IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Mr. Justice Muhammad Ali Mazhar
Mr. Justice Irfan Saadat Khan

Civil Petitions No.525-K to 541-K/2023
Against the order dated 14.02.2023 passed by High Court of Sindh, Karachi in Const. Petitions No.D-7068, 7069, 7070 to 7084 of 2021.

IFFCO Pakistan (Private) Limited ...Petitioner
(In all cases)

Versus

Ghulam Murtaza & others	(In CP No.525-K, 533-K & 537-K/23)
Manthar Ali & others	(In CP No.526-K/23)
Sajjad Ahmed & others	(In CPs No.527-K & 528-K/23
Mazhar Ali & others	(In CP No.529-K/23
Naseebullah & others	(In CP No.530-K & 534-K/23
Harrison & others	(In CP No.531-K/23
Abdul Razzak & others	(In CP No.532-K/23
Umar Hayat & others	(In CP No.535-K/23
Zeeshan Ahmed & others	(In CP No.536-K & 539-K/23
Syed Mehboob & others	(In CP.No.538-K/23
Javed Iqbal & others	(In CP.No.540-K & 541-K/23

...Respondents

For the Petitioner:	Mr. Muhammad Ali, ASC Dr. Raana Khan, AOR
For Respondents No.1&9:	Ghulam Murtaza & M.Ishtiaque, in person
For other respondents:	Nemo
Date of Hearing:	04.4.2024

JUDGMENT

Muhammad Ali Mazhar, J- These Civil Petitions for leave to appeal are directed against the common judgment dated 14.02.2023 passed by the High Court of Sindh, Karachi, in Constitution Petitions No. D-7068, 7069, 7070 to 7084 of 2020, whereby the constitution petitions were dismissed.

2. The transitory facts of the case are that the respondent, Ghulam Murtuza, and other respondents filed their cases in the National Industrial Relations Commission, Karachi ("**NIRC**") under Section 54(e) of the Industrial Relations Act, 2012 (**"IRA"**). In the petitions before the

NIRC, the respondents alleged that they are workmen within the meaning of Section 2(xxxiii) of the IRA and also under the Standing Order 2(1) of the Industrial & Commercial Employment (Standing Orders) Ordinance, 1968. According to the respondents, they are the employees of IFFCO Pakistan (Private) Limited **("IFFCO")** at Karachi for the past many years and performing the job of permanent nature regularly and without any gap or break. In the petitions before the NIRC, the respondents further alleged that they are not being allowed to join the trade union and are deprived of the employment benefits such as annual increment, bonus, leave benefits, medical facilities, education, group insurance, and other fringe benefits. The respondents before the NIRC also claimed that they are regular employees of IFFCO and the non-issuance of appointment letters to them by the management and treating them as contract employees is illegal, hence they sought the declaration that they be declared permanent employees of IFFCO as all the respondents are performing their duties under the direct control and supervisions of IFFCO's management and they are not the employees of the contractor. The learned Member (Single Bench) of NIRC, *vide* order dated 09.11.2020, allowed the petition and held that the respondents are employees of IFFCO and also allowed them to join lawful trade union activities or to join the trade union of their own choice. The management of IFFCO was also refrained from committing any act of unfair labour practice, including threatening the petitioners of taking adverse action against them. Being aggrieved, the present petitioner (IFFCO), challenged the order before the full bench of the NIRC, but *vide* judgment dated 13.09.2021, the appeal was dismissed. Thereafter, the petitioner challenged the appellate judgment in the Sindh High Court, but *vide* impugned judgment dated 14.02.2023, all of the constitution petitions were dismissed.

3. The learned counsel for the petitioner argued that the NIRC had no jurisdiction to decide the case of workers employed through a contractor and there was no relationship of employer and employees between the parties. He further argued that there was no instance of unfair labour practice on the part of IFFCO pointed out in the petition before the NIRC. It was further averred that the grievance petitions before the NIRC were not maintainable. It was further contended that the Single Member as well as the Full Bench of the NIRC failed to appreciate that the employees of a contractor cannot form a Trade Union nor can they become members of the union. He further argued

that the respondents were employed by independent contractors i.e., M/s Gul Muammad Enterprises, M/s Hasnain Tanveer Associates (Pvt.) Limited and Mr. Amanullah, and not IFFCO, hence the question of depriving the respondents from the benefits of bonuses, leave benefits, medical facilities, group insurance and other fringe benefits do not arise. The management entered into different agreements for running their business. He further argued that the IFFCO Pakistan Limited Employees Union is a registered trade union and have a Collective Bargaining Agreement for the workmen employed by IFFCO in which the respondents have no membership because they are employed by contractors. It was further averred that all this crucial and important questions were ignored by the NIRC while passing the concurrent judgment and the learned High Court also failed to consider the aforesaid grounds raised by the petitioner in the constitution petitions and affirmed the concurrent findings of the NIRC.

4. The respondent No.1 & 9 appeared in person and argued that they are the employees of IFFCO for the past several years without any gap and are performing duties under their direct control and supervision, including with regards to the approval of leaves, recording of daily attendance, management, and other employment obligations. It was further argued that the wages are being paid by the IFFCO management but in order to circumvent the labour laws, the management is refraining the employees from trade union activities and they are wrongly treated as the employees of a contractor just to deprive them of employment benefits.

5. Heard the arguments. In order to discover or disinter the veritably of whether there exists any relationship of employer and employee or conversely, to understand the relationship of an employer and employee through an outsource contractor, what actually matters is the evidence led by the parties at original proceedings/stage. The respondent employees, during evidence, produced various attendance and RPL requisition sheets issued by IFFCO to prove the direct relationship of employment with IFFCO and that the employees are performing duties in its establishment on regular basis against the job of permanent nature where the entire raw material is provided by the IFFCO management and they are also controlled and supervised by the said management. No such document produced by the employees before the NIRC was rebutted by the management. It is also reflected from the

NIRC judgments that IFFCO is engaged in the business of refining of oil, packing and selling of finished oil, and for effectively managing the said business, the plant and machinery and other business activities are directly being administered and controlled by its own management. In order to establish that workers have been engaged through an outsource contractor, the management of IFFCO, produced a copy of an agreement with M/S. Gul Muhammad Enterprises which was executed on 10.07.2007 and was valid up to 30.06.2008. Another agreement was allegedly executed with Hasnain Tanveer Associates (Pvt.) limited on 21.05.2009, which was also valid for 12 months from the date of its execution. Whereas the third agreement was entered into with Mr. Amanullah on 01.01.2008. The niceties of the aforesaid agreements were taken into consideration by the NIRC but on the face of it, all the agreements had already expired when presented in Court as an effectual defence to accentuate that the respondent employees were engaged through contractors and not directly by the company. While considering the material placed on record, the learned High Court also observed that the respondents are being paid from the account of the company/petitioner. The matter reached to this Court after the decision of the NIRC Single Bench which was vetted and considered by the Full Bench of the NIRC and the learned High Court had also gone through the judgments passed by the NIRC (both single bench and full bench) and affirmed the findings which connotes that the entire facts and evidence led by the parties were properly sieved and sifted one after the other. It is also significant to point out that the alleged contractors who provided labour/employees to the petitioner never came forward to rescue the petitioner. Neither did they challenge the judgment/order of single member NIRC in appeal nor challenged the NIRC Full Bench judgment through constitutional petitions before the High Court, while as a matter of principle, if the employees are on a payroll then they could have come to the Courts and asserted the relationship as an outsource contractor, but they failed to challenge the impugned judgments in their individual capacities to recuperate the standpoint, which is another dilemma for the petitioner.

6. Insourcing means and denotes the tactical and premeditated method of passing on a job to the in-house employees within the employer's establishment, while outsourcing is germane to the practice of entrusting a task to an exterior entity characterized as an outsourcing agency, separated from the entrepreneur's internal human resource. In

general, the theory and notion of outsourcing is predominantly based on the element of downsizing the cost effectiveness and every entrepreneur has the right and discretion to evolve the best suited business strategy and may outsource business activity to some external force or outsourcing agency/contractor and when it outsources any specific task or job/work to the contractor/agency to accomplish or perform, it will not be responsible for the manpower arrangement, or the supervision or control on such manpower. The Toll Manufacturing method is also a genre of outsourcing the task in which, for all intents and purposes, when a company or firm wants to launch some products in the market as a part of its business venture but does not want to make huge investments for infrastructure which may include plant, machinery, and manpower, they use the services of toll manufacturing undertakings having adequate paraphernalia with sufficient experience and skilled labourers to optimize the production on providing raw material and/or semi-finished objects as per required specifications. In essence, “Toll Manufacturing” or “Tolling” is a stratagem of outsourcing whole or part/jobwise production to a third-party company/contractor where the principal company/firm provides the raw materials or semi-finished products for production.

7. The tug of war is unending from time immemorial between an employer/company and employee with regards to whether an employee is an employee of such company or employee of an outsourced contractor. Time and again, the matter has reached this Court with heated arguments for and against the proposition that such agreement with a contractor to provide labour is a sham arrangement and fabricated with the sole aim of circumventing and thwarting the labour laws, and that by and large it boosts up the employer in an advantageous position with an undue advantage over the legitimate employees. On the contrary, the employer argues in favour of the arrangement and insists that the labour or manpower provided by the contractor are not its employees and also produce agreements with the contractors. In fact, a sham agreement is meant to achieve some advantage artificially with the sole aim of circumventing legal obligations with ulterior motives. In the present scenario, the respondent workers claimed it to be an unlawful strategy where IFFCO pretended that the relationship is only through an independent contractor, but for all practical purposes, they are in control and conduct supervision through its own management, and so-called

agreements were used as a tool of avoiding enforcement and implementation of labour laws. Under the garb of such arrangements, the employees are being treated as employees of independent contractors. In our view, the foremost distinction, rather the yardstick, to decide the controversy rampant between a direct employee of a company and an employee through an independent contractor rests on the extent of control & supervision on human resource, ongoing control of independent contractor, if any, financial risks and obligations, as well as the provision of plant, machinery, and premises, and finally supply of raw material and allied set-up.

8. The expression "circumvent" or "circumvention" is defined in different law lexicons as under:-

1. **Advanced Law Lexicon, (3rd Edition, 2005) Page 799:**

Circumvention. Overreaching; outwitting; baffling. It is nearly, if not quite synonymous, with fraud. It denotes a trick or device as induces the giving of one character of instrument under the belief that it is one of a different character.

2. **Words and Phrases (Volume 7, 1952) Page 241:**

Circumvention. Circumvention is nearly, if not quite, synonymous with fraud. It is any fraud whereby a person is induced by deceit to make a deed or other instrument. It must be borne in mind, however, that the fraud or circumvention must relate to the instrument itself, and not to the consideration on which it is based, nor can such fraud relate to the quality, quantity, value, or character of the consideration which moves the contract, but it is such a trick or device as induces the giving of one character of instrument under the belief that it is one of a different character *(Town of Oregon v. Jennings, 7 S. Ct. 124, 130, 119 U.S. 74, 30 L.Ed. 323).*

3. **Corpus Juris Secendum (Volume 14, 1939) Page 1125:**

Circumvention. Defined in the Standard Dictionary as a forestalling by artifice. "Circumvention' has been compared with "fraud".

4. **The Oxford English Dictionary (Volume 2, 1970) Pages 436-437:**

Circumvent. To encompass with evils, with malice, or enmity; to try to entrap in conduct or speed. To get the better of by craft or fraud; to overreach, outwit, cheat, 'get around', 'take in'.

Circumvention. The action of circumventing; overreaching, outwitting, or getting the better of any one by craft or artifice.

5. **Shorter Oxford Dictionary (Volume 1, 2007) Page 417:**

Circumvent. Deceive, outwit, overreach; find a way round, evade (a difficulty). Employ deception or evasion.

Circumvention. The action or an act of circumventing someone; deceitful or fraudulent conduct perpetrated against a facile person.

9. What would be the barometer or litmus test to examine the true nature of an arrangement with outside/outsource contractor, and

whether the same was a sham arrangement or a device to circumvent the labour laws, and particularly the relationship of employer and employee in the present context, that is precisely ruminating in past judgments of this Court which are quite relevant to decide the bone of contention. The *ratio decidendi* of the judgments are replicated as under:-

1. Fauji Fertilizer Company Ltd. versus National Industrial Relations Commission & others **(2013 SCMR 1253= 2014 PLC 10).** This Court held that the 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.

2. Abdul Ghafoor and others Vs. The President National Bank of Pakistan and others **(2018 SCMR 157).** The Court held that the respondent cannot be allowed to persist in its similar practice and machination to exploit it workers and to defeat the spirit and purpose of law and the judgments of this Court, by describing the employment of the petitioners as a contract and calling such workers as "contractors" instead of "contract employment" and "contract employees". As the petitioners for all intents and purposes were engaged/employed by the respondent bank for manual jobs and were being paid salary/compensation for the services they rendered for the respondent-bank, on monthly basis and from year to year personally/manually, and having so served for more than one year, on several 11 months stints, have earned entitlement for regularization of their services with the respondent-bank.

3.Messrs State Oil Company Limited vs. Bakht Siddique and others (**2018 SCMR 1181).** This Court held that 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 pretense and on that pretense 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 pretense and therefore, it being not a case of any disputed fact and no evidence was required to be recorded. Moreover, we have seen from the order under challenged that in such like cases where the orders have been passed by the Labour Tribunals, the employees, even those who were under the contractors' alleged employment, have been regularized by the petitioner. And thus keeping in view the rule of parity and equality, all the respondents even if considered to be the employees of the contractor, which is not correct, they having been performing duties of permanent nature should have been regularized. However, at this stage, we would like to observe that the employment of the respondents shall be regularized with effect from the date when they approached the learned High Court through the Constitution petition but for their pensionary benefit and other long terms benefits, if any, available under the law, they would be entitled from the date when they have joined the service of the petitioner and this Court also dismissed the petitions.

4 Messrs Sui Southern Gas Company Limited Vs. Registrar of Trade Unions and others **(2020 PLC 153).** This Court yet again while reiterating and relying on the dictum laid down in the case of Fauji Fertilizer Company Ltd. (2013 SCMR 1253), held that the workers enlisted as voters are performing their duties and functions for the benefit of the petitioner's establishment and are admittedly so serving since many years. The purported arrangement/contract between the petitioner and their purported labour contractors cannot be allowed to be used as a device to deprive the said workers of their legitimate and

> fundamental right of forming a union and or becoming a part thereof and ultimately in this case also, the petition was dismissed.

10. The rationale of disseminating the IRA was to consolidate the law relating to the formation of trade unions, and improvement of relations between employers and workmen in the trans-provincial establishments and industry. Our country has also ratified the International Labour Organization (ILO) Conventions, wherein Convention No.87 is germane to the freedom of association and Convention No.98 safeguards the right to organize and collective bargaining. Section 91 of the IRA accentuates the rights and duties of employers and workers; to perform their rights and obligations within the margins and precincts of the IRA and also adhere to the Code of Conduct to respect their rights and duties in accordance with the guidelines *inter alia* provided in the Schedule II, appended to the IRA. The employer has the right to manage, control and use enterprise property and conduct its business in any manner considered prudent and satisfactory; he has the right to manage the enterprise effectively and efficiently by finding the best use of its available resources, including human resource, in most prudent and fruitful manner in the general interest of the enterprise; while exercising the right to conduct business and the right to manage the enterprise, it will be the duty of the employer to act in accordance with the principles and guidelines provided under the law; it is bound to implement all laws, including labour laws; it has to protect and safeguard the interest and welfare of its workers to obtain maximum productivity and output to the mutual advantage of the enterprise; the employer is bound to respect the workers' rights to decent work, wages, decent living and quality of life, subject to the resources of the enterprise. In unison, it is the right of a worker to work according to the job assigned and to receive wages as per agreed terms and conditions of employment and to such welfare benefits and safety measures as one is entitled to according to law, agreement, settlement and/or award; and finally, the workers have the right to enjoy the benefits guaranteed to them under the law, rules, settlement, agreement, award and in line with the principles of social justice; and perform their duties, as assigned by the employer or his representatives, according to his best ability with due diligence, care, honesty and commitment; fully observe norms of organizational discipline; respect the rights of the employer and fully cooperate with the employer in efficient conduct of the business of the establishment. Some mutual obligations of employers and workers are also enunciated in this schedule wherein it is provided

that both employers and workers must promote and foster an atmosphere of trust, confidence and understanding for each other's viewpoint and make efforts to avoid conflict through bilateral negotiations at the establishment level and accept the same degree of responsibility for industrial relations and establish a formal and informal environment of communication and social dialogue at the establishment level.

11. Without a doubt, the employer has the right to administer, operate and carry out its business activity in the best suited manner, strategy and discernment and may make use of the most efficacious and proficient resources in its business planning. There is no bar to contract out the whole job or in the bits and pieces to the outsource contractor, including human resource within its own premises or through toll manufacturing agreements but what is crucial is that the outsourcing should not be used as a weapon of circumvention of labour laws by means of sham agreements. In the case in hand, it was established that the respondent employees were under the direct supervision and control of IFFCO and were working within their premises and involved directly or indirectly in the manufacturing process and were also performing their duties for the past many years. The agreements produced in evidence had also expired and reliance on such expired agreements could not be placed. Despite expiry of alleged contracts, the respondent employees were not disengaged but continued to perform their duties. The alleged outsourcing arrangement cannot be allowed to be used as a device to deprive the workers of their legitimate rights envisaged under the labour laws. Throughout the proceedings, the alleged contractors never came forward to rescue IFFCO and to show that they are the actual employers of the respondent workers which is also quite a strange state of affairs. There is a huge distinction between *bona fide* and *mala fide* outsourcing. The weapon of outsourcing should not be used to exploit the labourers and labour laws. It should not be used as vehicle of oppression to deprive the workers of their legitimate and fundamental right of forming a union and/or becoming a part thereof as observed by this Court. The case of Nilgiri Coop. Mkt. Society Ltd. v. State of T.N. **[(AIR 2004 SC 1639) = (2004) 3 SCC 514]** was also referred to in the case of Fauji Fertilizer case (*supra*) in which also the Court recapped that the control test and the organization test, are not the only factors which can be said to be decisive but the Court is required to consider

several factors which would have a bearing on the result, such as (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. This Court draws the crux of the above case law as under:-

> "(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".

12. The learned Full Bench of the NIRC re-evaluated and re-examined the entire evidence on record. If the facts have been justly tried by two courts and both the courts concurrently reached the same conclusion, then it was not judicious to ask the High Court to revisit and draw some other conclusion or different interpretation of evidence. We are sanguine that the High Court has the powers to re-evaluate the concurrent findings of fact arrived at by the lower fora if the concurrent findings are not based on reasonable appreciation of evidence on record or are perverse and unjustified, but it cannot upset such findings if the same are based on relevant evidence or are without any misreading or non-reading of evidence. The learned High Court in this case examined the concurrent findings recorded below which were neither found in violation of law nor found to be based on flagrant and obvious defect floating on the surface of record, hence the Court rightly declined to interfere. The learned High Court rightly scrutinized the facts and law and it was not in its dominion under the constitutional jurisdiction to judge the credibility of the witnesses examined by the parties.

Predominantly, the NIRC Single Bench and NIRC Full Bench, both already considered the oral and documentary evidence in light of the circumstances of the case and the probabilities, and rendered appropriate findings on it, therefore, in our view, the interference could only be permissible if the concurrent findings were found to be manifestly erroneous, illegal or violative of some fundamental rules of procedure or natural justice, which is missing in the case in hand. Thus, we do not find any logical justification or good reason to impede or get in the way of the concurrent findings rightly affirmed by the learned High Court by dint of the impugned judgment.

13. The aforesaid Civil Petitions were fixed for hearing on 04.04.2024, when sooner than commencing the arguments on merits, the learned AOR and ASC for the petitioner filed a statement that they do not want to press these civil petitions to the extent of 20 respondents in different petitions (the names of said respondents arrayed in the bunch of civil petitions are mentioned in the short order with the number of civil petitions and serial numbers of the respondents). In view of the statement, the civil petitions were dismissed as withdrawn against the said 20 respondents and the learned counsel for the petitioner was directed to file amended title after deleting their names. For the rest, the matters were taken up and after hearing the arguments the civil petitions were dismissed and leave to appeal was refused *vide* our short order. Above are the reasons assigned in support of the short order.

Judge

Judge

KARACHI
04.04.2024
Khalid
Approved for reporting