ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Const. P. No.D-2252 of 2021

DATE	ORDER WITH SIGNATURE OF JUDGE

1. For order on office objection
2. For hearing of CMA No.9647/2021
3. For hearing of main case.

17.08.2022.

None present for the petitioner.
Mr. Ali Safdar Depar, Additional Advocate General Sindh

Through this petition the petitioner seeks a declaration that he is entitled for pension and other retirement benefits on the ground that he has completed the requisite length of service.

2. On the other hand, learned AAG submits that the petitioner's claim is not maintainable as apparently earlier he was a contract employee and was permanently employed on 31.10.2014 and stood retired on 14.03.2020 on attaining the age of superannuation, whereas, the said period is much less than the minimum period of 10 years as provided in law for being entitled to pension. In support he has relied upon the judgment of the Hon'ble Supreme Court reported as *M/o Finance through Secretary, etc. v. Syed Afroz Akhtar Rizvi & others* (**2021 SCMR 1546).**

3. We have heard the learned AAG and perused the record. Insofar as the controversy is concerned, it appears that the same has already been settled by various pronouncements of the Hon'ble Supreme Court, whereas, a Division Bench of this court at Sukkur, speaking through one of us, namely ***Muhammad Junaid Ghaffar J.*** has also decided the said issue

same vide judgment dated 21.09.2021 passed in CP No.D-1406 of 2019 after considering the law as settled by the Hon'ble Supreme Court. The relevant findings in the said judgment of the learned Division Bench are as under:-

> 5. It is not in dispute that if the period of employment of deceased Umed Ali on contract basis is excluded, then he is not entitled for pension as he never completed ten (10) years' service. On the other hand, if the period of employment during contract is added, then perhaps he may become eligible. However, the issue that whether this period of contract service is to be added after permanent appointment to calculate the length of service for the purposes of qualifying service already stands decided by the Hon'ble Supreme Court in the case reported as *Chairman, Pakistan Railway, Government of Pakistan, Islamabad and others v. Shah Jehan Shah* **(PLD 2016 Supreme Court 534)** by Five-Members Bench and the relevant finding is as under:
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> > **"***6. ..... However, it is important to note that Article 371-A presupposes that such a government servant, whether falling under clause (i) or (ii), is otherwise entitled to pension (or gratuity, as the case may be). In other words, Article 371-A cannot be used as a tool to bypass the conditions for qualifying service of pensionary benefits, and such government servant has to fulfill the minimum number of years for grant of pension. This is due to the use of the word "count" as opposed to "qualify" or "eligible", as rightly argued by the learned counsel for the appellant. As per the settled rules of interpretation, when a word has not been defined in the statute, the ordinary dictionary meaning is to be looked at. Chambers 21st Dictionary defines "count" as "to find the total amount of (items), by adding up item by item; to include". Oxford Advanced Learner's Dictionary of Current English (7th Ed.) defines "count" as "to calculate the total number, of people, things, etc. in a particular group; in include sb/sth when you calculate a total; to consider sb/sth in a particular way; to be considered in a particular way". Thus in light of the above, service rendered for more than five years as contemplated by Article 371-A would only be added, included, or taken into account for the purposes of pensionary benefits, and not make such government servant qualify for pension per se. This interpretation is bolstered by logic, reason and common sense. If we were to accept the reasoning of the learned Service Tribunal in the impugned judgment and the arguments of the learned counsel for the respondents, it would create a bizarre and anomalous situation, where a government servant who has rendered temporary service in a temporary establishment for, let us say, seven years, would be entitled to pensionary benefits, and on the other hand, a government servant rendering services as a regular employee for fifteen years would not (yet) have completed the requisite number of years to qualify for grant of pension. It is absurd, ludicrous and inconceivable that a government servant, who is in regular employment, would become entitled to pension after serving the minimum years of qualifying service as prescribed by the law, whereas while interpreting Article 371-A, a government servant who has served as a temporary employee could be given preference over a regular employee, and after a minimum service of only five years would automatically become entitled to pension. Holding so would be against the object and spirit of the concept of pension which has been discussed by this Court in* ***Regarding pensionary benefits of the Judges of Superior Courts from the date***

of their respective retirements, irrespective of their length of service as Judges *(PLD 2013 SC 829) as follows:-*

> *"...pension is not the bounty from the State/employer to the servant/ employee, but it is fashioned on the premise and the resolution that the employee serves his employer in the days of his ability and capacity and during the former's debility, the latter compensates him for the services so rendered. Therefore, the right to pension has to be earned and for the accomplishment thereof,* ***the condition of length of service is most relevant and purposive."*** *(Emphasis supplied)*

*Thus, we are not inclined to interpret Article 371-A in such a way so as to render the provisions stipulating minimum years for grant of pensionary benefits superfluous and redundant. As far as the provisions of Article 371-A are concerned, which is a non-obstante clause to Articles 355(b), 361, 368, 370 and 371 stipulated therein, suffice it to say that such article by itself does not provide for the entitlement for the purposes of pension, rather, at the cost of repetition, it is restricted to the counting of the period of a minimum of five years which has been rendered by the temporary employee that once he is appointed on a permanent basis, such period shall be taken into account for the object of calculating his entitlement to pension with respect to the requisite minimum period under the law. Therefore we are not persuaded to hold the words "Notwithstanding anything contained in Articles 355(b), 361, 368, 370 and 371 of these Regulations..." in Article 371-A to allow those who do not fulfill the requisite conditions for qualifying for pension to bypass such conditions, so as to render the articles of the CSR providing for such conditions unnecessary and surplus. Therefore, we are of the candid view, that Article 371-A of the CSR would not ipso facto or simpliciter allow government servants rendering temporary service in a temporary establishment for more than five years to be entitled to grant of pension, rather such period would only be counted towards such government servants' pension if otherwise entitled to pension.***"***

6. The aforesaid view has recently been followed by the Hon'ble Supreme Court in the case of *M/o Finance through Secretary, etc. v. Syed Afroz Akhtar Rizvi & others* **(2021 SCMR 1546)** and following the aforesaid judgment, it has been held as under:

> **"***7. In case, an employee has served a Government Department for the duration of the period qualifying him to receive pension, the period spent as a contractual employee may be added to his regular qualifying service only and only for the purpose of calculating his pension and for no other purpose. The provisions of Article 371-A of CSR start with a non obstante clause which means that the said Article does not relate to the question entitlement or eligibility to receive pension. It is clearly and obviously restricted to counting the period of a minimum of five years which has been rendered by a temporary contractual employee to be taken into account with the object of calculating the quantum of his pension and not more. The non obstante clause in Article 371-A of CSR does not allow those who do not fulfil the requisite conditions for qualifying for pension to bypass such conditions and add up regular and contractual periods of employment for the purpose of meeting the eligibility criterion of ten years of service. Such an interpretation would create absurd situations and would render other provisions and Articles of CSR redundant, unnecessary and surplus. We are therefore in no manner of doubt that Article 371 of CSR does not allow Government Servants rendering temporary service in a temporary establishment for more than 5 years to be entitled for grant of pension rather such period can be counted towards calculation of pension only if otherwise entitled to pension by meeting the criteria of qualifying service.*

> *8. It is not disputed that the Respondent rendered continuous service from 1992 to 2008 as Data Entry Operator in NIEMS. It is also not disputed that he was regularized in 2008 and retired in 2016 before meeting the criteria of qualifying service. That being so, the benefit of Article 371-A of CSR was not available to him as he did not qualify for the pensionary benefits which qualification is a necessary pre-requisite for grant of pension.*
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> *9. It may also be pointed out that the earlier view taken by a three member Bench of this Court in the case of Mir Ahmad Khan v. Secretary to Government & others **(1997 SCMR 1477)** was declared per incuriam in a five member judgment of this Court rendered in Shah Jahan Shah's case ibid. As such, the view consistently taken by this Court in a situation where the services of a contractual employee are converted into regular employment is that although the period spent in contractual employment subject to a minimum of five years can be included in calculating pensionary benefits but only and only in a situation where the employee is otherwise entitled/ eligible to receive pension subject to having rendered qualifying service (10 years) in permanent employment. Unless he meets the criteria of having served for the duration of the qualifying period, the period spent in contractual employment cannot be added to make up for any deficiency in qualifying service for the purpose of eligibility to receive pension. The Tribunal has clearly and obviously taken an incorrect and erroneous view of the law and has been unable to appreciate the essence and tenor of Shah Jahan Shah's case ibid which is an authoritative declaration of law on the subject by this Court. Reference of the Tribunal to selective portions of the aforesaid judgments are found to be out of context leading to incorrect and erroneous interpretation of the relevant principles of law. We therefore find that the impugned judgment of the Tribunal dated 05.10.2018 is unsustainable. It is accordingly set aside. Consequently, the listed appeal is allowed and the Service Appeal bearing No.265(R) of CS 2016 filed by Respondent No.1 (Syed Afroz Akhtar Rizvi) before the Tribunal is dismissed.***"**

7. The crux of the dicta laid down by the Hon'ble Supreme Court is that the period spent as a contractual employee may be added to his regular qualifying service; but only for the purposes of calculating his pension and not otherwise i.e. he may be entitled for payment of an enhanced pension due to addition or aggregating the length of service; however, the said period cannot be added or aggregated for making him qualified for such pension, if he is otherwise not entitled. First by way of a qualified period of service he must be entitled for pension as a regular employee, and then his contractual service period can be added to the total length of service, so as to make him entitled for any enhanced pension. The period spent in contractual service cannot be added to make up any deficiency in qualifying service for the purposes of determination of eligibility to receive pension.

4. In view of the above, since the law is already settled by the Hon'ble Supreme Court, no case is made out and the Petition is hereby **dismissed**

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Amjad/PA