

**IN THE HIGH COURT OF SINDH,  
CIRCUIT COURT HYDERABAD**

C.P No. D- 1679 of 2017

***Before:-***

***Mr. Justice Abdul Maalik Gaddi***

***Mr. Justice Adnan-ul-Karim Memon***

Petitioner : Mazhar Ali through Mr. Pervez Tarique Tagar,  
advocate alongwith Petitioner.

Respondent No.3&4: Through Mr. Muhammad Arshad S. Pathan,  
Advocate

Respondent No.1 : Through Mr. Humayoon Khan, Deputy Attorney  
General for Pakistan.

Date of hearing : 20.08.2020  
& decision.

**ORDER**

**ADNAN-UL-KARIM MEMON, J:** - Through instant petition, the petitioner has impugned office order dated 11.05.2017 issued by Chief Executive Officer, Hyderabad Electric Supply Company (HESCO), Hyderabad whereby petitioner has been awarded major penalty and has been compulsory retired from service.

2. Brief facts of the case are that the Petitioner was working as an Executive Engineer Operation Division HESCO, Digri. During service, a showcause notice dated 21.03.2017 was issued to the petitioner charging him with the allegations of misconduct. The Petitioner averred that he replied the show cause notice, but, the respondents without holding an enquiry and proving the charges, imposed the major penalty of Compulsory Retirement from Service vide office order dated 11.5.2017. The petitioner being aggrieved by and dissatisfied with the impugned order dated 11.5.2017 has assailed the same before this Court.

3. Upon notice, para-wise comments were filed by the Respondent No. 3 &4.

4. Mr. Pervez Tarique Tagar, learned counsel for petitioner, has argued that the basic Letter of Explanation, Show Cause Notices, and impugned Order dated 11.5.2017 issued by the Respondent-Company are based upon malafide intention and without any legal justification. He next contended that the Petitioner has invoked the Constitutional Jurisdiction of this Court as he has no other efficacious and alternate remedy. He further added that as per

Office Order dated 08.01.2008, services of all employees working in the Companies falling under PEPCO have to be governed by Rules and Orders of WAPDA till such time the companies notify their service Rules and Regulations. As per learned counsel, the companies have not been able to frame service Rules and Regulations pertaining to disciplinary proceedings and Pakistan WAPDA Employees (Efficiency and Discipline) Rules, 1978 are still applicable to the employees of the Respondent-Company. He next contended that `1978 Rules` are statutory in nature as such this Court has jurisdiction to entertain the Constitutional Petition; that the office order has been issued malafidely without conducting inquiry in terms of rule 5 of Water and Power Development Authority Employees (Efficiency and Discipline) Rules, 1978, whereas sufficient opportunity has not been provided to the petitioner. It has further been contended by learned counsel that even from perusal of aforesaid office order, it can be appreciated that there was no allegation against the petitioner regarding misconduct or violation of efficiency and disciplinary rules, whereas, on a flimsy ground of less recovery during the relevant period, the petitioner has been awarded major penalty as discussed supra. Per learned counsel, the Petitioner has neither been heard nor allowed to put up his defense against the allegations rather he has been condemned unheard, which is in violation of Article 10-A of the Constitution. He lastly prayed for setting aside of the impugned office order dated 11.05.2017.

5. Mr. Arshad S. Pathan, learned counsel representing respondents 3&4, raised the preliminary objection with regard to maintainability of the instant Petition. He also pointed out that the petitioner during pendency of this petition superannuated; therefore, this petition cannot be entertained.

6. We have heard learned counsel for the parties and perused the material available on record.

7. First and foremost, we would address the question of jurisdiction of this Court to entertain the petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

8. In order to deal with these postulations, it is essential to make reference to scheme and framework of Water and Power Development Act, 1958 (hereinafter referred to as WAPDA Act), which provides for unified and coordination developments of Water and Power resources of Pakistan. Under section 3 of the WAPDA Act, 1958, an authority known as Pakistan Water and Power Development Authority (WAPDA) was established, which was a body Corporate and the Federal Government has the power to issue such directives as it may consider necessary on matter of policy from time to

time. Under sections 4 and 6 of the WAPDA Act, the Chairman and 6 Members of WAPDA are to be appointed by the Federal Government. The plans for the development and utilization of water and power resources of Pakistan on unified and multi-purpose basis are also approved by the Federal Government. To effectuate the concept of devolution of powers, HESCO and other distribution companies were created. Though these companies are distinct corporate entities incorporated under the Companies Ordinance, 1984, however, they are performing the same functions as once allocated to WAPDA under the WAPDA Act. While dilating the question whether HESCO is person within the meaning of Article 199 (1) (a) (ii) read with Article 199(5) of the Constitution, it is relevant to note that the Government is regulator and dispenser of special services and it has power to create jobs, issue licenses, fix quotas, grant leases, enter into contracts and provide variety of utility services and basic amenities to the people. Such entire entrepreneurial activities are at times carried out through companies created under the statutes or under the Companies Ordinance, 1984. The test to determine whether such company is a person amenable to judicial review has been generally classified by the Courts as the Functional Test. If the functions of these companies / institutions have an element of public authority or if they are performing public or statutory duties and carrying out transactions for the benefit of public at large and not for private gain or benefit, then their action will be amenable to judicial review. The Honorable Supreme Court in the case of Abdul Wahab and others v. HBL and others (2013 SCMR 1383), held that two factors are the most relevant i.e. the extent of financial interest of the State / Federation in an institution and the dominance in the controlling affairs thereof. And in the case of Salahuddin v. Frontier Sugar Mills and Distillery Ltd. (PLD 1975 SC 244), the Honorable Supreme Court laid down similar test to assess whether a body or authority is a person within the meaning of Article 199 of the Constitution. The aforesaid view was further affirmed in Aitcheson College, Lahore through Principal v. Muhammad Zubair (PLD 2002 SC 326). The Honorable supreme court in the case of Pakistan International Airlines v. Tanweer-ur-Rehman (PLD 2010 SC 676), reiterating the earlier view, the Honorable Supreme Court laid down a similar three pronged test.

9. As per the profile of HESCO, it is a State Enterprise. The Government owns the majority of shares. The Chief Executive of the Company is nominee of Government of Pakistan and has been delegated with such powers by the Board of Directors as are necessary to effectively conduct the business of the Company.

10. In view of the above background and status of HESCO, the same can ordinarily be regarded as a 'Person' performing functions in connection with the affairs of Federation under Article 199 (1) (a) (ii) read with Article 199 (5) of the Constitution, thus, the High Court has an entry point to exercise judicial powers in the subject affairs of HESCO under the Constitution.

11. On merits, we are cognizant of the fact that this Court vide order dated 13.09.2017 suspended the operation of office order dated 11.05.2017, whereby a major penalty of Compulsory Retirement from Service was imposed upon the petitioner; and in the meanwhile the Petitioner attained the age of superannuation i.e. 60 years, however, his retirement order was not issued.

12. As per record, the petitioner has been charge sheeted on the basis of poor performance, which does not reflect that the aforesaid action falls within the purview of misconduct. An excerpt of the office order dated 11.05.2017 is reproduced as below:

**“OFFICE ORDER**

*After due consideration of above mentioned documents, I, Asadullah, Chief Executive Officer, HESCO Hyderabad, being competent authority under Pakistan, WAPDA Employees E&D Rules 1978, have decided and hereby impose the major penalty of “Compulsory Retirement from Service” upon Mr. Mazhar Ali Qureshi, Executive Engineer, Opr: Divn: HESCO Digri, as the charges have been established against him. The officer badly failed to achieve the targets. From the last three months, recovery fallen (-4.5%) as compared to the last year. Only 709 No. kunda connections regularized against running 3513 kunda connections. Very poor performance in all KPIs. Payment against computed assessment is less (-7.06%) as compared to last year in the month of 04/2017.*

*Mr. Mazhar Ali Qureshi, XEN stands retired from service.*

**NOTE:** The prescribed time limit for submission of an appeal under section -11 of Pakistan WAPDA Employees E&D Rules 1978, is, two months from the date of communication of penalty order.”

13. The perusal of office order dated 11.05.2017 explicitly shows that the petitioner was awarded major penalty of compulsory retirement from service on the premise that he failed to achieve the targets from the last three months i.e. Recovery has fallen (-4.5%) as compared to the last year as well as on poor performance. The word 'misconduct' has been defined under Section 5 of the Pakistan WAPDA Employees (Efficiency & Discipline) Rules, 1978, which reads as under:

**“5. "Misconduct" includes:**

*(i) Breach of service discipline or instructions issued by the Authority;*

- (ii) Commission of theft, fraud, dishonesty or any other offence involving moral turpitude;*
- (iii) Wilful insubordination or disobedience, whether alone or in combination with others, to any lawful and reasonable order of a superior;*
- (iv) Wilful damage to or loss of the Authority's goods or property;*
- (v) Habitual absence without leave or habitual late attendance;*
- (vi) Riotous or disorderly behaviour during working hours;*
- (vii) Habitual negligence or neglect of work;*
- (viii) Striking work or inciting others to strike work in contravention of the provisions of any law or rule having the force of law;*
- (ix) Participation in, or subscribing in aid of any political movement in Pakistan or relating to the affairs of Pakistan;*
- (x) Canvassing or otherwise interfering or using influence in connection with or participating in any election to a legislative body, whether in Pakistan or elsewhere, except to the extent of exercising the right to vote, if otherwise qualified to do so, but without giving any indication of the manner in which it is proposed to vote;*
- (xi) Failure to repay house building or any other loans and advances*
- (xii) Conduct prejudicial to good order or service discipline or contrary to Wapda Employees (Conduct) Rules or unbecoming of an employee and a gentleman and includes any act on the part of a Wapda employee to bring or attempt to bring political or other outside influence directly or indirectly to bear on the Authority or any officer of the Authority in respect of any matter relating to the appointment, promotion, transfer, punishment, retirement or other conditions of service of a Wapda employee.*
- (xiii) Non initiation / countersigning of ACRs in accordance with the time frame specified in para 18 of the Guidelines for Completion of ACR.*
- (xiv) Non dispatching of ACRs to next reporting officer within seven days of its receipt."*

14. In view of the above, the punishment awarded to the petitioner is prima-facie harsh, since he has attained the age of superannuation during the pendency of the petition and no any justifiable reason has been put forwarded by the respondent-department to award major penalty without holding proper / regular inquiry, therefore, the impugned order is against the principles of natural justice.

15. Looking to the factual as well as legal position of the case, the impugned order is set-aside and this petition is disposed of with direction to the Competent Authority of respondents to re-calculate the pensionary benefits of the petitioner and other benefits as admissible under the law and make payment of the same to the petitioner within a period of 30 days from the date of this Order. Compliance report be filed through Additional Registrar of this Court within a specified period.

**JUDGE**

**JUDGE**

Karar\_hussain/PS\*