

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Adnan-ul-Karim Memon

C.P No.D-2901 of 2022

Qazi Khalid AliPetitioner

Versus

Federation of Pakistan & others.....Respondents

Dates of hearing: 12.01.2023, 18.01.2023

Date of order: 18.01.2023.

Date of reasons: 23.01.2023

Mr. Anwar Mansoor Khan, advocate for petitioner
Mr. Yasir Ahmed Shah, Assistant Attorney General.

ORDER

MUHAMMAD IQBAL KALHORO, J:- Petitioner, an advocate, was appointed as Chairman, Federal Service Tribunal (FST), Islamabad by the President of Pakistan vide notification dated 22.04.2019, issued by Ministry of Law & Justice for a non-extendable period of three years with effect from the date of assuming charge of the post, stipulating his entitlement to such pay, allowances and perquisites, as admissible to a Judge of High Court as may be prescribed from time to time.

2. The case brought by petitioner before the court is that after completing his term as the Chairman FST, he preferred a representation to respondent No.1/Secretary Ministry of Law and Justice, Government of Pakistan for grant of pensionary benefits *pari passu* with that of a judge of High Court based on an inclusive reading

of said notification, and in consideration of various precedents and provisions of law as well quoted by him. But the same was regretted through a letter dated 22.01.2020 impugned here. Petitioner's stance nonetheless is that his representation, required to be decided by the President of Pakistan, the competent authority to determine terms and conditions of service of the petitioner, has been decided by some official of Ministry of Law and Justice rendering the impugned letter regretting his representation as void *ab initio* and passed without jurisdiction. To support his stance, the petitioner has further reiterated that he has served on various official positions for an aggregate period of 20 years from 12.03.2003 to 22.04.2022 in various capacities, such as an Additional Advocate General, a judge of High Court of Sindh from 04.11.2007 till 02.08.2009, a professor of law, Sindh Muslim Govt. Law College Karachi, Dean faculty of law, Karachi University, founding Vice Chancellor of Shaheed Zulfiqar Ali Bhutto, University of law, Karachi and lastly as the Chairman FST. Ergo, he is entitled to pension and pensionary benefits under President's Order No.3 of 1997 r/w Regulation No.371-A of the Civil Service Regulations.

3. Although petitioner's appointment as a judge of High Court was declared as invalid and void by the judgment passed by the Honorable Supreme Court on 31.08.2009 in the case of Sindh High Court Bar Associations (PLD 2009 SC 879) but judgments/orders, decrees passed by him are protected on the principle laid down in the case reported as PLD 1998 SC 161. Remuneration and terms and conditions of service of a judge High Court have been provided in Fifth Schedule under Article 205 of the

Constitution wherein qualifying service for pension for a judge of High Court is five years but in the case of Ahmed Ali U. Qureshi Vs. Accountant General (PLD 2008 SC 522), the condition of five years qualifying service for a judge of a High Court to be entitled to pension has been done away with on the basis of harmonious interpretation of paragraph 2 and 3 of Fifth Schedule to the Constitution. As a result, the Government of Pakistan has introduced a pension package whereby permanent judges under Article 474(b) of the Civil Service Regulations are held entitled to receive *pro rata* pension at the rate of 17.5% per annum for each year of service, and a period of service above six months is to be counted as one year of service for pension purpose. This pension package has been approved by the Honorable Supreme Court of Pakistan vide a consent order dated 27.03.2019 in Civil Appeal No.140-L to 142-L of 2018. It is next stated that benefit of such pension package has been extended to all those retired judges including those judges who were not even party before the court. Citing past precedents, it has been interjected that appointment of Mr. Justice Sajjad Ali Shah and Mr. justice Abdul Hameed Dogar were held invalid and unconstitutional in Asad Ali case (PLD 1998 SC 161) and Sindh High Court Bar Association case (PLD 2009 SC 879), yet both the judges were granted pension and pensionary benefits as Chief Justice of Pakistan.

4. That petitioner's case is at par with the former Chief Justices of Federal Shariat Court: Mr. Justice (R) Agha Rafique Ahmed, Mr. Justice (R) Haziq ul Khairi, Mr. Justice (R) Riaz Ahmed Khan, Mr. Justice (R) Najamal Hassan and Mr. Justice (R) Dr. Tanzilur

Rehman. Since all these judges were held entitled to pay, allowances and privileges admissible to a judge of High Court, similarly petitioner in the capacity of the Chairman FST is also entitled to pay, allowances and privileges admissible to a judge of High Court. Mr. Justice Agha Rafique Ahmed was appointed as Additional Judge of Sindh High Court on 14.11.2007, later he was confirmed as a judge of Sindh High Court and thereafter he was appointed as Chief Justice, Federal Shariat Court. Petitioner's case is on identical footings and therefore, he may also be treated as a permanent judge of Sindh High Court in the matter of granting pension and pensionary benefits. In the backdrop of such, and ancillary facts, the petitioner has prayed as under:-

- a) **To declare order passed by the respondent which communicated by the Section Officer (Admin-II) Ministry of law and Justice vide No.F.38(1)/2019-A-II dated 22.01.2020 with regard to refusal to grant the petitioner pension and pensionary benefits is repugnant to the provision of Presidential Order No.3 of 1997 and the appointment Notification dated 22.04.2019 under Section 4 of the appointment Notification dated 22.04.2019 under Section 4 of the Federal Service Tribunals Act, 1973 and liable to be struck down, being null, void, ab-initio and without jurisdiction;**
- b) **To order the respondents to pay the petitioner maximum pension payable to a Judge of the High Court under Presidential Order No.3 of 1997 alongwith arrears; and**
- c) **Any other relief.**

5. His counsel narrating the above facts and grounds has pleaded for allowing the petition and in support has drawn court's attention to several documents available in the petition. Of particular importance is Annexure "K" page 59, the letter declining

representation of the petitioner, Annexure “O” page 71, Federal Public Service Tribunal (Chairman & Members) Service Rules, 1983 (the Rules, 1983), etc. Besides, his counsel in support of his arguments has relied upon the cases reported as PLD 1973 SC 514, 1991 SCMR 1041, PLD 1994 SC 72, 1996 SCMR 1185, 1997 SCMR 1477, 1999 SCMR 255, PLD 2013 SC 501 and 829, 2015 GBLR 293, 2022 PLC (C.S) 202 and 514, 2022 SCMR 1691 and a few unreported judgments of the Honorable Supreme Court.

6. Learned Asst. Attorney General, au contraire, has opposed this petition by stating that appointment of petitioner was term-based and not regular hence he is not entitled to pension; his holding of other offices such as Addl. Advocate General et al were contractual and governed by separate considerations and rules wholly independent of office of the Chairman FST that do not make him entitled to pension; there is no law to consider term of an individual in all such different and distinct offices aggregately and extend its benefit to him in the shape of pension. Petitioner was appointed as the Chairman FST not on the basis of his having remained as a judge of the High Court, which office albeit he held but has been declared as null and void by the Honorable Supreme Court in the case reported as PLD 2009 SC 879, but in consideration of his qualification as an advocate qualified to be appointed as a judge of High Court. He has relied upon the case law reported as PLD 2013 SC 829.

7. We have considered parties contentions and have perused pleadings filed by them including the case law cited at bar. Petitioner’s claim to pension is mostly founded, firstly, on the

notification dated 22.04.2019 appointing him as the Chairman FST that stipulates further his entitlement to such pay, allowances and perquisites as are admissible to a judge of High Court. And secondly, among others, rule 5 of Federal Service Tribunal (Chairman and Members) Service Rules, 1983 denoting 'if a person who is neither a judge or retired judge of a High Court nor is or has been in the service of Pakistan is appointed a Chairman he shall be entitled to such salary, allowances and privileges as are admissible to a judge of a High Court'. Neither the notification nor the above quoted rule bears any mention of entitlement of the petitioner to the pension, which has been defined in Article 260 of the Constitution separately on the one hand and on the other as remuneration that in a word would mean to pay an equivalent for a service, loss, or expense. Both the said instruments indicate his entitlement to only pay, allowances and perquisites against the service rendered by him in the office and that these privileges professedly do not include pension, which is to be paid on retirement either on attaining age of superannuation or after rendering requisite qualifying service, is not hard to understand

8. In any case, since the controversy in this petition is centered on right of the petitioner, if any, to pension, it is not illogical to understand the term pension itself. As per Article 260 of the constitution pension means 'a pension, whether contributory or not, of any kind whatsoever payable to or in respect of, any person and includes retired pay so payable, a gratuity so payable, and any sum or sums so payable by way of the return, with or without interest thereon or any addition thereto, of subscriptions to a provident fund'. The

Honorable Supreme Court has also expounded this term in para No. 66 of judgment in Human Rights Case No.40927/2012 (**PLD 2013 SC 829**). After reproducing some definitions from authoritative dictionaries and books and relevant discussion from the judgment in the case of I.A. Sharvani, it has been concluded that pension is a right which the government servant or an employee in different positions and capacities earns in terms of the relevant statutory provisions applicable to their case, mostly depending upon their length of service. In any case it is not a State bounty which can be awarded to any individual outside the scope of the applicable statute, as a favour. (Underlined by us).

9. Next, in the wake of above background, is the question that whether or not petitioner by serving as the Chairman FST has earned a right entitling him to pension? The notification of appointment show that his was tenure-based office for a non-extendable term of three years. And that such appointment was made by the President in terms of powers conferred upon him u/s 3 (4) of the Service Tribunal Act, 1973. This provision of law lays out that a person who has been or is qualified to be judge of a High Court can be appointed as the Chairman by the President for non-extendable term of three years on such terms and conditions as he may determine. No document has been produced or hinted at save what has been accorded in the notification of appointment that the President was pleased to lay down any extra terms in respect of office of the petitioner to insinuate his entitlement to pension particularly. The suggestion therein that petitioner would be eligible to pay, allowances and

appointment as such was declared unconstitutional by none else than the Apex Court of this country in the case of Sindh High Court Bar Association Vs. Federation of Pakistan (PLD 2009 SC 879), and he, among other judges, was de-notified vide notification dated 02.08.2009. This shall imply that petitioner's appointment as a judge of High Court of Sindh never materialized except for the service he rendered in that capacity and emoluments he earned, which, having no alternative, were protected on the principle of *fait accompli*. But in any case, to satisfy the argument of the petitioner on the point, it may be elucidated that the terms and conditions of service of a judge of High Court are regulated under the High Court Judges (Leave, Pension & Privileges) Order, 1973 (President's order No.3 of 1997) promulgated under the Fifth Schedule in terms of Article 205 of the Constitution. Part III relates to pension and subject matter of paragraph 14 thereof is 'Conditions or Admissibility of Pension'. It lays down that a judge shall on his retirement, resignation or removal be paid in accordance with the provisions of this Order if he has (a) completed not less five years of service for pension and attained the retiring age; or (b) completed not less than five years of service for pension and before attaining the age, resigned or sought retirement; or (c) completed not less than five years of service for pension and before attaining the retiring age either resigned, his resignation having been medically certified to be necessitated by ill-health or been removed for physical or mental incapacity or been allowed by the President for sufficient cause of retire.

11. Paragraph 15 of the Order is also important which sets forth that the Chief Justice and a judge on his retirement, resignation or removal as provided in the paragraph 14 shall be entitled to the minimum pension equal to seventy per cent of the salary determined by the president from time to time payable to the Chief Justice or, as the case may be, a judge on the completion of five years service for pension as judge, and thereafter an extra pension at the rate of two percent of such salary for each subsequent completed year of service as the Chief Justice or, as the case may be, the judge, including his service, if any, in the service of Pakistan maximum pension not exceeding eighty percent of the salary. A combined reading of paragraphs 14 and 15 leaves no ambiguity in understanding that entitlement to pension for a judge of a High Court actualizes or materializes or such right becomes available to him only after completion of five years in service. Five years service is the minimum benchmark, a mandatory requirement, a judge has to cross over and fulfill to lay claim on pension. In fortification of this view, para 3 to Fifth Schedule enacted in terms of Article 205 of the Constitution can be cited that too unambiguously prescribes yardstick of 5 years for pension to become payable to a judge of High Court, when it sets down that that the pension payable per mensem to a judge of a high court who retires after having put in not less than five years service as such judge shall not be less or more than the amount specified in the table below, depending on the length of his service as judge and total service, if any, in the service of Pakistan.

12. Notwithstanding, in order to rebut the said proposition, learned counsel for the petitioner relied upon the case of Accountant General Sindh and others Vs. Ahmed Ali Qureshi and others (PLD 2008 SC 522). In this case, the Honorable Supreme Court while discussing the issue of pension in para 14 has observed that notwithstanding the fact that right of pension of a judge of High Court, who retires after having put in less than five years of service as such judge, has not been recognized in P.O.No.3 of 1997, such judge in terms of Article 205 read with Fifth Schedule of the Constitution, is entitled to the pension and pensionary benefits. The wisdom behind the classification of judges in paragraphs 2 and 3 of Fifth Schedule was for the purpose of determination of pension, admissible to the two categories of judges with reference to the length of service and consequently these two paragraphs are not to be read conjunctively rather both having separated connotations and implications have to be read independently and given effect accordingly. The ceiling in the P.O.No.3 of 1997 on the right of pension of judge who put less than five years of service as such judge in terms of paragraph 3 of the Fifth Schedule is in conflict to the provision of Article 205 of the constitution read with paragraphs 2 of the Fifth Schedule.

13. Wrapping up discussion on the issue, it has been held in para 22 that the right of pension and retirement benefits admissible to a retired judge under Article 205 of the Constitution would invariably be available to all retired judges in terms of paragraph 2 of Fifth Schedule notwithstanding the date of retirement and length of service and consequently, the distinction created with reference to

the date of retirement under P.O.No.8 of 2007 promulgated on 14.12.2007 or on the basis of length of service as provided in paragraph 3 of the Fifth Schedule read with P.O.No.3 of 1997, would not distinguish the case inter se retired judges of High Court vis-a- vis their right of pension admissible under Article 205 read with Fifth Schedule. In view of the above, the mandate of the Constitution, is that all those judges who retired as judges of the High Court irrespective of their length of service and date of retirement, would be entitled to the pension and pensionary benefits without any distinction.

14. This pronouncement in fact paved the way for all the judges of High Court to receive pension and pensionary benefits regardless of their date of retirement and length of service. The permutation in compliance continued till the year 2013, and the judges of High Court irrespective of their length of service received pension and other relevant benefits accordingly, when a larger bench of the Supreme Court comprising five honorable judges took stock of such situation while hearing C.P No.127 of 2012, H.R.C. No.40927-S of 2012 and other matters (**PLD 2013 SC 829**) and decided the same. The judgment rendered in the case of Accountant General Sindh and others Vs. Ahmed Ali Qureshi (supra) was declared as *per incuriam* without jurisdiction and nullity in the eyes of law, as if it never existed at all. It is held in para 72 of the judgment that reverting to the language of paragraph 3 of Fifth Schedule to article 205 of the Constitution of 1973, we find that in its original text, paragraph 3 had different phraseology, but it was subsequently amended in the present form by 12th amendment Act of 1999. However, in both the situations,

right to pension of a retired High Court judge was made conditional to not less than five years actual service, while a further table was provided for increase in the percentage of pension depending upon the length of his service as judge of the High Court up-to the maximum of 80 percent of his salary. Thus, the two paragraphs 2 and 3 of Fifth Schedule to Article 205 of the Constitution either read separately / conjunctively or disjunctively, do not alter/change in any manner the requirement of minimum five years length of actual service for every judge of High Court as one of the basic condition to earn the right to pension.

15. In para No.82, it has been concluded that right to pension of every honorable retired judge of the High Court in the country is to be determined strictly in line with applicable Article 205, its Fifth Schedule read with applicable P.O.No.9 of 1970 or P.O.No.3 of 1997. Nonetheless, for better understanding, the Apex Court has even attempted to divulge into the question of condition of minimum length of service for honorable retired judges of High Court as one of the basic requirement to earn the right to pension. And has elaborated, for such purpose, that we have overseen some relevant constitutional and statutory provisions in force on this subject in the neighboring countries, India, Bangladesh, and Sri Lanka, which are in substance *pari materia* to ours and noticed that in each of these countries without any exception there is requirement of length of service of minimum five years or more for acquiring such right as retired judge of the High Court, while in some other counties it is stretched up-to to/12 year, and this long standing convention, having the force of law, is being

religiously adhered to. The conclusion drawn is that right to pension is neither absolute nor unqualified. Pension is not a bounty for the State/employer to the servant/employee, but it is tailored on the premise and the resolution that the employee serves his employer in the days of his ability and capacity and during the former's debility, the latter compensates him for the services so rendered. The right to pension has to be earned and for the attainment of which the condition of length of service is most relevant and purposive. A judge *per se* on the basis of his appointment shall not become entitled to the pension without earning the said right by meeting the minimum qualification and by fulfilling all the requirements stipulated by the legal instruments in force at the relevant point of time.

16. It is also expounded that right to pension was subject to, dependent upon, and circumscribed by the condition of determination; and when the said determination has laid down certain qualifications and requirements for conferment and for acquiring such rights, the right shall only be created as in mandated by law and conditions laid down therein are first satisfied. There has not been a single instance in the subcontinent that a retired judge who has not completed the requisite term of service would ask for or was granted the pension, which thus had developed into a convention and this was also the contemporary understanding of the law, this is why the legal illuminations of their time who had lesser term of service than required never pressed for pension. At another point, it has been stressed that all provisions of the Orders reproduced above show that a judge shall have a right to pension only if he has put in the prescribed

qualifying service. Mere appointment as a judge will not entitle him to pension. Many instruments regulating the entitlement of judges of the High Court to privileges and allowances and rights in respect of leave of absence and pension like Order II of 1993 and IX of 1970 have been enforced but none of them entitles them to rights to pension if they have put in less than five years of service. It, thus, clinches the matter once and for all and leaves no doubt that rights of the judges to pension who have put less than five years of service also stand determined.

17. After seeking guidance from above authoritative judgment on the point, no ambiguity or opaqueness is left in our mind, and nothing can be pressed in fact in this regard, that a judge of High Court who has not rendered five years service as such judge is not entitled to pension. Nonetheless, learned counsel for the petitioner was not ready to cede the ground and went on to insist upon, in support of his case, a judgment of the learned Lahore High Court in W.P. No.105298 of 2017 and the fact that it was upheld by the Honorable Supreme Court in Civil Appeal No. 140-L to 142-L/2018o vide judgment dated 27.03.2019. We have perused both the respective judgments respectfully and humbly note down the facts distinguishing the same from the case in hand: (i) the petition before the learned Lahore High Court was filed by the retired but permanent judges of High Court, the petitioner has never held, as per judgment of the Apex Court (PLD 209 SC 879), office of a High Court judge, nor he was appointed as the Chairman FST on the basis of such capacity or consideration; (ii) it was disposed of when a Deputy Attorney General placed on record a statement in writing by the Secretary Law and

Justice, Government of Pakistan giving details of the pension package, reproduced thereunder, to the retired judges of the court, here Asst. Attorney General has opposed the petitioner tooth and nail; (iii) it is an order passed with virtual consent of the parties without enunciating any law point or setting down any principles of law, let alone discussing Article 205 and Fifth Schedule thereunder dealing with pension of judges of a High Court and its concomitant ramifications. Before the Honorable Supreme Court, where Civil Appeal was filed against the above order by the Federal Government, learned Attorney General made a statement to stand by the statement made before the learned Lahore High Court, as referred above, and learned Advocate General, Punjab displayed his inability to make immediate payments to the petitioners and then on the suggestion of learned Attorney General to make good of arrears in three years, the appeals were disposed of with consent. The facts and circumstances rendering learned Lahore High Court's order dissimilar to the facts of the present case are applicable *mutates mutandis* in respect of the this order of the Apex Court. And therefore palpably both the order are of no help to the petitioner.

18. As far as learned counsel's contention that petitioner's holding of, for a period spanning almost twenty years, numerous other official positions like Addl. Advocate General, professor law, S.M. Law College Karachi, Dean Faculty of Law, Karachi University et al has made him worthy of pension is concerned, in our humble view, it is equally unsustainable in law. All the positions enjoyed by the petitioner have been, at the most, contractual/tenurial in nature and

governed, undisputedly, by separate considerations and rules. These contractual offices held by the petitioner, even if considered aggregately (which cannot be done under a law) or separately, utterly independent of office of the Chairman FST, do not make him entitled to the right to pension under any law, nor any law in this respect was quoted by learned counsel. The office of the Chairman FST, term-based as it is and contractual in nature plus, does not confer any right to pension upon the petitioner either. The case of Honorable retired judges of the Federal Shariat Court et al have no imaginable parallel with the case of the petitioner to bring him at par with them. All the Honorable judges were permanent judges of respective High Courts and received pensions in that capacity, whereas the petitioner has never served against any permanent or regular job, not to mention his lack of qualification: not completing minimum qualifying service of 5 years to claim pension. This position being unassailable in law, we do not see any merit in the case of petitioner and dismiss it accordingly.

19. Foregoing are the reasons of our short order dated 18.01.2023 dismissing the petition in hand.

JUDGE

JUDGE