdiction to determine whether the members of respondent No.2/union are employees of the petitioner or the service providers; that the membership of respondent No.2/union is restricted to Karachi and therefore it is not an industry-wise trade union; that all the members of respondent No.2/union are posted at Karachi; and that for an industry-wise trade union, it is essential for its membership to be from more than one Province. Learned counsel for the petitioner prayed for the writ petition to be allowed in terms of the relief sought therein.

9. On the other hand, Qazi Ahmed Naeem Qureshi, learned counsel for respondent No.2/union, submitted that the application for registration of respondent No.2/union was filed before respondent No.1 in the year 2015, but it was kept pending for a long time; that the I.R.A. is a beneficial legislation for workmen and therefore applications filed by workmen shall be decided expeditiously; that the management/employer has no *locus standi* in the process of registration of a trade union; that respondent No.1, in its order dated 16.02.2018, had addressed all the objections taken by the petitioner to the application for the registration of respondent No.2/union; that under Section 2(33) of the I.R.A., workers employed by an establishment through a contractor or a service provider can also register a trade union in the establishment; that in the instant case, the members of respondent No.2/union are admittedly working in the petitioner's premises; that for the provisions of the I.R.A. to apply, the establishment has to be trans-provincial, but there is no requirement for the workmen to be employed in different Provinces; that in the proceedings before respondent No.1, the

members of respondent No.2/union were not seeking their regularization; that the Hon'ble High Court of Sindh has already held that the N.I.R.C. has no power to issue regularization orders; that if a worker is employed against a permanent post, then regularization is his right; that the petitioner had given an undertaking before the Hon'ble High Court of Sindh that the employment of the members of respondent No.2/union shall not be terminated; that all the workers in L.O.B.P. are performing core functions; that an employer has no *locus standi* to object to the registration of a trade union in its establishment; and that regularization of employees/workmen does not come within the functions of N.I.R.C.

10. Learned counsel for respondent No.2/union further submitted that the petitioner had the alternative remedy of applying to respondent No.1 for the cancellation of the registration of respondent No.2/union under Section 11(1) of the I.R.A.; that Section 11(2) of the I.R.A. provides that where the Registrar is of the opinion that the registration of a trade union should be cancelled, he shall submit an application to the Commission praying for permission to cancel such registration; that if respondent No.2/union had been registered in contravention of any of the provisions of the I.R.A. or the rules, its registration could be cancelled under Section 11(1)(a) of the I.R.A.; that the mandate of respondent No.1 under the I.R.A. is limited; and that the instant petition was not maintainable inasmuch as the petitioner had the remedy of filing an appeal under Section 12 of the I.R.A. Learned counsel for respondent No.2/union prayed for the writ petition to be dismissed.

11. Mr. Mushtaq Bhatti, learned counsel for respondent No.3 adopted the arguments advanced by the learned counsel for the petitioner. Furthermore, he submitted that an employer cannot file an appeal under Section 12 of the I.R.A.; that Section 2(f)(iv) of the Industrial & Commercial Employment (Standing Orders) Ordinance, 1968 defines *"industrial establishment"* as an establishment of a contractor who, directly or indirectly, employs workmen in connection with the execution of a contract to which

he is a party, and includes the premises in which, or the site at which, any process connected with such execution is carried on; that there are two types of contractors *viz* (i) supplier of labour, whose role finishes when labour is supplied, and (ii) the provider of services; that the employees of a contractor can seek regularization with the contractor, but not with the principal supplier; that the petitioner had outsourced its non-core activities to the service providers; that since the members of respondent No.2/union were not the petitioner's employees, respondent No.2/union could not have been registered in the petitioner's establishment. Learned counsel for respondent No.3 prayed for the writ petition to be allowed.

12. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

13. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 5 above, and need not be recapitulated.

14. In the first instance, I propose to deal with the preliminary objection to the maintainability of the instant petition taken by the learned counsel for respondent No.2/union, that the petitioner had the alternative remedy of filing an appeal under Section 12 of the I.R.A. Section 12 of the I.R.A. provides that a trade union, its members or an officer may prefer an appeal against the order, decision and proceedings conducted by the Registrar within thirty days before the Commission. Although the proceedings culminating in the issuance of the impugned order dated 16.02.2018 passed by respondent No.1 can be assailed in an appeal under Section 12 of the I.R.A., but such right of an appeal is provided only to (i) a trade union (ii) members of a trade union and (iii) an officer of a trade union. Such a right of appeal has not been given to an employer or an establishment where the trade union functions. Recently, this Court in the case of National Electric Power Regulatory Authority Vs. Registrar of Trade Unions, N.I.R.C. (2015 PLC 148) interpreted Section 12 of the I.R.A. in the following terms:-

> ***"12. Next, whether any alternate remedy was available to NEPRA under the Act of 2012? section 12 provides for an appeal against the orders/decisions of the respondent No.1 i.e. the Registrar. The right of appeal is restricted to a trade union, its members or an officer. An 'officer' is defined in section 2(xxii). Section 12, therefore, does not provide a right of appeal to an employer even if the order is without jurisdiction. Section 58 provides for appeals against orders passed by any Bench of the Commission, and not to matters relating to the registration of a trade union passed by the respondent under the Act of 2012. However, in the present case, NEPRA has been able to make out a case of the impugned proceedings and orders being without jurisdiction and coram non-judice. Any act without jurisdiction is a nullity in law and, therefore, the same is open to judicial review in exercise of the powers vested in this Court under Article 199 of the Constitution. The Supreme Court has held in case of Essa Cement Industries Workers' Union v. Registrar of Trade Unions, Hyderabad Region, Hyderabad and 4 others [1998 PLC 500] that jurisdictional facts are not immune from the scrutiny of the High Court in the exercise of its jurisdiction under Article I99 of the Constitution. It has already been held that the impugned orders are without jurisdiction and coram non-judice, and since an efficacious alternate remedy was not available to the petitioner, therefore, the petition is maintainable under Article 199 of the Constitution."***

15. Additionally, this Court in the unreported order dated 06.10.2015 passed in writ petition No.2253/2015 held that the remedy of an appeal under Section 12 of the I.R.A. cannot be availed by the employer. In view of the ambiguous language employed in Section 12 of the I.R.A. which has already been interpreted by this Court in the cases mentioned above, I am of the view that the petitioner <u>could not have filed</u> an appeal under Section 12 of the I.R.A. against respondent No.1's order dated 16.02.2018, and consequently the preliminary objection taken by the learned counsel for respondent No.2/union to the maintainability of this petition is spurned. I now proceed to decide this petition on merits.

16. Section 8(1)(d) of the I.R.A. provides that a trade union shall not be entitled to registration unless its constitution provides for the number of persons forming the executive which shall not exceed the prescribed limit and shall include not less than 75% of its members from amongst *"<u>the workmen actually engaged or employed in the establishment</u> or establishments or the industry for which the trade union has been formed"*. *"Worker"* and *"workman"* have been defined in Section 2 (xxxiii)

of the I.R.A to mean *inter-alia* a person not falling within the definition of employer who is employed (including employment as a supervisor or as an apprentice) in an establishment or industry for hire or reward either directly or through a contractor. All the members of respondent No.2/union are workers whose services were engaged by the service providers. The petitioner asserts that these workers are not the petitioner's employees, but are those of the service providers, and therefore respondent No.2/union could not be registered. It may also be mentioned that the term *"establishment"* has been defined in Section 2(x) to mean *"any office, firm, factory, society, undertaking, company, shop or enterprise, which employs workmen directly or through a contractor for the purposes of carrying on any business..."* It is not disputed that the petitioner is indeed an establishment as defined in the I.R.A. The term *"employer"* as defined in Section 2(ix) of the I.R.A. does not include a service provider or a contractor to whom the services of workers are engaged. Therefore, workers employed through a contractor or a service provider cannot form a union in the office or undertaking of such a contractor or a service provider.

17. It is not disputed that the members of respondent No.2/union performed their duties at the petitioner's premises. Such workers have no privity of contract with the petitioner. They have a contractual relationship with contractors/service providers who have been paying their salaries/wages. The services that such workers render at the petitioner's premises include security, janitorial and gardening services. It is also not disputed that such workers have been rendering services at the petitioner's premises for a number of years. Regardless of the fact that terms of the agreements executed between the petitioner and the service providers and the agreements executed between the members of respondent No.2/union and the service providers do not show any privity of contract between the petitioner and the workmen, the Superior Courts have considered such workmen to be the employees of the company upon satisfaction of prescribed conditions. In the case

of Fauji Fertilizer Company Ltd. Vs. National Industrial Relations Commission (2013 SCMR 1253), the Hon'ble Supreme Court, after making reference to a catena of case law on the subject, culled out the following principles therefrom:-

> ***"(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."***

18. In the abovementioned case, the Hon'ble Supreme Court held that the workers who performed the work of bagging urea and connected activities at the premises of the company, and whose services were engaged by contractors/service providers who paid their wages/salaries, were in fact the employees of the company. In this regard, the operative part of the said judgment is reproduced herein below:-

> ***"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."***

19. Additionally, in the case of State Oil Company Limited Vs. Bakht Siddique (2018 SCMR 1181), a petition filed by the respondents for the regularization of their services was contested by the company primarily on the ground that the respondents were not the company's employees, and that their services had been engaged by a third party service provider/contractor. This contention did not find favour with the Hon'ble Supreme Court which directed that the respondents' services be regularized with effect from the date when they had approached the Hon'ble High Court for the regularization of their services. The operative part of the said report is reproduced herein below:-

> ***"As regards the question that the respondents were not the employees of the petitioner but the contractor, suffice it to say that it is a normal practice on behalf of such industries to create a pretence and on that pretence to outsource the employment of the posts which are permanent in nature and it is on the record that the respondents have been in service starting from as far back as 1984. This all seems to be a sham or pretence and therefore, it being not a case of any disputed fact and no evidence was required to be recorded."***

20. The learned R.T.U., after making reference to the law laid down in the case of Fauji Fertilizer Company Ltd. Vs. National Industrial Relations Commission *(supra)*, held that the members of respondent No.2/union were working in the petitioner's establishment and therefore respondent No.2/union was entitled to be registered in the petitioner's establishment irrespective of the fact whether they were directly employed by the petitioner or through a contractor. This finding is in consonance with the law laid down by the Hon'ble Supreme Court in the abovementioned cases, and the learned counsel for the petitioner has given no reason to interfere with the said finding.

21. The documents on the record show that most of respondent No.2/union's members had been working at the petitioner's premises for several years. Given this fact, it cannot be held that the works performed by such workmen/workers at the petitioner's premises were not of a permanent nature.

Furthermore, if the duties performed by such workers were not related to running the affairs of the petitioner/company, it does not appeal to reason as to why such workers had been engaged to work at the petitioner's premises for such a long period of time. The agreements between the petitioner and the service providers may well provide for such workers to work under the supervision and control of the service providers, but the fact remains that there was nothing brought on the record to show that it was the service provider's representative at the petitioner's premises under whose orders or dictation such workers performed their duties.

22. As regards the contention of the learned counsel for the petitioner that since the members of respondent No.2/union had filed a petition before N.I.R.C., Karachi Bench, praying for a declaration that they were employees of the petitioner, the R.T.U. could not have registered respondent No.2/Union without waiting for the outcome of the proceedings before the N.I.R.C., Karachi Bench, suffice it to say that in the case of Pakistan State Oil Company Ltd. Vs. Ghulam Ali (SBLR 2015 SC 233), the Hon'ble Supreme Court held in no uncertain terms that N.I.R.C. could not determine nor could it order the regularization of the employees as it had a limited scope. For the purposes of clarity, the operative part of the said order passed by the Hon'ble Supreme Court is reproduced herein below:-

> ***"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 the 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."***
> **(Emphasis added)**

23. Even otherwise, the prayer in the grievance petition before the N.I.R.C., Karachi Bench, was that the petitioner be directed to issue appointment letters to the members of respondent No.2/union confirming their employment with effect from the date

of their initial appointment. The case of the members of respondent No.2/union before the R.T.U. was not that they were permanent workmen in the petitioner's establishment, but that they *"are workmen actually engaged or employed in the industry with which the trade union is connected"* in terms of Section 8 (2) (a) of the I.R.A. Therefore, it is my view that the R.T.U. was not bound to wait for the decision of the N.I.R.C., Karachi Bench before deciding the application for the registration of respondent No.2/union. It ought to be borne in mind that the Hon'ble Supreme Court in the case of State Oil Company Limited Vs. Bakht Siddique (*supra*), made the following observations:-

> ***"As regards the question that the respondents were not the employees of the petitioner but the contractor, suffice it to say that it is a normal practice on behalf of such industries to create a pretence and on that pretence to outsource the employment of the posts which are permanent in nature ..."***

24. Since the definition of *"worker"* and *"workman"* includes a person employed directly or through a contractor; and since the workmen who were members of respondent No.2/union had been working against posts of a permanent nature; and since such workmen had been working at the petitioner's premises since several years; and since there was nothing brought on the record to show that the service provider's representative had been supervising the duties performed by such workmen at the petitioner's premises; and since I do not find any jurisdictional infirmity in the impugned order dated 16.02.2018 passed by respondent No.1/R.T.U., the instant writ petition is dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2019

(JUDGE)

*Qamar Khan**

APPROVED FOR REPORTING