91/20

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE GULZAR AHMED, HCJ
MR. JUSTICE FAISAL ARAB
MR. JUSTICE IJAZ UL AHSAN

1. CAFR) D.J

CIVIL APPEAL NOS.248, 252, 253, 254, 265, 269, 270, 271, 277, 280, 284 & 302 OF 2020.

(Against the judgments dated 26.09.2017, 23.11.2017, 14.03.2018, 10.04.2018, 04.09.2018, 11.10.2018, 05.12.2018, 14.03.2019 of the Peshawar High Court, Peshawar, passed in Writ Petitions No.3958-P/2014, 37-P/2017, 38-P/2017, 4733-P/2016, 1008-P/2017, 786-A/2016, 787-A/2016, 678-A/2017, 866-A/2018, 2361-P/2014, 1015-A/2018 and 4272-P of 2017).

Government of Khyber Pakhtunkhwa through Secretary Health, Peshawar and others. **...Appellant(s)** *(in all cases)*

VERSUS

Jawad Ali, etc.	In C.A. 248/2020
Inamullah, etc.	In C.A. 252/2020
Fazal Rabi, etc.	In C.A. 253/2020
Shafiq ur Rehman, etc.	In C.A. 254/2020
Samiullah etc.	In C.A. 265/2020
Nisar Ahmad, etc.	In C.A. 269/2020
Reema Bibi, etc.	In C.A. 270/2020
Babar Sultan, etc.	In C.A. 271/2020
Mumtaz Hussain & another.	In C.A. 277/2020
Ishfaq Bacha, etc.	In C.A. 280/2020
Raheel Zeb, etc.	In C.A. 284/2020
Faizan Rashid & another.	In C.A. 302/2020

...Respondent(s)

For the Appellants: Barrister Qasim Wadood, Addl. A.G. KP
Mr. Atif Ali Khan, Addl. A.G. KP
(In all cases)

For the Respondents: Mr. Muhammad Shoaib Shaheen, ASC
Syed Rifaqat Hussain Shah, AOR
(For respondents 1-3, 5, 6, 8-25 in CA 248/2020)

Nemo
(For respondents 4, 7, 26 in CA 248/2020)

Mr. Mukhtar Ahmed Muneri, ASC
(For respondents 1, 3, 7, 8, 11, 13, 14, 16, 19-21 in CA 252/2020 and for respondents 3, 6, 7, 18, 19 in CA 265/2020, and for respondent 2 in CA 284/2020)

Mr. Rehman Ullah, ASC
(For respondents 4, 5, 15, 18 in CA 252/2020 & for respondent No.2 in CA 253/2020 and respondent 1 in CA 254/2020)

Nemo
(For respondent 1 in CA 253 & 284/2020, for respondents in CA 277/2020, for respondents in CA 302/2020 and for remaining respondents in CA 252/2020, & CA 265/2020, CA 269, 271 & 270/2020)

Mr. Altaf Ahmed, ASC
(For respondents 5, 8, 25, 27, 31 in CA 265/2020)

Mr. Muhammad Siddique, ASC
(For respondents 1-2, 8-13 in CA 269/2020 and for respondents 1, 3-7, 9 in CA.271/2020)

Mr. Nasir Mehmood, ASC
(For respondents 1-12 in CA 280/2020)

Date of Hearing: 21.10.2020

JUDGMENT

IJAZ UL AHSAN, J-. Through this single judgment, we propose to decide Civil Appeals (hereinafter referred to as "CA") No. 248, 252, 253, 254, 265, 269, 270, 271, 277, 280, 284, and 302 of 2020 as these involve common questions of law.

2. Through the instant Appeals, the Appellants have challenged the judgments of the Peshawar High Court dated 26.09.2017, 23.11.2017, 14.03.2018, 10.04.2018, 04.09.2018, 11.10.2018, 05.12.2018, 14.03.2019 (hereinafter referred to as "The Impugned Judgments") whereby petitions of the respondents were accepted and the appellants were ordered to regularize the respondents on their respective posts.

3. The necessary facts giving rise to this *lis* are that the respondents in the aforementioned Civil Appeals were contractual employees of the Sarhad Rural Support Programme (hereinafter referred to as "SRSP"), a company registered under the Companies Ordinance, 1984. The Respondents were working on temporary project posts in an outsourced project of the provincial government, known as the Peoples Primary Healthcare Initiative (hereinafter referred

to as PPHI). The PPHI was outsourced for execution to SRSP which employed the Respondents for the duration of their contract with the Health department of the Government. It was clear from the outset that the Project was to expire after a certain period of time after which the respondents were to be relieved from their services. The term of the Project expired and on such expiry the Respondents were relieved by SRSP. Upon being relieved from their services, the respondents approached the appellants to regularize them on their respective posts. However, denial of this request, the respondents filed writ petitions before the Peshawar High Court. Their petitions were accepted and their services were thenceforth regularized vide the impugned judgments. Aggrieved, the appellants approached this Court and sought leave to appeal.

4. Leave to appeal was granted by this Court vide order dated 09.03.2020 which is reproduced below for ease of reference:

> *"The learned Additional Advocate General, Khyber Pakhtunkhwa contends that all the Respondents in these petitions were employed either on a contract basis or were employees under Section 42 of the Companies Act, 2017, and in no circumstances their services were to be regularized. He contends that this very aspect of the matter has time and again come before this Court where it has been held that such employees could not be regularized. He further contends that in all the impugned judgments, the learned High Court has merely allowed writ petitions on the basis of similarly placed persons, but without at all adverting to the facts and circumstances of each and every case separately and without applying its mind to the same. He adds that even the laws under which their appointments were made were not adverted to. He submits that the Respondents who are employees on project or contract employees under Section 42 employees were not liable to regularized and thus their regularization by the learned High Court through the impugned judgment on these petitions was altogether illegal. In support of his contentions, the learned Law Officer has referred to a three Member judgment of this*

Court dated 24.06.2014 passed in Civil Appeal No. 687 of 2014 (Government of Khyber, Agricultural, Livestock and Cooperative Department through its Secretary and others v. Ahmad Din and another).

2. We note that some of the petitions are time barred and in one of the petitions even no application for condonation of delay has been filed. The learned Law Officer states that such will be done by the petitioners.

3. The contentions raised by the learned Additional Advocate General, Khyber Pakhtunkhwa need consideration. Therefore, subject to limitation, leave to appeal is granted to these petitions to consider inter alia the same. The appeal stage paper books shall be filed within a period of one month with permission to the parties to file additional documents, if any. As the matter relates to service, the office is directed to fix the same expeditiously preferably after three months.

4. In the meantime, operation of the impugned judgment(s) shall remain suspended."

5. The main argument advanced by the learned Additional Advocate General, Khyber Pakhtunkhwa is that the respondents were employees of the SRSP, a company registered under the Companies Ordinance, 1984. They were never employed by the Government as is evident from their appointment letters which were issued by SRSP. Therefore, the Regularization Act, 2009, did not apply to them. He submits that a Memorandum of Understanding (hereinafter referred to as "MoU") was signed between the appellants and the SRSP. In pursuance of the MoU, a three-year service agreement was signed between the appellants and the SRSP(hereinafter referred to as "The Agreement"). He further contends that by virtue of The Agreement, all human resource related tasks were completely outsourced to the SRSP by the appellant as per section 22(b) which specifically states that "*Staff recruited by the Second Party shall have no claim against the First Party upon conclusion of this Agreement*". He submits that the management and administration of the

project was outsourced to SRSP, therefore, there is no relationship contractual or otherwise between the Respondents and the appellants.

6. The learned counsel for all of the respondents on the other hand have made arguments that are similar in nature. Therefore, we will deal with them collectively. They have submitted that the respondents were employed at a Basic Health Unit (hereinafter referred to as "BHU") on various posts vide appointment letters issued by the District Selection Commission as authorized by the MoU. They submit that the MoU was just an artificial device to create a buffer between the real employer namely the health department of the Government and the Respondents. They submit that this was a device to deprive the Respondents of the benefits of the Regularization Policy. They maintain that such devices and practices have been deprecated by this Court. They have vehemently argued that the services of the Respondents should be regularized under the Regularization Act, 2009 on ground of regularization of services of similarly situated employees in similar programs whilst relying on the impugned judgments.

7. We have heard the learned counsel for the parties at considerable length and gone through the record with their assistance. The question of law which falls for the determination by this Court is whether the Hon'ble Peshawar High Court correctly interpreted the law by concluding that the respondents, being project/company employees and not

civil servants, nevertheless fell under the purview of the Regularization Act, 2009 and were entitled to benefit from the same.

8. A bare perusal of the MoU reveals that the SRSP retained sole discretion over the employment, posting, removal, remuneration and customary managerial prerogative over the staff it recruited for the PPHI project. It was clear all along to all concerned parties including the Respondents that employees of SRSP shall have no claim against the Health Department upon conclusion of the agreement. Moreover, the Company Policy made it clear from the outset that the respondents were hired against project posts for a definite period of time and that upon the termination of the project they were to be relieved from their services. It is noteworthy that the respondents were never appointed on contract basis by the provincial department Khyber Pakhtunkhwa. The agreement also envisaged that the Government of Khyber Pakhtunkhwa did not have any concern with the terms and conditions of the services of the respondents as they are employed by a private company i.e. SRSP who paid and supervised them and was responsible for all matters regarding their contractual employment.

9. A plain reading of the agreement between the Appellants and the SRSP reveals that this is a clear case of outsourcing, an arm's length transaction where a private company entered into an agreement with the provincial government to provide certain services, for a certain period of

time. Such services were to be provided by SRSP by employing its own staff which was neither supervised nor paid by the Government. More importantly, the Government could neither hire nor fire them and they were to be supervised and were answerable to their own employer namely SRSP. In regular terms the word 'project' indicates any endeavor which is for a definite period of time and upon the completion of the said project, employees who were hired for that definite period have to be relieved from their duties. In this regard, reliance is placed on *Pakistan Railways through Chairman, Islamabad and another V. Sajid Hussain and others (2020 SCMR 1664)* which discusses the word "project". The relevant portion of the said judgment is reproduced below:

> *"In ordinary terms, the word 'project' is used to denote any undertaking which is for a limited time period and after the objective for which the said project has been set up is achieved, funding for the same dries up and employees who are hired for a limited time period for duration of the project have to be relieved from their duties owing to the fact that the project has concluded, the funding has ceased and the very basis on which such employees were hired has come to an end. "*

10. In such arm's length transactions, any staff recruited by the company and appointed to the project does not under any circumstances either directly or by implication become an employee of the government. Therefore, the respondents being project-based employees, recruited and supervised at the sole discretion of the SRSP, cannot be deemed to be employees of the Government and therefore do not fall within the purview of the Regularization Act, 2009. Therefore, we are of the view that the High Court has erred in

law by holding that the Government had employed the Respondents on contract basis and ordering the Appellants to regularize their services.

11. Another significant aspect of the matter is that the respondents have almost entirely relied upon the Regularization Act 2009 for the claim of the regularization of their services. However, a bare perusal of the Act clearly indicates that the term 'employee' explicitly excludes any persons appointed for project posts. Section 2(b) of the Act provides the definition of the term "employee" which is reproduced hereunder for convenience:

> *"employee" means an adhoc or a contract employee appointed by Government on adhoc or contract basis or second shift/night shift but does not include the employees for project post or appointed on work charge basis or who are paid out of contingencies".*

12. It is apparent that the cases of the respondents clearly fall outside the ambit of the Khyber Pakhtunkhwa Employees (Regularization of Services) Act, 2009 as they were all hired against project posts and the project itself was to be executed by a private company which had a contractual arrangement with the Government. For the said Act to apply, it is the Government that must employ the individual as contractual employees. The MoU clearly shows that SRSP and the appellants had entered into a management contract whereby one of the cardinal reasons for which SRSP was engaged was to manage all recruitment. We are, therefore, in no manner of doubt that there is a qualitative and conceptual difference between contract employees covered by the

provisions of the 2009 Act and the employees hired by SRSP to execute the Project. Such employees cannot by any stretch of the language be termed or treated as employees hired by the Government. In these circumstances, the benefit of the Regularization Policy, 2009 was not available to them.

13. As for the argument of the learned counsel for the respondents that the District Health Officer (hereinafter referred to as "DHO") employed the respondents, the same is misconceived. The agreements made under the MoU clearly envisage that the DHO is merely a part of the selection committee of the BHU staff. Therefore, it cannot be said that merely by being a member of the committee, the DHO has the sole power over selection and appointment. Even otherwise, the selection process, the appointment letter and payment mechanisms negate the argument of the learned counsel for the Respondents.

14. It must be clarified that certain industries have adopted the practice of creating a pretense of outsourcing the employment of posts which are of permanent nature in order to avoid applicability of labour laws. In such cases of sham outsourcing, this Court has held that such outsourcing amounts to committing a fraud on the statute. In this regard reference may be made to *State Oil Company Limited V. Bakht Siddique (2018 SCMR 1181)*. However, a distinction must be drawn in the present case where the respondents were project employees, managed and fully controlled by SRSP which had entered in an agreement with the appellants to outsource its

employees on a project basis. There is an MoU on record and all other agreements made there-under point towards bonafide outsourcing and the arrangement shows an arms length transaction between the Government and SRSP in which the Government does not have any say in the hiring, firing, salaries, emoluments or disciplinary matters of the employees of SRSP. As such the principles of law settled in the case of State Oil Company Limited (ibid) are not attracted to the instant case. It does not appeal to us that this is a sham. It has not been denied at any stage by the respondents that SRSP was indeed managing them. Thus, it is a clear case where employees of a private company were hired for a temporary project and therefore distinguishable from cases of sham outsourcing.

15. As regards to the argument that there was an Agency relationship between the Appellants and SRSP and the employees of SRSP are actually employees of the Appellants, we find the same to be farfetched and misconceived. For an agency relationship to exist, it is settled law that there must be a Principal who circumscribes the powers of the Agent to act within either express authority or implied authority for the said Principal. Such a relationship does not exist in the present case. It is evident from the record that there were two separate contracts. One contract was between SRSP and the appellants i.e. the management contract, while the second was between the SRSP and the respondents which was an employment contract. Nowhere is

there a linkage between the two and nowhere is it mentioned that SRSP is acting on behalf of the Appellants in hiring the Respondents. Contrarily, SRSP has been given sole discretion in matters related to human resource and the appellants are to act within their own settled confines which are separate from those of SRSP.

16. Lastly, with regards to the argument of the learned counsel of the respondents that they have been discriminated against as some employees in other projects who were regularized, we are not impressed by the same. The instances cited by the learned counsel for the Respondents relate to employees hired by the Government on contractual basis against permanent posts. Such employees squarely fell within the ambit of the Regularization Policy. The case of the Respondents is clearly distinguishable insofar as they were never hired by the Government, they were hired by a private entity against project posts and they were informed at the time they were hired that their employment would come to an end on expiry of the period of the Project. That being so the argument that they have been unjustly discriminated does not hold much water.

17. We, therefore, find that the learned High Court has erred in law in coming to the conclusion that the benefit of Regularization Act, 2009 is available to the Respondents. Consequently, we find the impugned judgments to be unsustainable.

18. Above are the reasons of our short order dated 21.10.2020 which for ease of reference is reproduced below:

> *"We have heard learned counsel for the parties and have also gone through the record of the case. For reasons to be recorded later, all these appeals are allowed and the impugned judgments are set aside."*

19. In view of the fact that we have allowed these appeals on merits, applications for condonation of delay filed in some of the appeals are allowed and the delay in filing the same is condoned.

ISLAMABAD, THE
21st October, 2020.
ZR/*
'Not Approved For Reporting'