

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Irfan Saadat Khan

Mr. Justice Adnan-ul-Karim Memon

C.P No. D-5773 of 2016

Muhammad Irfan Khan and others

V/s

The Federation of Pakistan & others

Petitioners : Through Mr. Muhammad Akram Tariq
Advocate
Respondents Nos. 2 & 3 : Through Mr. Faisal Mehmood Ghani
Advocate
Respondent No.1 : Through Shaikh Liaquat Hussain,
Assistant Attorney General
Dates of hearing : **11.09.2018, 26.09.2018,
17.10.2018 & 22.11.2018**

J U D G M E N T

ADNAN-UL-KARIM MEMON, J:- Basically the Petitioners are seeking directions to the Respondent-House Building Finance Corporation Limited (HBFCL) to announce the salary package 2016-2017 in favour of the Petitioners and built up their case on the premise that aforesaid allowances had been allowed to the clerical and non-clerical staff of HBFCL, with effect from 01.01.2016, whereas the same benefit has been denied to them, in violation of Article 25 of the Constitution of the Islamic Republic of Pakistan 1973. It is further submitted that to utter shock and dismay of the Petitioners, instead of announcing the salary package 2016-2017 in favour of the Petitioners, Respondent-Company granted the aforesaid benefits to all the staff (clerical and non-clerical) up to the level of the Assistant Manager (O.G-3) but ignored the Petitioners/officers category. The Petitioners have submitted that they

are serving in the Respondent-Company as officers and executive cadre and since long time they have been drawing the aforesaid allowances, whereas the Respondent-Company has abruptly stopped the said allowance with effect from 1.6.2016 for unknown reasons. Petitioners raised their voice of concern and agitated their claim for revision in pay and scale as per policy and past practice by moving representation to the Respondent-Company, which was decided by the Respondent-Company vide impugned letter dated 30.08.2016 issued by the Respondent-Company, in a discriminatory manner. Petitioners being aggrieved by and dissatisfied with the impugned letter dated 30.08.2016 have filed the instant petition.

2. Mr. Muhammad Akram Tariq, learned counsel for the Petitioners has argued that the Services of the Petitioners are protected under Section 18 of the SRO 941 (1)/ 2009 issued by the Government of Pakistan Finance Division dated 31.10.2009; that the Respondents have increased pay scales and allowances in respect of staff (clerical and non-clerical) of HBFCL with effect from 01.01.2016, whereas the same benefits have been denied to the Petitioners in violation of Article 25 of the Constitution; that the Petitioners were waiting for increase in their salaries and allowances, keeping in view inflation during 2014-15 to enable them to maintain their day to day affairs; that the decision dated 30.08.2016 of the management of the Respondent-Company is erroneous and discriminatory rather demoralizing the officers and executive cadre, representing the Respondent-Company; that the Petitioners' grievance is that they may be treated at par with the other staff members/employees of the company and the same benefits may be allowed to them as per the policy of HBFCL with effect from 01.01.2016. In support of his

contention he has placed reliance upon the order dated 06.02.2014 passed by the Hon'ble Supreme Court in Civil Appeal No. 26-K of 2012 (Muhammad Ali Gohar Zaidi Vs. H.B.F.C & others). An excerpt of the order is reproduced as under:-

“ 3. Learned ASC for the Respondents Nos. 1 to 3, when confronted with the proposition of law raised on the leave granting order, applicable to the facts of the present case, candidly conceded that those employees of House Building Finance Corporation, who were in service before change of its status as House Building Finance Corporation Limited by virtue of clause 18 of the S.R.O dated 25.07.2007, as reproduced above, will not be governed by the principle of Master and Servant but will have their remedy under Article 199 of the Constitution before the High Court as held in the cases reported as Masood Ahmed Bhatti and others vs. Federation of Pakistan through Secretary M/O Information Technology and Telecommunications and others (2012 SCMR 152) & Zarai Taraqiati Bank Limited and others vs. Said Rehman and others (2013 SCMR 642).

4. this being the position, the impugned judgment, being based on misapplication of law is liable to be set aside and the case is to be remanded to the High Court for fresh disposal of Constitutional Petition No. D-527 of 2010 in accordance with law, preferably within three months. Order accordingly.”

3. At this stage, we queried the learned counsel for the Petitioner that on 24.05.2018, the Parliament has promulgated the Act No. XXV of 2018, whereby HBFC Act 1952 has been repealed, he in reply to the query has submitted that the previous enactment of HBFC is protected under Article 264 of the Constitution and General Clause Act 1897. In support of his contention he has placed reliance upon the cases of Muhammad Tariq Badar and another vs. National Bank of Pakistan (2013 SCMR 314), Rasheed Baig & others vs. Zarai Taraqiati Bank Ltd. (2013 PLC (C.S) 1444), Ikram Bari & others vs. National Bank of Pakistan and another (2005 SCMR 100), Executive Council Allama Iqbal Open University, Islamabad and another vs. M. Tufail Hashmi (2010 SCMR 1484), Nizamuddin & another vs. Civil Aviation Authority & others (1999 SCMR 467). He lastly prayed for allowing the instant petition.

4. On the other hand, the learned counsel for the Respondent No.2 and 3 Mr. Faisal Mehmood Ghani, has primarily raised the question of maintainability of the instant petition and argued that HBFCL is a public limited company, which was incorporated under the Companies, 1984 and is being managed by an autonomous Board of Directors for Policy guidelines and overall control under the provisions of the Companies Ordinance, 1984 and has its own Memorandum and Articles of Association respectively; that HBFCL has no statutory rules of service, therefore the petition is not maintainable. According to him the disputed facts involved in the instant Petitions require recording of evidences, which cannot be done in a Constitutional Petition. In addition to above, the applicable HBFCL Service Rules are not statutory and the Petitioners are not covered by Section 2(1) (b) of the Civil Servant Act, 1973, as such the relationship between HBFCL and the Petitioners is that of "Master and Servant" and no discrimination was meted out with them by the Respondent-Company. According to him, the Petitioners cannot claim that they had a vested right to be placed at par with the other staff members of the company so the grievance of the Petitioners is not tenable under the law. He further contended that it is the prerogative of the company to enhance the salary package and to award the same to other staff members of the company as per service rules; that this is a policy matter and the Petitioners cannot claim any fundamental/vested right in this behalf; that the case of Muhammad Ali Gohar Zaidi as cited by the Petitioners is not applicable to the instant Petition since the said case pertains to different situation and grounds, therefore, the same is distinguishable from the facts of the present Petitioners. In support of his contentions he relied upon the case of Muhammad Ali Gohar Zaidi

Vs. House Building Finance Corporation & others (2011 SCMR 247), Chaudhary Zulfiqar Ali Vs. Chairman NAB & others (PLD 2003 Lahore 593), Pakistan Telecommunication Company Vs. Iqbal Nasir (PLD 2011 SC 132), Pakistan International Airline Corporation & others Vs. Tanveer-ur-Rehman (PLD 2010 SC 676), Abdul Wahid & others Vs. HBL & others (2013 SCMR 1383), Habib Bank Ltd Vs. The State (SBLR 2013 SC 01), Government of Balouchistan Vs. Azizullah Memon (PLD 1993 SC 341), I.A. Sherwani Vs. Government of Pakistan (1991 SCMR 1041), and State Life Insurance Corporation Pakistan vs. Syed Hassan Ali Shah (2010 PLC (C.S) 789). He further argued that the Respondent-Company has decided to introduce performance management system, which could not be implemented due to stay order issued by NIRC and would be applicable with effect from the year 2019. He further added that the Respondent-Company would be in loss and chaotic condition if the contention of the Petitioners is accepted; that annual increment for the year 2016-2017 and 2018 have already been allowed at the rate of 7.5 percent. He next added that there was a classification made between the officers of executive cadres and clerical and non-clerical cadre therefore the action of the Respondent-Company constitute "intelligible differentia" between two categories of the employees in the Respondent company therefore the management offered to the Petitioners to increase their salary package at the rate of 10%, but they refused to accept the same and insisted on increasing pay and allowances with effect from 01.01.2016, without evaluation of their performance; that any future increase in salary w.e.f 01.01.2019 shall be based on performance management system which would be implemented w.e.f. 01.01.2019. Learned counsel relied upon various statements and counter affidavit

filed on behalf of the Respondent-Company and argued that under the present circumstances, no relief can be granted to the Petitioners by this Court. He lastly prayed for dismissal of the instant petition.

5. Learned AAG representing the Respondent No. 1 has adopted the arguments of the learned counsel for the Respondent No.2 and 3.

6. Learned counsel for the Petitioners, in exercising of his right of rebuttal has argued that the cases cited by the learned counsel for the Respondent-Company are distinguishable from the facts of the present case as a majority shareholding in HBFCL Board was not of the Government but of a private entity and HBFCL was not a person owned and controlled by the Government nor was it carrying on essential State Functions. He next argued that the Judgments relied upon by the counsel for the Respondent are “per incurium” as this Court has already allowed various writ petitions against limited companies, incorporated under the Companies Ordinance 1984, so long as the majority ownership and control of such companies vests with the Government and in support of his contention he relied upon the case of Ramna Pipes and General Mills versus SNGPL (2004 SCMR 1274). Learned counsel has further contended that the issue of maintainability was raised in the case of Ramesh Kumar Ukrani vs. Federation of Pakistan (2016 CLC 1152) but the contention was emphatically rejected by the Division Bench of this Court by holding that Judgment of the Hon’ble Supreme Court on this point were to be preferred. He has further argued that the question of statutory or non-statutory Rules of Service does not arise as the Respondent-Company has violated Section 18 of the SRO 941 (1)/ 2009,

which is a statutory dispensation; therefore, the petition is maintainable.

An excerpt of the relevant Clause 18 is reproduced as under:-

“The employees of HBFC who were in the service of HBFC before the Effective Date shall stand transferred to and become employees of the Company as of the Effective Date on the same terms and conditions of their service and rights including pension benefits to which they were entitled as employees of HBFC. The terms and conditions of service and pension benefits of any such employees shall not be revised to their disadvantage by the Company except in accordance with law or with the consent of such employees.”

7. Learned counsel in support of his claim has relied upon the case of Zaeen Aziz Qureshi vs. PIAC (2016 PLC CS 272) and argued that the question of statutory and non-statutory rules of service is irrelevant, when violation of the statutory provision takes place. Learned counsel has placed on record the copy of Rules and Regulation of Respondent No.3 through statement dated 10.11.2016. An excerpt of the relevant extract of HR manual is reproduced as under:-

“General Increase:

It is HBFC’s policy to review its salary structure annually by way of the management’s review of the salary market within Pakistan. Such reviews will not necessarily lead to any change in the structure if the review demonstrates that HBFC’s structure is competitively in the position most suitable to the HBFC’s Board policy.

However, should a change be indicted, it could lead to alterations to part or all of the salary structure. Any percentage change to any grade within the structure will lead to the same percentage increase being applied to all salaries that fall within that grade. Consequently, any percentage increase applied uniformly to all the grades in the structure will also be applied uniformly to all salaries within HBFC’s Board of Directors.

7.4.3. Annual Increment.

7.4.3.1 Date of grant of increment:

The first January of each year shall be the date for the grant of annual increment to the employees.

7.4.3.2 One Normal Increment to each confirmed employee:

A confirmed employee shall be entitled on first January of each year to one increment in his pay within his pay scale.

Learned counsel has also relied upon the case of I.A Sherwani and others vs. Government of Pakistan (1991 SCMR 1081) and argued that the discrimination has been meted out with the Petitioners.

He has next contended that the most of the case laws cited by the learned counsel for the Respondent-Company relate to different points of law and not to the issue in hand is not akin to that, as such are distinguishable. He lastly argued that the Petitioners want similar treatment as meted out with their other staff/employees.

8. We have heard the learned counsel for the Petitioners, learned counsel for the Respondent-Company and the learned AAG for the Respondent No.1 and have perused the material available on record minutely with their assistance as well as the decisions relied upon by them.

9. Upon perusal of the pleadings and arguments extended thereon by the learned counsel for both the Parties, three basic primordial questions require our determination, which are as follows:

- (i) ***Whether or not a writ could be issued against the Respondent-Company under Article 199 of the Constitution?***
- (ii) ***Whether there is any violation of the operative sections of the SRO 941 (1)/2009 to invoke Writ Jurisdiction of this Court?***
- (iii) ***Whether denying salary package 2016-2017 in favour of Petitioners and allowing to staff (clerical and non-clerical) of HBFCL is discriminatory and violative of Article 25 of the Constitution of the Islamic Republic of Pakistan?***

10. Firstly with regard to the question of maintainability, reference may be made to the case of Ramna Pipe and General Mills (Pvt.) Ltd v. Sui Northern Gas Pipe Lines (Pvt.) Ltd. reported in 2004 SCMR 1274. In view of the dicta laid down in the aforesaid Judgment, particularly the principle laid down with regard to the maintainability of a petition under Article 199 of the Constitution against a public limited company. We are

of the considered view that the instant petition is maintainable against the Respondent-Company under Article 199 of the Constitution of Pakistan, 1973. The Respondent No.2 indeed is a Company, which is performing function in connection with the affairs of the Federation and as such, is amenable to the Constitutional jurisdiction of the High Court. Mere fact that company is a Limited Company, registered under the Companies Ordinance, 1984, limited by shares, is not sufficient to hold that Constitution petition could not be maintained against it. In our view, if companies are registered under the Companies Ordinance but are funded by the Federal or Provincial Government and are under the dominative control of the State, the jurisdiction under Article 199 of the Constitution would lie against such companies. We, therefore, hold that the instant Constitutional petition is maintainable under Article 199 of the Constitution. Our view is further supported by the test laid down by the Hon'ble Supreme Court in the case of Pakistan Defence Housing Authority & others vs. Lt. Col. Syed Jawaid Ahmed (2013 SCMR 1707), is applicable in the present case. The Hon'ble Supreme Court has discussed about the status and the functions of various authorities. The aforementioned test is applicable on HBFCL as well which mostly follow the policies laid down by the Government of Pakistan, being a Public Utility Company providing basic facilities to the public at large. Therefore, we have no hesitation to hold that HBFCL is a body corporate performing functions in connection with the affairs of the State, since the involvement of the Government is not limited to the fact that its majority shares are held by the Government of Pakistan. It may further be of relevance to point out the fact that subscription of major shareholding is a part of capital of the Government, which is public money, which

establishes control of the Government over the affairs of the Respondent-Company too. Company is a public authority, which perform and carry out its transactions for the benefit of the public and not for private gain or benefit, making the Company amenable to judicial review under the Constitutional jurisdiction. A reference has been given by the learned counsel for the Respondent-Company to the case of Abdul Wahab and others v. HBL and others (2013 SCMR 1383), where he attempted to demonstrate that the Respondent-Company is not a “person” as defined under Article 199 (5) of the Constitution. In this context, the Hon’ble Supreme Court has held that two factors are most relevant i.e. the extent of financial interest of the State/Federation in an institution and the dominance in the controlling affairs thereof. In Salahuddin v. Frontier Sugar Mills and Distillery Ltd. (PLD 1975 SC 244), the Hon’ble Supreme Court laid down similar test to assess, whether a body or authority is a person within the meaning of Article 199 of the Constitution. The aforesaid view was further affirmed in Aitcheson College, Lahore through Principal v. Muhammad Zubair (PLD 2002 SC 326). Thus, in view of the above discussion, we do not find any substance in the claim of the learned counsel for the Respondent-Company that the jurisdiction to this Court is barred on the ground that the Respondent-Company is not a “person” as discussed above. To further strengthen the above proposition that has been answered in the case of Pakistan International Airlines v. Tanweer-ur-Rehman (PLD 2010 SC 676), the Hon’ble Supreme Court has endorsed the three pronged test. In the light of the aforesaid Judgments of the Hon’ble Supreme Court of Pakistan, the objection on the maintainability of the captioned Constitution Petition is not sustainable in law and is accordingly rejected.

11. So far as the objection raised by the learned counsel for the Respondent-Company that the Petitioners cannot invoke constitutional jurisdiction of this Court against Respondent-Company, which is a Company registered under the Companies Ordinance, 1984 with no statutory rules of service is concerned, we are of the considered view that this is not a case of enforcement of statutory or non-statutory rules of service but, this is a simple case of enforcement of Article 25 of the Constitution in the case of the Petitioners, which is a fundamental right of every citizen of this country and the Petitioners have specifically taken the plea of discrimination on the part of the Respondent-Company. On the aforesaid pleas, we are fortified by the decisions given in the cases of **ZAIN YAR KHAN V. THE CHIEF ENGINEER C.R.B.C, WAPDA. D.I.KHAN and another (1998 SCMR 2419), ZAFAR MAHMOOD V. WAPDA and others,(1998 SCMR 2401), MIR ZAMAN V. Mst. SHEDA and others (2000 SCMR 1699), MUHAMMAD IQBAL V. FEDERATION OF PAKSTIAN and others (2014 PLC CS 467), RAZIUDDIN V. MEMBER-II, PUNJAB SERVICE TRIBUNAL LAHORE and others (2004 PLC CS 469), ALI AZHAR KHAN BALOCH and others V. PROVINCE OF SINDH and others (2015 SCMR 456), Syed JAWAD RAZA NAQVI and others V. FEDERAL TAX OMBUDSMAN and others (2015 PLC CS 1300), Syed AFTAB AHMED and others V. K.E.S.C. and others (1999 SCMR 197), GULSHAN ARA V. THE STATE (2010 SCMR 1162), AKHLAQUE HUSSAIN MEMON and others V. WATER AND POWER DEVELOPMENT AUTHORITY and others (2015 PLC CS 596), Engineer SAMIULLAH MUGHAL V. CHAIRMAN, PAKISTAN ENGINEERING COUNCIL and others (2009 PLC CS 280), SHABBIR AHMAD V.WAPDA, ETC. (NLR 1981 Lahore 276), MUHAMMAD SALEEM and others V.SECRETARY PROSECUTION, GOVERNMENT OF PUNJAB, LAHORE and another (2010 PLC CS 1), YOUSAF A.MITHA and others V. ABOO BAKER and others (PLD 1980 Karachi 492), PAKISTAN DEFENCE OFFICERS" HOUSING AUTHORITY and others V. Lt. Col. Syed JAWAID AHMED (2013 SCMR 1707), I.A. SHARWANI and others V. GOVERNMENT OF PAKISTAN and others (1991 SCMR**

1041), INAMUR REHMAN V. FEDERATION OF PAKISTAN and others (1992 SCMR 563), DR. MOBASHIR HASSAN and others V. FEDERATION OF PAKISTAN and others (PLD 2010 SC 265), PAKISTAN AND OTHERS V. PUBLIC AT LARGE AND OTHERS (PLD 1987 SC 304), HUMAN RIGHTS COMMISSION OF PAKISTAN and others V. GOVERNMENT OF PAKISTAN and others (PLD 2009 SC 507), Captain SALIM BILAL V. PAKISTAN INTERNATIONAL AIRLINE CORPORATION (PIAC) and others (2013 PLC CS 1212), ISLAMIC REPUBLIC OF PAKISTAN V. S.A.RIZVI (1992 SCMR 1309), FEDERATIOAN OF PAKISTAN and others vs. Mrs. ITRAT SAJJAD KHAN (2017 SCMR 1010), ABDUL REHMAN V. FEDERATION OF PAKISTAN and others (2010 PLC CS 691).

12. On merits, the Petitioners' counsel vehemently emphasized that the Respondent have increased pay scales and allowances in respect of staff (clerical and non-clerical) of HBFCL with effect from 01.01.2016, whereas the same benefits have been denied to the Petitioners in violation of Article 25 of the Constitution. However the claim of the Petitioners has been refuted by the management of HBFCL, who offered the Petitioners to increase their salary with effect from 01.01.2019. In our view this classification made between the two categories of the employees of the Respondent Company did not constitute intelligible differentia having rational nexus to the very object of the policy that must be objective and reasonable therefore the Respondent-Company has no legal justification to deny the Petitioners the same relief as granted to the other staff of the Respondent-Company. Our view is supported by the decision rendered by the Hon'ble Supreme court in the case of Federation of Pakistan Vs. Agri-tech Limited & others (PLD 2016 SC 676).

13. We have noticed that performance of the Petitioners in the Respondent-Company has not been called in question throughout their

service period by the Respondent-Company. We are not satisfied with the policy of the Respondent-Company that has been placed on the Court record. The said conduct of the Respondent-Company is clearly reflecting a discriminatory treatment to the Petitioners, which is not sustainable in the eyes of law. The Respondent-Company has adopted a policy of their own wish and will, which would attract the prohibition contained under Article 25 of the Constitution. Under Article 5 of the Constitution it is the imperative obligation of the functionaries of the State to abide by the Constitution and the law because it has been held inviolable obligation of every citizen, wherever he may be and of every other person for the time being within Pakistan. The aforesaid benefits granted to the staff (clerical and non-clerical) of HBFCL and denying the Petitioners in our view is discriminatory and violative of Article 25 of the Constitution. In this regard, while placing reliance on the dicta laid down by the Hon'ble Supreme Court in the case of I.A. Sharwani and others v. Government of Pakistan through Secretary Finance Division, Islamabad and others (1991 SCMR 1041). The larger Bench of the learned five members Bench of the Hon'ble Supreme Court made exhaustive scrutiny with respect to granting of pensionary benefits to a class of retired employees of the Executive Branch, who had retired within a particular period, while the same was denied to another class of employees similarly placed, who had retired on another period. The Petitioners have been given discriminatory treatment for no plausible reason whatsoever by non-inclusion of the aforesaid allowances in their salaries. Accordingly, while following the principle of law enunciated in I.A. Sherwani's case (ibid), and in view of the peculiar facts and circumstances of the present case, while invoking the jurisdiction conferred upon by this Court under Article 199 of the

Constitution, we hereby declare the impugned action/orders of the official Respondents No.2 and 3 to be in violation of strict and prohibitory command contained in Article 25 of the Constitution, because the Petitioners have been treated with sheer discrimination, which cannot be approved on any premise whatsoever.

14. In this view of the matter, the decision taken by the Respondent-Company that it has fixed two separate categories for paying the aforesaid allowance only to be paid to the staff (clerical and non-clerical) of HBFCL, excluding its officer and executive cadre employees is erroneous and is of no legal effect. We are of the considered view that Petitioners are entitled to the similar treatment, which was given to their similarly placed colleagues.

15. The matter is remanded to the Competent Authority of HBFCL for fresh decision on the issue of inclusion of the aforesaid pay and Allowances in the emoluments of the Petitioners in accordance with the law and dicta laid down by the Hon'ble Supreme Court of Pakistan, in the above referred matter, within a period of two months, from the date of receipt of the Judgment of this Court.

16. The Captioned petition is allowed to the aforesaid extent with no order as to costs.

JUDGE

JUDGE

Karachi Dated: -26.11.2018.