JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.451 of 2020
M/s Pak Telecom Mobile Ltd.
Versus
Full Bench, National Industrial Relations Commission and others

Date of Hearing:	**16.04.2024**
Petitioner by:	**M/s Bilal Ahmed and Nauman Ahmed, Advocates.**
Respondent by:	**Mr. Muhammad Arif Khawaja, Advocate for respondent No.3.**

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition the petitioner, M/s Pak Telecom Mobile Limited ("**PTML**"), impugns the order dated 23.09.2019 passed by the learned Full Bench, National Industrial Relations Commission (**"NIRC"**), whereby respondent No.3's appeal against the order dated 20.04.2017 passed by the learned Member, NIRC was allowed and it was directed that respondent No.3, Muhammad Shakeel, be reinstated in service with full back benefits if he was not gainfully employed elsewhere during the period that he had remained out of service of PTML.

2. The record shows that vide letter dated 03.03.2008, M/s ASK Development offered employment to respondent No.3 as Customer Facilitating Agent at Ufone. Admittedly, respondent No.3 served in the said position until 22.11.2013 when his services were verbally terminated. This caused respondent No.3 to send grievance notice dated 19.02.2014 to PTML as well as M/s ASK Development. PTML denies having received the said grievance notice. On 11.04.2014, respondent No.3 filed a grievance petition before NIRC which was dismissed vide order dated 20.04.2017. Vide order dated 23.09.2019, respondent No.3's appeal against the said order was allowed by the learned Full Bench, NIRC, which also allowed his grievance petition with the direction to PTML to reinstate him in service with full back benefits if he was not gainfully employed elsewhere after his services had been terminated.

UNCERTIFIED COPY

3. Learned counsel for the petitioner, after narrating the facts leading to the filing of the instant petition, submitted that respondent No.3 was an employee of M/s ASK Development and not PTML; that there was no privity of contract between PTML and respondent No.3, who had been employed by M/s ASK Development; that respondent No.3's salary was paid by M/s ASK Development and not PTML; that respondent No.3's appointment letter dated 03.03.2008 had been issued by M/s ASK Development and not PTML; that the learned Full Bench, NIRC erred in holding that the Customer Facilitation Call Centre performs core activities of PTML; that respondent No.3 did not produce any evidence to prove that he was performing his duties on the direction of PTML; that respondent No.3 also did not produce any evidence to show that he was doing his job manually and clerically; that respondent No.3 did not prove that he had served a grievance notice on PTML; that the services being performed by respondent No.3 had always been outsourced by PTML; that respondent No.3 had not sought any relief against PTML in the prayer clause of his appeal; and that the impugned order passed by learned Full Bench, NIRC is liable to be set-aside having been passed without considering the questions of law and fact involved in the matter. Learned counsel for PTML prayed for the instant petition to be allowed in terms of the relief sought therein.

4. On the other hand, learned counsel for respondent No.3 submitted that contents of appointment letter dated 03.03.2008 leave no doubt that respondent No.3 was appointed by M/s ASK Development to work for PTML; that since the day of his appointment, respondent No.3 has continuously been working for PTML; that there has been no break in period of his service; that involvement of M/s ASK Development was mere pretense to deprive respondent No.3 from benefits of beneficial labour laws; that he has acquired status of permanent worker within the meaning of Standing Order 1(a) of the West-Pakistan Standing Orders Ordinance, 1968 ("**Standing Orders**"); that non-issuance of respondent No.3's termination order in writing was itself a violation of the Standing

UNCERTIFIED COPY

Order 2-A of the Standing Orders; that the work of respondent No.3 was neither supervisory nor managerial, as he had no subordinates instead he was performing manual work as a workman; that during cross-examination, PTML did not challenge respondent No.3's claim with regard to his status as a workman; that during the evidence, respondent No.3 produced grievance notice dated 19.02.2014 as Exh.P-2 and also produced the postal receipts as Exh.P-3 to P-5 with regard to dispatch of the said grievance notice; that customer service is a core function of PTML; that respondent No.3 along with his colleagues had earlier filed a grievance petition seeking his regularization wherein vide the order dated 26.11.2013 PTML was restrained from taking adverse action against respondent No.3; that he performed work upto 30.11.2013 but was orally terminated with effect from 22.11.2023; and that the instant petition has been filed to deprive respondent No.3 from reinstatement pursuant to the order dated 23.09.2019 passed by learned Full Bench, NIRC. Learned counsel for respondent No.3 prayed for the writ petition to be dismissed with costs.

5. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 above and need not be recapitulated.

6. The impugned order dated 23.09.2019 shows that the learned Full Bench, NIRC held respondent No.3 to be PTML's employee because his appointment letter provided that he was selected as Customer Facilitation Agent "at Ufone" and also because his office identity card mentioned him to be employee of ASK Development *"under contract of Ufone."* The record shows that during cross-examination, respondent No.3 appeared as PW-1, and deposed that the offer letter for appointment was delivered to him by the Ufone management. He had also deposed that his salary was transferred in his account by the Ufone and expressed his readiness to produce his salary slip. Respondent No.3, in his affidavit-in-evidence, clearly

UNCERTIFIED COPY

deposed that he had been rendering services in Ufone for many years continuously under control, management and administration of Ufone. He had also deposed that he worked for Ufone under the management and supervision of Ufone in the building of Ufone and he sat and worked in the office of Ufone. These claims of respondent No.3 were not put to challenge with specificity by PTML during respondent No.3's cross-examination. Additionally, neither did PTML produce any evidence to contradict respondent No.3's said stance nor did Mr. Waheed Anwar (PTML's Manager Human Resource) in his affidavit or while appearing as RW-1 deposed that respondent No.3 was not performing duties at PTML's premises. He had only said that employees hired through M/s Ask Development are assigned a separate code. This shows that respondent No.3 performed his duties at PTML's premises and under its control. The services that he had rendered at PTML's premises were related to customer facilitation which cannot be considered separate from core functions of PTML. It is also not disputed that respondent No.3 had been rendering services at PTML's premises for a number of years.

7. Regardless of the fact that the service agreement of respondent No.3 may not show any privity of contract between PTML and him, the superior Courts, upon satisfaction of prescribed conditions, have considered such a workman to be the employee of the establishment for which and in whose premises he performs service. 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' is 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***

UNCERTIFIED COPY

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."

8. In the above-mentioned 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."

9. Additionally, in the case of State Oil Company Limited Vs. Bakht Siddique (2018 SCMR 1181), a petition filed by the respondents in the said case 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:-

UNCERTIFIED COPY

> ***"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."***

10. As regards the contention made on behalf of PTML that respondent No.3 did not serve a grievance notice on PTML, the said respondent during his evidence produced postal receipts (Exh.P-4 and Exh.P-5) to prove that on 19.02.2014, he had sent the grievance notice to PTML. Veracity of the said postal receipts or correctness of addresses mentioned therein has not been disputed by PTML. Indeed Section 33(1) of the Industrial Relations Act, 2012 ("IRA") requires a workman to bring his grievance to 'the notice of the employer' but where a party produces postal receipts showing dispatch of a document and where address had been properly mentioned with postage charges having been paid, Section 26 of the West Pakistan General Clauses Act, 1956 deems such a document, sent through registered post, to be served on the addressee within the time that a letter is served in ordinary course of post. This presumption can however be dislodged if the contrary is proved, which is not the case here. In the case of Kaneshiro (Private) Limited Vs. Sajjad Ali (2022 PLC 137), the workman had produced postal receipts for dispatch of grievance notice, the Hon'ble Sindh High Court, while considering the same, spurned the petitioner's argument that the grievance notice was not served on it. Reference in this regard may also made to the case of Ghulam Abbass Vs. Manzoor Ahmed (2008 SCMR 1366).

11. It is an admitted position that respondent No.3 was working for PTML for several years since his appointment on 03.03.2008 till his oral termination on 22.11.2013 and had attained the status of a permanent workman within the meaning of Standing Order 1(a) of the Standing Orders. Therefore, his termination without adopting procedure set out in Standing Order 15 of the Standing Orders was

UNCERTIFIED COPY

illegal. His termination without an order in writing is also violative of the Standing Order 12(3) of the Standing Orders. It is to be kept in mind that the seven classes of workmen provided in Standing Order 1(a) to (g) of the Standing Orders do not include as a separate class workers who have been engaged on contract of monthly salary. The category of contract worker under Standing Order 1(g) of the Standing Orders provides for *"a workman who works on contract basis for a specific period of remuneration to be calculated on piece rate basis."* It is no one's case that respondent No.3 was working on piece rate basis. Furthermore, PTML's case is not that there has been any misconduct committed by respondent No.3.

12. Respondent No.3 clearly deposed that he was performing manual work and had not been given a service role which may involve any of the attributes which are ascribed to employer under Section 2(ix) of the IRA. This part of respondent No.3's statement was not put to challenge during cross-examination. Furthermore, I have also not been shown any material on record which may show that nature of respondent No.3's work excludes him from the category of workmen. Respondent No.3, in his grievance petition under Section 33 of the IRA, had sought his reinstatement in service. After the said petition was dismissed vide the order dated 20.04.2017 passed by learned Member, NIRC, he filed an appeal before the learned Full Bench, NIRC and in the prayer clause of the said appeal beside seeking the setting-aside of the impugned order, also sought his reinstatement in service. This shows that the argument of the learned counsel for PTML that respondent No.3 did not seek the relief of reinstatement in service in his appeal, is without force.

13. Learned counsel for PTML could not point out any evidence on the record which had been misread by the learned Full Bench, NIRC while passing the impugned order dated 23.09.2019. Now, the instant petition is for issuance of writ of *certiorari* which is not a writ of right, but one of discretion. Its object is to curb excess of jurisdiction and to remedy an error of law apparent on the face of the record. It lies where the inferior Court or Tribunal has exceeded its jurisdiction or

UNCERTIFIED COPY

has not proceeded in accordance with the essential requirements of law which they were meant to administer. It is also issued when the inferior Court or Tribunal acts illegally in exercise of its jurisdiction. These essential prerequisites for issuing a writ of *certiorari* do not appear to be satisfied in this case.

14. In view of the above, I do not find merit in the instant petition which is accordingly dismissed. The petitioner shall bear cost of respondent No.3 throughout.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 26.04.2024.

(JUDGE)

Sultan

UNCERTIFIED COPY