

IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 950 of 2008

PRESENT:

Mr. Justice Arshad Hussain Khan.

Muhammad Arshad Malik

Vs.

Pakistan International Airline Corporation and 02 others

Plaintiff: Muhammad Arshad Malik
Through Mr. Muhammad Ali Lakhani, Advocate.

Defendants PIAC & 02 Others.
Through Ms. Farkhunda Shaheen Advocate.

Date of Hg: 21.01.2020, 11.02.2020 & 27.02.2020

JUDGMENT

ARSHAD HUSSAIN KHAN, J. This suit was filed on 08.07.2008 against the Defendants for Declaration, Mandatory and Permanent Injunction with the following prayers:-

- i) Declare that the letter dated 25.04.2008 is illegal, arbitrary, in derogation of and against the settled policies of the Pakistan International Airline Corporation through Chapter XII Rule 12.01.2004, its affiliated offices and the settled norms of natural justice.
- ii) Declare that the Plaintiff having served as a Pilot with the Defendant Corporation for a continuous period of fifteen (15) years and seven (07) months without any interruptions and/or grievances of whatsoever nature, due to efflux of time as much as operation of law is entitled to benefits which are permissible and paid to regular employees upon retirement.
- iii) Grant a Mandatory Injunction directing the Pakistan International Airline Corporation to treat the Plaintiff as a regular employee from the date of his first flight i.e. 15.03.1992 and to award all pensionary and retirement benefits to the Plaintiff, including but not limited to all financial emoluments guaranteed to a regular employee.
- iv) Grant a Permanent Injunction restraining the Defendants and/or any other person(s) acting under it, through it or in its behalf from affecting retirement on the Plaintiff without awarding him all pensionary and retirement benefits and privileges, including but not limited to all financial emoluments guaranteed to a regular employee.

- v) Any other, better, equitable and further relief that this Honourable Court may deem fit, proper and just given the circumstances of the case.
- vi) Cost of the suit may kindly be awarded.

2. Briefly stated the facts of the present case are that the plaintiff was inducted in the services of Defendant Corporation on 09.12.1992 after having applied through a publication and completed his first flight on 15.03.1993 and has since then been aptly serving Defendant Corporation to the utmost satisfaction of the management and without any intervals, breaks and or interruptions. It is further stated that under the policies and norms of procedure of Defendant Corporation, any person inducted through a contract is liable to be regularized in the services after completion of either three (03) and /or five (05) years of service, a procedure which is followed and applied without fail by various autonomous, semi-autonomous and government bodies. It is further stated that such practice has always been prevailed within the Corporation as is made apparent by the regularization of First Officers Obaid Jatoi and Shuja Ahmed bearing Nos. P-54928 and P-55596 respectively in the year 1996 and as such the above mentioned officers were also inducted through contracts. It is stated that the Plaintiff has also been serving uninterruptedly on the basis of a contract executed between the Plaintiff and Defendant Corporation against a permanent and vacant post existing within the ranks of Defendant Corporation, which was to be confirmed according to them. It is also stated that due to the proficiency, skills and competence of the Plaintiff, the Defendant Corporation has been extending the Plaintiff's services without any hindrances and/or conditions for the last fifteen (15) years and seven (7) months of its own accord and in this regard the last such extension was granted on 18.09.2006, vide a letter bearing Reference No.HRM/FO/P-52376/06. Further the Defendant Corporation has all times promised the Plaintiff for regularization against the office under which the Plaintiff has been serving Defendant Corporation but due to mala fide reasons, the Plaintiff has been denied the regularization of a legitimate expectation in continuance of a promise / assertions made by Defendant Corporation.

It is further stated that Defendant Corporation seeking to retire the Plaintiff from its services on 10.07.2008, whereas it is a settled

practice that no Corporation exercises the requisite discretion to retire an employee inducted on contract but can terminate the said contract on its expiry and/or for reasons of misconduct etc. It is also stated that the mala fides of Defendant Corporation are highlighted by the fact that in spite of being duly recommended by the concerned and competent authority on various occasions and while being constantly guaranteed regularization, Defendant Corporation has failed to perform the needful and has kept the Plaintiff under false pretenses. It is stated that after having received a favourable and justified recommendation for regularization from the concerned offices within Defendant Corporation, a legitimate expectation and right had accrued in favour of the Plaintiff and Defendant Corporation is at no point equipped with the discretion to overrule and/or discard a right that has substantively accrued to an employee against an extended period of service in Defendant Corporation and especially when such right is also supported by the rules and policies of Defendant Corporation itself. It is stated that the actions of Defendant Corporation are not only against the fundamental rights guaranteed to the Plaintiff but the same are also infringement on his substantive, promised vested rights; the malicious actions of Defendant Corporation are also in derogation of an illegal deviation of the decision arrived at during the 265th and 274th meetings of the Board of Directors held on 16.09.2002 and 17.10.2003 respectively. It is further stated that the Defendant Corporation continued its absorption and regularization of all such Pilots and First Officers that had satisfactorily served it for a period of either three or five years and continued to deny the Plaintiff regularization in order to cause him devastation, damage and wrongful loss. It is further stated that the Plaintiff wrote a letter to Defendant Corporation to which a reply dated 25.04.2008 was received from the office of Defendant No.2, which is self-explanatory and a reflection of Defendant Corporation's ill intent and malafides that have till date denied the Plaintiff's a legitimate expectation, vested right and promised privileges. That the Plaintiff has been striving for regularization since the year 1999 upon having completed five years of satisfactory service and having received recommendations and after being promised the same but has been discriminated by the Defendant Corporation and has seen innumerable candidates, both in the same cadre and junior to him

acquiring regularized services. It is stated that the Plaintiff is due to retire on 10.07.2008 and seeks regularization in order to get benefit from the retirement and pensionary benefits including all financial emoluments and all other miscellaneous privileges promised to regular employees reaching the age of superannuation. It is further stated that the Plaintiff does not seek promotion and/or extension in services but is seeking to realize a substantive right and implementation of the policies and norms of procedure put forth by Defendant Corporation itself.

3. Upon notices of the present suit, the Defendants have filed their joint written statement in the matter denying the allegations sought dismissal of the suit. They have stated that as a matter of fact the Plaintiff was selected for appointment for DH-6 in Flight Operation Department of PIAC initially on three years contract w.e.f. 7.12.1992. The Plaintiff had duly signed the said agreement. The said contract of service was extendable depending upon operational requirement of DH-6 Aircraft and was not liable for absorption on permanent basis in PIAC. The said Aircraft DH-6 has never been part of career plan of the pilots in PIAC. Based upon requirement of PIAC, the contract of service of Plaintiff was extended from time to time until 31.12.2004. The Plaintiff was known that his contractual position could not be regularized as notified to him at the time of execution of initial contract of service. It is further stated that Mr. Obaid Jatoi ex P-52378 and Shuja Ahmed ex P-54335 were appointed as First Officer and Captain DH-6 respectively on contract basis. Their contracts were expired on 6.12.1995 and 02.06.1996 respectively. They were re-employed against an external advertisement as Cadet Pilots with new P-Numbers i.e. 52928 and 55596 respectively, hence the adverse contents and allegations are denied. It is also stated that the service contract of the Plaintiff as Captain DH-6 was finally expired on 31.12.2004. Meanwhile, he was re-designated as cadet pilot on 5.09.2004, which was for all purposes deemed afresh appointment and he was not entitled to any benefit or advantage of his past contractual service as notified to him, vide letter dated 14.09.2004. It is stated that the employment contract of the Plaintiff as First Officer F-27 Aircraft was extended from time to time up till 10.07.2008. As per contract of employment the Plaintiff's privilege leave [PL] could be accumulated subject to refusal

in writing by the competent authority as such the Plaintiff was informed for accumulation of his privilege leave. It is further stated that allowing PL and permitting the Plaintiff to perform work during his accumulated leave period at his own request amounts to accepting the Plaintiff as a regularized employee by the Defendant Corporation as alleged is denied.

It is further stated that the PIAC Service Rules and Regulations 1985, which are not statutory rules / regulations, were framed by the Board of Directors of PIAC. It has been further stated that the Plaintiff's case did not fall merit consideration for his permanent absorption into the service of the Defendant Corporation. Furthermore, no right of the Plaintiff is supported by the Rules and Policies of the Defendant Corporation as alleged and no right of the Plaintiff has been over ruled or discarded by the Defendant Corporation as alleged. It is also stated that the contract period of the Plaintiff with Defendant Corporation has already been expired on 10.07.2008, which was the date of his superannuation as well and as such he has been relieved from duty / service of PIAC with effect from 10.07.2008. It is further stated that vide letter dated 18.09.2006, the Plaintiff was informed by Defendant Corporation that his service contract period has been extended w.e.f. 5.09.2006 to 10.07.2008 i.e. the date of his superannuation on the same terms and conditions except a new clause contained in the said letter and the Plaintiff was also informed in the month of July, 2007, that his service contract will be expiring on 10.07.2008 as such he will stand released from service w.e.f. 10.07.2008. He was advised to avail 178 days privilege leave balance to his credit. The Plaintiff, however, has given the undertaking in writing that he voluntarily surrendered his accumulated privilege leave and he intended to continue flying duties during his LPR and he undertook that he will not claim any compensation for surrendered period of accumulated leave later on. It is further stated that the Defendant Corporation in its letter dated 16.01.2008, informed the Plaintiff that his request for performing work during LPR period without claim of encashment of accumulated leave has been accepted and he was allowed to perform duties during LPR w.e.f. 17.01.2008, and it has again been clarified / notified that he shall stand retired from

service on 10.07.2008. It is further stated that after completing successful training and necessary technical formalities, the Plaintiff was re-designated as Flight Officer on ATR Aircraft, he had willingly opted this process as required by Defendant Corporation.

It is stated that it is the right of PIAC Board of Directors to take decision in the interest of Defendant Corporation. Moreover, the position in question as pleaded by the Plaintiff had never been permanent and DH-6 Aircraft had already been disposed of and no pilot is deputed thereon. It is further stated that the Plaintiff had served on the contractual service willingly and eagerly otherwise he had always the option to leave / terminate the service agreement any time on the agreed terms and conditions. The request of the Plaintiff was duly considered, the confirmation of the Plaintiff, therefore, did not deem fit. No element of discrimination on the part of Defendant Corporation is there in the matter of the Plaintiff. The Plaintiff was allowed all the benefits for which he was entitled. It is denied that the Plaintiff is entitled to the benefits, which are permissible and are paid to the regular employees upon their retirement and he is not entitled to be treated as regular employee as alleged. Hence, the Plaintiff is not entitled for any relief(s) claimed as the suit has been filed with mala fide intention and ulterior motives just to extort the money from the Defendant Corporation. It is also stated that no cause of action has been accrued to the Plaintiff for filing the above suit, which is not only time barred but the same is infructuous, therefore, the suit of the Plaintiff as framed is not maintainable in law and the same is liable to be dismissed.

4. On 05.03.2014 out of the pleadings of the parties, following issues have been settled by the Court:-

1. Whether the suit of the Plaintiff is maintainable?
2. Whether subsequent to a recommendation by the competent authority, can an employee serving the Defendant No.1 Corporation be denied the vested right(s) and legitimate expectation(s) against such recommendation? If so, what is the effect ?
3. Whether the reasons stated in the impugned letter dated 25.04.2008 are in consonance with the policies, rules, regulations and decisions of the Board of Directors of Defendant No.1 Corporation? If not, what is the effect ?

4. Whether Plaintiff being contract employee can claim right of regular employees?
5. Whether the contract employee can be treated regular employee only on the basis of length of service ?
6. Whether Plaintiff is entitled for relief claimed?
7. What should the decree be ?

Then on the same day, i.e. 05.03.2014, by consent, commissioner was appointed for recording evidence in the matter, who after completing the commission submitted his report dated 17.02.2017 which is available on the record and thereafter the matter came up for final arguments, vide order dated 09.05.2017.

5. From the perusal of the commissioner's report, it appears that the Plaintiff in support of his stance examined himself as PW-1 and produced the following documents:-

S.NOS.	DESCRIPTIONS	EXHIBITS
1	Affidavit in evidence	5/1
2	Notice u/o XII Rule VIII CPC dated 15.10.2014 along with Courier Receipt and confirmation receiving	5/2, 5/2/1/,5/2/2
2	Copy of Identity Card issued by PIAC	5/3
3	Extension of Contract dated 18.09.2006 [OS & R]	5/4
4	Acceptance of Request during LPR by PIAC	5/5
5	Copy of Minute-2 dated 17.09.1997	5/6 Under objection
6	Copy of Minute-1 dated 9.9.1997	5/7 Under objection
7	Copy of Minute-1, for contract renewal dated 15.12.2000	5/8 Under objection
8	Certified copy of Writ Petition No.3118/2001	5/9
9	Certified copy of order dated 17.1.2003 in Writ Petition 3118/2001	5/10
10	Photocopy of comments filed by PIAC in writ petition 3118/2001	Article 5/1
11	Photocopy of conversion of contractual employment into regular dated 29.5.2008	5/11
12	Photocopy of correction in record regarding failure during training dated 25.4.2008.	Article 5/2

Thereafter the Plaintiff was cross-examined by the counsel for the Defendant.

6. On the other hand, on behalf of the Defendant, one Tahir Mehmood, Sr. HR Officer, PIA, was examined as DW-1 on 11.2.2017 before the learned commissioner, who had produced the following documents:-

S.NOS.	DESCRIPTIONS	EXHIBITS
1	Affidavit in evidence	6/1
2	Photocopy of agreement dated 7.12.1992	6/2
3	Copy of Renewal of Contract dated 2.1.2004 [OS & R]	6/3
4	Office copy of re-designation as Cadet Pilot dated 14.9.2004 [OS & R]	6/4
5	Copy of Agreement dated 21.2.2005 [OS & R]	6/5
6	Copy of Extension of contract dated 18.9.2006 [OS & R]	6/6
7	Copy of Expiry of contract [OS & R]	6/7
8	Letter dt 14.1.2008 [OS & R] [OS& R]	6/8
9	Copy of Undertaking dated 9.1.20008 [OS & R]	6/9
10	Copy of expiry of contract dated 9.1.2008 [OS & R]	6/10
11	Copy of request for performing work during LPR dated 16.1.2008 [OS & R]	6/11
12	Copy of Resolution passed by PIA Board	Article 6/2 Under objection
13	Original letter of authority dated 17.3.2016	6/12

The abovenamed witness of the Defendants was also cross-examined by the Plaintiff's counsel.

7. During the course of arguments, learned counsel for the Plaintiff while reiterating the contents of the Complaint has argued that the Plaintiff admittedly was inducted in PIAC's services as a contract employee after having applied through a publication and continued to serve PIAC for more than 15 years aptly to the utmost satisfaction of the Management and without any intervals and breaks. Learned counsel submits that under the policies and norms of procedures prevalent at PIAC, any person inducted through a contract is liable to be regularized in its services after completion of a specified period of service, a procedure which is followed and applied without fail by various

autonomous, semi-autonomous and government bodies and such practice has always been prevailed within the PIAC. Learned counsel urged that the tenure of the Plaintiff with PIAC was on the basis of a contract executed against permanent and vacant posts existing within the Department and, therefore, his appointment was to be confirmed accordingly. He has argued that due to a proficient display of skills and competence, PIAC continued to extend services of the Plaintiff without any hindrances and / or conditions for over fifteen years of its own accord and such extensions is the proof of the Plaintiff's professional skill. However, due to mala fide reason the Plaintiff has been denied regularization of a legitimate expectation in continuance of a promise made by the PIAC. Learned counsel urged that the PIAC has actually by its conduct treated and accepted the Plaintiff to be a regular employee within its cadre by various actions, including [but not limited to] assigning him leave prior to retirement and then subsequently seeking to retire him from services on 10.07.2008. Learned counsel further argued that issuance of leave prior to retirement, Plaintiff's subsequent retirement from the services of PIAC and its written consent for the Plaintiff to continue in service / flying during the period of his leave prior to retirement, vide letter dated 16.01.2008 are confirmation and the accession of the fact that PIAC had accepted the Plaintiff as a regular employee. Learned counsel has argued that despite being duly recommended by the concerned and competent authority on various occasions, and while being constantly guaranteed regularization, PIAC has failed to give effect to the recommendation. The Plaintiff, after having received a favourable and justified recommendation for regularization from the concerned offices within the PIAC, a legitimate expectation and right had been accrued to the Plaintiff. Learned counsel further argued that the actions of the PIAC are malicious and in derogation of law against the rights of the Plaintiff. Besides it is also in deviation of the decision arrived at during 265th and 274 meetings of the Board of Directors held on 16.09.2002 and 17.10.2003, respectively. Finally, learned counsel has urged that the Plaintiff through instant suit seeking benefits concerning retirement and the consequent pensionary grants, including all financial emoluments and all other miscellaneous privilege promised to regular employees reaching the age of superannuation as well as seeking implementation

of a substantive right and policies put forth by PIAC itself, as the policies and norms of procedure that cannot be deviated from so as to inadvertently deny a right to an employee under any given circumstances; thus the present suit may be decreed as prayed for. In support of his stance, learned counsel has relied upon the following case law:-

NABEELA ASHFAQ v. FEDERATION OF PAKISTAN
through Secretary Defence and 3 others [2020 PLC (C.S.) 24]

8. On the other hand, learned counsel for the Defendant while reiterating the contents of the written statement and the affidavit in evidence of Tahir Mehmood, Sr. HR Officer of PIAC, filed on behalf of the Defendants, has argued that the Plaintiff was selected for appointment for DH-6 [Twin Otter Aircraft] in Flight Operation Department of PIAC initially on three years contract w.e.f. 7.12.1992, and in this regard, he signed the contract Agreement. It is also argued that the said contract was extendable depending upon operational requirement of DH-6 Aircraft and was not liable for absorption on permanent basis in Defendant PIAC and the said Aircraft DH-6 has never been part of career plan of the pilots in PIAC. He has submitted that upon requirement of Defendant PIAC, the contract of service of Plaintiff was extended from time to time until 31.12.2004, and it was known to the Plaintiff that his contractual position could not be regularized as notified to him at the time of execution of initial contract of service. Learned counsel has submitted that the service contract of the Plaintiff as Captain DH-6 was finally expired on 31.12.2004 and meanwhile he was re-designated as cadet pilot on 05.09.2004, which was for all purposes deemed afresh appointment and he was not entitled to any benefit or advantage of his past contractual service as notified to him vide letter dated 14.09.2004. It has been submitted that the employment contract of the Plaintiff as First Officer F-27 Aircraft was extended from time to time till 10.07.2008. Learned counsel further argued that as per contract of employment the Plaintiff's privilege leave [PL] could be accumulated subject to refusal in writing by the competent authority as such the Plaintiff was informed for accumulation of his privilege leave. Later on, the Plaintiff himself requested to allow him to perform work during his accumulated leave period, which was allowed by the Management of Defendant to

perform work upto 10.07.2008 i.e. the date of expiry of contract of the Plaintiff's employment and also the date of his superannuation. It has been further argued that the PIAC Service Rules & Regulations 1985 are not statutory rules and regulations which were framed by the Board of Directors of PIAC. Thus, the Plaintiff's case does not fall merit consideration for his permanent absorption into the service of the Defendant. Learned counsel urged that neither any right of the Plaintiff is supported by the Rules and Policies nor the same have been discarded by the Defendant, therefore, the suit of the Plaintiff as framed and filed is not maintainable in law. Learned counsel has submitted that the contract period of the Plaintiff has already been expired on 10.07.2008 and as such he had been relieved from service of PIAC with effect from 10.07.2008. It has been further submitted that after completing successful training and necessary technical formalities, the Plaintiff was re-designated as Flight Officer on ATR Aircraft and he had willingly opted this process as required by the Defendant Corporation. Further argued that it is the right of the PIAC Board of Directors to take decisions in the interest of Defendant Corporation. Furthermore, the position on which the plaintiff was inducted had never been permanent as DH-6 Aircraft was never the part of career plan of the pilots in PIAC and subsequently the said air craft had been disposed of and no pilot is deputed thereon. Learned counsel further argued that the Plaintiff has totally failed to produce any evidence in support of his allegations; hence he is not entitled to any of the relief claimed and has failed to shake the evidence of the Defendants' witness who has fully supported and corroborated the contents of their written statement by a well documentary evidence as such the suit is liable to be dismissed. In support of his stance, learned counsel has relied upon the following case law :-

- i) SHAHBAZ KHAN vs. ADDITIONAL DISTRICT JUDGE, FERORZWALA and others [**2017 SCMR 2005**],
- ii) SAIMA FAREED and 4 others vs. DIVISIONAL DIRECTOR SCHOOLS ELEMENTARY / SECONDARY [FEMALE MUZAFFARABAD] and 24 others [**2018 PLC CS 338**],
- iii) A. GEORGE vs. PAKISTAN INTERNATIONAL AIRLINES CORPORATION [**PLD 1971 Lahore 748**],
- iv) MST. RANI vs. PAKISTAN INTERNATIONAL AIRLINE CORPORATION & another [**SBLR 2016 Sindh 564**],

- v) Qazi MUNIR AHMED vs. RAWALPINDI MEDICAL COLLEGE AND ALLIED HOSPITAL through Principal and others [20019 SCMR 648],
- vi) MESSRS MALIK AND HAQ & ANOTHER vs. MUHAMMAD SHAMSUL ISLAM CHOWDHURY and two others [PLD 1961 SC 531],
- vii) An un-reported judgment of the Honourable Supreme Court of Pakistan passed in the case of ATTIYA SEHRAI vs. PAKISTAN INTERNATIONAL AIRLINES CORPORATION through its president [**Civil Petition No.1159 of 2018**],
- viii) An un-reported judgment of the High Court of Sindh, passed in the case of MST. RANI v. PAKISTAN INTERNTIONAL AIRLINE CORPORATION and another [**High Court Appeal No.42/2016**].

9. I have heard the learned counsel for the parties, perused the record minutely, and have also gone through the relevant law as well as the case law relied upon by the learned counsel for the parties in the suit and my findings on the above issues are as follows: -

ISSUE NO.1:

From the perusal of the record, it appears that the plaintiff was inducted in the service of defendant PIAC as contract employee vide agreement dated 07.12.1992 [Exh. 6/2]. Relevant portions whereof for the sake of ready reference are reproduced as under:

“A G R E E M E N T

THIS AGREEMENT is made this 7th day of DECEMBER 1992 BETWEEN Pakistan International Airlines Corporation organized, existing and operating under the Pakistan International Airlines Corporation Act, 1956 and having its Head Office at PIA Building, Karachi Airport, Karachi (hereinafter called the “Corporation” of the one Part and Mr. Mohammad Arshad Malik son of Malik Muhammad Akhtar (hereinafter called the Employee of the other Part:

WHEREAS the Employee has offered to serve the Corporation and the Corporation has agreed to employ the Employee on contract basis for a period of 3 years effective from _____ and on the terms and conditions hereinafter contained:

Now therefore the parties hereto agreed as under:-

ARTICLE-1:

Terms of Agreement

This agreement shall remain in force for a period of three years (effective _____) extendable or till the redundancy of the aero plane whichever is earlier. The agreement is extendable depending upon the requirement of the Corporation. The position is exclusively for DH-6 (Twin Otter Aircraft) and is not liable for absorption on permanent basis in PIA.”

ARTICLE -5:

- i) The employee shall not be entitled to any emoluments benefits or facilities except those specified in Article-4 hereinabove.
- ii) This contract shall not constitute any right in favour of the employee for permanent absorption in the service of the Corporation.
- iii) No demand for increase in salary and allowance and other terms and conditions shall be raised by the employee.
- iv) Increase in salaries/Allowances allowed to permanent employee of the Corporation shall not be admissible to the contracted employee during the course of contract on automatic basis.

ARTICLE-6:

Any matter not provided in the Agreement, the rule and regulations of the Corporation shall apply and prevail provided that in case of conflict between the provision of this Agreement and any rules or regulations of the Corporation, the provisions of this Agreement shall apply and prevail.”

From the perusal of the aforesaid agreement, it transpires that the plaintiff was inducted purely as a contract employee exclusively for DH-6 (Twin Otter Aircraft) and was not liable for absorption on permanent basis in PIA. And further the period of contract was extendable for further period or till the redundancy of aero plane, whichever ever was earlier.

Record also shows that the contract of the plaintiff under the agreement [Exh.D/4] extended from time to time till December 2004. In the meanwhile, the plaintiff along with other pilots, on the strength of recommendation letters dated 09.09.1997 by Chief Pilot (North) [Exh.5/7] and 15.13.2000 [Exh.5/8], approached the learned Lahore High Court by filing Writ Petition bearing W.P No.3118 of 2001- Muhammad Arshad Malik and 8 others vs. Pakistan International Airline Corporation and 2 others [Exh.5/9] and, inter alia, sought the following relief:

“It is therefore, most respectfully prayed that the respondent corporation may be directed to declare the petitioners as regular employees of PIA and pay them the same salary and allowances/benefits which are being paid to other regular employee of the corporation working against the same posts.”

From the perusal of memo of the above said petition [Exh.P/9], it appears that the present plaintiff was the leading petitioner in the said petition and sought their regularization of service, inter alia, on the

similar grounds as that of present case. PIAC in the said petition filed their reply/comments [X-5/1]. relevant portion whereof for the sake of ready reference, are reproduced as under:

“2. Para-2 is correct to this extent that petitioners were interviewed by PIA in response to advertisement issued by P.I.A for recruitment of DH-6 Twin Otter Aircraft operations initially for a period of 3 years which was extendable from time to time according to exigencies of requirement of P.I.A. In the advertisement widely circulated in the National press, it was also clearly specified that Captains & Pilots inducted against this advertisement are not eligible for employment on permanent basis. Knowing the terms and conditions well, the petitioners applied for the post and were interviewed and were selected as Twin Otter Pilots.

3. Para-3 is incorrect and is denied as framed by the petitioners. As explained in para-2 above the petitioners were recruited as Twin Otter Pilots till such time as they required by the Corporation. In the advertisement, it was specifically stated that this appointment is on contract basis. A copy of the advertisement is attached as Annexure-A. The persons who were taken on permanent basis were much younger and it was specifically mentioned in the advertisement that age of pilot for twin otter flight are much higher than those of pilots inducted on regular basis

The petitioners do not meet the job specifications of a regular cadet pilot. They are all over-age. Their dates of birth/age is depicted below as against requirement of 30 years which includes five years relaxation allowed by federal Government.

S.No.	Name/P.No.	Date of Birth	Approx.age
1.	Capt. Arshad Malik P-52376	11.07.1948	54 years
2.	Capt. Hameed ullah P-52377	04.08.1949	33 years
3.	Capt. Imranul Islam P-52487	20.01.1951	52 years
4.	Capt. Athar Butt P-52827	09.09.1946	55 years
5.	Capt. Asad Cheema P-54421	21.10.1958	43 years
6.	F/O Abid Chishty P-52379	04.08.1964	37 years
7.	F/O Shaukat Mahmood P-54247	17.06.1957	44 years
8.	F/O Irfan Ashraf P-54095	26.01.1958	43 years
9.	F/O Abid Hamza P-54096	06.04.1964	37 years

Younger pilots are more likely to put in more number of years of service. If age did not matter, experienced pilots with thousands of hours at their credit would not have been retired at the age of sixty years. Pilot training is very expensive and tedious and during ten years of their service the training cost is likely to be recovered.

4. Para-4.....PIA is a commercial organization and has to take decision under commercial consideration. The advertisement issued was open to every candidate subject to meeting the job specification. DH-6 pilots were exclusively hired for twin otter operation only. At present only one twin otter aircraft is in operation which is being used by LOSMO Oil Company. No regular P.I.A flights are operated with this aircraft.”

The above said petition had remained pending till 17.01.2003 when the counsel for petitioner pleaded “No Instructions” and the

matter was directed to be consigned to record. Order dated 17.1.2003 passed in W.P. No. 3118/2001 [Exh. 5/10] is reproduced as under:

“17.01.2003

Mr. M. A. Ghani advocate for the petitioners
Mr. Javed Altaf, Advocate for the respondents

“Learned counsel for the petitioners reports no instructions. The file be consigned to record.”

From the perusal of the above, though it does not appear that the said petition was disposed of or not, however, the plaintiff presumed that the case filed by him stands disposed of as withdrawn. Furthermore, the conduct of the plaintiff also corroborates such fact as after the above order the plaintiff neither disputed the said order nor agitated his regularization till the date of filing of the present suit.

Record also reflects that the plaintiff, vide letter No. DFO/P-52376/04 date on 04.09.2004 [Exh.6/4], was selected/re-designated as cadet pilot in Flight Operation Department of PIAC on contract. For the sake of ready reference Exh.6/4 is reproduced as under:

“PAKISTAN INTERNATIONAL AIRLINES CORPORATION
FLIGHT OPERATIONS DEPARTMENT

Mr. M. Arshad Malik
P-52376

DFO/P-52376/04
14th Sept 2004

SELECTION/REDESIGNATION AS CADET PILOT

Reference letter number EMP:PLC:05/29/04 DATED 03.09.2004 from Manager Employment.

We are pleased to inform you that Management has approved your selection, re designation as Cadet Pilot in Flight Operations Department of the Corporation on contract basis for a period of two years w.e.f. 05.09.2004 to 04.09.2006. Your selection is based on the following terms-and conditions:

- a) During Training: You will continue to get your current emolument till you are re designated as First Officer on F-27 aircraft.
- b) Other Terms & Conditions:
 - i) After successful completion of training you will be re designated as F/O. F-27 and your salary will be fixed in the scale of Rs.6000-600 plus other allowances as per rules of the Corporation.
 - ii) Other terms and condition will be as contained in the agreement/ contract of employment and also as laid down in the PIA Employees (Service & Discipline)

Regulations 1985 and orders and instructions issued by the Management from time to time.

- iii) Your selection/re designation will for all purposes be deemed as a fresh and you will not be entitled to any benefit or advantage of your past contractual service.

Sd/-
ADMINISTRATIVE MANAGER
FLIGHT OPERATIONS DEPARTMENT

Thereafter in pursuance of the above said re-designation, an agreement dated 21.02.2005 [Exh.6/4] was entered into between the PIAC and the plaintiff. Relevant portions of the agreement [Exh.6/4] is reproduced as under:

“AGREEMENT

THIS AGREEMENT is made this 21st day of Feb 2005 between Pakistan International Airlines Corporation organized, existing and operating under the Pakistan International Airlines Corporation Act, 1958 and having its Head Office at PIA Building, Karachi Airport, Karachi (hereinafter called the Corporation) of the one part and M. Arshad Malik S/o Malik Muhammad Akhtar Resident of 3-B, Sharif Colony, Canal Park, Gulberg-II, Lahore (hereinafter called the Employee of the other party).

WHEREAS the Employee has offered to serve the Corporation and the Corporation has agreed to employ on contract basis for a period of 2 years effective from 05.09.2004 and on the terms and conditions hereinafter contained.

Now therefore the parties hereto agreed as under:-

ARTICLE-I

TERMS OF AGREEMENT

This agreement shall remain in force for a period of 2 years (effective 05.09.2004 extendable or till the depending upon the sole requirement of the Corporation. This employment is purely on contract basis and does not entitle the employee in any manner whatsoever to become a permanent employee or absorption on permanent basis in Corporation.

Thereafter the contract of the plaintiff was extended from 05.09.2006 to 10.07.2008 vide letter dated 18.09.2006 [Exh.6/6]. For the sake of ready reference Exh.6/6 is reproduced as under:

“TO :F/O ARSHAD MALIK, P-52376, (CONTRACTUAL) ISB
BASED

COPY : Sr. V P. (Flight Ops.), Chief Pilot (Plng & Sch.), Chief Pilot (North) – ISB,
General Manager (Admn.)/Secretary ELT, General Manager (HRM),
General Manager (Security), Dy. GM Payroll/Taxes,

Dy. GM Finance (RWP/ISB), Dy. GM HR (Records),
Dy. GM HR (Services)

REF : HRM.FO/P-52376/06
DATE : 18th September, 2006

EXTENSION OF CONTRACT

We are pleased to inform you that Management has approved extension in your contract period w.e.f. 05-09-2006 to 10-07-2008 i.e. the date of your superannuation. The terms and conditions of the Agreement executed between you and Pakistan International Airlines will remain the same with the addition of a new clause that you will fly any aircraft based on your training and requirement of PIA.

Sd/-

(SABIHA ASHFAQ)
Human Resource Manager

The defendant PIAC through its letter No. FO/P-52376/07 dated July 2007 [Exh.6/7] had informed the plaintiff about the expiry of the contract and for availing the Privilege Leave balance in his credit. Relevant portion of the said letter [Exh.6/7] is reproduced as under:

“EXPIRY OF CONTRACT/AGREEMENT

1. It is to inform you that your service contract will be expiring on 10.07.2008. As such you will stand released from service w.e.f 10.07.2008(A.N). Since you have 178 days Privilege Leave balance to your, therefore, you are requested to avail the same in such a way that the date of expiry of contract shall coincide with availing of leave or before the expiry of your Service Contract i.e. 10.07.2008.
2. You are advised to deposit the following documents/property of PIA and obtain clearance on the attached Clearance form, which may please be returned to the office of Dy. General Manager HR (Flight Ops) for final settlement of your accounts:
 - a) PIA I.D. Card
 - b) PIA Uniform
 - c) Family Cards
 - d) Any other property/documents
3. At this moment, we appreciate the service rendered by you and we wish you a very happy life with good health in the years ahead.”

On 09.1.2008, the plaintiff has given an undertaking [Exh.6/9] in respect of accumulated privilege leave as under :

“Subject : UNDERTAKING

Reference is made to the Management decision to discontinue encashment of accumulated leave for cockpit crew.

I hereby voluntarily surrender my accumulated P/Leave and intend to continue flying duties during my Leave Preparatory to retirement and undertake that I will not claim any compensation for surrendered period of accumulated leave later on.

09.01.08 signature: Sd.
 Name: ARSHAD MALIK
 P-No: 52376”

Record further reflects that the PIAC, in reply to the plaintiff’s letter, which appears to have been written in respect of correction in the record regarding failures during Training, has addressed a letter dated 25.04.2008 [X-5/2], which letter is impugned in the present proceedings. For the sake of ready reference, the said letter [X-5/2] is reproduced as under:

“HR & Administration
 Flight Operation Department

TO : F/O ARSHAD MALIK, P-52373
 COPY : Director Flight Operation, Chief Pilot Training
 REF : HR/FO/P-52373/08
 DATE : April 25, 2008.

Subject: Correction in Record regarding Failures during Training

1. Kindly refer your application dated nil addressed to Director Flight Operations on the subject.
2. Your application has been examined thoroughly. As per record available with us, you were inducted as Captain DH-6 on 09.12.1992 and operated Ist Flight as Captain Twin Otter on 15.03.1993. Regularization beyond the age of 50 years is not permissible under the rules, in vogue.
3. As far as the training record is concerned, the Chief Pilot Training is of the view that there is no misunderstanding regarding the training record.

(MUHAMMAD IFTIKHAR AZAD)
Dy. General Manager Human Resources.”

From the above facts and circumstances, it transpires that the plaintiff initially in the year 2001 had approached the learned Lahore High Court for regularization of his contractual service in PIAC on the basis of recommendation of Chief Pilot North dated 09.09.1997 [Exh.5/7] and 15.12.2000 [Exh.5/8], however subsequently he

abandoned his claim resulting which his case was consigned to record on 17.01.2003[Exh.5/10]. Thereafter, the plaintiff in the year 2004 - 2005 entered into a fresh contract with PIAC as cadet pilot (First Officer) F-27 by accepting the condition that he will not be entitled to claim any benefit or advantage of his past contractual service besides to become a permanent employee or seeking absorption on permanent basis in PIAC. The plaintiff has served defendant-PIAC from 2004 till 2008 under the new agreement as First Officer F-27 on contractual basis without raising any objection. However, it seems that to create a fresh cause of action, the plaintiff addressed a letter, which letter though is not available on record yet from the reply dated 25.04.2008 [X-5/2] by PIAC of the said letter, it appears that the same was addressed by the plaintiff for correction in the record regarding Failures during Training and under the garb of this letter he also agitated his regularization.

Although in the present suit, which was filed few days before the expiry of contract [Exh.6/6] which is also a date of his superannuation, the plaintiff impugned the letter 25.04.2008 [X-5/2], yet in a way he is seeking similar relief as that of his writ petition bearing No. 3118 of 2001 [Exh.5/9], that is, the plaintiff be treated as permanent employee and be entitled for all the benefits and advantages of a regular employee from the date of his induction that is 15.03.1992 in PIAC. Since the plaintiff had earlier abandoned the claim of regularization of his service in PIAC which he agitated through writ petition bearing No. 3118 of 2001 [Exh.5/9] filed in the Lahore High Court, therefore, he is estopped from agitating his same claim in the present case as there is nothing available on the record, which could show that the plaintiff in his earlier case (W.P. No. 3118 of 2001) sought any permission from the court and or reserved his right for agitating his subject claim in future.

There is bar as envisaged in the Order XXIII of the Civil Procedure Code, that a party in case of withdrawal of suit or abandonment of part of a claim without the permission, he shall be precluded from instituting any fresh suit/lis in respect of such subject matter or such part of the claim. It seems expedient to reproduce the Order XXIII of the Civil Procedure Code, which reads as below:-

WITHDRAWAL AND AJUSTMENT OF SUITS

"1. **Withdrawal of suit or abandonment of part of claim.**---(1)
At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim

(2) Where the Court is satisfied-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others."

[Emphasis supplied]

From the perusal of the above provisions, it is manifest that the noted Rule-1 sub-rule (1) entitles the plaintiff of a case to withdraw his suit and/or abandon his claim or a part thereof, against all or any one of the defendants, at any stage of the proceeding and this is his absolute privilege and prerogative. And where the plaintiff has exercised his noted privilege he shall be precluded from instituting a fresh suit on the basis of the same cause of action in respect of the same subject matter and against the same defendant(s) and this bar is absolute and conclusive, which is so visible from the mandate of sub-rule (3). Reliance in this regard can be placed on the cases of *MUHAMMAD YAR (DECEASED) through L.Rs. and others* [2013 SCMR 464] and *SHAHBAZ KHAN v. ADDITIONAL DISTRICT JUDGE, FEROZEWALLA and others* [2017 SCMR 2005]

The Honourable Supreme Court, while dealing with somewhat like issue in the present suit, in the case of *AZHAR HAYAT v. KARACHI PORT TRUST through Chairman and others* [2016 SCMR 1916], inter alia, has held as under:

"6. We shall first deal with the legal objections taken by the learned counsel for the respondents. The petitioner had filed C. P. No.

D-2602/2014 which was "not pressed" on 19th August 2014 and then filed the suit on 26th August 2014 (which was converted into a petition) wherein the earlier petition filed by the petitioner was mentioned in paragraph 13 by stating that, "the same has been withdrawn by the Plaintiff as fresh cause of action has accrued to the Plaintiff." The respondents had objected to the subsequent filing of the suit-petition as the requisite permission had not been obtained from the court when it was not pressed and dismissed. The impugned order took notice of this fact, but the learned judges did not non-suit the petitioner on this ground even though he could have been because sub-rule (3) of Rule 1 of Order XXIII of the Code stipulates that where the plaintiff withdraws from a suit without being given permission to institute a fresh suit in respect of the same subject-matter or such part of claim he would be precluded from doing so....."

[Emphasis supplied]

Here the question may arise that earlier lis was filed under the constitutional jurisdiction whereas the present case was filed under civil original jurisdiction. This question has been answered by the learned Division bench of this Court in the case of *Messrs CLASSIC MARBLE and another v. KARACHI ELECTRIC SUPPLY CORPORATION LIMITED [2006 CLC 702]* as under:

“Additionally, the present case the petitioners have filed number of suits and petitions on the same cause of action and thereafter have withdrawn the same without permission of the Court. We invited the attention of Mr. H.A. Rehmani to the prayer contained in Petition No.2504 of 2001, which is exactly the same as contained in the present petition except date of the Final Demand Notices and asked him to satisfy us as to whether the general principles contained in the Code of Civil Procedure are applicable to the constitutional jurisdiction of this Court and if so whether this petition on account of withdrawal of C.P. No.D-2504 of 2001 would not be incompetent by virtue of bar contained in sub-rule 3 of Order XXIII of C.P.C. Mr. Rehmani conceded to the application of Code of Civil Procedure to the proceedings in hand but insisted that the present petition has been filed on a different cause of action as the demand challenged in that petition was raised by Final Demand Notices dated 11-12-2001, whereas in the present petition the petitioners have challenged Final Demand Notice dated 28-4-2005. We have already discussed in detail and have held that both demands raised by notices dated 11-12-2001 and 28-4-2005 are the same and in three demand notices dated 28-4-2005 specific reference has been made to notice dated 11-12-2001.

We, therefore, following the dictum laid down by the Supreme Court in the case of *Hussain Bakhsh v. Settlement Commissioner Rawalpindi PLD 1970 SC 1* that the Code of Civil Procedure regulates the civil proceedings and the nature of the proceedings does not necessarily depend on the nature of the jurisdiction of the Court invoked. If the proceedings involve the enforcement of a civil right it is a civil proceeding and the provisions of Code of Civil Procedure other than the specially excepted one, shall apply in the exercise of High Courts jurisdiction in a civil matter, whatever may be the nature of that jurisdiction, hold the present petition barred

under sub rule 3 of rule 1 of Order 23 of Code of Civil Procedure as well.”

Besides above, in the present case the principle of acquiescence and waiver is also attracted. The waiver or acquiescence may be described as intentional relinquishment of a known right or such conduct as would warrant an inference of relinquishment of such right; implying consent to dispense with or forgo something to which a person is entitled, however to constitute waiver there must be some conscious giving up of a right and a person cannot be held bound unless he is aware of what exactly he was waiving and what right he was giving up with knowledge of all the facts. It may be observed that where a person in spite of having full knowledge of violation of any of his rights of personal nature remained silent and did not take any measure for safeguarding it then he would be deemed to have impliedly waived it. Reliance in this regard can be placed on the case of *Messrs DADABHOY CEMENT INDUSTRIES LIMITED and others v. Messrs NATIONAL DEVELOPMENT FINANCE CORPORATION* [2002 C L C 166].

In the present case, the plaintiff pursuant to the recommendations of Chief Pilot North dated 09.09.1997 [Exh.5/7] and 15.12.2000 [Exh.5/8], had approached to Defendant-PIAC for regularization of his service, however, the request of the plaintiff was turned down by the PIAC apparently on the ground of his age, which fact is also corroborated from the reply/comments filed by PIAC in W.P. No.3118 of 2001 [X -5/1]. The said decision and or the stance of the PIAC taken in the in W.P. No. 3118 of 2001 was never challenged by the plaintiff. Not only this, the plaintiff in the year 2004 -2005 entered into a fresh contract with PIAC as cadet pilot (First Officer) F-27 by accepting the condition that he will not be entitled to claim any benefit or advantage of his past contractual service besides to seek absorption on permanent basis in PIAC. Thereafter, the plaintiff has served PIAC from 2004 till 2008 under the new agreement as First Officer F-27 on contractual basis without raising any objection. Such conduct of the plaintiff clearly reflects that he has consciously given up his right for seeking permanent absorption and or seeking any benefit of permanent employee in PIAC on the basis of his past contractual

service. In the circumstances, the plaintiff is estopped from raising any demand either for permanent absorption and or any benefit or advantage of his past contractual service in PIAC.

The plaintiff during his cross examination has admitted certain facts, which goes against his stance in the case. Relevant excerpts of the cross examination of the plaintiff, for the sake of ready reference, are reproduced as under:

“.....It is correct that my appointment as Cadet Pilot was a fresh appointment as per PIAC concerned. I say that probably a letter was issued for my appointment as Cadet Pilot by PIAC. I may have been issued letter on 14.9.2004 for my fresh appointment as Cadet Pilot.”

“... I say that my contract was extended for further period of two years after 2006. Vol. says it was extended till my age of superannuation i.e. 10.7.2008. I say that age for superannuation is sixty years. It is correct that terms and conditions of my services were written in those agreements. It is correct that PIAC has mentioned my date of superannuation in the letter issued for last extension in contract service. It is correct to suggest that I was informed by PIAC vide letter of July, 2007 that my service period will expire on 10.7.2008 and I have 178 days privilege leave balance in my credit and I was advised to avail the same. It is correct that I requested PIAC that I want to perform flying duty during the remaining period of L.P.R. (Leave Preparatory to Retirement). It is correct that I had undertaken not to claim any compensation for my performance of duties during the period of accumulated leaves (LPR). It is correct that on 10.1.2008, I was informed that I am being allowed to perform flying duties during L.P.R. It is correct that my L.P.R. period started from 17.1.2008. It is correct to suggest that as advised by PIAC, I have returned my original ID card to PIAC and submitted due clearance as required by PIAC. Vol. says that I was not willing to do the clearance as my case was pending in Sindh High Court and I gave undertaking to that effect while doing the clearance. I say that PIAC has given me my services benefits after the completion of my employment period. Vol. says that I recall it was only gratuity.”

“..... It is correct to suggest that I was one of the petitioners in Writ Petition No. 3118/2001, filed before Lahore High Court, prior to filing of this present suit. I say that the petition has been disposed of as we have concern. It is correct that my fresh application as Cadet Pilot was after the disposal of above Writ Petition. It is correct that my fresh appointment was made as first officer, F-27 Aircraft. It is correct that F-27 Aircraft is different from D.H.6 Aircraft. I had gone through with the training for appointment as first officer for F-27 Aircraft. The training, was carried out with PIAC. It is correct that I have throughout served on contractual agreement with PIAC and I was not absorbed permanently in PIAC service. It is correct to suggest that I have not filed copy of any application, showing that I have requested PIAC to permanently absorb me in PIAC service. Vol. says that I have submitted two letter of recommendation, given by two different Chief Pilot North. The witness is shown with Ex-5/7 and says that it is correct that after September, 1997, the contract agreement have been extended from time to time. The witness is

shown with Ex-5/8 and says that it is correct that after 15 December, 2000, my contract has been extended. I say that I along with other eight pilots (D.H.6 Aircraft) approached Lahore High Court after given no heads to the recommendation of 1997 and 2000. It is correct that I have filed this present suit and Writ Petition No. 3118/2001 at Lahore High Court against PIAC regarding my all grievances in respect of my contract services in PIAC.”

“..... The witness is shown with Article X-512 and says that this is not my grievance. Vol. says that I have specific grievance of giving regular carrier to contract pilots after serving for five years whereas, I have served for fifteen years seven months and three days without break and I was not regularized.....”

“..... The Corporation itself extended agreements on yearly basis or whenever those were due to expire. I say that I continued to fly in terms of letters issued by PIAC accordingly. I say that I had not filed any document which shows my objections to the extensions made by PIAC. Vol. says that I simply complied with the directions issued by the Corporation.”

[Emphasis supplied]

For the foregoing discussion, I am of the view that the present suit is not maintainable being hit by the provisions of sub-rule (3) of Rule 1 of Order XXIII of the Civil Procedure Code. Besides the doctrine of waiver and acquiescence is also applicable to the case. Accordingly, this issue is answered in negative.

10. ISSUES 2, 3, 4 & 5:

For the foregoing discussion and my findings on Issue No.1, these issues have become redundant; hence no findings are required to be made on the same.

11. ISSUES 6 & 7:

In view of the above discussion and my findings on Issue No.1, I am of the opinion that the Plaintiff has failed to establish his claim and as such the suit is dismissed.

JUDGE

Karachi
Dated: _____