

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Irfan Saadat Khan
Mr. Justice Adnan-ul-Karim Memon

C.P No.D-4622 of 2016

Imtiaz Hussain Mohsin Petitioner

Versus

Federation of Pakistan & others Respondents

**Dates of hearing: 05.09.2018, 18.9.2018, 10.10.2018,
11.10.2018 & 18.10.2018**

Mr. Malik Naeem Iqbal Advocate for the Petitioner.
Mr. Shaikh Liaquat Hussain, Assistant Attorney General.
Mr. Abdul Latif Shaikh, Acting Managing Director KFHA.
Mr. Naveed Sikandar, Section Officer, Ministry of Maritime Ports & Shipping.

J U D G M E N T

ADNAN-UL-KARIM MEMON, J:- Through the instant petition, Petitioner demands Gratuity in addition to Contributory Provident Fund (CPF), as per the terms of Office Memorandum (OM) dated 11.02.1985 issued by the Finance Division, Government of Pakistan.

2. Petitioner has submitted that he was appointed as Assistant in BPS-11 vide appointment order dated 23.04.1983 on permanent basis in the office of Korangi Fisheries Harbor Authority (KFHA), thereafter he was promoted to the post of Office Superintendent vide letter dated 21.12.2009. Petitioner has submitted that he stood retired from service upon attaining the age of superannuation on 01.05.2016. Petitioner has asserted that the

the Respondent No.2 did not pay his Gratuity in addition to the Contributory Provident Fund (CPF) as per his entitlement under the aforesaid OM. Petitioner's basic claim as agitated by him was first time in the year 2000 when he filed C.P. No. D-212 of 2002 on 12.02.2000 on the ground of delay in implementation of CPF Regulation, 1994 and non-approval of Pension Scheme, the stance of the KFHA in the aforesaid petition was that they did not have adequate financial capability to introduce a Pension Scheme and the Respondent-Ministry had to bear the financial burden for that whereas they were not interested to do the need full. Petitioner has submitted that the aforesaid petition was disposed of vide order 07.03.2002 with the following observation:-

“We noticed that the main ground for not approving the Draft Rules appears to be an extra financial burden which the Federal Government may be required to bear as the Fish Harbor Authority does not appear to have adequate financial capability to introduce a Pension Scheme. Indeed, we cannot involve into the merits of the reasons though it is hoped that the matter will be reconsidered when the financial condition of the Authority improves. The petitioner is free to take appropriate action according to law.

The petition stands disposed of along with the listed application.”

3. Primarily, the petitioner attempted to take benefit of the observation made by this court vide order dated 07.03.2002 that the matter of the petitioner would be reconsidered when the financial condition of the KFHA improves. Yet some of the employee of KFHA filed another C.P. No. 937 of 2008 before this Court which was disposed of vide order dated 08.05.2009 with the directions to the Respondents to implement the approval with regard to finalizing the pension Regulations within a period of two months. The Petitioner added that the aforesaid directives were not

complied with by the Respondents, compelling them to initiate contempt proceedings against the alleged contemnors and this Court vide order dated 28.05.2010 observed as under:-

“In pursuant to order of the Court Officers are present along with Syed Tariq Ali Federal Counsel and Mr. Muhammad Ashraf Mughal, DAG. They will file concise statement on behalf of the respondent No.1; it is conceded that the orders passed by this Court on 08.05.2009 were assailed before the Hon’ble Supreme Court in CPLA No. 2571/2009, which was dismissed being barred by time. Various orders were passed by this Court and ultimately on 27.01.2010. Notices were issued to the Secretary, Ministry of Finance, Islamabad to appear in person to answer as to why the pension scheme of the authority has not been approved by the Federal Government. It is stated that Contributed Provident Fund (CPF) has been done away in pursuance of directions of Cabinet Division. It is therefore, stated that there are certain legal difficulties in the way of the Ministry to comply with the orders of the Court.

Whatever the case may be this was not the case when the matter came up for consideration of this Court on 08.05.2009 and in pursuant to para 8 of the comments filed by the respondent No.4 the order was passed which order still hold the field. It was requested that this order may be reviewed as per the directions of Cabinet Division. It is our view that the order of this Court was challenged before the Supreme Court and the respondents did not succeed and the respondents cannot fall back on this Court in exercise of its review jurisdiction. Our contends that they shall work out a modality to extend financial benefits to the respondent and to match the earlier commitment of Rs. 20 million as seed money and Rs. 15 million as compensation by working out with the Managing Director, KFHA, though viable proposal and such modality will be worked out within a period of 60 days from today. It is expected that the Officers present in Court on behalf of the Ministry of Finance, Islamabad, standby its commitment and do the needful without any delay and to find out an amicable proposal to resolve the dispute and not to wriggle out. Such proposal is recorded a san order of the Court and in violation thereof will be treated as violation of the order of the Court and follows the consequence.

Let the petition be fixed in week immediately after re-opening of the Court when such final proposal should be placed in Court for consideration.”

4. Record reflects that the compliance report was furnished by the Respondents vide statement dated 09.03.2016 along with letter dated 02.03.2016 (available at page 127 of the file). The contents of letter dated 2nd March 2016 are reproduced as follows:-

“The Honorable Court has directed for compliance of the following commitment of one Mr. Junaid Saeed, Manage Admin, KOFHA:-

Korangi Fisheries Harbour Authority is ready to make payment of gratuity in addition to CPF in the light of finance Division’s O.Ms dated 16.04.1984 and 11.02.1985 and approval of the Board of Director of KOFHA to the eligible employees subject to concurrence of the Federal Government.

3. Accordingly the case was referred to Ministry of Finance for their advice as per requirements of rule 12 of Rules of business, 1973 amended from to time which reads as under:-

“No Division shall, without previous consultation with the Finance Division, authorize the issue of any orders, other than orders in pursuance of any general or special delegation made by the Finance Division, which will affect directly or indirectly the finances of the Federation—

4.The M/o Finance has conveyed their advice vide its O.M, No. 11(6) Reg-7/2009-351 dated 14.10.15 (copy enclosed). According to advice of the Ministry of Finance.

....that Finance Division has considered the mater and to inform that in terms of Government policy, contained in Finance Division’s O.M No. 15(3)R-14/84 dated 16.10.1984, reiterated on 21.1.2015, payment of gratuity in addition to CPF would not be allowed to employees of autonomous/ semi-autonomous bodies and corporation etc. on their quitting service. However, in terms of Finance Division’s O.M dated 11.2.1985, government allowed, as a special case, the benefit of gratuity in addition to CPF to the employees of autonomous/semi-autonomous bodies corporations etc. under the administrative control of Ministries/ Divisions, as available to them prior to 16.10.1984. However the policy instructions contained in Finance Division’s O.M. dated 16.10.1984 should be strictly followed in respect of all those employees who entered in service after 16.10.1984.

Moreover, the policy decision dated 11th February, 1985 is not applicable to KFHA, since in 1985 they were project employees (working on Development side) and thus they cannot claim the benefit that was available 03 years prior to their being established as non-project/regular employees.

The matter may be decided in the light of Finance Division’s policy dated 16.10.1984. Those employees of KOFHA that were employed in KFHA on regular basis prior to 16.10.1984 may be extended the benefit of gratuity along with CPF if the fact is established that KFHA was not a project at that time. But all those employees who were inducted or after 16.10.1984 will be extended CPF only.

5. The Ministry of Port and Shipping has already forwarded the advice of the Finance Division to the MD, KFHA on 16.11.2015. It is respectfully submitted that the case will be processed in the light of the advice of Finance Division for the reasons explained above.”

**(Khalid Mahmood Khan)
Deputy Secretary (Admn)**

5. We have noticed that the petitioner did not give up here, yet demanded the benefit of Gratuity in addition to CPF, introduced by the Ministry of Finance Government of Pakistan, vide Office Memorandum dated 11.02.1985. The Petitioner made his claim on the basis that the benefit of Gratuity in addition to CPF was available to the employees, who were inducted in service prior to 16.10.1984, and his assertion is that he was inducted in the service of KFHA in the year 1983. Prima-facie this is the cause of action, leading to the Petitioner to call in question the

inaction/unwillingness of the Respondents to extend the benefits of the Office Memorandum dated 11.02.1985 to him and that's why he has approached this court that since similar benefits under the aforesaid (OM) had been extended to other employees of different Government Organizations/ Entities, whereas the Petitioner has been discriminated in violation of Article 25 of the Constitution.

6. The only plea that has been taken by the Respondents that payment of Gratuity in addition of Contributory Provident Fund cannot be extended to the Petitioner in view of fact that the Competent Authority i.e. Ministry of Food, Agriculture and Live Stock transferred KFHA from Development to Non-Development side along with existing 46 personnel of KFHA. It is also claimed that the benefit of Office Memorandum dated 11th February 1985, cannot be extended to the Project employees and it was emphatically claimed that the Petitioner was a Project employee, therefore he is not entitled to Gratuity in addition to the CPF. The Respondents in support of their contention have relied upon letter dated 8th July 1998 filed along with statement dated 15.10.2018.

7. To rebut the contention of the Respondents Mr. Naeem Iqbal, learned counsel for the Petitioner has contended that KFHA is/was not a project and Petitioner was a permanent employee of KFHA, he further elaborated that KFHA was established in the year 1982 under Ordinance (XVI) of 1982, which is a statutory body, created under the Statute, thus KFHA is not a project, therefore the claim of the Petitioner for enforcement of O.M dated 11.02.1985, in

favour of the Petitioner cannot be denied. Per learned counsel this act on the part of the Respondent department is illegal and discriminatory; that the Petitioner being inducted in the Respondent department, prior to 16.10.1985 is eligible for Gratuity in addition to CPF in accordance with Policy decision made by the Federal Government as discussed supra and the Petitioner cannot be deprived of the benefit of the same; that omission of the Respondents is discriminatory inasmuch as similarly placed employees of other State Owned Entities (SOE)/ Statutory Bodies and Autonomous Bodies are getting the benefit of Gratuity in addition to CPF vide O.M dated 11.2.1985, yet the Petitioner is deprived of the same; that at the time of appointment of the Petitioner as a regular employee in KFHA, the Respondent No.3 was in existence that's why this is not a project but a Statutory Authority and the said Authority cannot be called a Project; that the Respondents are lingering on the matter, which tantamount to violation of Articles 4 & 25 of the Constitution. He lastly prayed for allowing the instant petition.

8. To refute the assertion and claim of the Petitioner, Shaikh Liaquat Hussain, learned AAG, has raised the issue of maintainability of the present petition as well and argued that the Finance Division has considered the matter and informed that in terms of Government policy contained in Finance Divisions' OM. No. 15(3)R-14/84 dated 16.10.1984, reiterated on 21.01.2015, payment of Gratuity in addition to CPF would not be allowed to employees of Autonomous/Semi-autonomous Bodies and Corporation etc. on their quitting service, however in terms of

Finance Division's OM dated 11.02.1985, Government of Pakistan allowed as a Special case, the benefit of Gratuity in addition to CPF to the employees of Autonomous/Semi-Autonomous Bodies Corporation etc. under the Administrative control of Ministries/Divisions, as available to them prior to 16.10.1984, however the policy instructions contained in Finance Division's O.M dated 16.10.1984 ought to be strictly followed in respect of all these employees, who entered in service after 16.10.1984. He has further averred that since Korangi Fisheries Harbor Authority (KFHA) was transferred from Development (Project) to Non-Development (Regular) side in the year 1988 and CPF Scheme was introduced on 31.07.1994 effective from 01.07.1998, therefore they cannot claim the benefit available for the employees inducted prior to 16.10.1984. He has further contended that the Respondent No.2 has already forwarded advice of the Finance Division/Respondent No.1 to Director General (Ports & Shipping) Wing/Fisheries Development Commissioner and (KFHA) on 16.11.2015. He next contended that (KFHA) being administrative Organization was bound to implement decision of Respondent No.1/Finance Division, which is the Authority on such issues; that the Petitioner maliciously distorted and concealed the facts as he joined the Respondent No.3 as a Project employee on 23.04.1983 purely on temporary basis and at that time (KFHA) was a Development Project under the Korangi Fisheries Harbor Authority Ordinance 1982 and as per Finance Division's OM dated 14.10.2015, since (KFHA) was transferred from Development (Project) to Non-Development (Regular) side, therefore Petitioner cannot claim the

benefit available for the employees inducted prior to 16.10.1984. He lastly prayed for dismissal of the instant Petition.

9. Syed Tariq Ali, learned counsel for the Respondent No.3 reiterated his submission as contained in parawise comments filed on behalf of the Respondent No.3 and argued that he has no objection for payment of Gratuity to the employees, who were in service before 16.10.1984 and appointed on regular basis. In support of his contention he relied upon the letter dated 01.11.2012 of Respondent No.2.

10. We have heard the learned counsel for the parties at some length and have perused the material available on record.

11. As per profile of Korangi Fisheries Harbour Authority (KFHA), was established in 1982 under Korangi Fisheries Harbour Authority Ordinance No.XVI of 1982. The objective of the Authority was planning, construction, operation and maintenance of Korangi Fisheries Harbour near Port Qasim area in Karachi. The Harbour was completed in 1992 and commenced trial operation in 1996. From the aforesaid factual position of the matter, we are of the considered view that, prima-facie KFHA, is a Government Owned and Controlled Authority, which receives grants from the Federal Government, since its inception and completion i.e. 1996, or even today. In view of the above background and status of KFHA, the same can 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 the authority to interfere in the subject affairs of KFHA

under the Constitution, even otherwise the case in hand is enforcement of a beneficial enactment, thus the objection regarding maintainability of the instant petition is not sustainable, which is hereby repelled.

12. From the pleading of the parties, the following pivotal question of law is involved in the subject petition:-

Whether the Petitioner is entitled to payment of Gratuity in addition to Contributory Provident Fund under the policy decision of the Respondent No.1?

13. The Petitioner has heavily relied upon the Office Memorandum dated 11th February 1985 to claim Gratuity in addition to CPF on the premise that the Petitioner was inducted in the service of KFHA in the year 1983 as a permanent employee on probation, which period of probation was completed by the Petitioner, thus entitled to the aforesaid beneficial instrument. To appreciate the above factum, we deem it appropriate to have a glance on the aforesaid O.M. An excerpt of the same is reproduced as under:-

OFFICE MEMORANDUM

Islamabad the 11th February 1985

Sub: PAYMENT OF GRATUITY IN ADDITION TO CONTRIBUTORY PROVIDENT FUND

“In continuation of Finance Division’s O.M of even number dated 16.10.1984, on the subject noted above, the undersigned is directed to say that it has been decided to allow, as a special case, the benefits of gratuity in addition to CPF to the employees of autonomous/semi-autonomous bodies and Corporations etc., under the administrative control of the Ministries/Divisions, as available to them prior to 16.10.1984. However, the instructions contained in the above referred Finance Division’s O.M should be strictly followed in respect of all those employees who entered in service after 16.10.1984.”

(Hafiz Khalid Mahmood)
Deputy Secretary (R-IV)

14. In order to resolve the controversy in hand, it is expedient to dilate upon the objection of the Respondent No.2 with regard to grant of Gratuity in addition to CPF. Reliance has been placed by the Respondents on the letter dated 08.07.1998 issued by Ministry of Food, Agriculture, Live Stock, Government of Pakistan, which reads as under:-

Islamabad, the 8th July, 1998.

**The Accountant General,
Pakistan Revenue,
Islamabad/sub-office, Karachi**

**Sub: TRANSFER OF KORANGI FISHERIES HARBOR FROM
"DEVELOPMENT TO NON-DEVELOPMENT."**

I am directed to convey the approval /sanction of the competent authority to transfer of Korangi Fisheries harbor Authority from Development to Non-Development side along with the existing 46 personnel of the KOFHA w.e.f. 01.07.1998.

The expenditure involved will be debatable to demand No. 50-other Expenditure of Food, Agriculture and Livestock Division for the financial year 1998-99.

This administrative approval has been accorded with the concurrence of F.A's Organization and Planning & Development division vide their Dy. No. 444-DFA) dated 23.05.1998 and Dy. No. 611-Programming Section, dated 13.04.1998 respectively.

**(Dr. Qaiser Abbas Zaidi)
Section Officer**

15. As per KFHA Contributory Provident Fund Regulation 1994, the employees are getting the Provident Fund so far as Gratuity is concerned; the Respondents had already introduced the aforesaid Office Memorandum dated 11th February 1985 to grant benefits to those employees, who entered in service of the Government Owned and Controlled Organizations/Entities after 16.10.1984. Prima-facie this benefit is not available to those employees, who were inducted in service as a project employee, but in the present case, the Petitioner had entered in the service of KFHA in the year 1983, not as a project employee, which makes his case quite distinguishable.

16. We have noticed that in pursuance of public notice dated 14.01.1983 published in Daily Dawn, applications were invited for various vacancies in KFHA against permanent posts, without limit of time. Record shows that the Petitioner was appointed as Assistant in BPS-11 vide appointment order dated 23.04.1983 and promoted to the post of Office Superintendent vide letter dated 21.12.2009, which shows that he was initially appointed on Probation for one year, prima-facie the contents of appointment letter does not show that it was an ad hoc/contract/project based appointment. Record further reflects that the Petitioner served the KFHA till he attained the age of superannuation on 01.05.2016.

17. In the light of the above factum, we are of the considered view that the Petitioner was inducted into the service of KFHA in the year 1983, on temporary basis, subject to completion of probationary period and after completion of his probationary period his appointment became permanent due to efflux of time, therefore at this juncture, we do not agree with the assertion of learned AAG that it was a project based appointment.

18. Now the moot point is whether KFHA is/was a Project?, we in the circumstances of the case cannot divulge in the controversy as to whether KFHA is/was a Project or otherwise for the simple reason that KFHA is/was run by a Board of Directors under the Administrative Control of Ministry of Food and Agriculture, now Ministry of Ports & Maritimes.

19. On merits as per the record, the Respondent No.1 introduced the beneficial enactment to allow the payment of Gratuity in addition to CPF vide Office Memorandum dated 11.2.1985 and the State Owned Entities (SOE) received the benefits of the aforesaid Office Memorandum. Record reflects that the Finance Division Government of Pakistan had acceded the request of the Petitioner through Office Memorandum dated 14.10.2015, on the premise that those employees of KFHA, who were serving on Regular basis prior to 16.10.1984 were entitled to the benefit of Gratuity along with CPF. Since there is no opposition to that extent that the Gratuity can be granted to the Regular employees of KFHA, if it is proved that the KFHA is not a Project, since we have already observed in the preceding paragraph and we refrain to dilate upon further on the aforesaid issue as this is not the case before us so far as Project is concerned as no material has been placed on record by the parties on the aforesaid proposition thus, we leave it for the Competent Authority of Respondent No.2 to look into the matter and decide the same in accordance with the law.

20. The case before us is simple case of enforcement of beneficial legislation in favor of the Petitioner, who stood retired from the service with effect from 01.05.2016, therefore prima-facie the benefit of Office Memorandum dated 11.02.1985 can be extended to the Petitioner as he was in the service of KFHA before the cut-off date, as mentioned in the aforesaid Office Memorandum. The objection of Respondent No.2 would be of no legal effect as it would hit by the prohibition contained in Article 25 of the Constitution. 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 the benefit to the Petitioner, who was inducted in the service from a particular date and giving the same to the other class of employees of SOE is discriminatory and violative of Article 25 of the Constitution.

22. In this regard while reliance can be placed 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 of the Honorable Supreme Court, made an exhaustive scrutiny with respect to granting of pensionary 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 Petitioner has been given highly discriminatory treatment for no plausible reason whatsoever by non-inclusion of the benefit of the aforesaid O.M in his emoluments. 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. 2 to be in violation of strict and prohibitory command contained under Article 25 of the Constitution, because the Petitioner has been treated with sheer discrimination, which cannot be approved on any premise whatsoever.

24. In the light of above facts and circumstances of the case, the instant petition is disposed of with directions to the Respondents to award benefit of Office Memorandum dated 11.02.1985 to the Petitioner, without discrimination, within a period of two months from the date of receipt of this judgment.

25. Petition stands disposed of in the above terms along with the listed application(s).

Karachi
Dated: .10. 2018.

JUDGE

JUDGE