

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

C.P. No.D-4795 of 2013
C.P. No.D-4796 of 2013

Date **Order with signature of Judge**

Present
Mr. Justice Muhammad Ali Mazhar
Mr. Justice Abdul Maalik Gaddi

1. Ghulam Abbas
2. Wali Muhammad.....Petitioners

Versus

Federation of Pakistan & others.....Respondents

Date of hearing: 18.10, 25.10.2016 and 10.3.2017.

Mr. Abdul Salam Memon Advocate for the petitioners.

Mr. Hussain Bhora Advocate for the Respondents Nos.2 to 4.

Mr.Aqil Awan, learned Amicus Curiae.

Shaikh Liaquat Hussain, Standing Counsel.

Muhammad Ali Mazhar, J: These petitions were brought to strive for the directions against the respondents Nos.2 to 4 to maintain proper seniority with effect of date of promotion and regularize the services of the petitioners from the date of their joining to the Trade Corporation of Pakistan, (respondent No.2). Seeing as the petitioners attained superannuation so the learned counsel constricted and quarantined the bounds of these petition to the claim of antedated regularization only and its effect for the

calculation of full and final settlement dues, however the learned counsel on instructions abandoned other reliefs.

2. The transient sequence of events are that both the petitioners were earlier employed by the Cotton Export Corporation of Pakistan (Pvt.) Ltd. which was subsequently merged with Trading Corporation of Pakistan (Pvt.) Ltd. (TCP) in consideration of an order passed by this court in the petition for amalgamation i.e. J.M. No.36/1999. Their earlier employer introduced Voluntary Retirement Scheme (VRS) which was opted by the petitioners but by virtue of an office order dated 11.09.1998 issued by Secretary, Cotton Export Corporation of Pakistan (Pvt.) Ltd., it was unambiguously alluded to that the officers opted the VRS shall not be relieved from their duties and they will continue to work beyond 11.09.1998 till further orders to complete the work in hand. In paragraph 3 it was further added that the said officers shall be entitled to the same salary and allowances as were admissible to them as on 11.09.1998.

3. This petition was allowed by us on 25.10.2016. Whilst finalizing the order and before we could sign it certain crucial queries were cropped up in our minds so we feel it appropriate to fix the matter for rehearing in court after notice to the parties and passed an order for this purpose on 17.11.2016 as under:

“The respondent in this case is Trading Corporation of Pakistan (Pvt.) Limited and the matter pertains to dispute raised by the petitioner relating to actual date of regularization for the purpose of full and final settlement of dues. Counsel for the petitioner had referred to the order passed by hon’ble Supreme Court on 24.8.2016 in **Civil Appeal Nos.185-K and 186-K of 2015 (Muhammad Rafi v. Federation of Pakistan)** in which while referring to the case of **Pakistan Defence Officers’ Housing Authority v. Jawaid Ahmed (2013 SCMR 1707)** the apex court held that “an aggrieved person can invoke the

constitutional jurisdiction of the High Court against a public authority if he satisfies that the act of the authority is violative of the service Regulations even if they are non-statutory.”

This petition was heard and allowed but while finalizing the order some crucial query has been cropped up in our mind, which was not addressed in relation to the non-statutory service rules of Private Limited Company owned by Government of Pakistan, therefore, in order to seek proper assistance on the aforesaid query let this matter be fixed in court for re-hearing on 25.11.2016 at 11:00 a.m. Office is directed to issue intimation to the counsel for the petitioner as well as respondents and D.A.G. to ensure their presence on the next date”.

4. The learned counsel for the petitioners argued that the petitioners had performed their duties with the respondent No.2 for more than fifteen (15) years continuously without any break against the permanent post and without any complaint regarding their conduct, competence, hard work and or integrity. Since the petitioners were performing their duties against permanent posts therefore they were entitled to all consequential benefits as regular employees. He further argued that despite considerable length of service, an office order was issued on 15.08.2008 by General Manager, Trading Corporation of Pakistan whereby the services of the petitioner Ghulam Abbas was regularized w.e.f. 15.08.2008 while services of another petitioner Wali Muhammad was regularized w.e.f. 22.02.2011 vide office order dated 23.02.2011, but the fact remains that they were performing continuously their duties in the Trading Corporation of Pakistan w.e.f. 11.09.1998. When these regularization orders were received by the petitioners, they filed appeals to the management, but no action was taken in this regard so far. He also referred to an Office Order No.TCP/(S)/14-103/2000-East, dated 12th March 2001, issued by General Manager (Admn.) TCP which start in on that officers working in the former RECP and CEC (now

merged in TCP) as retainees, daily wagers government servants are temporarily allowed to work in the various divisions/sections/offices of TCP with immediate effect and until further orders. The name of the present petitioners are mentioned at Serial No.6 and 7 of this letter. The petitioners are claiming regularization w.e.f. 19.01.2001 which is the effective date of merger order passed by this court in J.M. No.36/1999.

5. The learned counsel for the respondent 2 to 4 admitted that the petitioners opted VRS and ceased to be employee of CEC w.e.f. 11.09.1998. However the petitioners were not relieved from the duty to complete the work in hand. Both the petitioners were allowed to work temporarily in TCP. However this Office Order does not confirm any right of employment of permanent or temporary to the petitioners. However he admitted the filing of merger petition and its allowance on 19.01.2001. He further contended that the petitioners were employed by TCP on temporary basis. In fact their services were seized of by the defunct corporation on availing VRS but they were working temporally to complete work in hand of defunct corporation. The petitioners submitted applications to the respondent No.3 with a request for protection of pay in TCP scales with effect from 12.03.2001 but their request was not accepted as there was no rule to accommodate the petitioners. The learned counsel also raised the issue of maintainability due to lack of statutory rules of service.

6. The learned amicus curiae argued that the petitioners were appointed in Cotton Export Corporation of Pakistan (Pvt.) Limited which was merged into TCP w.e.f. 19.1.2001.

Before merger, CEC floated VRS and petitioners applied for VRS and their option was accepted but the petitioners were asked to continue the duties till completion of the work on the same salary and other benefits. The status of the petitioners remained as temporary employee till their regular induction. The maximum relief which can be granted is to finalize the seniority list with the direction to issue final seniority list within a reasonable time and nothing else. For retrospective regularization, the petitioners have not given any cogent ground except quoting of the order of the company judge dated 19.1.2001. In order to justify retrospective regularization, petitioners have cited few instances of their colleagues but without impleading them as party. The petitioners have not shown any immediate grievance except claiming retrospective regularization which was afforded to their junior colleagues. The relief of regularization cannot be granted but this court can recommend to the competent authority to consider the petitioners for such relief. He made reliance on **1987 SCMR 156 (Federation of Pakistan Vs. Hashim Shah Qureshi)** in which apex court held that since appointment of civil servant was temporary, he did not become permanent employee notwithstanding the completion of the probationary period. Confirmation of a civil servant in a service or post take effect from the date of occurrence of permanent vacancy or post or from the date of continuous officiating. He further referred to **2000 PLC (C.S) 1079 (Izhar ul Haq Vs. Chief Administrator Auqaf)** in which court held that length of service which was purely of temporary nature could not automatically result into regular appointment or on permanent basis. Tenor of appointment

order would govern situation as to the nature of appointment.

7. We have flip through and delved into the order dated 26.03.2002 passed by learned Company Judge of this court on CMA No.2416/2001 in J.M. No.36/1999. Indeed this application was moved under Section 489 of the Companies Ordinance whereby some ex-employees had approached for the payment of their dues. In this order, the learned Company Judge referred to the office order dated 11.09.1998 that if the employees were allowed to continue then it was on the same terms and conditions which they enjoyed at the time when office order was issued.

8. At this moment in time, it is essential to unveil that the petitioner Ghulam Abbas retired from service on 09.07.2015 whereas another petitioner Wali Muhammad retired on 12.09.2013. During course of hearing, the learned counsel for respondents Nos.2 to 4 submitted a calculation sheet of full and final settlement dues of both the petitioners but the petitioners objected that the calculation has been made with effect from the date of regularization of Ghulam Abbas from 15.08.2008 and Wali Muhammad as of 22.02.2011. The bone of contention between the parties in this case is the date of regularization. The petitioners have beseeched and entreated only for the relief right now that they should be regularized from the date of merger of their past employer with TCP and give up and abandon other reliefs.

9. The learned counsel for the respondents Nos.2 to 4 raised the issue of maintainability and further argued that the petitioners before their regularization were performing their duties as temporary employees. He took the plea that the

management has properly worked out the full and final settlement dues of both the petitioners from the date of regularization.

10. In keeping with the profile hosted at official website "<http://tcp.gov.pk>, the Government of Pakistan set up TCP as private Limited company in July 1967 under the Companies Act 1913 (Now the Companies Ordinance 1984), with sole ownership and under the administrative control of Ministry of Commerce. This company is principal trading arm of the Government of Pakistan. The Corporation is fully owned by the Government of Pakistan. It also facilitates the private sector by making its vast storage areas available to them on favorable terms, thus considerably helping to improve the supply chains.

11. To start with, we would like to engage in the question of maintainability. The acid test and or touchstone of entertaining the constitution petitions by the high court is to perceive first and foremost as to whether the institution/organization arrayed is a statutory corporation and if yes then whether it has statutory rules of service or not. The learned counsel for the petitioners had placed on record a copy of Trading Corporation of Pakistan (Pvt.) Limited Recruitment Rules, 2005. These Rules were framed in pursuance of provisions of Memorandum and Articles of Association of Trading Corporation of Pakistan Limited and admittedly, the TCP is not a statutory corporation but it fully owned by Government of Pakistan without having any statutory rules of service. The learned amicus curiae mainly focused on the question of regularization of service but no assistance was provided in relation to the rules framed by a private limited company through its board of directors

though fully owned by government. In paragraph 50 of the judgment of **Pakistan Defence Officers' Housing Authority vs. Lt. Col. Syed Jawaid Ahmed (2013 SCMR 1707)** and judgment of apex court in **Civil Appeal Nos.185-K and 186-K of 2015**, (Muhammad Rafi & Sajid Iqbal vs. Federation of Pakistan (**Civil Aviation Authority**)), enlightened guidelines have been rendered by the apex court that an aggrieved person can invoke the constitutional jurisdiction of the High court against a public authority if he satisfies that the act of the authority is violative of the service Regulations even if they are non-statutory. Recently, apex court in the case of "**Muhammad Ramzan versus Government of Pakistan**" reported in **2017 SCMR 571** held that whether rules/regulations were statutory or otherwise is not solely whether their framing required the approval of the government or not, rather it is the nature and efficacy of such rules/regulations. Court has to see whether the rules/regulations dealt with instructions for internal control or management, in which case they would be non-statutory, or they were broader than and were complementary to the parent statutes in matters of crucial importance, in which event they would be statutory.

12. It is clear in the case in hand that neither TCP is a statutory corporation nor it has statutory rules of service but there is no disagreement that TCP has been formed by the Government of Pakistan for facilitating and boosting trades of all kinds of Pakistani and foreign goods and services to the foreign countries as well as in Pakistan. Due to holding of hundred percent shares by the Government of Pakistan, it is not the case here that TCP is not amenable to writ jurisdiction of this court but there is no reservation in

our mind that in the matter of employment or issues relating to the terms and conditions of service, the internal rules framed as private limited company by the BOD cannot come in to rescue the petitioners. The expression “performing of function in connection with the affairs of Federation” has already been discussed in detail by the Apex Court in the case of Pakistan International Airlines Corporation vs. Tanweer-ur-Rehman, (PLD 2010 SC 676=SBLR 2010 303) while referring to the judgment in the case of Salahuddin vs. Frontier Sugar Mills and Distillery (PLD 1975 S.C. 244), Maqsood Ahmed Toor vs. Federation of Pakistan (2000 SCMR 928), Aitchison College, Lahore vs. Muhammad Zubair (PLD 2002 S.C. 326), Ziaullah Khan Niazi vs. Chairman, Pakistan Red Crescent Society (2004 SCMR 189), Pakistan Red Crescent Society vs. Syed Nazir Gillani (PLD 2005 S.C. 806) and Muhammad Idrees vs. Agricultural Development Bank of Pakistan (PLD 2007 S.C. 681), the Apex Court held that Pakistan International Airlines Corporation is performing its functions in connection with the affairs of the Federation but in paragraph 19 of the same judgment, the hon’ble Supreme Court held that if any adverse action has been taken by the employer in violation of statutory rules only then such action should be amenable to the writ jurisdiction and if such action has no backing by statutory rules then the principal of Master and Servants would be applicable and such employee had to seek remedy permissible before the court of competent jurisdiction. In another judgment, reported in **2015 SCMR 1257 “Pir Imran Sajid vs. Managing Director/General Manager (Manager Finance) Telephone Industries of Pakistan”** leave to appeal was granted by the Apex Court to examine whether despite the petitioners having remained in

continuous service of the respondents for a period of one decade as contract employees, no vested rights were created in their favour for grant of relief of their regularization as laid down in the case of Province of Punjab v. Ahmad Hussain (2013 SCMR 1547). In paragraph No.5 of the judgment, the hon'ble Supreme Court held as under:-

“5. Keeping in view such status of the company, and the "Function Test" as prescribed and applied by a five member Bench of this Court in the case of Abdul Wahab and others v. HBL and others (2013 SCMR 1383), authored by one of us (Mian Saqib Nisar, J.), which test/criterion is fully met in the present case, the status of TIP could not prevent the appellants from seeking constitutional remedy as the company clearly falls within the definition of a "person" as envisaged by Article 199 of the Constitution. The learned counsel for the respondents, in support of his second objection i.e. lack of statutory service rules, relied upon the judgment in the case of Fakhrur-Islam Qureshi (Civil Appeal No.424 of 2009), authored by one of us (Mian Saqib Nisar, J.), whereby the said appeal was dismissed on the ground that relationship between the appellant, retired employee and TIP is not governed by statutory rules. Such reliance, in our view, is wholly misplaced for the reason, that unlike in the preset case the appellants therein were seeking pensionary benefits on the basis of pensionary rules, which rules were non-statutory. Whereas in the present case, the appellants are seeking implementation of the directive of the Prime Minister of Pakistan and the decision of the cabinet sub-committee for their regularization sought to be enforced by the relevant ministry.”

In the same judgment, in paragraph No. 10, the Apex Court further held that the service/employment rules of TIP are non-statutory but such does not prevent the appellant from

seeking implementation of the decision/order of the Federal government/Ministry for their regularization.

13. It is well settled that each case has to be seen in its own idiosyncratic and peculiar circumstances. After the retirement of the petitioners, no other issue is involved here except the payment of full and final dues from the date of their joining TCP. There is also no dispute with regard to pension or gratuity or leave encashment amount but the bone of contention is only the effective date of their regularization alone. The respondents have placed on record the calculation sheet of the petitioners in which also no dispute or hostility has been raised by the petitioners to the formula applied for the calculation of provident fund, gratuity and or encashment of earned leaves except the effective date. The letter of G.M. (Godowns/CEC Affairs) available at page 157 in C.P.No.D-4795/2013 in which the opinion of legal advisor is also reflected that petitioner Ghulam Abbas may be treated regular employee with effect from 11.09.1998.

14. In the case of Ejaz Akbar Kasi and vs. Ministry of Information and Broadcasting, reported in 2011 PLC (C.S)367, the apex court dealt with the matter of regularization of PTV contract employees and observed that Board of Directors may have not declined the petitioners' regularization, however it is a fact that regularization of contract employees, if at all is to be made is to depend upon the performance. It was further held that the petitioners performance as well is up to mark which is evident that for the last more than ten years they have been allowed to continue work against the vacancies which they are holding without any interference and there is, now, no question of

performance at all as they have already shown their performance. The court held that the case of the petitioners deserves to be considered by the Board of Directors as they cannot be discriminated without any cogent reason by violating the provisions of Article 25 of the Constitution and at the same time after having spent a considerable period of their lives in the Organization performing duties on contract basis. It is also the duty of the Organization to protect their fundamental rights enshrined in Article 9 of the Constitution. Finally the apex court sent cases to the PTV Management for considering the regularization of contract employees in service. The learned amicus curiae in this case has also in the line of above judgment of apex court suggested that this court may recommend to the competent authority to consider the case of petitioners.

15. As a result of foregoing discussion, we have reached to the finale that neither the TCP is a statutory corporation nor it has any statutory rules of service hence no directions can be issued to the management for regularizing their services. So far as the case of Pir Imran Sajid (supra) is concerned the petition of contractual employees was found maintainable by the apex court in view of the cabinet decision for regularizing the contractual employees in various federal government departments/organization across the board which is a distinguishable case. Nevertheless the case of present petitioners may be disposed of in line with the terms laid down in the Ejaz Akbar Kasi case (PTV case). It is well known that PTV is also neither a statutory corporation nor has its statutory rules of service but it is owned by the Government of Pakistan alike TCP so for that reason we feel it appropriate to send out the cases of petitioners to the

Board of directors of TCP and leave it to their fine sense of judgment to equitably consider and revisit the length of service of their retired employees (petitioners) for their regularization in service from the date of their joining TCP and or merger just for the payment of full and final dues and communicate the decision to the petitioners within a reasonable period of time. The petition is disposed of.

Judge

**Karachi:-
Dated.09.06.2017**

Judge