

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Adnan-ul-Karim Memon

C.P. No. D- 1511 of 2019

Jam Mitha Khan,
Petitioner through:

Malik Naeem Iqbal, advocate a/w Khurram
Memon, advocate

Respondents
Through:

Mr. Shahriyar Mahar, AAG

Dates of hearing:
Date of judgment:

04.9.2019 and 17.09.2019
23.09.2019

J U D G M E N T

ADNAN-UL-KARIM MEMON, J: - Basically, by means of this petition, the Petitioner is seeking direction to the Respondents to issue notification of his post-retirement benefits, on the premise that he was appointed as Junior Engineer (Civil) BPS-17 in Pakistan Water and Power Development Authority (WAPDA) vide appointment letter dated 22.12.1982 and after completion of probation and departmental examination he was confirmed on 10.1.1983; that on account of policy decision of both the Governments i.e. Federal and Provincial, his services were transferred to Irrigation and Power Department, Government of Sindh vide Notification dated 2nd October, 1999. Petitioner continued his job in Sindh Government, till he was asked to report back to his parent department by the Order of Honourable Supreme Court on 4.3.2015. Consequently his repatriation order was issued by the Government of Sindh vide Notification dated 2.3.2015. In the meanwhile petitioner reached the age of superannuation on 14th May, 2017 and now he is claiming his pensionary benefits on the ground that he was not at fault when his repatriation order was issued by the Respondent-department, rather it was unanimous decision of WAPDA and Government of Sindh to absorb him in the Irrigation and Power Department, as discuss supra. Petitioner being aggrieved by and dissatisfied with the aforesaid Order of the Honorable Supreme Court filed Criminal Review Petition No.98/2015 in Criminal Original Petition No.121/2013 in

Criminal Original Petition No.89/2013. The Honorable Supreme Court vide order dated 13.02.2019 observed as under:-

“2. Having said this, the learned counsels for the parties agree to this mode of disposal of the above cases in that the affected employees will be free to agitate their matters in the manner as noted above. Accordingly, all the listed petitions along with CMAs are disposed of. The Courts before whom the matters are instituted by the affected employees may deal and decide the same expeditiously preferably within a period of six months.”

2. Malik Naeem Iqbal learned Counsel for the petitioner briefed us on the factual background of the case that the Sindh Government vide notification dated 17.06.1991 approved the transfer of administrative control of 739 completed tube wells of South Rohri Project WAPDA Hyderabad in Hala Division (*Salinity Control and Reclamation project*)(SCARP) with effect from 01.7.1991 and brought the aforesaid project under the administrative control of Chief Engineer Irrigation Hyderabad; that the Petitioner was working in SCARP South Rohri project Hyderabad at Hala and at the time of its completion and handing over to the Irrigation Department, Government of Sindh along with staff en-block, the name of the Petitioner was initially included in the list of staff to be transferred, however, subsequently, the name of the Petitioner was omitted in exigency of service as he was looking after other components of the large projects; that vide Notification dated 2nd October, 1999, with the approval of the competent authority, the Petitioner was transferred/absorbed as Executive Engineer (Civil) BS-18 in Irrigation and Power Department, Government of Sindh; that upon absorption/transfer of the Petitioner in Irrigation Department, his lien in the WAPDA stood terminated with effect from 04.10.1999 and his pension contribution was also transferred by WAPDA to the account of Accountant General Sindh, Karachi vide office order dated 18.2.2004; that he was subsequently promoted to BS-20 vide Notification dated 18th May, 2012; that some junior colleagues of the petitioner being aggrieved by and dissatisfied with his promotion filed Criminal Original Petition No.121/2013 in Criminal Original Petition No.89/2011 before the Honorable Supreme Court seeking implementation of Criminal Review Petition No.193/2013, and succeeded to obtain order of Repatriation of the Employees including petitioner to their parent department

i.e. WAPDA, however therein the petitioner was not arrayed as respondent; that Petitioner having been aggrieved by and dissatisfied with the impugned notification filed Criminal Review Petition No.98/2015 in Criminal Original Petition No.121/2013 in Criminal Original Petition No.89/2013, the review petitions were heard and disposed of by the Honorable Supreme Court vide order dated 13.02.2019, with directions to the petitioner to approach the appropriate forums for redressal of his grievances. On merit, he attempted to persuade us that the case of petitioner falls within the scope of Rule 9-A of Sindh Civil Servants (Appointment Promotion and Transfer) Rules, 1974, which provides that when a person, who has been rendered surplus on account of abolition of a post of the Government or any autonomous body or on account of permanently taking over the administration of such autonomous body wholly or partially by the Government, may be appointed to any post in any Department of the Government with the conditions enumerated therein, as the Government of Sindh took over the administrative control of 739 completed tube wells of South Rohri Project WAPDA Hyderabad in Hala Division SCARP. He emphasized that he fulfills all the criteria as enumerated in the aforesaid Rule and he was permanently absorbed in the Sindh Government vide Notification dated 2nd October, 1999, his lien was terminated with WAPDA and all of his pensionary benefits were transferred to Sindh Government and thereafter he was treated as a Civil Servant and his seniority was fixed accordingly. In support of his contention, he relied upon section 16 of WAPDA Act, 1958 and argued that the Federal Government was empowered to direct the WAPDA to handover any scheme to the Provincial Government for carrying out the purpose of the project. He further submitted that he was erroneously nonsuited by the order dated 4.3.2015 passed by the Hon'ble Supreme Court, whereby he filed Review Petition, which matter now has been entrusted to this Court for decision. He next argued that on the basis of misinterpretation of the Judgment reported as Ali Azhar Khan Baloch vs. Province of Sindh (2015 SCMR 456) and Contempt Proceedings against Chief Secretary Sindh and others (2013 SCMR 1752), his services were

affected by the Notification of his repatriation, despite the fact that neither he was deputationist nor he was absorbed from such position rather he was employed through Notification duly issued by the Sindh Government with the status of Civil Servant; that during pendency of the aforesaid proceedings, he attained the age of superannuation i.e. 60 years without pensionary benefits. He lastly prayed for directions to the Respondent-Sindh Government to issue Notification of his retirement from service of Sindh Government as he has rendered more than qualifying pensionable service in Irrigation Department of Government of Sindh. He next submitted that the Respondents have already issued such Notification of retirement of the colleagues of the Petitioner; therefore, he is entitled for the similar treatment being a retired employee of the Irrigation Department, Government of Sindh.

3. At this stage, we directed the petitioner's Counsel to assist this Court more particularly regarding Article 187(2) of the Constitution of the Islamic Republic of Pakistan 1973 that whether this Court can examine and or modify the Judgment of the Hon'ble Supreme Court or only to enforce it in accordance with the law. He replied that this Court is competent to enforce the Judgment of the Hon'ble Supreme Court in its letter and spirit being the executing court of the Judgments of the Hon'ble Supreme Court of Pakistan. We reminded him that the present proceedings have been initiated under Article 199 of the Constitution and not under Article 187(2) of the Constitution and the powers of this court are limited to the extent of enforcement of the Judgment of the Hon'ble Supreme Court only. He referred to the Order of Honorable Supreme Court as discussed supra and various documents attached with the Memo of Petition and argued that this matter needs to be looked into in terms of the aforesaid order of the Honorable Supreme Court.

4. Mr. Shahriyar Mahar, Assistant Advocate General, in principle has accepted the stance of the petitioner, however, he laid emphasis on his para-wise comments and argued that though the petitioner was absorbed in Sindh Government long ago, but due to the directions of the Honourable Supreme

Court, Government of Sindh has decided to repatriate him to his parent department i.e. WAPDA vide impugned notification. We confronted him that the pensionary benefits of the petitioner were also transferred by the WAPDA to the Sindh Government vide office order dated 18.02.2004, which means that he was permanently retained by the Sindh Government. He conceded the aforesaid factual position of the case. Finally he states that there is no cavil to the proposition that the petitioner was permanently absorbed in the Irrigation department Government of Sindh along with the project and he has served in the department for a considerable period and has the required length of pensionable service. He also conceded that the colleagues of the petitioners have already been granted pensionary benefits by the Government of Sindh. He lastly prayed for an appropriate direction for disposal of the instant petition.

5. We have heard the learned Counsel for the parties and perused the entire material available on record.

6. Prima-facie, the claim of the Petitioner is admitted by the Respondent-department on the analogy that he was permanently transferred from WAPDA along with staff en-block, assets including machinery and equipment, residential colonies, tube wells etc., long ago. The only exception which has been put forwarded is that the colleagues of the Petitioner filed Criminal Original Petition No.121/2013 before the Hon'ble Supreme Court of Pakistan against non-repatriation of the Petitioner to his parent department i.e. WAPDA; that the matter was taken up by the Hon'ble Supreme Court and the Respondent-Irrigation Department, Government of Sindh supported the stance of the Petitioner with the assertion that the Petitioner and others were absorbed in Irrigation and Power Department, Government of Sindh on permanent basis along with tube wells etc. with the terms and conditions mentioned in the Notifications dated 30.7.1988 and 25.9.1980. However, the Hon'ble Supreme Court during hearings of the Review Petitions filed against the Judgment dated 12.6.2013 passed in Criminal Original Petition No.89/2011 directed for repatriation of the Petitioner. Resultantly petitioner

was repatriated to WAPDA vide Services General Administration and Coordination Department's Notification dated 2.3.2015, such compliance report was submitted before the Hon'ble Supreme Court, during the hearing on 4.3.2015 which order was passed with directions to the Secretary Establishment Division to take steps to comply with the directions contained in the Judgment in Review Petition No.193/2013 dated 5.1.2015. Petitioner being aggrieved by and dissatisfied with the aforesaid order filed Review Petition No.98/2015. Respondent-department has filed Concise Statement in the above referred Petition vide CMA No.170/2016, in the said Statement they took the same stance as discussed supra. The Hon'ble Supreme Court vide its order dated 13.2.2019 disposed of the Review Petitions filed by the Petitioner and others with directions, to the Courts before whom the matters are instituted by the affected employees, to decide expeditiously preferably within a period of six months.

7. Virtually, the order dated 4.3.2015 passed by the Hon'ble Supreme Court, directing the petitioner to report to the Secretary, Establishment Division in terms of the directions contained in the case of Ali Azhar Khan Baloch reported in 2015 SCMR 456 was in fact, in the conscious knowledge of Honorable Supreme Court while deciding the aforesaid Review Petitions leaving the effected employees to agitate their matters in the manner as noted in the order dated 13.2.2019. For convenience sake, the relevant Paragraph of the order dated 4.3.2015 (supra) is reproduced as follows:-

Crl.O.P.121/2013

The learned Additional Advocate General, Sindh, after arguing the case at some length, states that two officers namely Jam Mitha Khan and Muhammad Essa Memon were denotified by the Sindh Government. He, however, states that Zahid Hussain Junejo and Salman Memon were not denotified. On instructions, he undertakes to denotify them within one week. Another officer namely Muhammad Mithal Abbasi, who has already retired, need not be denotified.

The learned Additional Advocate General, Sindh, shall place the proposed notifications of repatriation of the two officers before this Court through the Registrar for our perusal in Chambers. The repatriated officer shall report to the Secretary, Establishment Division in terms of directions contained in the judgment in Civil Review Petition No.193 of 2013 dated 5.1.2015 and the Secretary, Establishment Division shall take steps to comply with the directions contained in the afore-said judgment. Disposed of accordingly.

Crl. M.A.No.773/2014

3. In view of the order passed in Crl. O.P.No.121/2013, the learned Counsel for the Applicant does not press the Application as it has borne fruit. Disposed of accordingly.

Crl. M.A. No.817/2014 and 185/2015

4. The learned Counsel states that since Jam Mitha Khan and Muhammad Essa Memon have already been denotified, therefore, these Applications have become infructuous. Disposed of accordingly.”

8. Record reflects that the Respondents in compliance with the aforesaid directions of the Honorable Supreme Court issued the Notification dated 2.3.2015, which is now impugned in the instant petition. An excerpt of the impugned Notification dated 2nd March, 2015 is as under:-

Karachi, dated 02nd March, 2015

NOTIFICATION

In pursuance of the Judgment dated 12.06.2013, passed by the Honorable Supreme Court of Pakistan in Criminal Original Petition No.89/2011 & other cases and the Judgments dated 05.01.2015, passed in Civil Appeal No.404/2011, etc. and Civil Review Petition No.193/2013, etc and with the approval of the Competent Authority, the absorption/appointment by transfer of Mr. Jam Mitha Khan, Senior Engineer (Civil), Water & Power Development Authority (WAPDA) in **Irrigation Department, Government of Sindh** as Executive Engineer (Civil) (BS-18), presently Chief Engineer (BS-20)/awaiting posting, is hereby withdrawn ab-initio and he stands relieved to report to his parent department i.e. Water & Power Development Authority (WAPDA).

SAJJAD SALEEM HOTIANA
CHIEF SECRETARY
GOVERNMENT OF SINDH

9. As per record, the aforesaid review petitions were heard and disposed of vide order dated 13.02.2019 with directions to the Courts to decide the matter expeditiously. Petitioner has approached this Court for the aforesaid purpose. An excerpt of the order dated 13.02.2019 is as under:-

“We have heard the learned counsel for the petitioners in these cases and are of the view that the petitioners are, in fact, seeking implementation of the judgments of this Court reported as Ali Azhar Khan Baloch v. Province of Sindh (2015 SCMR 456) and Contempt Proceedings against Chief Secretary, Sindh and others (2013 SCMR 1752). Some of the petitioners are saying that on the basis of misinterpretation of the said judgments their services have been affected in that orders for repatriation have been issued, despite the fact that neither they were deputationists nor were they absorbed from such positions rather they were employed through notifications duly issued by the Sindh Government With the status of Civil Servants. Whether such a status could be enjoyed by the petitioners or not, the same has to be looked into individually in each and every case and also the policy of the Sindh Government and the relevant law governing the matter of employment and induction in the Civil Service of Government of Sindh and obviously this Court in the present circumstances cannot take such exercise. More appropriate mode by which all these disputes can be resolved is that the employees alleged to have been effected by the judgments of this Court referred to above should avail the remedy under the law, particularly, under Article 187(2) of the Constitution of Islamic Republic of Sindh, 1973 which gives powers to the High Court to examine the judgment of this Court and also to enforce it in accordance with law.

2. Having said this, the learned counsel for the parties agree to this mode of disposal of the above cases in that the affected employees will be free to agitate their matters in the manner as noted above. Accordingly, all the listed petitions alongwith CMAs are disposed of. The Courts before whom

the matters are instituted by the affected employees may deal and decide the same expeditiously preferably within a period of six months.”

10. The crux of the legal submissions of the learned Counsel for the petitioner is that his case does not explicitly falls within the basic concept of Rule 9-A of Sindh Civil Servants (Appointment Promotion and Transfer) Rules, 1974, on the premise that he was originally appointed by WAPDA from where he was permanently taken over by the Government of Sindh along with its staff and machinery and thereafter was permanently absorbed in Sindh Government. Therefore Rule 9-A does not envisage such eventuality as WAPDA is still functional, though it has transferred the project with the employees. The notification governing his terms and conditions of service are reproduced hereunder:-

“NOTIFICATION

NO.A-1/2-3/(88)/98:- With the approval of the Competent Authority, Mr. Jam Mitha Khan, Senior Engineer (Civil) SCARPs Monitoring (South) WAPDA, Sukkur is hereby absorbed an Executive Engineer (Civil), BPS-18, in Irrigation and Power Department from the date he assumes the charge of the post.

2. His posting orders will be issued separately.
3. The terms and conditions of Mr. Jam Mitha Khan on absorption in Irrigation & Power Department are as under:-
 - i. He will be absorbed against the vacancy of Executive Engineer as and when fall vacant due to promotion of Executive Engineer to the post of superintending Engineer.
 - ii. His services will be regulated under the Sindh Civil Servants Act, 1973 and rules made thereunder.
 - iii. His seniority in the cadre of Executive Engineer of Irrigation and Power Department will be reckoned from the date of assumption, at the bottom of present 18 grade officers of Irrigation and Power Department.
 - iv. He will be liable to serve at any place in the Province of Sindh.
 - v. He will continue to subscribe towards the G.P. Fund, Benevolent Fund, Group Insurance and other compulsory contributions as under the Sindh Government Rules and will also repay in the prescribed manner and time all advances if any from G.P. Fund, Car Purchase, House Building etc. by cash deposite into the Government Treasury.

MUHAMMAD IDRIS RAJPUT
SECRETARY TO GOVERNMENT OF SINDH

11. We have seen the Notification dated 2.10.1999 and Notification dated 10.12.1999 whereby a lien of the Petitioner was terminated with WAPDA with effect from 4.10.1999, which stood revived, since the Honorable Supreme Court has ordered his repatriation as discussed supra.

12. In the given circumstances, instead of travelling into the merits of the case, the petitioner since has retired during litigation, as he has not joined WAPDA, besides the notification of repatriation has not been given effect.

13. We may also notice that judgment of the Honorable Supreme Court does not apply to the retired employees as on retirement; they do not affect the seniority, promotion or any other benefit of the serving employees.

14. We in the circumstances are constrained to direct Sindh Government to pay all his perks and privileges to which he was entitled to on issuance of notification of his repatriation, inclusive of his entire pensionary benefits within [02] months and report compliance through MIT-II of this court.

15. The instant Petition stands disposed of in the above terms.

JUDGE

JUDGE

Nadir