IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.D-1972 of 2006

ORDER / OPINION

Date of hearing: 24.07.2007 :

Petitioner: Aijaz Ahmed, in person :

Res. No.1: State Cement Corporation of Pakistan (Pvt.) Ltd. through Mr. Ghulam Mustafa Lakho, Advocate :

Res. No.2: Govt. of Pakistan through Mr. S. Mahmood Alam Rizvi, Standing Counsel :

N O T E:

This matter was heard by a Division Bench comprising of my learned brother Sabihuddin Ahmed, CJ. (as his lordship then was) and my self and by a short order dated 24.07.2007 the same was allowed in open Court and the short order was signed. Thereafter, I have recorded the reasons but before signing the same my learned brother Sabihuddin Ahmed, CJ. (as his lordship then was) ceased to be a Judge of this Court.

Rule 3 of Chapter 4-H of Volume V of the High Court Rules & Order deals with such situation and provides as under:-

> "Opinion recorded before delivery of judgment: Where an appeal has been heard by a Bench of the Court, the written opinions of the Judges who heard the appeal, but have ceased to be attached to the Court before delivery of judgment, shall, unless delivered by another Judge of the Bench which heard the appeal, be deemed to be minutes merely and not judgments."

Earlier the same situation was dealt by two separate learned Division Benches of this Court. In the reported case of GHULAM HUSSAIN VS. THE STATE (PLD 1981 Karachi 711) it was held as under:-

> ". . . Although both the Judges of a Division Bench may have concurred in the decision and the short order, it is conceivable that the reasons for the conclusion reached may be different. In that case, if one of the Judges of the Division has ceased to be available, as in the instant case, the reasons given by the Judge who still continues to adorn the High Court, would not really be the reasons of the Bench in support of the conclusions reached or the short orders passed by it, but would be, in effect, the individual opinion of that learned Judge. However, such a written opinion would be of assistance to the Supreme Court, in case an appeal against the decision of a Division Bench is preferred to it."

In the reported case of OFFICE REFERENCE DATED 28.4.1981 (PLD 1982 Karachi 250) a learned Division Bench of this Court has held as under:-

> ". . . The cases in which short orders have been recorded and signed by the concerned Judges, these cases stand disposed of as these orders are fully operative in law. In the last-mentioned cases the Judges who have ceased to hold office cannot record reasons, but in cases in which one of the Members of the Bench was a Judge who is still available, he may be requested to record his reasons in support of the decision which will, however, serve as minutes of his individual opinion for use as deemed fir by the Supreme Court in case appeals are filed against such orders."

The matter was also placed before the Hon'ble Chief Justice by Reference dated 26.11.2007 who had allowed the undersigned to deliver the judgment.

Following the above pronouncements and permission of the Hon'ble Chief Justice I am recording the following reasons/opinion in support of short order already announced and signed by both the members of the bench.

NADEEM AZHAR SIDDIQI, J: By filing this petition, the petitioner has prayed for benefit of gratuity at the rate of two months basic salary and Special Additional Allowance at the rate of 20% to him.

The facts necessary for disposal of the above petition are that the petitioner joined Thatta Cement Company Limited, a company wholly owned by State

Cement Corporation of Pakistan in the year 1981. The petitioner claims that in 1994 he was transferred by the State Cement Corporation to serve in another company owned by it i.e. Javedan Cements Limited and retired as its Managing Director on attaining the age of superannuation. The petitioner further pleaded that in terms of Memorandum of Settlement entered into between State Cement Corporation of Pakistan and State Cement Officer Welfare Association the officers were to be granted gratuity at the rate of two months of the last drawn salary for each completed year. On retirement, however, the petitioner was paid gratuity at the rate of one month's salary for each completed year. The petitioner filed representation before the Chairman, State Cement Corporation of Pakistan, which was rejected.

The Respondent No.1 has filed comments in which it was stated that the petitioner was in service of Javadan Cement who was not impleaded as party to the proceedings. It was further stated that the petitioner was initially appointed as Deputy Manager (Electronics) by Thatta Cement and his services were governed by the Rules and Regulations of Thatta Cement and subsequently transfers/postings/promotions during his service were ordered by the Chairman, State Cement Corporation of Pakistan, in exercise of the powers vested in him in the capacity of Chairman of the Board of Directors of Associated Companies being the only competent authority. The Thatta Cement and Javadan Cement are separate legal entities and payment of gratuity is regulated and determined under their own respective gratuity rules and the petitioner was rightly paid gratuity in accordance with the rules of M/s. Javadan Cement.

The petitioner has filed reply to the parawise cement.

The petitioner contended that for all purposes he was employee of State Cement Corporation and is entitled to all retirement benefits to which the employees of State Corporation are entitled. He referred to Clause 3-1 of the Memorandum of Settlement entered into between the State Cement Corporation and State Cement Officers Welfare Association which provides payment of gratuity at the rate of two months last drawn basic pay for each completed year. He also referred to an unreported judgment of Supreme Court in THATTA CEMENT CO. LTD. VS. MUHAMMAD ABDUL HAYEE (CPLA No.443-K of 2002) and submits that the Respondent No.1 has deprived the employees working at Thatta Cement who approach the Court and the said relief was granted to them.

Mr. Ghulam Mustafa Lakho, learned counsel for Respondent No.1, contended that since the petitioner is not an employee of State Cement Corporation he is not entitled to the benefits available to its employees and the benefits were given to the petitioner in full and final settlement and this question cannot be reopened. He attempted to distinguish the judgment of Hon'ble Supreme Court of Pakistan by saying that Thatta Cement has its own service rules.

Mr. S. Mahmood Alam Rizvi, learned Standing Counsel, has submitted that employees of State Cement Corporation cannot be dealt with separately and in view of the judgment of Hon'ble Supreme Court the petitioner is entitled to the relief claimed.

The Petitioner has relied upon the transfer order dated 13.06.1994 issued by the Respondent No.4 transferring him from TCCL to JCL. The Promotion order dated 19.06.1995 stipulating interalia that the Respondent may transfer him to any corporation or company managed by the Government or the Corporation. The long service of award dated 15.7.1996 on completion of 15 years continuous service in the Respondent Corporation.

The Respondent No.1 has filed parawise comments, wherein it is contended that the aforesaid Respondent i.e State Cement Corporation of Pakistan (SCCP) and its associated companies i.e Thatta Cement Company Limited (TCCL) and Javidan Company Limited (JCL) are separate legal entities under the Companies Ordinance and neither of the later companies are part of the Respondent or parties to the petition. It is urged that the petitioner was initially an employee of TCCL and was subsequently transferred to JCL by the Chairman SCCP in the exercise of his powers as Chairman of the Board of Director of all Cement companies owned by SCCP but that did not create an employer employee relationship between the Petitioner and the SCCP. It is further stated that under Rules of JCL, the Petitioner was only entitled to gratuity at the rate of one year pay for the month of each completed year of services as is evident from Para-11 of his promotion letter dated 19.06.1995.

I regret I have not been able to persuade myself to subscribe to the position taken by the Respondent No.1. The orders transferring the petitioner from TCCL to JCL and promoting him in JCL were passed on the letter head of the Respondent No.1 which evidently reflect that some authority vested in the Respondent No.1 as a Corporate entity was purported to be exercised and the Chairman was not merely acting in his capacity as Chairman of another Corporate entity i.e TCCL or JCL. Secondly if the Chairman of Respondent No.1 had only passed the order in the capacity of an ex-officio Chairman of an associated company he could only terminate the services of employee of the company where the Petitioner was employed and perhaps re-employ him in another company but certainly no power to transfer a person from one company to another could be exercised when two companies were to be treated as separate and independent entities. Thirdly if the Petitioner were to be treated as an employee of JCL being a completely independent legal entity having nothing to do whatsoever with the Respondent No.1 there could be no question whatsoever of stipulation in the promotion order dated 19.06.1995 enabling the Respondent No.1 as a Corporate entity to transfer him to another company or Corporation. Fourthly a Certificate of continuous service with the SCCP issued by the Respondent No.1 itself granted at the time and after the Petitioner had left TCCL and joined JCL is completely inconsistent with the position taken up by the Respondent No.1. I, therefore, find

considerable force in the Petitioner's contention that for all intents and purposes the petitioner was required to be treated as an employee of the Respondent No.1.

It may be pertinent to mention that in the aforesaid Judgment their lordships upheld the right of an officer serving in TCCL to receive gratuity at the rate of two months salary for each completed year of service on the touchstone of Article 25 of the Constitution. In Para-11 of their comments the Respondent No.1 have attempted to submit that such gratuity has also been paid to Mr. Mohammad Haroon Okelvi who according to the said Respondent was an officer of the JCL. The denial of such benefit to the petitioner causing hostile discrimination sheerly on account of his transfer from TCCL to JCL effected by the Respondent No.1 itself would be treated as nothing but malafide.

Furthermore, the Hon'ble Supreme Court of Pakistan has allowed the same benefits to the employees of Thatta Cement as were available to the employees of Respondent No.1. The Hon'ble Supreme Court in its unreported judgment of M/S. THATTA CEMENT COMPANY LIMITED AND ANOTHER VS. MUHAMMAD ABDUL HAI AND ANOTHER (CPLA No.443-K of 2002) has held as under:-

> ". . . When officers placed in the same position were given benefit of gratuity in terms of the memorandum said above, then the Respondent No.1 could not be discriminated by the petitioners in respect of the payment of gratuity, which being violative of Article 25 of the Constitution of the Islamic Republic of Pakistan, cannot be upheld."

The petition was allowed by the short order dated 24.7.2007 and above are the reasons/opinion for the same.

JUDGE

Karachi:
Dated:04.02.2008.

S.A