

Judgment Sheet
IN THE HIGH COURT OF SINDH KARACHI
Constitutional Petition No. D –3055 of 2016

Before:

Mr. Justice Nadeem Akhtar

Mr. Justice Adnan-ul-Karim Memon

Masood Ahmed and another

Versus

Federation of Pakistan and 02 others

Dates of hearing : 26.10.2020, 12.11.2020, 03.12.2020 & 17.12.2020

Date of judgment : 12.01.2021

Mr. Ovais Ali Shah, advocate for the petitioners.

Mr. Khalid Javed, advocate for respondent No.2.

Mr. Faizan Hussain Memon, advocate for respondent No.3.

Mr. Muhammad Nishat Warsi, DAG.

J U D G M E N T

ADNAN-UL-KARIM MEMON, J. By way of this writ petition, in principle, the petitioners are seeking a declaration to the effect that absorption of the respondent No.3 CDR @ Khalid Munir as Deputy Estate Manager (BPS-18) in the Estate Department of Karachi Port Trust (“KPT”) vide selection committee meeting dated 27.11.2004 was/is unconstitutional. They further prayed that respondent No.3 was/is not entitled to a pension from the respondent-KPT.

2. Mr. Ovais Ali Shah, learned counsel for the petitioner, has briefed us that respondent No.3 was initially deputed in Karachi Port Trust from Navy as Port Intelligence Officer with effect from 16.08.2001; and, after his term of three years ended, he retired from Pakistan Navy on the post of Commander which is equivalent to Lt. Colonel. He continued to serve at KPT at the pleasure of the Chairman, on the basis of an administrative order issued without any authority as no rules allow for this. Therefore, there was a period of six months where he was neither employed in Pakistan Navy nor was he a regular employee of KPT; and, after, six months, he was absorbed in KPT in complete violation of the law on his own application. Further, in his application he also stated that his absorption should be as Deputy State Manager; and, at the time of absorption he was paid full salary and no deduction was made on account of pension being received from Pakistan Navy; and, the premise of appointment was that the post was lying vacant. However, no justification has been shown as to why advertisement for the post was not made or appointment was not made by promotion. His case is

that respondent No.3 could not be absorbed in KPT; and, his appointment was entirely unlawful. Even otherwise, if he could be absorbed, he could not have been paid full salary and consequently, he could not be paid full pension. Learned counsel referred to various provisions of Estacode more particularly SI No.231, Part IV and could only be taken on contract basis three to five years up to the age of 60 years; that no transparency in his appointment / absorption was made under the law. Learned counsel emphasized that respondent No.3 was not qualified and eligible for appointment in the Estate Department under clause 85 of Chapter VI of the KPT Recruitment, Appointment Seniority and Promotion, Regulations, 2011. The qualification is Bachelor of Engineering (Civil) or MBA / MPA with at least seven years' experience with estate matters in Government / Semi government organizations. He was in Pakistan Navy and deputed as Port Intelligence Officer for three years. He lacks the seven years' experience required for the post. He attacked on his eligibility for pension and relied upon Regulation 3.5 of the West Pakistan Civil Service Pension Rules, which provides that a person is entitled to pension upon performing twenty-five years of service, whereas in the present case respondent No.3 has only performed fourteen years. Accordingly, even otherwise, he is not entitled to pension from KPT. He further argued that the reemployed officers will not have any seniority and will not be placed on the regular gradation list and the incidences of the respondent No.3's employment are in gross violation of the afore stated provisions of the law so he can be employed, if at all, on a contract basis; that respondent No.3 stands to draw two pensions simultaneously which would an anomaly in the eyes of law; that the waiver of probation to initial appointment of the respondent No.3 violates the Regulation 2011 and the impugned actions of the respondent No.2 amount to the maladministration of office and breach of public trust; that various remunerations received by the respondent No.3, in particular, the remuneration received for the six months of service at the verbal instructions of the Chairman, amount to gross misconduct, misappropriations of funds, therefore, the respondents 2 and 3 are jointly liable for their acts of default and breach of trust. He prayed for allowing the instant petition.

3. Conversely, Mr. Faizan Hussain Memon, learned counsel for respondent No.3, has argued that the petition filed by the petitioners is kind of a writ of quo warranto with multiple prayers and respondent No.3 has retired from KPT on 09.08.2017 and is not holding a public office, therefore, the instant petition has become infructuous and merits dismissal. It is contended that respondent No.3

was serving in Pakistan Navy and sent to the deputation to KPT as Port Intelligence Officer (equivalent to BPS-18) with effect from 16.08.2001 for 03 years. Whilst on deputation, he was raised to the rank of Acting Commander by Pakistan Navy, but, due to deputation he remained in the same rank; and, that after he retired from Pakistan Navy on 24.05.2004, he continued to serve KPT with the commendation of the Chairman, KPT. He relied upon Section 23 of the Karachi Port Trust, 1886 read with Section 20 thereof and Rule 49 of the Karachi Port Trust Officers Recruitment / Appointment, Seniority and promotions Regulations, 2011(Regulations, 2011); and, that according to Rule 23 and 33 of the Rules, 2011, deputation is permissible and induction by way of absorption is also permissible under Rule 44, which provides that an officer on deputation in KPT may be absorbed permanently in KPT after one year service; that the dicta laid down by the Hon'ble Supreme Court in the case reported as Re-Azhar Hayat v. KPT and others, **2016 SCMR 1916**, is distinguishable since the Hon'ble Supreme Court held that the case of the officer was covered under SI 214 of Part V of Chapter 2 of Estacode 2013 Edn. Whereas respondent No.3 was absorbed under SI 231; that he was absorbed under paragraph 12 of SI 231 on the recommendations of the Internal Selection Committee, therefore, the same is lawful. He relied upon the case of Muhammad Saleem vs. Federal Public Service Commission and others, **2020 SCMR 221** and contended that the absorption of the contesting respondent No.3 is proper and lawful, and within the scope of the law, and in consonance with the Estacode; he further contended that as per paragraph 17 of the SI 231, an officer inducted in the civil post is entitled to draw a civil pension in addition to military pension subject to completion of minimum 10 years of qualifying service. He referred to Regulation 525 of Civil Service Regulations and placed reliance on the cases reported as Mosam Khan v. Pakistan Atomic Energy Commission through its Chairman and 2 others, **2018 PLC (CS) Note 197**, Suo Motu Case No. 13 of 2016 reported in 2017 SCMR 838, and argued that respondent No.3 thus is also entitled to all the pensionary benefits and perks that was/is due to him upon such retirement from KPT. He relied upon the cases of Masudul Hassan v. Khadim Hussain and another, **PLD 1963 Supreme Court 203**, Dr. Kamal Hussain and 7 others v. Muhammad Sirajul Islam and others, **PLD 1969 Supreme Court 42**, Federation of Pakistan and others v. Khuda Dad Khan, **1984 SCMR 1297**, Sardar Zaheer Ahmed Khan, advocate v. Mohtarma Benazir Bhutto and another, **1994 MLD 397**, Dr. Azim-ur-Rehman Khan Meo v. Government of Sindh, **2004 SCMR 1299**, Muhammad

Liaquat Munir Rao v. Shams-ud-din, 2004 PLC (C.S) 1328. He prayed for dismissal of the instant petition.

4. Mr. Khalid Javed, learned counsel representing KPT has supported the stance of respondent No.3 and referred to various provisions of Estacode on the subject and argued that the officers of the rank of Major and equivalent who may retire or may have retired on completion of the prescribed age or service limit is eligible for induction in grade 18 on regular basis in KPT. He also pointed out that the inducted officers would continue to receive their military pension, but that it would be deducted from the civilian allowance. In addition to the military pension, officers will be entitled to a civilian pension upon retirement from civilian employment if they have completed the required qualifying service (i.e. 10 years of minimum employment). They will receive a gratuity if they have completed more than five years and less than ten years of service in the public service. He further elaborated on the issue and argued that Officers of the rank of Major/ equivalent who retire or may have retired before completion of the prescribed age or service limit and officers of the rank of Lieutenant Colonel and above and equivalent who may retire or may have retired either after completion of prescribed service or age limit or before such completion will be eligible for re-employment on contract for 3 to 5 years, renewable up to the age of 60. On the subject of the pension, he argued that Pay of the retired officers of the armed forces, who are re-engaged in civil posts on contract in grades equal to the substantive rank or temporary rank if maintained for one year, may be made at the minimum of the grade in which re-employment is regularized and full-service pension can be paid besides.

5. We have heard learned counsel as above, and considered the record and case law relied upon.

6. To elaborate on the issue of absorption of respondent No.3 in KPT after he retired from Pakistan Navy on 24.05.2004, we have to see whether his absorption in KPT was under the law and the dicta laid down in the cases decided by the Honorable Supreme Court or otherwise and whether he was also entitled to a second pension from KPT after his second retirement on 09.08.2017?

7. We have seen the service profile of respondent No.3, which reveals that the absorption / re-employment of respondent No.3 as Deputy Estate Manager (BPS-18) in the Estate Department of Karachi Port Trust (KPT) vide selection

committee meeting dated 27.11.2004 against the post of Deputy Estate Manager (BPS-18) in the Estate Department, KPT was without competitive process; and, his subsequent transfer, posting and promotions were without lawful process and in violation of the Constitution / KPT Service Regulations-2011, provisions of Estacode and Civil Servant Act 1973, hence *void ab-initio*. Moreover, the re-employed / rehired officers on contract basis cannot retain seniority nor can they be set on the regular gradation list under the service jurisprudence.

8. During arguments, we have been informed that respondent No.3 is now drawing two pensions simultaneously from Pakistan Navy as well as from respondent-KPT which was/is against the basic spirit of the law. The record further reveals that respondent-KPT while absorbing him waived the mandatory provision of the probationary period, thus they also violated the KPT Service Regulations, 2011. In our view, the impugned actions of the respondent-KPT constitute maladministration and breach of public confidence and have resulted in losses to the public exchequer. We have also noted that various remunerations were received by respondent No.3 particularly the remuneration received in the intervening period at the verbal instructions of the Chairman KPT, amounting to gross misconduct on his part, hence, respondents 2 & 3 are collectively liable for their acts of default and breach of trust.

9. *Prima-facie*, after his absorption / re-employment, respondent No.3 was barred under the law to retain any seniority and ought not to have been enlisted on the regular gradation list of KPT and his service rendered in KPT does not qualify him for a second pension for the reason that he served on deputation in respondent-KPT till 25.10.2004; and, at the time of his absorption in respondent-KPT on 25.10.2004 he had already retired from the active service of the Pakistan Navy as discussed supra, thus was not entitled to be absorbed as he was no more in active service of Armed Forces of Pakistan after his retirement and was just an ordinary / retired person who could not be absorbed / appointed in Government owned and controlled organization i.e. KPT. We have noticed that he received salary for the entirety of six months from the national exchequer without his entitlement to the same being, not being on the payroll of the KPT in the intervening period, hence his subsequent recommendation for absorption and further actions on the part of KPT were in violation of the law.

10. We have noticed that the respondent-KPT dragged the matter of respondent No.3 and perpetuated the illegalities by allowing him to continue with

the job and finally allowed him to retire from service by paying pensionary benefits with effect from August 2016 and now he is drawing pensionary benefits to which he was / is not entitled under the law rather he ought to have been treated as a contract employee for all intent and purposes. In our view, the Selection Committee's decision of November 27, 2004, in its 68th meeting and subsequent proceedings in favour of respondent No 3, was/is unconstitutional. On the aforesaid propositions, we are laced by the determinations of the Honorable Supreme Court 'In re Criminal Original Petition No.89 of 2011 2013 SCMR 1752, Ali Azhar Khan Baloch v. Province of Sindh and others 2015 SCMR 456 and Azhar Hayat v. Karachi Port Trust (2016 SCMR 1916).

11. Primarily, there is no cavil to the effect that armed personnel can be inducted into civilian Cadre during their tenure of service subject to the qualification made in the Estacode / rules as discussed supra and with the approval of the competent authority. Here the question is completely different as respondent No.3 during the deputation period in KPT stood retired from Pakistan Navy on 24.05.2004 and after a few months from his retirement he was permanently absorbed in KPT on 25.10.2004 in violation of rule 21, 22, 23(b) and 24 of KPT Service Regulations, 2011 and dicta laid down by the Hon'ble Supreme Court in the aforesaid matters.

12. In principle his absorption in KPT after retirement from Pakistan Navy is not supported by any law as he in the intervening period was neither in service of armed forces, nor he was civil / government servant and his deputation ended when he retired from the service of Pakistan Navy. Even otherwise the Civil Servants Act, 1973, and rules framed thereunder also restrict absorption of a non-civil / government servant in the service of Government owned and controlled organizations. The record indicates that under the rules of the KPT 2011 Service Regulations, the initial appointments in BPS-16 and above are to be made solely through a competitive process and not otherwise.

13. *Prima facie*, the induction / absorption of respondent No 3 in the regular framework of KPT was/is against the judgment of the Hon'ble Supreme Court of Pakistan in Cr.Org. Petition No.89 / 2011 (2013 SCMR 1752). In our view, since the direction of the Honorable Supreme Court in the aforesaid matters is still in the field, we are bound to follow it under the Constitution. Besides, the issue of re-employment after retirement from the disciplinary force has been discouraged by the Honorable Supreme Court in SUO MOTU CASE NO.24 of 2010

[Regarding Corruption in Hajj Arrangements in 2010] and held at paragraph No.38 as under:-

“38. The matter of re-employment of police officers after their retirement also came under consideration by this Court in the case of In Re: Suo Motu Case No.16 of 2011 (PLD 2013 SC 443) wherein on 22.03.2013 it was held that re-employment in disciplinary force like Police or for that matter in any other department has to be made subject to section 14 of the Civil Servants Act, 1973 read with instructions contained in Esta Code under the heading “Reemployment”. It was further observed that undoubtedly, it is the Government, which has to perform its function strictly in accordance with law but, prima facie, re-employment of police officers (noted SMC 24/10 therein) was not in conformity with the law and the judgment of this Court. Consequently, with the approval of the Competent Authority i.e. Chief Minister Sindh, the contract appointments of 8 police officers were terminated, whereas, one of the re-employed employee, namely, Mr. Waseem Ahmed, Additional Chief Secretary, Home Department (BS-21), who was also a former Police Officer and on retirement has been appointed by the Government of Sindh, tendered his resignation, which was accepted by the competent authority”

14. In this regard, the Hon’ble Supreme Court of Pakistan in the case of Azhar Hayat v. Karachi Port Trust (2016 SCMR 1916) has dealt with the issue of deputation / absorption / re-appointment of officers of Armed Forces of Pakistan in civil posts at paragraph 8 of the Judgment. We also refer to paragraph 2, No.4/85 of the JSI and Serial No.214, Part V, Chapter 2 of Volume I of the Estacode, reproduced herein below for a better understanding of the issue under discussion. It may be noted that both these provisions are identical.

No.4/85 of the JSI / SI. No.214 of the Estacode

It has been decided that Armed Forces Officers seconded to civil ministries (other than Defence), departments of the Central/Provincial Governments, autonomous/semiautonomous bodies and corporations, etc., will be governed by the following terms and conditions: -

"2. Tenure" of the JSI / "1. Tenure" of the Estacode:

(a) Officers will normally be seconded for a period up to three years extendable, in exceptional circumstances, by one year by the Government, after which the officer will normally either be recalled to the parent service or released. No extension in service will be allowed to officers who complete age/service limits for retirement during the secondment.

(b) If the deputation of an officer tends to become indefinitely prolonged, permanent absorption of the officer concerned in the civil cadre by retiring him from the parent service, would be considered.

(c) In case of an emergency, the parent service will have the option of withdrawing a deputed officer without notice, if necessary.

(d) An officer will have the option to request for return to his parent service if he feels that his service career is adversely affected by continued deputation."

15. Respondent No.3's case before us is for absorption / appointment in KPT as Deputy Estate Manager (BPS-18) in the Estate Department of Karachi Port Trust (KPT) vide letter dated 27.11.2004. The main question for our consideration is the scope of the JSI / the Estacode and in particular whether permanent re-employment / absorption in such cases is permissible or not? The afore cited provisions of JSI / Estacode stipulate that officers may be seconded for a period of up to three years and only in exceptional circumstances such period can be extended by another year. We are cognizant of the fact that respondent No.3 was "absorbed / re-employed" after he retired from Pakistan Navy in the year 2004. In this regard serial 231, Part V, Chapter 2 of Volume I of the Estacode is referred to, which provides for the "Induction / Re-employment of Officers of Armed Forces of Pakistan in Civil Posts". Relevant paragraphs are reproduced hereunder for the sake of brevity: -

"Sl. No. 231

Induction/Re-employment of Officers of Armed Forces of Pakistan in Civil Posts

The question of institutionalizing the induction and re-employment of officers of the armed forces of Pakistan in civil posts has been under consideration for some time past. The President has now been pleased to decide that induction of officers of the armed forces of Pakistan and their re-employment, as the case may be, shall be regulated by the following instructions: -"

The particular provision which would be applicable to the petitioner, is of "officers of a rank of Lieutenant Colonel and above", and is attended to in the following paragraphs of Sl. No.231:

18. Officers of the rank of Major/equivalent who retire or may have retired before completion of the prescribed age or service limit and officers of the rank of Lieutenant Colonel and above and equivalent who may retire or may have retired either after completion of prescribed service or age limit or before such completion will be eligible for re-employment on contract for 3 to 5 years, renewable up to the age of 60, up to the maximum of 10% of annual vacancies in various groups and cadres, as may be specified, on the terms and conditions mentioned hereinafter.

19. Re-employment will be made in grades equivalent to their substantive rank, or temporary rank, if held for one year, in accordance with the army rank-civil grade equivalence formula already approved by the President. However, the officers will be eligible for being considered for a subsequent contract in higher grade. Re-employment of officers may be considered for a higher grade either at the time of subsequent

contract or after completing service of three years in the existing contract whichever is earlier.

20. Re-employment on contract basis will be made through the High Powered Selection Board which will also determine the group or cadre in which re-employment is to be made. The procedure for selection will be the same as prescribed in para 6.

21. In selecting officers for re-employment, provincial quotas will be kept in view.

22. Re-employment on contract in various grades shall be made by the authorities competent to make an appointment to these grades in accordance with rule 6 of the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973.

16. The afore quoted paragraph 20 refers to paragraph 6 of Sl.231, which is reproduced hereunder:

"6. The induction will be made through the High Powered Selection Board constituted by the President for the purpose. The High Powered Selection Board will also determine the Occupational Groups to which the officers are allocated. For this purpose, each Service Chief may be asked to recommend by the 30th June every year names of officers for induction in grade 17 in various groups, keeping in view their educational qualifications and experience. For each vacancy, a panel of preferably 3 officers may be recommended. The recommendations will be scrutinized by the Ministry of Defence before they are placed before the Board."

17. Admittedly, the foregoing paragraphs of Sl.231 about the re-employment of respondent No.3 has not been complied with. Respondent No.3 has also failed to show that the competent authority had accorded approval to his absorption / appointment in KPT after his retirement from Pakistan Navy as discussed in the preceding paragraphs. Therefore, respondent No.3's contention that he was properly absorbed / appointed in KPT as the regular employee has not been established and his reliance upon Section 44 of the Regulations 2011 is misconceived for the simple reason that his deputation period had already expired in KPT when he stood retired from Pakistan Navy on 24.05.2004.

18. As to the contention of learned counsel for the respondents that the ratio of judgments of the Honorable Supreme Court in the cases (supra) is not applicable, suffice it to say that respondent No. 3's absorption / appointment in the regular cadre (BPS-18) in KPT on deputation basis and subsequent absorption / regularization is itself illegal and void-abinitio. Therefore, the question raised is not worth consideration and is hereby discarded. It is well-settled law that a deputationist does not have any vested right to remain on the post as deputationist forever or for a stipulated period. He can be repatriated to

his parent department at any time. The Honorable Supreme Court in the case of Shafiur Rehman Afridi v. CDA, **2010 SCMR 378**, has settled the issue on the aforesaid proposition, therefore, no further deliberation is required by us.

19. Since respondent No 3 has crossed the age of 60 years and left his position from KPT, no further action is required. However, it is made clear that he is not entitled to a second pension from KPT due to his illegal deputation and subsequent absorption in KPT in the intervening period without the approval of the competent authority as discussed in the preceding paragraphs.

20. Before parting with this order, it may be observed that even on moral ground, the illegalities committed by the management of KPT and respondent No.3, being a retired naval forces personnel and a patriot, was expected to act honestly in the best interest of the country. However, he chose not only to get himself illegally absorbed in KPT, but also claimed and received pension from their different services causing heavy loss to the national exchequer.

21. Therefore, this petition is allowed along with the pending application(s) in the above terms with no order as to costs.

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