

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Aziz-ur-Rehman

Mr. Justice Adnan-ul-Karim Memon

C.P No. D- 100 of 2013

Nafees Fatima
Widow of Abid HammadPetitioner

V/s

Federation of Pakistan
through its Secretary, (IT&TD),
Ministry of Information Technology,
Islamabad & 04 othersRespondents

C.P No. D- 101 of 2013

Syed Hasnain RazaPetitioner

V/s

Federation of Pakistan
through its Secretary, (IT&TD),
Ministry of Information Technology,
Islamabad & 04 othersRespondents

Date of hearing: 27.03.2019

Date of Decision: 05.04.2019

M/s. Syed Ansar Hussain Zaidi and Saood Ahmed Khan,
Advocates for Petitioners.

M/s. Khalid Jawed Khan and Muhammad Ahmer Advocates for
Respondents No.2 and 3.

M/s. Zia-ul-Haq Makhdoom and Muhammad Azhar Mahmood
Advocates for Respondents No.4 and 5.

Ms. Durdana Tanweer, Assistant Attorney General.

J U D G M E N T

ADNAN-UL-KARIM MEMON, J:- In the above referred
Constitutional Petitions, basically the Petitioners are seeking
inclusion of `Cost of Living Allowance` (CLA) @ 7% in their
pensionable emoluments in the light of the Office Memorandum
(O.M) dated 16.05.2011 issued by the Ministry of Finance,

Government of Pakistan and O.M dated 28.3.2013 issued by the Pakistan Telecommunication Company limited (PTCL).

2. Brief facts of the case are that the Petitioner in C.P No. D-100 of 2013 is widow of retired employee of respondent-PTCL, whereas the Petitioner in C.P No. D- 101 of 2013 is also retired employee of Respondent-PTCL, however he opted for early retirement plan under Voluntary Separation Scheme (VSS) and retired on 28.2.1998 (as per Annexure A page No. 17 of Memo of Petition). Petitioner-widow claims that her husband was drawing cost of living allowance (CLA) @ 7% of his basic pay on the date of his retirement in the year 2001 vide letter dated 29.6.1995 as per Office Memorandum Number .13(10) Reg. 6/2008/413, dated 16.05.2011, issued by Government of Pakistan, Finance Division. Their entire claim is that all retired employees and serving officers of respondent-PTCL 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 pensionary benefits. 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] and in compliance of the aforesaid Judgment, Respondent-Trust decided, vide letter dated 28.3.2013, increase in orderly allowance and inclusion of cost of living allowance admissible @ 7% of basic pay be included in the pensionable emoluments reckonable towards pension 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 further claim is that they are beneficiary of the respondent-Trust managed by the Respondents No.2 and 3 and

meet all the conditions as mentioned in O.M No. 13(10) Reg. 6/2008/413, dated 16.05.2011 on the premise that the pensionary rights of the Petitioners are protected under Trust deed dated 02.04.1994, after promulgation of Pakistan Telecommunication (Re-organization) Act, 1996 (Act). Petitioners have asserted that they approached and requested the Respondents to pass an order to include the cost of living allowance @ 7% of their pay per month, drawn by them on the date of their retirements from service, and grant pro-rata increase, monthly pension, the amount of arrears accrued due to this increase up to date and 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-Company filed the captioned Petitions on 19.01.2013.

3. Upon notice, Respondents filed para-wise comments, controverted the allegations leveled against them.

4. We queried from the learned counsel for the petitioners that how the petitioner in C.P No. D- 101 of 2013 claiming entitlement for cost of living allowance, when he opted for early retirement under Voluntary Separation Scheme (VSS) and retired on 28.2.1998?

5. Syed Ansar Hussain Zaidi, learned counsel for the Petitioners in reply to the query has argued that the Petitioner No.1 is widow of retired employee of Respondent-PTCL, thus entitled for the cost of living allowance @ 7% in her gross pension; however he admitted that petitioner in C.P No. D- 101 of 2013 opted for early retirement under (VSS) and confined his arguments, for the aforesaid relief to the extent of petitioner in C.P No. D- 100 of 2013. He submitted that the serving employees, retired employees and widows of retired employees, who were employed in the Pakistan Telegraph

and Telephone Department (T&T Department) and were subsequently transferred to Pakistan Telecommunication Corporation and then to Pakistan Telecommunication Company limited are entitled to receive pensionary benefits as fixed and increased by the Federal Government; 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 and Ad hoc Allowance, 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 the emoluments of certain class of retired employees, excluding the petitioners; that 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 PTCL on 31.05.2011 for information and compliance, however the petitioner-widow is denied the fruit of the aforesaid judgments. He added that the Petitioner-widow is aggrieved person and being victim of inordinate delay on the part of Respondent-PTCL Administration, who have illegally deprived her of her legitimate right to get the CLA @ 7% in her pensionable emoluments reckonable towards calculation of pension to which right she is 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; that the Petitioner-widow is entitled for 7% cost of living allowance of basic pay to be included in her pensionable emoluments, which is not being paid to her. Learned counsel for the Petitioners attempted to give brief history of the case and contended that through Trust Deed dated 2-4-1994,

Pakistan Telecommunication Corporation Employees' Pension Fund was created and all departmental employees transferred to the Corporation were entitled to be paid pension as defined under the Federal Government Pension Rules; that after promulgation of the Act of 1996, Pakistan Telecommunication Employees Trust was created which took over the liability of the Pension Fund created by the Trust Deed of 2.4.1994 to that there was a continuity of Pension Fund from the one created by Trust Deed dated 02.04.1994 to that of the Pakistan Telecommunication Employees Trust. He referred to the definition of the term '*telecommunication employees*' as given in the Act of 1996 and robustly argued that all employees of former T&T Department are entitled to receive pensionary benefits as per the one fixed and increased by the Federal Government. He emphasized that through vesting order dated 07.02.1996 issued by the Ministry of Communication, Government of Pakistan, the effective date of vesting of all properties, rights and liabilities of the Corporation to that of Pakistan Telecommunication Company Limited was announced to be that of 01.01.1996. Similarly, all employees of the Corporation become employees of the respondent-Company with effect from 1-1-1996 with liability in respect of payment of pension; therefore, the entitlement for payment of pension at the rate fixed by the Federal Government was accepted by the respondent-Company. He referred to the provision of subsection (2) of section 59 of the Act of 1996 and contended that all orders passed prior to the promulgation of this Act were saved including the Employees' Pension Fund Rules, 1994 and that the respondent-Company has assumed the liability and such pension of the Petitioner-widow is also protected, therefore her pensionary benefits cannot be reduced; that the increase in pension as fixed by the Federal Government is not being paid to the Petitioner-widow as per her

entitlement; that the respondent-Company has been following the Government Rules in payment of pension up-to 2010 and that such was a guaranteed right of the Petitioner-widow, which cannot be denied. He also referred to the case of *Pakistan Telecommunication Employees Trust vs. Muhammad Arif and others* [2015 SCMR 1472], and argued that the notifications providing for increase in pension as per Government Rules, having been paid for almost 13 years became practice and such practice cannot be discontinued as it has force of law; that the Transferred Employees are deemed to be civil servants and their terms and conditions of service are governed by the Civil Servants Act, therefore no discriminatory treatment can be meted out with the petitioner-widow. In support of his submissions, he relied upon the case of **Pakistan Telecommunication Corporation and another v. Riaz Ahmed and 6 others** [PLD 1996 SC 222]; **Divisional Engineer Phones, Phones Division, Sukkur and another v. Muhammad Shahid and others** [1999 SCMR 1526]; and unreported Order dated 23-8-2013 passed by the Honorable Supreme Court in Civil Petitions Nos.717 and 718 of 2013. On the issue of cost of living allowance he argued that the same is admissible to the retired employees of PTCL who were earlier retired before 31.12.1995 are drawing the aforesaid allowance, therefore, the Petitioner-widow is also entitled for same relief; that discriminatory attitude has been meted out with the Petitioner by imposing condition of date of retirement in the Office Memorandum by the respondent-company in order to deprive retired employees from the benefit of cost of living allowance. In support of his contention, he relied upon in case of **P.T.C.L. and others vs. Masood Ahmed Bhatti and others** [2016 SCMR 1362]. He lastly prayed for allowing the instant Petitions.

6. Conversely, Mr. Khalid Jawed Khan, learned counsel for the Respondents No.2& 3 has raised the issue of maintainability of the instant petitions and argued that the instant Petitions are not maintainable on the ground that the Petitioners have adequate alternate remedy under Section 56 and 61 of the Trusts Act, 1882; that the Petitioners are claiming Cost of Living allowance @ of 7% on the basis of the Judgment of Honourable Supreme Court of Pakistan reported in SCMR 2015 Page 1472, which has no bearing in the case of petitioners and has nothing to do with Cost of living allowance issue. He emphasized that the only employees who were retired before 1.1.1996 were entitled for Cost of living allowance, whereas the case of petitioner-widow does not fall within the ambit of Office Memorandum dated 28.3.2013, for the simple reason that the husband of the Petitioner, admittedly retired from his service on 1.1.2001 as an employee of Respondent No.4/PTCL, therefore she is not entitled for the Cost of living allowance. Learned counsel pointed out that the petitioner in C.P.No.101 of 2013 had not only exercised the option but received the amount under VSS, freely and voluntary as well without any protest, therefore he is not entitled for double benefits. He further averred that this Court cannot make any deletion, amendment, addition or insertion in VSS, when the same was free from any ambiguity and does not call for interference by this court at this stage. In support of his contention, he relied upon the case of State Bank of Pakistan vs. Khyber Zaman and others [2004 SCMR 1426]. He next added that the case of Petitioner-widow, who is seeking enforcement of Trust Deed date 2.4.1994, executed between Pakistan Telecommunication Corporation and its officials, the same cannot be enforced being a non-statutory instrument, which was subsequently superseded by Section 44 of the Pakistan Telecommunication (Re-organization) Act, 1996, and Section 52(2)

thereof, which clearly ousted its applicability; that the pleas raised by the petitioners are of factual nature cannot be determined under Article 199 of the Constitution; that the Petitioners have simply overlooked the fact that, the Pakistan Telecommunication Corporation Act was enacted on 25.11.1991, while the Trust Deed on which reliance has been placed, was executed on 02.04.1994; that Pakistan Telecommunication Employees Trust (PTET) is neither a local authority nor is performing any functions in connection with the affairs of the Federation and is therefore not amenable to jurisdiction under Article 199 of the Constitution; that Respondent No.3 is merely a designation/title and not a legal person; that even this court has no territorial jurisdiction to entertain these petitions, and these petitions may be returned for filing within the High Court having jurisdiction in the matter; that the Petitioners have raised a number of disputed issues of fact, which require evidence, an exercise is to be undertaken by the Civil Courts and not by this Court under Article 199 of the Constitution; that in the absence of necessary particulars and proof, it is not even possible to accept that the Petitioners were employed in the T&T Department, transferred to PTC then to PTCL, or opted for VSS and retired from service in PTCL; that assuming without conceding, that the Petitioners were transferred to PTCL, a Public Limited Company, they enjoyed extra benefits and perks as employees of a Public Limited Company but in respect of pension, the Petitioners desire to be treated as of a Federal Government Employees; that the Board of Trustees of PTET are not bound to match the increases announced by the Federal Government for its employees or retirees; that the PTET is neither bound nor obliged to keep on increasing the rate of pension as allowed to Federal Government pensioners nor is PTCL under any statutory compulsion to keep on increasing its contributions, to keep pace

with increases announced by the Federal Government for its pensioners; that pensionery benefits do not include within its meaning future increases. This is limited only to those, who exercised the option available to them under Section 36(3) of the Act of 1996, within one year; that PTCL does not have the financial resources to keep on matching increases, announced by the Federal Government for its retirees and the same would wipe out PTCL, as a viable company; that Respondent No.2 has not acquired any pensionery benefits nor is under an obligation statutory or otherwise, to grant such increases in pension to PTCL retirees, that match the increases announced by the Federal Government, for its retirees; that the Petitioners were not drawing any cost of Living Allowance. The Memo of Ministry of Finance dated 16.5.2011 is inapplicable to pensioners of PTCL; that the Respondents have not acted over and above any authority; that the Trustees have not deviated from any provision of law applicable in the matter; that no fundamental rights of the petitioners have been abridged; that pension is essentially protected but increase in the pension is the exclusive statutory function/domain of the Trustees of PTET and quantum of increase is not protected. Learned counsel relied upon the case of **Wali-ur-Rehman and others vs. State Life Insurance Corporation** [2006 SCMR 1079], and argued that petitioners on opting premature retirement under Voluntary Retirement Scheme got additional benefits qua, therefore, petitioners after having retired from the respondent-Corporation would have no case against the present respondent-company for claiming benefit of revised pay scales. He next relied upon the case of **Qari Allah Bux and others vs. Federation of Pakistan and another** [2011 PLC (C.S) 488] and argued that the petitioners cannot be allowed to wriggle out of such contractual obligation by availing the benefits of VSS and ask for other benefit. He next relied upon the

case of **Wahid Baksh Wattoo and others vs. Pak American Fertilizers Limited and others** [2014 SCMR 113]. He lastly prayed for dismissal of both the Petitions.

7. Mr. Ziaul Haq Makhdoom, learned counsel for the Respondents No. 3 to 5 has adopted the arguments of Mr. Khalid Jawed Khan, learned counsel for Respondents No.2 & 3 and prayed for dismissal of the instant Petitions.

8. Ms. Durdana Tanweer, learned Assistant Attorney General representing Respondent No.1, has adopted the arguments of Mr. Khalid Jawed Khan learned counsel for Respondents No.2&3 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. She 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 PTCL, Ministry of Telecommunication, 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 PTCL.

9. We have heard learned counsel for the parties and perused the entire material available on record and case law cited by them.

10. In the first place, we would like to examine the issue of maintainability of the instant Petitions under Article 199 of the

Constitution, 1973. The background of the Respondent-Company is that the Respondent-Company is indeed a Company, which is performing functions in connection with affairs of Federation and as such, is amenable to Constitutional jurisdiction of this Court. Mere fact that company is a limited company, registered under the Companies Ordinance, 1984, limited by shares, is not sufficient to hold that Constitutional petition could not be maintained against it. Even if companies are registered under the Companies Ordinance but are funded by the Federal or Provincial Government and are under the dominant control of the State, the jurisdiction under Article 199 of the Constitution 1973 would lie against such companies. Reference is made to the case of Ramna Pipe and General Mills (Pvt.) Ltd v. Sui Northern Gas Pipe Lines (Pvt.) reported in 2004 SCMR 1274.

11. Mr. Zia ul Haq Makhdoom, the learned Counsel for the Respondent-PTCL argued that it is not under the control of the Federal Government, hence, cannot be construed as a person in terms of Article 199(5) of the Constitution, 1973. This contention of the learned Counsel is misconceived as this question has been set at rest by the Hon'ble Supreme Court of Pakistan in the case of *PTCL and others Vs. Masood Ahmed Bhatti and others* [2016 SCMR 1362]. The relevant portion of the Judgment is reproduced below:

“The question whether the PTCL was a “person” performing functions in connection with the affairs of the Federation within the contemplation of Article 199(5) of the Constitution was first dilated upon by this Court at great length in Muhammad Zahid’s case in which the plethora of case law was gone into and it was held that the employees of the erstwhile T&T Department transferred to the Corporation [PTC] under the relevant provisions of the Act of 1991 and later/on succeeded by the PTCL, discharging their functions and duties in the International Gateway Exchange as Operators were inducted permanently or regularized subsequently under the rules necessarily related to one of the affairs of the Federation within the purview of provisions of Article 199 of the Constitution; hence similar duties and functions in the International Gateway Exchange being discharged by the private respondents as Operators could not be distinguished to say that the same did not relate to the affairs of the Federation though conferred upon the Corporation [PTC] and finally upon the PTCL. It was further held that the Telecommunication undisputedly was the subject which dischargeable now through the PTCL; hence such entity involved in the same exercise of the sovereign

powers, essentially fell within the connotations of the Constitution; accordingly, the grievance of the private respondents was amenable to the writ jurisdiction of the High Court. However, be that of a „worker“ or a „civil servant“ or a „contract employee“ had no nexus to the maintainability of the writ petition on the ground of discrimination meted out to them. 23. It may also be added here that as rightly held by a learned Division Bench of the High Court of Sindh in the judgment impugned in C.A. No. 883 of 2010 that the Federal Government has first sold 12% shares through public subscription and then it sold 26% all of B class shares to the EIP and the remaining 26% shares of PTCL were still owned by the Federal Government and as long as the Government owned majority or partially in the name of any other organization or entity be amenable to the jurisdiction of the High Court under Article 199 of the Constitution. In this view of the matter the argument that the PTCL was not a person within the meaning of Article 199 (5) of the Constitution is not tenable.

24. However, this Court in the case of *Principal Cadet College Kohat v. Muhammad Shoaib Qureshi* (PLD 1984 SC 170), while dealing with the question, as to whether in absence of any breach of statutory provision the employees of a corporation can maintain an action for reinstatement, held that where the conditions of service of an employee of a statutory body were governed by statutory rules, any action prejudicial taken against him in derogation or in violation of the said rules could be set aside by a writ petition; however, where his terms and conditions were not governed by statutory rules but only by regulations instructions or directions, which the institution or body, in which he was employed, had issued for its internal use, any violation thereof would not, normally, be enforced through a writ petition. Recently, this Court in *Tanveer-ur-Rehman's* case (supra), while dealing with issue of invoking of jurisdiction of the High Court under Article 199 of the Constitution by the employees of the PIAC, held that although employer, and not by the statutory rules framed under section 30 of the Pakistan International Airlines Corporation Act, 1956 with the prior approval of the Federal Government, therefore, they would be governed by the principle of „Master and Servant“. On the question whether in absence of any breach of statutory provision, the employees of appellant could maintain an action for reinstatement etc., it was observed that the said question needed no further discussion in view of the fact that this Court was not of the opinion that if a Corporation was performing its functions in connection with the affairs of the Federation, the aggrieved persons could approach the High Court by invoking its constitutional jurisdiction. But as far as the cases of the employees regarding their individual grievances were concerned, it was held that they were to be decided on their own merits, namely if any adverse action was taken by the employer in violation of the statutory rules, only then such action would be amenable to the writ jurisdiction. Therefore, in absence of statutory rules, the principle of „Master and Servant“ would be applicable and such employees would be entitled to seek remedy permissible before the Court of competent jurisdiction.

Similarly, in *M. Tufail Hashmi* (supra), after discussing the aforesaid two judgments in detail, it was held that the employees of those organizations, which were performing functions in connection with the affairs of Federation, were eligible to approach the High Court under Article 199 of the Constitution if their services were governed by statutory rules. It was further held that since the employees of AIOU, SME Bank and Pakistan Steel Mills, who approached the Service Tribunal for redressal of their grievances, were not enjoying the protection of statutory rules, therefore the Service Tribunal had no jurisdiction to adjudicate upon such matters and they would be governed by the principle of „Master and Servant.“

9. The same view was held in the case of *Pakistan Telecommunication Company Limited through General Manager and another v. Muhammad Zahid and 29 others* (2010 SCMR 253) which attained finality as review there against was also dismissed. We depart much less outright from the dicta of this Court laid down in the cases of *Principal Cadet College, Kohat v. Muhammad Shoaib Qureshi*, *Pakistan Red Crescent Society v. Syed Nazir Gillani*, *Executive Council, Allama Iqbal Open University, Islamabad through Chairman and another v. Muhammad Tufail Hashmi*, *Pakistan Telecommunication Company Ltd. through Chairman v. Iqbal Nasir and others*, *Pakistan International Airlines Corporation and others v. Tanveer-ur-Rehman and others*, *Oil and Gas Development Company and others v. Nazir Hussain and others*, *Syed Tahir Abbas Shah v. OGDCL through M.D Head Office, Islamabad and another*, *Muhammad Tariq Badar and another v. National Bank of*

Pakistan and others, Pakistan Telecommunication Employees Trust (PTE) through M.D Islamabad and others v. Muhammad Arif and others, Pakistan Telecommunication Corporation and another v. Riaz Ahmed and 6 others, and Divisional Engineer Phones, Phones Division, Sukkur and another v. Muhammad Shahid and others(supra).

12. As per the profile of PTCL and the dicta laid down by the Hon'ble Supreme Court in the case of PTCL and others (supra) as well as in the case of Pir Imran Sajid and others Vs. Managing Director/General Manager Telephone Industries of Pakistan and others (2015 SCMR 1257), the instant petitions are maintainable. The relevant extracts of the judgment are reproduced below:

“A fleeting glance at the provisions quoted above would reveal that the departmental employees on their transfer to the Corporation became employee of the Corporation under section 9 of the Act of 1991 and then of the Company under section 35 of the Act of 1996. Their terms and conditions of service were fully protected under section 9(2) of the Act of 1991 and 35(2) of the Act of 1996. None of the terms and conditions could be varied to their disadvantage as is provided by the sections reproduced above. Not only that the legislature also bound the Federal Government to guarantee the existing terms and conditions of service and rights including pensionary benefits of the transferred employees. Since they by virtue of the aforesaid provisions became employees of the Corporation in the first instance and then the Company, they did not remain Civil Servants any more. But the terms and conditions of their service provided by sections 3 to 22 of the Civil Servants Act and protected by section 9(2) of the Act of 1991 and sections 35(2), 36(a) and (b) of the Act of 1996 are essentially statutory. Violation of any of them would thus be amenable to the constitutional jurisdiction of the High Court. (Emphasis added).

13. 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 Petitioner-widow is entitled for inclusion of Cost of Living Allowance (COLA) @ 7% in her 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 pensioner-widow, whose husband had retired from a particular date and giving the same to the other class of employees of PTCL by imposing condition in the office memorandum dated 28.3.2013 is discriminatory and violative of Article 25 of the Constitution of the Islamic Republic of Pakistan?**
3. **Whether petitioner' husband was the employees of T&T Department having retired after his transfer to the PTC and PTCL, is entitled to the same pension as is announced by the federal Government?**

14. 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.

15. 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".

16. 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.

17. We have perused the Office Memorandum dated 16.05.2011, which is a beneficial instrument equally applicable in the category of retired employees of PTCL. An excerpt of O.M is reproduced as under:-

**Government of Pakistan
Finance Division
(Regulation Wing)

No.F.13(10)-Reg.6/2008/413 Islamabad, the 16th May, 2011

OFFICE MEMORANDUM

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

The undersigned is directed to refer to the Finance Division's O.M. No.F-1(40)-Imp/95 (i) dated 29.06.1995 read with para 2 (i) 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.468(L)/2006 upheld by the Supreme Court of Pakistan vide its order dated 01.04.2011 in Civil Petition No.173/2011, it has been decided to treat the cost of living allowance admissible @ 7% of basic pay as emoluments reckonable towards pension for all those employees in BPS 1-22 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.

Sd/-
(Khadim Hussain)
Section Officer (Reg.6)

18. As per Petitioner-widow, she meet the conditions mentioned in the aforesaid Office Memorandum and letter dated 28.03.2013 issued by the respondent-company, as at the time of the superannuation retirement of her husband i.e. 60 years, he was receiving cost of living allowance @ 7% of basic pay and did not avail the benefit of Revised Basic Pay Scale 2001.

19. To understand the concept of introduction of Office Memorandum dated 28.3.2013 by the respondents, for convenience sake, an excerpt of O.M dated 28.03.2013 is reproduced as under:-

PAKISTAN TELECOMMUNICATION EMPLOYEES TRUST
O/o the Director Pension PTET, PT&T Building, Ground Floor, Mauj-e-Darya Road, Lahore

PH: 37322080

No.Pen/PTET/LHR/3850

Dated: 28-03-2013

All Postmasters in Pakistan

Subject: **INCREASE IN ORDERLY ALLOWANCE AND INCLUSION OF 7% COST OF LIVING ALLOWANCE CALCULATION OF PENSION**

The PTET Board of Trustees in its 63rd meeting held on 27th March 2013 has approved the following:

(a) Cost of living allowance (CLA) @ 7% of basic pay to be included in the pensionable emoluments of those pensioners who retired between 01-June-1995 to 31-Dec-1995 and were drawing CLA in their salary during service up to 31-12-1995.

(b) Orderly allowance to be increased from Rs.3,000/- per month to Rs.7,000/- per month w.e.f. 01-01-2013 for those self-pensioners who retired before 01-01-1996 in BPS-20 and above.

Separate authorities for CLA will be issued shortly and payment on account of increase in orderly allowance w.e.f. 01-01-2013 will be authorized through Payment Systems at main GPOs.

Sd/-
Director Pension
PTET Lahore

20. From bare perusal of the aforesaid O.M, which prima-facie suggest that the respondent-PTCL imposed condition on the

premise that the Cost of living allowance (CLA) @ 7% of basic pay to be included in the pensionable emoluments of those pensioners who retired between 01-June-1995 to 31-Dec-1995 and were drawing CLA in their salary during service up to 31-12-1995. In our view, the aforesaid condition is against the principle of rule of consistency and hit by the prohibition contained in Article 25 of the Constitution. 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 Petitioner-widow. 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.”

21. Much emphasis has been raised on the Territorial Jurisdiction of this Court on the premise that dominant Trust is a challenge to rules made and resolutions passed in Islamabad outside the Territorial Jurisdiction of this Court and falls within the jurisdiction of learned Islamabad High Court where number of similar kind of petitions were/are filed on the same subject,

therefore, this Court lacks the jurisdiction. This objection would be of no legal effect as it is in direct conflict of Article 25 of the Constitution and this court has concurrent jurisdiction to dilate upon the issue involved in the present matter. In our view 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.

22. The beneficial notification/enactment of the Federal Government, denying increase in family pension by non-inclusion of COLA to pensioner-widow, whose husband had retired in the year 2001 and giving the same to the other class of retired employees of PTCL through O.M/letter dated 28.3.2013 is discriminatory and violative of Article 25 of the Constitution.

23. 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.

24. The Petitioner-widow has been given highly discriminatory treatment for no plausible reason whatsoever by non-inclusion of COLA @ 7% in her 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 Respondents to be in violation of strict and prohibitory command contained in Article 25 of the Constitution, because the Petitioner-widow has been treated with sheer discrimination, which cannot be approved on any premises whatsoever.

25. The case law cited by the learned counsel for the Respondent-PTET on the subject has already been dealt with by the Hon'ble Supreme Court in the case of **PTCL and others vs. Masood Ahmed Bhatti** [2016 SCMR 1332], therefore no further discussion is required on our part on the aforesaid case laws.

26. Reverting to the propositions put forwarded by Mr. Khalid Jawed Khan, learned counsel for the respondent-PTET, we have noted that the Honorable Supreme Court in the case of **Pakistan Telecommunication Employees Trust and others vs. Muhammad Arif and others** [2015 SCMR 1472] has already settled all the pleas raised by the learned counsel in the present matter and held at paragraphs No.19 and 20 as under:-

“19 we may note that while the Company may be entitled to fix the terms and conditions of service of its employees so also the provision of pension by the Board of Trustees of the Trust but as discussed above, as regards the employees of T&T Department transferred to the Corporation and then to the Company, their terms and conditions of service stand protected by the provision of section 9 of the Act of 1991 and sections 35, 36 and 46 of the Act of 1996 and thus they will be entitled to payment of increase in pension as is announced by the Government of Pakistan. The contribution of the Company to the Pension Fund determined by the Actuary and its payment by the Company does not appear to be of much relevance because the question before us is of entitlement of the respondents to the increase in pension.”

“20 For the foregoing reasons, we have come to conclusion that the respondents, who were the employees of T&T Department having retired after their transfer to the Corporation and the Company, will be entitled to the same pension as is announced by the Government of Pakistan and that the Board of Trustees of the Trust is bound to follow such announcement of the Government in respect of such employees. Consequently, these petitions are dismissed. Therefore, no further discussion is required on the aforesaid citations.”

27. In this view of the matter, the decision taken by the Respondent-PTET that it has fixed conditions for paying cost of living allowance as contained in the OM/letter dated 28.3.2013, is erroneous and discriminatory as provided under Article 25 of the Constitution, for the simple reason that the aforesaid cost of living allowance has been made applicable on the basis of retirement date and not from the length of service of employee, who attained the age of superannuation i.e. 60 years. Besides, the Office Memorandum dated 16.05.2011 issued by the Government of Pakistan, Finance Department has not been taken into consideration which, prima-facie, does not show any classification for grant of benefit of the beneficial instruments which is subject to entitlement to those employees in BPS-1 to 22 who were in receipt of the aforesaid allowance at the time of their retirement and who had not availed the benefit of Revised Basic Pay Scale 2001.

28. We have noted from the record that the petitioner in C.P No.D-101 of 2013 had accepted VSSR and received the benefits, therefore, his case does not fall for grant of Cost of Living Allowance, and as such his Petition is devoid of merit is dismissed. However, Petitioner in C.P No.D-100 of 2013 has specifically pleaded that her husband was receiving the aforesaid allowance at the time of his retirement.

29. In the light of forgoing discussion, the matter of the Petitioner in C.P. No. D-100 of 2013 is remanded to the Competent Authority of Respondents for afresh decision on the issue of inclusion of Cost of Living Allowance @ 7% in pensionable emoluments of the Petitioner in accordance with law and dicta laid down by the Honorable Supreme Court of Pakistan, in the above referred matters, within a period of two months, from the date of receipt of the Judgment of this Court.

30. The Captioned Petition No. D-100 of 2013 is disposed of in the above terms along with pending application(s) if any.

JUDGE

JUDGE

Nadir/PA