

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Irfan Saadat Khan

Mr. Justice Adnan-ul-Karim Memon

C.P No.D-2520 of 2014

Syed Faisal Ali and others.....Petitioners

Versus

Federation of Pakistan & othersRespondents

Date of hearing. 08.02.2018

Mr. Malik Naeem Iqbal Advocate for the Petitioners

Mr. Fayyaz A. Soomro Advocate for Respondent No.2 to 4

Mr. Shaikh Liaquat Hussain, Assistant Attorney General

J U D G M E N T

ADNAN-UL-KARIM MEMON,J:- Through the above captioned Petition, Petitioners are seeking regularization of their services, as per terms of the advertisement and grant of back benefits as well as seniority with effect from the month of December 2011 and January 2012 respectively.

2. Brief facts of the case are that Petitioners, in pursuant to the advertisement published in Daily Newspaper on 13.12.2009, they submitted their applications for appointment against the post of Junior Engineers/ Assistant Manager (Electrical, Mechanical, & Electronic), BPS-17 in Central Power Generation Company Ltd (GENECO-II) Guddu/Respondent-Company. Subsequently, Petitioners were appointed on contract basis for one year vide appointment letters dated 29.12.2010

and 22.01.2011 respectively and have continued their service till date. Petitioners have averred that the posts against which they were appointed were of permanent nature; hence their services were required to be regularized on satisfactory performance basis. Petitioners have further submitted that as per the recruitment policy amended up to date, the Respondent-Company decided that in future recruitment in BPS-17 and above will be made on one year contract basis and after satisfactory completion of one year of their services those persons would be regularized. Petitioners have further added that the Respondents have continued to keep the Petitioners on false hopes. Petitioners have asserted that, although, their case for regularization of the services were considered by the Respondent-Company and special ACRs were also called by Assistant Manager (HR) vide letters dated 26.09.2011 and 17.12.2013, however petitioners could not be regularized, without assigning any cogent and lawful reason. Petitioners further averred that pursuant to the policy of the Federal Government, the services of similarly placed employees working in Central Power Generation Company Ltd/Respondent-GENCO-II have been regularized vide office order No. CPGCL/CEO/HRAD/GEN-19-A/4513-26 dated 06.04.2009, office order No. HRD/DMHR/CM/329-50 dated 14.03.2014, office order No. 121-R/CE/MEPCO/EA-Reg/Asstt. Managers dated 23.11.2012 and office order No CEO/MZG/HR&AD/898/-88 dated 16.07.2011, respectively. Petitioners have further submitted that the Respondent-Company have adopted a discriminatory policy against the Petitioners, and are bent upon to deprive the Petitioners from their legitimate right of regularization of their service. Petitioners have asserted that they have been working in the Respondent-Company with devotion and care, thus

are entitled to be considered for regularization of their services. Petitioners being aggrieved by and dissatisfied with the non-consideration of the Petitioners for regularization of their services have filed the captioned petition.

3. Upon notice, the Respondents have filed Para wise comments in which they have controverted the stance taken by the Petitioners.

4. Mr. Malik Naeem Iqbal, learned counsel for the Petitioners has argued that Petitioners are serving in the Respondent-Company on contract basis with effect from 29.12.2010 and are eligible and qualified for regularization of their services. Per learned counsel the case for regularization of the Petitioners were recommended by the committee constituted for regularization of the services, but the Respondent-Company did not consider the petitioners on false pretext, which is not sustainable under the law. According to the learned counsel the Petitioners have sufficient expertise in their profession, therefore they are entitled to be considered for regularization and denial of the same tantamount to infringement of an inalienable right and fundamental right of the petitioners, as enshrined under Article 4,9, 25 of the Constitution of the Islamic Republic of Pakistan 1973. According to him the Respondent-Company has willfully causing harassment and have arbitrarily deprived the petitioners of their legitimate rights; that the Petitioners are being discriminated by the Respondent-Company due to ulterior motives in order to coerce the Petitioners to leave the job or get a cause to terminate their services; that pursuant to consistent policy of Federal Government to regularize to similarly placed employees and in view of their qualification and performance after initial appointment, the

Petitioners had legitimate expectation of being regularized. Petitioners being aggrieved by and dissatisfied with non-consideration of regularization of their services have approached this Court. Learned counsel for the petitioners in support of his contention has relied upon the case of Pakistan Defence Officers Housing Authority and others Vs. Lt. col. Syed Jawaid Ahmed (2013 SCMR 1707) and argued that the case of Hyderabad Electric Supply Co. Vs. Mushtaq Ali Brohi (2010 PSC 139) is per in curium on the premise that the Hon'ble Supreme Court in the case of DHA supra held that in the aforesaid case it was not appreciated that though the rules/ regulations may be non-statured but there was statutory intervention in the shape of the Ordinance and the employees had to be dealt with under the said law. He also relied upon the case M/s State Oil Company Ltd. Vs. Bakht Siddique and others (unreported case decided by the Hon'ble Supreme Court vide order dated 08.12.2017 in Civil Petition No. 409-K to 414 of 2017 and argued that the Hon'ble Supreme Court has dismissed the Petitions of State Oil Company and directed for regularization of their services of its employees. (Outsource employees), he further relied upon the case of Oil & Gas Development company Vs. Federation of Pakistan and other (unreported case decided by the Hon'ble Supreme Court vide order dated 21.11.2017 in Civil Petition No. 2718 to 2783 and 2980 of 2017) and argued the Hon'ble Supreme Court has maintained the judgment passed by this Court in C.P. No. 4442/2016, whereby Respondent OGDCL was directed to regularize the services of Petitioners.

5. Mr. Fayyaz A. Soomro, learned counsel for the Respondent No.2 to 4 has raised the preliminary objection with respect

to the maintainability of the instant Petition. Learned counsel has contended that the Respondent-Company is incorporated under the Companies Ordinance 1984 and relationship between the Petitioners and the Company is that of "master and servant" as such the instant petition is not maintainable. Learned counsel next contended that the petitioners have no cause of action as they have already been dealt with in accordance with law as the Respondent Company is non-statutory body having non statutory rules of service and therefore, the instant petition under Article 199 is not maintainable. Learned counsel further contended that Petitioners are contractual employees of Respondent No.4, thus they have no vested right to claim regularization; that Respondent No.2 has only allowed/ permitted 23 permissions for appointment due to the ban imposed by the Federal Government on fresh recruitments; that as per permission obtained on 24.12.2010, thereafter 8 more junior engineers were inducted, despite of ban and without approval of the Respondent No.2 and as such the appointment letters issued to the Petitioner No. 3,6,9,11 and 14 are illegal; that the regularization board never concluded its hearing as the Finance Manager and CEO of Respondent No.3 raised serious objection in respect of regularization of the service of the Petitioners; that entire recruitment process as initiated has been challenged in three different constitutional petitions bearing No. D-973, 1073 and 1170 of 2012 and the same are pending under adjudication before this Court, Circuit Bench at Larkana; that no any discriminatory treatment has been meted out with the Petitioners; that all 30 candidates appointed, including the Petitioners have not been regularized, Audit objection, Enquiry recommendation are on record, only extension in service of contract from time to time was

allowed to the Petitioners. He lastly prayed for dismissal of the instant petition.

6. Mr. Shaikh Liaquat Hussain, learned Assistant Attorney General has adopted the arguments of the learned counsel for Respondent No.2 to 4.

7. We have considered the submissions of the learned counsel for the parties and perused the material available on record and case law cited at the bar.

8. In the first place, we would like to examine the following issues:-

- (i) Whether the Central Power Generation Company Ltd (GENECO-II) is discharging functions in connection with the affairs of Federation or a Province within the meaning of clause 5 of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973?**
- (ii) Whether CPGCL (GENECO-II) is amenable to the Constitutional Jurisdiction of the High Court?**
- (iii) Whether service of the Petitioners is liable to be regularized under the policy of Government of Pakistan?**

9. In order to deal with the above postulations, it is essential to make reference to scheme and framework of Water and Power Development Act, 1958 (hereinafter referred to as WAPDA Act), which provides for unified and coordination developments of the water and power resources of Pakistan. Under section 3 of the WAPDA Act, 1958 an authority known as Pakistan Water and Power Development Authority (WAPDA) was established as a body Corporate and the Federal

Government has the power to issue such directives as it may consider necessary on matter of policy from time to time. Under Section 4 and 6 of the WAPDA Act, the Chairman and 6 Members of WAPDA are to be appointed by the Federal Government.

10. We have noted that CPGCL (GENECO-II) and other distribution companies were created to effectuate the devolution of powers. Though these companies are distinct corporate entities incorporated under the Companies Ordinance, 1984, however, they are performing the same functions as once allocated to WAPDA under the WAPDA Act. Secondly, the plans for development and utilization of water and power resources of Pakistan on unified and multi-purpose basis are also approved by the Federal Government.

11. While dilating the question as to whether CPGCL (GENECO-II) is "person" within the meaning of Article 199(1) (a) (ii) read with Article 199(5) of the Constitution we refer to the test amenable to judicial review which has been generally classified by the Courts as the "Functional Test". If the functions of these companies/institutions have an element of public authority or if they are performing public or statutory duties and carrying out transactions for the benefit of the public at large and not for private gain or benefit, then their action will be amenable to judicial review. The Honourable Supreme Court in the case of Abdul Wahab and others v. HBL and others (2013 SCMR 1383), held that two factors are most relevant that is, the extent of financial interest of the State/Federation in an institution and the dominance in the controlling State/Federation in an institution and the dominance in the controlling affairs thereof. The case of Salahuddin v. Frontier Sugar Mills and

Distillery Ltd. (PLD 1975 SC 244), the Honourable 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 Vs. Muhammad Zubair (PLD 2002 SC 326) and Pakistan International Airlines v. Tanweer-ur-Rehman (PLD 2010 SC 676).

12. As per the profile of CPGCL (GENECO-II), it is a state enterprise. The Government owns the majority of shares. The Chief Executive of the Company is a nominee of the Government of Pakistan and has been delegated with such powers by the Board of Directors as are necessary to effectively conduct the business of the Company. In view of the above background and legal position, CPGCL can ordinarily be regarded as a 'person' performing functions in connection with the affairs of the Federation under Article 199 (1) (a) (ii) read with Article 199 (5) of the Constitution. Thus, the High Court has jurisdiction to exercise judicial powers in the subject affairs of CPGCL (GENECO-II) under the Constitution. In the light of the aforesaid judgments of the Honorable Supreme Court of Pakistan, the objection on the maintainability of the captioned Constitution Petition is not sustainable in law and is accordingly rejected.

13. 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

regularization of service of the Petitioners in the Respondent-Company. 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 PAKISTAN 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).

14. In the matter of regularization of service of the Petitioners, we seek guidance from the unreported case of M/s Hadeed Welfare Trust & another vs. Syed Muhammad Shoaib & others rendered by the Honorable Supreme Court of Pakistan in Civil Petitions No.121-K and 122-K of 2017, wherein, the Honorable Supreme Court has maintained the Judgment dated 15.12.2016 passed by this Court against Hadeed Welfare Trust (A subsidiary of Pakistan Steel Mills), whereby contract employees of Pakistan Steel Cadet College were regularized, reported in (2017 PLC (C.S) 1020). The relevant portion of the judgment is reproduced as follows:

“3. The other pretext for not regularizing the respondents was that the office memo dated 29.8.2008, issued by the respondent No.26 (Federation of Pakistan), which required regularization of the service of the employees of the Federal Ministries/Divisions/ Attached Departments, Subordinate offices, Autonomous, Semi-Autonomous Bodies/Corporations, was for the benefit of employees in BS-1 to BS-15, and is not applicable to the present respondents, however, in so pleading the present petitioners have ignored the minutes of the meeting of the Cabinet Committee dated 07.2.2011 and minutes of the meeting of the Cabinet sub-committee on regularization, inter alia, of contract employees in Ministries/Divisions/Attached

Department / Autonomous Bodies/Organizations held on 13.3.2013, relevant paragraphs whereof, for the ease of reference are reproduced below: -

“MINISTRY OF PRODUCTION

236. The representative of the Ministry of Production/Secretary Pakistan Steel Mills informed the Cabinet Sub-Committee that there are certain contract/daily wages employees in the Cadet College and other educational institutions of the Steel Mills at Karachi who have served for more than one year and whose services are required to be regularized.

DECISION

237. The Cabinet Sub-Committee discussed and directed that the services of all the contract/daily wages employees (teaching and non-teaching staff) of the Cadet College and other educational institutions of Pakistan Steel Mills Karachi, who have served for more than one year should be regularized subject to fulfillment of criterion and availability of posts under intimation to the Establishment Division.”

4. As can be seen from the forgoing, the above decision is not restricted to any scale or grade, and no such restriction can be read therein by any stretch of imagination and is therefore equally applicable to the employees of all grade and scales including the present respondents, who were thus rightly granted such relief through the impugned judgment. We therefore do not find any lacuna in the impugned judgment justifying our interference in the matter, the petitions are therefore dismissed.”

15. On the issue of regularization in service, our view is further strengthened by the judgment of this Court dated 01.6.2017 passed in Constitution Petition No. D-3199, D-4605 and D-5079 of 2013 respectively and Constitution Petition D-509, D-2034, and D-1091 of 2014 respectively. In the said judgment this Court directed Pakistan State Oil Company for regularization of service of third party contractor/“outsourced employees”. The said Judgment was assailed before the Honorable Supreme Court of Pakistan in Civil Petitions No.409-K to 414-K of 2017 and was maintained as under: -

“As regards the question that the respondents were not the employees of the petitioner but the contractor, suffice it to say that it is a normal practice on behalf of such industries to create a pretence and on that pretence to outsource the employment of the posts which are permanent in nature and it is on the record that the respondents have been in service starting from as far back as 1984. This all seems to be a sham or pretence and therefore it being not a case of any disputed fact and no evidence was required to be recorded. Moreover, we have seen from the order under challenged that in such like cases where the orders have been passed by the Labour Tribunals, the employees, even those who were under the contractors’ alleged employment, have been regularized by the petitioner. And thus keeping in view the rule of parity and equity, all the respondents even if considered to be the employees of the contractor, which is not correct, they having been performing duties of permanent nature should have been regularized. However, at this stage, we would like to observe that the employment of the respondents shall be regularized with effect from the date when they approached the learned High Court through the Constitution petition but for their pensionary benefit and other long terms benefits, if any, available under the law, they would be entitled from the date when they have joined the service of the petitioner. All the petitions are accordingly dismissed.”

16. From what has been discussed above, we have reached the conclusion that submissions of Respondent-Company are misconceived and not well founded. The regularization of the employees is not part of terms and conditions of service of the employees but, it depends upon the length of service. Therefore, it is on the above principle that Petitioners have approached this Court for regularization of their services, when they have no legal remedy for enforcement of their fundamental rights particularly those enshrined in Article 9 and 25 of the Constitution of the Islamic Republic of Pakistan 1973, in the case of Khawaja Muhammad Asif Vs. Federation of Pakistan & others (2013 SCMR 1205).

17. We are of the considered view that particularly the Respondent-Company cannot adopt a policy of their own wish and will to make fresh appointments against the posts already held by the Petitioners, who were appointed after going through a transparent procedure. Secondly, record shows that during entire service of Petitioners nothing adverse in terms of their qualification and character and/or inefficiency in the subject field was observed by the Competent Authority of the Respondent-Company. Thirdly, Petitioners served the Respondent-Company for 8 years, which is more than sufficient time to acquire expertise in their respective fields. Therefore, to consider someone other than the Petitioners for regular job is unjustified and against the principles of natural justice and equity.

18. We have gone through the Office Memorandum dated 11th May, 2017 issued by Government of Pakistan, Cabinet Secretariat, Establishment Division, which is a beneficial notification and excerpt of the same is reproduced herein below: -

**Government of Pakistan
Cabinet secretariat
Establishment division**

No.F-53/1/2008-SP Islamabad the 11th May, 2017

OFFICE MEMORANDUM

Subject:- Amendment in the Recruitment Policy/Mechanism to Ensure Merit Based Recruitment in the Ministries/Divisions/Sub-ordinate Offices/Autonomous/Semi-Autonomous Bodies/Corporations/Companies/Authorities

The undersigned is directed to state that the Federal Cabinet in its meeting held on 12th April, 2017 has accorded approval of the subject amendment to be inserted as para 1(e) in the Recruitment Policy/Mechanism issued vide this Division's O.M. No.531/2008-SP dated 16th January, 2015 as under: -

“(e) Appointment on Regular Basis of Contract/Contingent/ Paid/ Daily Wages/Project Employees For the purpose of appointment on regular basis of Contract/Contingent/Paid/Daily Wages/Project employees the following criteria shall be observed: -

(i) All Contract/Contingent/Paid/Daily Wages/Project employees who have rendered a minimum of one year of service in continuity, as on 1.1.2017 (hereinafter referred to as eligible employees) may apply for appointment on regular basis in the manner prescribed hereinafter provided that the condition of continuity shall not be applicable in case of person(s) employed on daily wages who have completed at least 365 days service.

(ii) For initial appointment to posts in BS-16 and above, the employees shall apply direct to FPSC against relevant/suitable vacancies as and when arising for which they are eligible.

(iii) For initial appointment to posts in BS-1 to BS-15, the eligible employees may apply as per criteria given vide this Division's O.M. No.531/2008-SP dated 16.1.2015 and 3.3.2015 shall be adopted.

(iv) The eligible employees shall be awarded extra marks in interview at the rate of one (01) mark for each year of service rendered upto a maximum of five (05) marks, on the recommendation of the respective selection authorities.

(v) The period served as Contract, /Contingent/Paid/Daily Wages/Project employees shall be excluded for the purpose of determination of upper age limit in addition to relaxation of upper age limit as per existing rules.

(vi) Qualifications prescribed for a post shall be strictly followed in case a person does not possess the prescribed qualifications/experience for the post he/she is applying for he/she shall not be considered for the same.

(vii) The employees must be in good mental and bodily health and free from any physical defect likely to interfere with the discharge of his duties unless appointed against disability quota.

(viii) The advantage of para 1(e) is a one-time dispensation for all Contract/Contingent/Paid/Daily Wages/Project employees for their eligibility to regular appointment.

2. This Division's O.M. of even number dated 16th January, 2015 is modified to the above extent. All Ministries/Divisions are requested to take further action accordingly.

(AttiqHussainKhokhar)
Director General
[Tel:051-9103482](tel:051-9103482)

*All Ministries/Divisions
 Rawalpindi/Islamabad*

19. The through above specified Memorandum dated 11th May, 2017 issued in pursuance of the decision of the Cabinet Sub-Committee for regularization, the Federal Government has directed Ministries/Divisions/Sub-ordinate Offices/Autonomous/Semi-Autonomous Bodies/ Corporations/Companies/Authorities/ to

regularize all contract employees who have rendered a minimum of one year of service in continuity, as on 01.01.2017. Based on facts, relevant law and judgments of the Hon'ble Supreme Court as well as this Court (dilated upon in detail supra) we are of the view that Petitioners ought to have been regularized.

20. The case of the Petitioners is fully covered by the un-reported Judgment rendered by the Honorable Supreme Court of Pakistan in Civil Petitions No.409-K to 414-K of 2017, in the case of M/s State Oil Company Ltd Vs. Bakht Sidique and others as discussed supra.

24. Reverting to the plea raised by the learned counsel for the Respondent-Company that the Petitioners were not appointed initially in accordance with the directives of competent authority, this is hardly a ground to nonsuit the Petitioners as it is well settled nor that a right had come to vest in the favour of the Petitioners on issuance of appointment letters and more so after joining the service. The Hon'ble Supreme Court of Pakistan has consistently held that irregularities in appointment, if committed by the department itself, the appointee could not be harmed, damaged or condemned subsequently, when it occurred to the department that it had itself committed some irregularities quo appointments. We are also fortified by the decision rendered by the Honorable Supreme Court in the case of Mst. Basharat Jehan Vs. Director General Federation Government Education FGEI (C/Q) Rawalpindi and others (2015 SCMR 1418).

22. In the light of above facts and circumstances of the case discussed above and decision rendered by the Hon'ble Supreme

Court in the aforesaid cases, the instant Petitions is hereby disposed of with directions to the Chief Executive Officer/ Competent Authority of Respondent-Company to consider cases of the Petitioners for regularization of their service in accordance with law and dicta laid down by the Hon'ble Supreme Court of Pakistan in the cases referred to hereinabove within a period of two months from the date of receipt of this Judgment.

23. These are the reasons of our short order dated 8.2.2018, whereby the captioned petition was allowed.

JUDGE

JUDGE

Karachi
Dated.10.02.2018.