JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.3074/2017
M/s Sui Southern Gas Company Limited
Versus
Ghulam Nabi Deeshak, Registrar Trade Unions and others

Date of Hearing:	28.11.2018.
Petitioner by:	Mr. Asim Iqbal, Advocate.
Respondents by:	Ch. Muhammad Junaid Akhtar, Advocate for respondent No.3. Ch. Sagheer Ahmed, Advocate for respondent No.4. Mr. Ashraf Ali Khan, Advocate for respondent No.5. Mr. Muhammad Asif Gujjar, Advocate/*Amicus Curiae*.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner M/s Sui Southern Gas Company Limited, impugns the order dated 16.08.2017, passed by respondent No.1 (Registrar Trade Unions), accepting application dated 23.09.2016 filed by respondent No.3 (Sui Southern Gas Insaf Jafakash Union) seeking the names of its members, who were employed by contractors/service providers to work at the petitioner's premises, to be included in the voter's list of the said Union before holding the referendum.

2. The facts essential for the disposal of the instant writ petition are that the petitioner is a public limited company primarily engaged in the business of transmission and distribution of natural gas to consumers in the Provinces of Sindh and Balochistan. It is an admitted position that 61% of the petitioner's shareholding vests indirectly in the Government of Pakistan, whereas 39% is traded on the stock market.

3. On 03.10.2013, respondent No.1 issued a certificate to the effect that respondent No.3/Union had been registered under the provisions of the Industrial Relations Act, 2012 ("I.R.A.") in the petitioner's establishment. This certificate was issued after

respondent No.1 had passed order dated 03.10.2013 accepting respondent No.3/Union's application for registration as an industry-wise trade union.

4. The aims and objects of respondent No.3/Union, as per its constitution, were *inter-alia* to unite the workers for creating harmony amongst them and maintain cordial relations with the employer/management; and to ameliorate the working conditions of the members and workers in the establishment. As per Article 5(a) of said constitution, any worker/workman, as defined in section 2(xxx) of the I.R.A., discharging of professional obligations in M/s Sui Southern Gas Company Limited and its Branches situated in the Provinces of Sindh, Balochistan and Federal Capital Territory, could become a member of the said Union. Article 5(d) of the said constitution provided that respondent No.3/Union could not entertain any application for membership of a person who was not a workman or not actually employed or engaged by the petitioner.

5. On 23.09.2016, respondent No.3 filed an application before respondent No.1 praying for the following relief:-

> ***"In the circumstances, it is respectfully prayed that the name[s] of the contract employees may kindly be included in the voter['s] list before holding the referendum."***

6. The position taken by respondent No.3/Union in the said application was *inter-alia* that there were more than 3,000 workers employed on contract basis by the petitioner and had been performing their duties against posts which were of a permanent nature; that 500 such employees were members of respondent No.3/Union; that employees whose services were engaged directly by the employer or through a contractor, and were performing duties against posts of permanent nature, were entitled to be included in the voter's list of a trade union; and that if the names of contract employees were not included in the voter's list, they would be deprived of their fundamental rights.

7. On 12.01.2016, the petitioner filed an application before respondent No.1 for the dismissal of the said application filed by

respondent No.3/Union. The position taken by the petitioner, in its application, was that employees of third party manpower contractors/service providers are not the petitioner's employees; that under Section 19(5) of the I.R.A., only those workers who had completed three months' service and were direct employees of the petitioner were eligible to participate in the referendum; that the petitioner had acquired services of workers through third party manpower contractors/ service providers so as to cater to the petitioner's skilled and unskilled manpower requirements; that in this regard, service agreements had been executed between the petitioner and service providers; that as per the terms and conditions of such service agreements, the service provider is directly responsible for the management, control and supervision of all the personnel/employees engaged by him for rendering services; that for all practical purposes, the service provider is the employer of the employees engaged by him for rendering services in the petitioner's establishment; and that the service provider is not the petitioner's agent or representative.

8. Vide order dated 28.03.2017, respondent No.1 allowed respondent No.3/Union's application seeking inclusion of the workers engaged through service providers in the said Union's voter's list. The said order was assailed by the petitioner in writ petition No.1280/2017 before this Court. Vide order dated 12.07.2017, the said petition was disposed of in the following terms:-

> ***"3. In view of the above consensus, and with the consent of the learned counsel present, this matter is disposed of in the following terms:-***
>
> ***(I) The impugned order dated 28.03.2017 passed by the learned Registrar, Trade Union is set-aside;***
>
> ***(II) The matter is remanded to the learned Registrar, Trade Union who shall decide respondent No.3's application (which is at page-343 to 353 of this petition), after affording an opportunity of hearing to the parties, and after going through the agreements executed between S.S.G.C.L. and the Service Providers as well as the agreements between the Service Providers and the employees working at the sites of the S.S.G.C.L.;***

(III) It is expected that the said application will be decided, within a period of three weeks from the date of the receipt of this order by the learned Registrar, Trade Union; and

(IV) The learned Registrar, Trade Union while finalizing the voters list, shall include the names of only those workmen/employees who are entitled to be so included in accordance with the law."

9. The post-remand proceedings before respondent No.1 culminated in the order dated 16.08.2017 allowing respondent No.3's application for the inclusion of the workers engaged through service providers in its voter's list. Furthermore, respondent No.1 gave directions for the inclusion of the names of such workers in respondent No.3/Union's voter's list for the referendum due to be held for the determination of the collective bargaining agent for the workmen employed in the petitioner's establishment. The said order has been impugned by the petitioner in the instant writ petition.

10. Mr. Asim Iqbal, Advocate, learned counsel for the petitioner, after narrating the facts leading to the filing of the instant petition and making submissions in reiteration of the petitioner's application dated 12.01.2016 before respondent No.1, further submitted that the workers whose names were sought to be included by respondent No.3/Union in its voter's list were not the petitioner's employees but those of independent service providers; that there was no privity of contract between the petitioner and the workers engaged by the service providers; that the salaries of such workers were paid by the service providers and not by the petitioner; that perusal of respondent No.3/Union's application dated 23.09.2016 shows that the names of *"contract employees"* were sought to be included in the said Union's voter's list; that the workers with whom the petitioner had entered into employment contracts were already in respondent No.3/Union's voter's list; that respondent No.3/Union had not prayed for the names of the employees engaged by the service providers to be included in the voter's list; and that by virtue of the impugned

order, the employees of the service providers have been treated as the petitioner's employees.

11. Learned counsel for the petitioner further submitted that ever since the petitioner's incorporation, employees of the service providers performing duties in the petitioner's establishment have not taken part in any referendum; that respondent No.3/Union failed to produce letters of appointment or any other evidence showing that the petitioner had employed the workers whose names were sought to be included in the voter's list; that the service agreements executed between the petitioner and the service providers clearly provide that the personnel/employees employed by the service providers who perform services under the terms of such agreements shall for all purposes be considered as employees of the service providers and at no time during the continuance of such agreements will the service providers attempt to represent such employees as the employees of the petitioner; that the effect of giving such employees voting rights would be tantamount to treating them as the petitioner's regular employees; that unless a worker is declared to be the petitioner's employee, he cannot be given an entitlement to vote in terms of sub-sections(1)(d) and (2)(a) of section 8 of the I.R.A.; and that the impugned order dated 16.08.2017 is in stark contrast to respondent No.1's earlier order in the case of Sui Southern Gas Workers Union Vs. Sui Southern Gas Company Limited (2012 PLC 247), and the order passed by the Hon'ble High Court of Sindh in the case of Muhammad Hashim Vs. General Manager, Human Resources, Sui Southern Gas Co. Ltd. (2015 PLC (C.S.) 195). Learned counsel for the petitioner prayed for the writ petition to be allowed in terms of the relief sought therein.

12. On the other hand, Ch. Muhammad Junaid Akhtar, Advocate, learned counsel for respondent No.3/Union, submitted that the impugned order dated 16.08.2017 does not suffer from any jurisdictional infirmity; that the petitioner had no *locus standi*

to challenge the said order passed by respondent No.1; that under Section 19(4) and (5) of the I.R.A., it is the responsibility of respondent No.1 to prepare the voter's list of a trade union; that the petitioner has not shown as to how the impugned order passed by respondent No.1 is in violation of the law; that the substance of the application is to be seen and not the form; that respondent No.3/Union had applied for the names of its members, whose services were engaged through service providers, to be included in the voter's list; that the title of respondent No.3/Union's application explains its nature; that para-9 of the impugned order dated 16.08.2017 shows that respondent No.1 had understood the nature of respondent No.3/Union's application; that the documents with respect to the duties of the workers who were sought to be included in the voter's list were issued by the petitioner and not the service providers; that these workers had worked in the petitioner's establishment for more than twenty years; and that under Section 19 of the I.R.A., the management is only required to give the list of its employees. Learned counsel for respondent No.3/Union prayed for the writ petition to be dismissed.

13. Mr. Muhammad Asif Gujjar, learned *Amicus Curiae,* submitted that a workman whose period of employment was not less than three months could be included in the voter's list; and that employees of a third party service providers are deemed to be permanent employees of the company/employer if they have served the company/employer for more than nine months. In making his submissions, learned *Amicus Curiae* placed reliance on the judgments reported as ***2010 SCMR 253*** and ***2013 SCMR 1253***.

14. I have heard the contentions of the learned counsel for the contesting parties as well as the learned *Amicus Curiae* and have perused the record with their able assistance.

15. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 9 above and need not be recapitulated.

16. I intend to confine myself to the question as to whether a writ of *certiorari* is to be issued regarding respondent No.1's order dated 16.08.2017, whereby respondent No.3/Union's members who had entered into contracts with third party service providers/contractors for performing duties at the petitioner's establishment. The core question that needs to be determined is whether the order dated 16.08.2017, passed by respondent No.1 allowing respondent No.3/Union's application for the inclusion of the names of its members was unlawful on account of the fact that the services of such members were engaged through third party contractors/service providers.

17. Section 19(4)(a) of the I.R.A. provides that every employer shall on being so required by the Registrar, submit *inter-alia* a list of all workmen employed in the establishment excluding those whose period of employment in the establishment is less than three months. Section 19(5) of the I.R.A. provides that the Registrar shall, after verification of the lists submitted by the trade unions, prepare a list of voters in which shall be included the name of every workmen whose period of employment, as computed in accordance with sub-section (4), is not less than three months and who is not a member of any of the contesting trade unions and shall, at least four days prior to the date fixed for the poll, send to each of the contesting trade unions a certified copy of the list of voters so prepared. The proviso to Section 19(4)(b) provides that in computing the period of three months in the case of a workman employed in a seasonal factory within the meaning of Section 4 of the Factories Act, 1934, the period during which he was employed in that factory during the preceding season shall also be taken into account.

18. Since the list of voters submitted by respondent No.3/Union had to be verified by respondent No.1 before the voter's list could

be prepared, there is no substance in the contention of the learned counsel for respondent No.3/Union that the petitioner had no *locus standi* to object the voter's list prepared by respondent No.1. In the case of Karachi Electric Supply Corporation Vs. National Industrial Relations Commission (1983 PLC 367), it has been held that the Registrar is not to accept the list submitted by the trade union as a matter of course, but has to verify the list and after being satisfied about the correctness of the list in terms of the law, the voter's list is prepared and its certified copy is supplied to the trade union.

19. Section 8(1)(d) of the I.R.A. provides that a trade union shall not be entitled to registration unless 75% of its members from amongst *"the workmen actually engaged or employed in the establishment or establishments or the industry for which the trade union has been formed"*. "Worker" and "workman" has 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. The list submitted by respondent No.3/Union, included workers whose services were engaged by the service providers. The petitioner asserts that these workers are not the petitioner's employees but those of the service providers and, therefore, their names cannot be included in the voter's list.

20. It appears that there are several service providers who have entered into service agreements with the petitioner for providing skilled and trained personnel for rendering services to the petitioner. These service providers include M/s. Akbar Ali & Co. (Pvt.) Ltd., M/s. Al Mukhtar Gas Engineers, M/s. Rafiq Awan Enterprises (Pvt.) Ltd., M/s. Basit & Bros. (Pvt.) Ltd., M/s. Thrity Enterprises, M/s. H.A. Rashid & Co., M/s. M. Aizazullah (Pvt.) Ltd., M/s. Mehran Traders, M/s. Zafar& Sons (Pvt.) Ltd., M/s. Ziarat Gas Company, M/s. HRSG Outsourcing (Pvt.) Ltd., M/s. Sunrise

Enterprises, M/s. Muhammad Ashraf Mughal, M/s. Raheel Associates, and M/s. Ali Hassan & Brothers, etc.

21. It is not disputed that the members of respondent No.3/Union, whose names are sought to be included in the voter's list, 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, gardening, information technology, ditching/ backfilling, bills printing/distribution, meter reading and disconnection/reconnection of 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 company and the service provider and the agreements executed between the workmen and the service providers do not show any privity of contract between the company 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 catena of case law on the subject, culled out the following principles therefrom:-

> ***"(a) the word 'employed by the factor' 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."

22. 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 petitioner/Company, and whose services were engaged by contractors/service providers, who paid their wages/salaries, were in fact the employees of the petitioner/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."

23. 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 petitioner/Company primarily on the ground that the respondents were not the petitioner/Company's employees, and that their services had been engaged by a third party service provider/contractor. This contention on the petitioner's part 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."***

24. Respondent No.1 allowed respondent No.3/Union's application after holding that the workers, whose names were sought to be included in the voter's list, were performing their duties under the direct control and supervision of the petitioner, and that the agreements with the service providers had been made only to deprive such workers from their legal rights under the labour law. This finding is in consonance with the observations of the Hon'ble Supreme Court in the case of State Oil Company Ltd. (*supra*). Furthermore, respondent No.1 was also given reason to believe that a representative of the contractor/service provider was not available at the petitioner's premises to supervise the work of the workmen, whose names were sought to be included in respondent No.3/Union's voter's list. This finding of fact, the learned counsel for the petitioner has given me no reason to interfere with.

25. The documents on the record show that most of the respondent No.3/Union's members, whose names were sought to be included in the voter's list, had been working at the petitioner's premises for more than a decade – some of them for more than two decades. 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 working 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.

26. Since the definition of "Worker" and "workman", includes a person employed directly or through a contractor; and since the workmen, whose names were sought to be included in respondent No.3/Union's voter's list had been working against posts of a permanent nature; and since the such workmen had been working at the petitioner's premises since more than a decade; 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 16.08.2017, passed by respondent No.1, the instant writ petition is dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____, 2018.

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**