

IN THE HIGH COURT OF SINDH, KARACHI

Present:-

Mr. Justice Irfan Saadat Khan

Mr. Justice Adnan-ul-Karim Memon

1. C.P. No.D-3491/2013

Lal Badshah Petitioner

V E R S U S

The Chairman and one another Respondents

2. C.P. No.D-2821/2014

Fida Muhammad Khan Petitioner

V E R S U S

The Trustees of the Port of
Karachi & others Respondents

Date of hearing:16.02.2018

M/s. Javed Iqbal and Khalid Javed advocates for the Petitioner in
C.P. No.D-3491/2013.

M/s M.K Shikoh and Jawad Rizvi advocate for the Petitioner in
C.P. No. D-2821/2014.

Mr. Javed Asghar Awan advocate for respondent No.1 in
C.P. No. D-3491/2013.

Mr. Khaleeq Ahmed advocate for Respondents No.1 and 2 in
C.P. No. D-2821/2014.

Mr. Shaikh Liaquat Hussain, Assistant Attorney General.

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JUDGMENT

ADNAN-UL-KARIM MEMON-J. The above referred
Constitutional Petitions are being disposed of vide this single
judgment as common question of law and facts are involved
therein. In nut shell, basically Petitioners are seeking inclusion of
Cost of Living Allowance (CLA) @ 7% in their pensionable
emoluments.

2. Brief facts of the case are that the Petitioners are retired employees of Karachi Port Trust (KPT) and were drawing cost of living allowance (CLA) @ 7% of their basic pay on the dates of their retirements. Petitioners have submitted that as per Office Memorandum (O.M) No. 13(10) Reg. 6/2008/413, dated 16.05.2011, issued by Government of Pakistan, Finance Division, that all retired employees and serving officers of KPT of Grade 1 to 22 are entitled for the grant of Cost of Living Allowance (CLA) @ 7% of basic pay as emolument reckonable towards pension and periodical increases in their pensionery benefits. As per Petitioners the aforesaid Office Memorandum was issued in pursuance of Finance Division's OM No.1 (40) imp/95 dated 29.06.1995, read with Para 2(i) of Finance Division's OM dated 4.9.2001 and as per decision dated 1.4.2011 rendered by Honorable Supreme Court of Pakistan in the case of Government of Pakistan Vs. Rana Arshad Faheem. Petitioners have added that in compliance of the Judgment, Respondents decided that cost of living allowance admissible @ 7% of basic pay be included in the pensionable emoluments reckonable towards pension for all those Government employees in BPS 1 to 22, who were already in receipt/grants at the time of their retirements and those, who had not availed the benefits of Revised Pay Scales 2001. Petitioners have emphasized that they meet all the conditions as mentioned in Office Memorandum No. 13(10) Reg. 6/2008/413, dated 16.05.2011; that they were receiving cost of living allowance @ 7% of their basic pay respectively, amounting to Rs. 677.25 per month with effect from 1.6.1995 up to date of their retirements from services. Petitioners

further added that they had not availed the benefits of Revised Pay Scales 2001. Petitioners claimed that they approached and requested the Respondent No.1 to pass an order to include the cost of living allowance @ 7% of their pay amounting to Rs. 677.25 per month, drawn by them on the date of their retirements from service, and grant pro-rata increase in promotion, monthly pension, the amount of arrears accrued due to this increase up to date. Petitioners have further submitted that their claim for inclusion of the cost of living allowance @ 7% in their gross pension is being denied. Petitioners being aggrieved by and dissatisfied with the inaction on the part of Respondent-KPT, has filed the captioned Petitions.

3. Upon notice, Respondents have filed para wise comments.

4. Mr. M.K Shikoh, learned counsel for the Petitioner in C.P. No. D-2821/2014 has contended that the Petitioners are retired employees of Karachi Port Trust, worked in KPT in basic pay scale 4 to 8 and were drawing monthly Basic Pay, plus Cost of living allowance @ 7% of Basic pay on the date of their retirement; that the Petitioners remained in receipt of the Cost of living allowance, with effect from 01.06.1995 till the date of their retirement and have not availed the benefits of Revised pay Scales of 2001; that in the Basic Pay Scales announced on 01.12.2001 the Cost of Living Allowance was permissible to the employees from BPS- 1 to 22 @ 7% of the basic pay, which was later on discontinued with other two allowances i.e. Personal Allowance of Rs. 100/- and Ad hoc Allowance of Rs. 300/- per month, which

were already allowed to be included in the pensionable emoluments but the Cost of Living Allowance was not included in the pensionable emoluments, which has now been ordered to be included in pursuance of the Judgment of the learned Federal Service Tribunal dated 02.12.2010 passed in Appeal No. 486(L)/2006, maintained by the Honorable Supreme Court of Pakistan vide its order dated 01.04.2011 passed in Civil Petition No. 173/2011, which was received by KPT on 31.05.2011 for information and compliance; that the Petitioners are aggrieved person and being victim of inordinate delay on the part of KPT Administration, who have illegally deprived them of their legitimate right to get the CLA @ 7% of their Basic pay drawn by them with effect from 01.06.1995 upto to the date of their retirement included in their pensionable emoluments reckonable towards calculation of pension and have not availed the benefits of revised pay scales, 2001, to which right they are entitled; that the above cost of living allowance has already been merged in the pay of officials opting for the revised pay scales of 2001; He lastly prayed for allowing the instant Petitions.

5. M/s. Javed Iqbal and Khalid Javed advocates for the Petitioners in C.P. No.D-3491/2013 have adopted the arguments of Mr. M.K Shikoh, learned counsel for the Petitioner in C.P. No. D-2821/2014.

6. Mr. Javed Asghar Awan learned counsel for Respondent-KPT in C.P. No. D-3491/2013 has raised the issue of maintainability of the instant Petitions; that the terms & conditions

of employment of Petitioners are governed by the terms of settlement agreed between Trade Union/ CBA and the Respondent Trust. The same has legal binding upon the parties/employees of the KPT; that though there is no allegations that any of the terms or provisions of settlement has been violated, however even if there is any alleged violations, appropriate remedy under the law is available to the Petitioners in the hierarchy of Industrial Relations law for the enforcement of settlement; that the jurisdiction of this Court is barred under Article 199 of the Constitution of the Islamic Republic of Pakistan; that in absence of any statutory rules of service governing employment of Petitioners, these Constitutional Petitions are not maintainable; that Petitioners were employed as Crane Operators and retired, while they were in KPT Pay Scale (PS-3) and PS-5); that in KPT there are two pay scales structure since 1990, so far as pay scale of officers are concerned, they are linked with Governments pay scales i.e. BPS-16 and above, while for workers in KPT, there are KPT Pay scales ranging from PS-1 to PS-8; that these pay scales have no link with the Government pay scale (BPS); that this was done vide Memorandum of settlement reached between CBA and Management of KPT, effective from 01.04.1990; that so far increase in grant of pension as announced by the Federal Government from time to time is concerned is being followed in the case of KPT employees along with KPT officers; that cost of living allowance is granted in pursuance of Finance Division's O.M dated 16.05.2011 has been included; that aforesaid circular is clear that only officers were made entitled to inclusion CLA @ 7% towards their pension; that Petitioners along with other

workers /employees, whose terms and conditions of employment are governed under settlements between CBA and Management of KPT, it was agreed between CBA and Management of KPT that 7% of basic pay will be allowed to employees, whose pay and benefits are subject to settlements as a Adhoc relief w.e.f. 1995; that Petitioners had been receiving this Adhoc relief @ 7% of basic pay; that settlements being binding upon Petitioners and all other employees, who are not officers, nowhere provided entitlement of 7% CLA to be included in the pension. He lastly prayed for dismissal of the instant Petition.

7. Mr. Khaleeq Ahmed advocate for Respondents No.1 and 2 in C.P. No. D-2821/2014 has adopted the arguments of Mr. Javed Asghar Awan, learned counsel for the Respondent KPT in C.P. No. D-3491 of 2013.

8. Mr. Shaikh Liaquat Hussain, learned Assistant Attorney General has adopted the arguments of learned counsel for KPT and further argued that in pursuance of Judgment of the Hon'ble Supreme Court of Pakistan vide its order dated 01.04.2011 Government has allowed vide Office Memorandum dated 16.05.2011 to treat the cost of living allowance admissible @ 7% of basic pay as emolument reckonable towards pension for all those employees in BPS- 1 to 22, who were in receipt of the said allowance at the time of their retirement and who had not availed the benefits of revised basic pay scale 2001. He further added that Government of Pakistan, Finance Division's instructions are applicable to the retired Government Servants or retired Armed

Forces Personnel only; that as regards, cases of retired employees of Autonomous / Corporate bodies like KPT, Ministry of Port & Shipping they may follow the relevant rules of their organization as per previous practice, keeping in view the financial position of the organization; that Federal Government Rules are not applicable upon the employees of KPT.

9. Firstly, we would address the question of the jurisdiction of this Court with regard to maintainability of the Petitions under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

10. The profile of the Karachi Port Trust reveals that it is a Public Sector statutory entity. In view of the above background and status of Karachi Port Trust, the same 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. Karachi Port Trust Officers Recruitment, Appointment, Seniority and Promotion Regulations-2011 are statutory rules of service and admittedly the same were framed by the Board of Directors of Karachi Port Trust with the prior approval of the Federal Government, pursuant to Section 22 of the Karachi Port Trust Act, 1886.

11. In the given circumstances, we are fully fortified by the view enunciated by the Hon'ble Supreme Court in para 50 of the Judgment delivered in the case of Pakistan Defence Housing Authority vs. Lt. Col. Javed Ahmed (2013 SCMR 1707) "that an

aggrieved person can invoke Constitutional jurisdiction of this Court against a public authority". The same principle is also enunciated in the case of Muhammad Rafi and another Vs. Federation of Pakistan and others (2016 SCMR 2146). We have also considered that the Petitioners are seeking inclusion of Cost of Living Allowance (COLA) @ 7% in their pensionable emoluments and the only remedy available to them is under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. Accordingly, we are of the view that these Petitions could be heard and decided on merits by this Court, while exercising its Constitutional jurisdiction.

12. Having decided on the maintainability of the instant Petitions, questions, which agitate the controversy at hand, could be reduced to the following:-

1. **Whether the petitioners are entitled for inclusion of Cost of Living Allowance (COLA) @ 7% in their pensionable emoluments and meet all the conditions as mentioned in Office Memorandum No. 13(10) Reg. 6/2008/413, dated 16.05.2011?**
2. **Whether denying increase of pension by inclusion of COLA @ 7% to pensioners, who had retired from a particular date and giving the same to the other class of employees of KPT is discriminatory and violative of Article 25 of the Constitution of the Islamic Republic of Pakistan?**

13. To appreciate the controversy in proper perspective, we think it appropriate to have a glance on the term "cost of living allowance", which is the cost of maintaining a certain standard of living of an employee by the employer. The concept cost of living allowance is popularly called as dearness allowance. The Dearness

Allowance (DA) is a cost of living adjustment allowance paid to Government employees, Public sector employees (PSE) and pensioners. "Minimum Wages for Unskilled Workers Ordinance 1969" makes no specific mention of the term "dearness allowance", but it refers to an allowance paid on rise of cost of living. Variable dearness allowance (VDA) is part and parcel of wages. On 16.2.2016, the Government has also fixed minimum wage in the country at Rs. 13, 000, under Minimum Wages for Unskilled Workers (Amendment Act 2016). Once the rates of minimum wages are prescribed under the Act, whether as all-inclusive or by combining basic plus dearness allowance, they are not amenable to split up. It is one pay package. Neither the scheme nor any provision of the Act provides that the rates of minimum wages are to be split up on the basis of the cost of each of the necessities taken into consideration for fixing the same. Section 2(g), which defines the term "Wage" specifically provides that the value of the items given there under is not required to be computed for finding out whether the employer pays minimum wages as prescribed under the law. Therefore, the Competent Authority is not required to bifurcate each component of the costs of each item taken into consideration for fixing minimum wages, as lump sum amount is determined for providing adequate remuneration to the workman so that he can sustain and maintain himself and his family and also preserve his efficiency as a worker. In other words, dearness allowance is part and parcel of cost of necessities of life. In cases where the minimum rates of wages is linked up with VDA, it would not mean that it is a separate component, which is required to be

paid separately nor can it be said that such component does not form a part of the minimum wage. The minimum rate of wages is linked with VDA; it would not mean that it is a separate component, which is required to be paid separately, where the employer pays a total pay package, which is more than the prescribed minimum rate of wages.

14. It is well-settled that the capacity of the employer to pay minimum wage is totally irrelevant consideration while fixing or revising the minimum wages. The argument of the Respondents that they are paying to the employees a gross pay package, which incidentally is higher than the minimum rate of wages fixed by the State and, hence, they are not liable to pay the cost of living allowance may not be a sound proposition. Merely because the Respondents are able to pay higher rate of wages it does not absolve them from paying separately the "cost of living allowances".

15. In the present case, it is cost of living allowance, which is to be considered. The cost of living allowances is a variable factor. The cost of living goes on changing. It depends on rise or change in the day-to-day living index and inflation. As such, as the cost of living allowance is a variable factor, it cannot be said that the pay package fixed once for all by the employer would be inclusive of the living wages. The liability of the employer to pay minimum wages to the employee does not depend upon the employer's consent.

16. We have perused the Office Memorandum dated 16.05.2011, which is a beneficial instrument equally applicable in

the category of retired employees of KPT. An excerpt of O.M is reproduced as under:-

**Government of Pakistan
Finance Division
Regulations Wing**

No. F. 13(1) Reg-6/2008/413

Islamabad the 16th May 2011

Subject: **INCLUSION OF COST OF LIVING ALLOWANCE @ 7%
IN THE PENSIONABLE EMOULUMENTS**

The undersigned is directed to refer to the Finance Davison's C.M. No. F. 1(40) imp/95 (i) dated 29.06.1995 read with para 2 of Finance Division's O.M No. F 1(5) imp/ 2001 dated 4th September, 2001 on the above subject and to state that in pursuance of the judgment of Federal Service Tribunal dated 02.12.2010 in Appeal No. 486(L)/2006 upheld by the Supreme Court of Pakistan vide order dated 01.04.2011 in Civil Petition No. 173/2011, it has been decided to treat the cost of living allowance for all those employees in BPS- 1 to 22 who were in receipt of the said allowance at the time of their retirement and who had not availed the benefit of Revised Basic Pay Scales, 2001.

**(KHADIM HUSSAIN)
SECTION OFFICER**

17. As per Petitioners, they meet the conditions mentioned in the aforesaid Office Memorandum as at the time of their retirement they were receiving cost of living allowance @ 7% of basic pay and did not avail the benefit of Revised Basic Pay Scale 2001. The unreported order dated 01.04.2011, passed by the Hon'ble Supreme Court of Pakistan in the case of Government of Pakistan

& others Vs. Rana Arshad Faheem, supports the stance taken by the Petitioners. Relevant portion of the Judgment is reproduced as under:-

“The judgment under challenge in this petition that of the Federal Service Tribunal (Tribunal) whereby while accepting and allowing the appeal of the respondent/employee for the grant of Living Allowance petitioner/department was directed in terms that the case of the respondent be treated at par with ad hoc allowance and personal/secretariat allowance and also on the ground of rule of consistency as the Tribunal has also sent the cases of other employees for the grant of similar allowance.

The learned Deputy Attorney General has contended that the case referred to in the impugned judgment by holding the rule of consistency the appeal has been disposed of while in the instant case the appeal was allowed. The relevant portion of the judgment was referred to and we have examined that judgment also whereby by the same relief has also been directed to be granted to other employees of the department. We have asked the learned Deputy Attorney General whether the afore-referred judgment has been challenged before this Court but the answer was in the negative. We have further asked him about the compliance of that judgment and his reply was in the affirmative i.e the judgment has been complied with and the Living Allowance has been granted to the employees in that case.

In this view of the matter the petitioner is left with no grievance, therefore, while refusing leave in appeal the petition is dismissed.”

18. We have perused the order dated 03.02.2014 passed by this Court in C.P. No. D-1857 of 2012 which reads as under:-

“ The petitioner has prayed that effect of 7% cost of living allowance to be merged in the monthly pension which the respondents were not paying to him. Today Mr. Obaid-ur-Rehman and Mr. Muhammad Sabir, Deputy Manager (Legal) have submitted the letter of Manager (HR) dated 31.01.2014 with reference to this petition in which in para-1 it is clearly stated that all K.P.T officers

retired/died from June, 1995 to November, 2001 including the petitioner are eligible for cost of living allowance @ 7% of basic pay as emolument reckonable towards their pension. In the light of this letter, the petitioner is satisfied. The petition is disposed of accordingly. The respondents are directed to include 7% cost of living allowance in the monthly pension of the Petitioner.

19. Record reflects that the above referred order passed by this Court has been complied with vide letter dated 31.01.2014 issued by KPT. According to the Respondent-KPT, the Finance Division has clearly mentioned in its Office Memorandum dated 29.06.1995 that cost of living allowance shall not be treated as part of emoluments for fixation of pension, therefore the claim of the Petitioners could not be granted. This objection would be of no legal effect as it would be hit by the prohibition contained in Article 25 of the Constitution.

20. 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.

21. The beneficial notification/enactment of the Federal Government, denying increase of pension by inclusion of COLA to pensioners, who had retired from a particular date and giving the same to the other class of employees of KPT is discriminatory and violative of Article 25 of the Constitution.

22. In this regard while placing reliance on the dicta laid down by the Honorable 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 learned five members Bench of Honorable Supreme Court made exhaustive scrutiny of with respect to granting of pensionery benefits to a class of retired employees of Executive Branch, who had retired within a particular period, while the same was denied to another class of employees similarly placed, who had retired in another period.

23. The Petitioners have been given highly discriminatory treatment for no plausible reason whatsoever by non-inclusion of COLA @ 7% in their monthly pensionery benefits. 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 this Court under Article 199 of the Constitution, we hereby declare the impugned action/orders of the official Respondents No.1 and 2 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 premises whatsoever.

24. In this view of the matter, the decision taken by the Respondent-KPT that it has fixed two separate categories for paying cost of living allowance only to be paid to the employees in grade 1 to 22, excluding its Retired Employees is erroneous and is of no legal effect.

25. The matter is remanded to the competent authority of KPT for fresh decision on the issue of inclusion of Cost of Living Allowance @ 7% in pensionable emoluments of the Petitioners in accordance with law and dicta laid down by the Honorable 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

26. The Captioned petitions are allowed to the aforesaid extent with no order as to costs.

JUDGE

JUDGE

Karachi
Dated:- . 02.2018.

Shafi Muhammad P.A