IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

C.P. No. D- 789 of 2024
[Dalan Khan Shar v. Federation of Pakistan & others]

Present:
Mr. Justice Khadim Hussain Tunio
Mr. Justice Yousuf Ali Sayeed

Petitioner	:	through Mr. Ishrat Ali Lohar, Advocate
Respondents	:	Nemo
Date of hearing	:	22.05.2024

ORDER

YOUSUF ALI SAYEED, J.- The Petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution, arraying the Federation of Pakistan and various functionaries of the Hyderabad Electric Supply Company ("**HESCO**") as respondents, while seeking to impugn an Office Order, bearing No. CEO/HESCO/M(HRM)/ A2/(LOEC-6557)/C-/2000-20, dated 01.03.2024, issued by its Chief Executive Officer.

2. A perusal of the Office Order reflects that it relates to departmental proceedings undertaken by HESCO against the Petitioner in the matter of his employment, with his Appeal against the major penalty of "Compulsory Retirement from Service" imposed by the General Manager (C&CS) HESCO Hyderabad vide office order No. C-11797-11811 dated 28.11.2023 being decided so as to allow his reinstatement with the penalty being converted to that of "Reduction to lower stage in present time scale by five steps for a period of five years without future effect".

3. In view of the nature of the matter, we had posed a query to learned counsel for the Petitioner on the first date that it had come up in Court as to whether HESCO's service rules were statutory in nature, to which the answer forthcoming was in the negative. That being so we had put counsel on notice to satisfy us as to the maintainability of the Petition in view of the Judgment rendered by the Supreme Court on 21.12.2021 in the case reported as Pakistan Electric Power Company v. Syed Salahuddin and others 2022 SCMR 991.

4. As it transpires, that case entailed an appeal by leave of the Court arising out of a Judgment of the High Court of Baluchistan, where a Constitutional Petition relating to a service matter had been entertained and allowed. The cited Judgment reflects that one of the main grounds urged before the Supreme Court was that the respondents (i.e. the petitioners before the High Court) were admittedly employees of Quetta Electric Supply Company ("**QESCO**") which was a separate and distinct corporate legal entity and did not have any statutory rules, hence an alleged violation of such rules or terms and conditions of service was not justiciable through the constitutional jurisdiction of the High Court. Leave had thus been granted in the matter in the following terms:

> *"The learned ASC for the petitioner-PEPCO inter alia contends that there are no statutory rules of service governing the employees of the petitioner-PEPCO and the High Court has erred in law in observing that the employees of the petitioner are governed by the statutory rules of service and thereby allowed the constitutional petition filed by the Respondents.*
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> *2. Having heard the learned counsel and going through the impugned judgment, we are inclined to grant leave to appeal in this case to consider inter alia the reasons recorded in our last order dated 24.05.2021 as well as the submissions made before us today. Appeal stage paper books be prepared on the available record. However, the parties are at liberty to file additional documents, if any within a period of one month. As the matter relates to service, the Office is directed to fix the same for hearing in Court expeditiously, preferably after three months.*

> *3. Since the impugned judgment has been rendered by a Division Bench of the High Court, the appeal arising out of the instant petition be fixed before a three member Bench of this Court."*

5. Upon consideration, the Appeal was allowed by the Supreme Court with the Judgment of the High Court being found to be unstainable, and set aside accordingly. The relevant excerpt of the Judgment, setting out the reasons that prevailed as well as the *ratio* of the case, reads thus:

> "10. There is yet another aspect of the matter. A specific objection regarding jurisdiction of the High Court to entertain the petition was raised which was dealt with in the following manner:
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> > *"The petitioners being employees of QESCO/PEPCO are governed by statutory rules and as such the constitutional petition filed by the Respondents under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 is maintainable."*
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> We find that in the first place, there was no ground to hold that the Respondents were governed by the statutory rules. Admittedly, the Respondents by their own choice had joined QESCO which is a distinct and separate legal entity having been incorporated in the erstwhile Companies Ordinance, 1984 and has its own Board of Directors. Just by reason of the fact that QESCO had adopted existing rules of WAPDA for its internal use does not make such rules statutory in the context of QESCO. It was clearly and categorically held by this Court in Pakistan Defence Officers Housing Authority (ibid), Pakistan Telecommunication Company Ltd. through its Chairman v. Iqbal Nasir and others (PLD 2011 SC 132) as well as Pakistan International Airlines Corporation and others v. Tanveer ur Rehman and others (PLD 2010 SC 676) that where conditions of service of employees of a statutory body are not regulated by rules/regulations framed under the Statute but only by rules or instructions issued for its internal use, any violation thereof could not normally be enforced through constitutional jurisdiction and they would be governed by the principle of "master and servant". The learned High Court appears to have not been assisted properly in the matter and therefore omitted to notice the said principle of law laid down in the aforenoted case and reiterated repeatedly in a number of subsequent judgments of this Court.

> 11. Further, while assuming jurisdiction in the matter, the learned High Court omitted to appreciate that in case of an employee of a Corporation where protection cannot be sought under any statutory instrument or enactment, the relationship between the employer and the employee is governed by the principle of "master and servant" and in such case the constitutional jurisdiction of the High Court under Article 199 of the Constitution cannot be invoked. We also find that although a judgment of this Court dated 07.03.2019 in the case of employees of IESCO was brought to the notice of the High Court in which a similar finding was recorded regarding non-availability of constitutional jurisdiction to the employees of IESCO, the Court appears to have misinterpreted and misconstrued the ratio of the same and therefore arrived at a conclusion which appears to be contrary to the settled law on the subject. We also notice that a judgment of a Division Bench of the same High Court escaped the notice of the High Court of Balochistan whereby it had clearly held that employees of QESCO could not invoke its constitutional jurisdiction. Further, a judgment of this Court rendered in the case of Chief Executive Officer PESCO, Peshawar (ibid) examined the question of jurisdiction of the High Court under Article 199 of the Constitution in matters relating to employees of PEPCO which is identically placed insofar as it was also incorporated under the Companies Ordinance, 1984 pursuant to bifurcation of various Wings of WAPDA into separate corporate entities and it came to the conclusion that since PEPCO did not have statutory rules, the High Court lacked jurisdiction to interfere in matters involving employment disputes between PEPCO and its employees. The ratio of the said judgment was clearly attracted to the facts and circumstances of this case, which appears to have escaped the notice of the High Court. We are therefore in no manner of doubt that in view of the fact that QESCO does not have statutory rules governing the terms and conditions of service of its employees, the relationship between the Appellant-PEPCO and Respondents Nos.1 and 2 was governed by the principle of "master and servant" and the Respondents could not have invoked the constitutional jurisdictional of the High Court for redress of their grievances.

6. Applying the principle laid down by the Supreme Court, a learned Division Bench of this Court seized of a Constitutional Petition No. D-1638 of 2021 filed at Sukkur by an employee of the Sukkur Electric Power Company (“**SEPCO**”) was pleased to hold on 23.02.2022 that no writ petition would lie against SEPCO at the behest of an employee in respect of the terms and conditions of service. The relevant excerpt of that Judgment states that:

> "In view of hereinabove findings of the Hon'ble Supreme Court on identical facts, wherein it has been held that a constitutional petition of an employee is not maintainable against QESCO as it has no statutory rules of service and the relationship is to be governed by the principle of master and servant, whereas, the present Respondent (SEPCO) has been incorporated in a similar manner and has also merely adopted the WAPDA Service Rules for internal purpose and is also performing the same functions as QESCO, therefore, no writ petition is maintainable against SEPCO filed by its employees in respect of their terms and conditions of service."

7. Be that as it may, in an endeavor to demonstrate the maintainability of the Petition, learned counsel for the Petitioner placed reliance on two pronouncements emanating from the Supreme Court, one being the Judgment in the matter reported as Pakistan Defence Officers Housing Authority v. Lt. Col. Syed Jawad Ahmed 2013 SCMR 1707, and the other being an as yet unreported Order passed in Civil Petition No. 65-K of 2020 (HESCO v. Arif Manzoor and others). Additionally, he also cited various judgments/orders in Constitutional Petitions that had been entertained at this Circuit, being the:

(i) Order dated 05.12.2019 in CP No. D-1589 of 2013 and connected petitions (Kalimullah v. HESCO & others);

(ii) Order dated 15.01.2020 in CP No. D-689 of 2016 (Arif Manzoor v. Federation of Pakistan & others);

(iii) Order dated 27.01.2021 in CP No. D-2214 of 2016 (Nayyar Sultana v. Federation of Pakistan & others);

(iv) Judgment dated 17.11.2022 in CP No. D-1630 of 2022 (Ms. Hina Talpur v. Federation of Pakistan & others); and

(v) Judgment dated 19.03.2024 in CP No. D-1596 of 2016 (Abdul Ghani Patoli v. Federation of Pakistan & others).

8. Having perused and considered the judgments cited by learned counsel, we are of the view that the same are of no avail to the Petitioner inasmuch as the judgment of the Supreme Court in the Case of Pakistan Defence Officers Housing Authority (Supra) relates to statutory bodies as opposed to a company and was even otherwise considered in the subsequent case of PEPCO regarding the employees of QESCO, which is directly relatable to the matter at hand. As for the unreported Judgment of the Supreme Court in Civil Petition No. 65-K of 2020, it is pertinent to note that the same stems from the appeal filed against the Judgment of this Court dated 15.01.2020 in CP No. D-689 of 2016 (Arif Manzoor supra), but the question of maintainability was neither raised or discussed before either forum.

9. Turning then to the other judgments emanating from this Court, it falls to be considered that in CP No. D-2214 of 2016 (Nayyar Sultana supra) there was similarly no discussion or decision vis-à-vis maintainability, whereas the judgment in CP No. D-1589 of 2013 and connected petitions (Kalimullah supra) is clearly distinguishable on the facts as it pertained to a completely different subject, with the question of maintainability relating to whether the writ jurisdiction could be invoked in relation to maters falling within the domain of the Electric Inspector under Section 26(6) of the Electricity Act, 1910. As for the Judgments in CP No. D-1630 of 2022 (Hina Talpur supra) and CP No. D-1596 of 2016 (Abdul Ghani Patoli supra), neither takes into account the Judgment of the Supreme Court in PEPCO's case or the Judgment of the learned Division Bench of this Court in SEPCO's case, both of which are binding in effect, suggesting that the Court was not properly assisted and that both decisions were thus made *per incurium*.

10. That principle was expounded by a three-member Bench of this Court in the case of Abdul Wahab and another v. The State 2020 PCrLJ 556, as follows:

> "38. What is meant by giving a decision per incurium is giving a decision when a case or a statute has not been brought to the attention of the court and they have given the decision in ignorance or forgetfulness of the existence of that case or that statute or forgetfulness of some inconsistent statutory provision or of some authority binding on the court, so that in such cases some part of the decision or some step in the reasoning on which it was based on that account is demonstrably wrong. See Nirmal Jeet Kaur's case (2004 SCC 558 AT 565 para 21), 1131], Cassell and Co Ltd. 's case (LR 1972 AC 1027 at 1107, 1113, 1131, Watson's case (AELR 1947 (2) 193 at 196), Morelle Ltd.'s case (LR 1955 QB 379 at 380), Elmer Ltd.'s case (Weekly Law Reports 1988 (3) 867 at 875 and 878) Bristol Aeroplane Co.'s case (AELR 1944 (2) 293 at page 294) and Morelle Ltd.'s case (AELR 1955 (1) 708).
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> 39. The ratio of the aforesaid judgments is that once the Court has come to the conclusion that the judgment was delivered per-incuriam then the Court is not bound to follow such decision on the well known principle that the judgment itself is without jurisdiction and per-incuriam therefore, it deserves to be over-ruled at the earliest opportunity. In such situation, it is the duty and obligation of the apex Court to rectify it. The law has to be developed gradually by the interpretation of the Constitution then it will effect the whole nation, therefore, this Court, as mentioned above, is bound to review such judgments to put the nation on the right path as it is the duty and obligation of the Court in view of Articles 4, 5(2) read with Articles 189 and 190 of the Constitution".

11. The meaning, concept and connotation of the term had earlier been elaborated by a learned Division Bench of this Court whilst emphasizing the importance of *stare decisis* and effect of Article 189 of the Constitution in the case reported as S. Nasim Ahmed Shah and 115 others v. State Bank of Pakistan through Governor and another 2017 PTD 2029. Speaking for the Court, Muhammad Ali Mazhar, J, observed that:

> "22. The binding effect of the judgment of honourable Supreme Court is well known. Under Article 189 of the Constitution, any decision of the Supreme Court to the extent that it decides question of law or enunciates a principle of law is binding on all other courts in Pakistan. In the case of Justice Khurshid Anwar

Bhinder v. Federation of Pakistan, reported in PLD 2010 SC 483, it was held that "where the Supreme Court deliberately and with the intention of settling the law, pronounces upon a question, such pronouncement is the law declared by the Supreme Court within the meaning of this Article and is binding on all courts in Pakistan. It cannot be treated as mere obiter dictum. Even obiter dictum of the Supreme Court, due to high place which the court holds in the hierarchy of courts in the country, enjoy a highly respected position as if it contains a definite expression of the Court's view on a legal principle or the meaning of law.

23. What Articles 189 and 201 of the Constitution do is to recognise and adopt the doctrine of precedent; they also seem to have accorded recognition to "one of the existing realities of life" namely that Judges make and change the law. Under Articles 189 and 201 of the Constitution, only that decision is binding which (a) decides a question of law or (b) is based upon a principle of law, or (c) enunciates a principle of law. In the case of Union of India v. Raghubir Singh (1989) 2 SCC 754 = AIR 1989 SC 1933, the court held that "The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a court.

24. The doctrine of "Stare decisis" means to abide by, or to adhere to, decided cases. It is a doctrine under which a deliberate or solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent, in the same court, or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy. This doctrine has been given constitutional recognition in Articles 189 and 201 of the Constitution. Cooley in his treatise "Constitutional Limitations", while commenting on this doctrine quotes Chancellor Kent:

> "A solemn decision upon a point of law arising in any given case becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the Judges are bound to follow that decision so long as it stands unrevised, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favour of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would, therefore, be extremely inconvenient to the public if precedents were not duly regarded and implicitly followed."

In that very matter, his Lordship then went on to observe that:

> "25. So far as the plea of per incuriam articulated by the respondent's counsel that while taking cognizance, earlier judgment on the point of deduction made on account of income tax was not taken into consideration, we would like to take the aid and assistance from Black's Law Dictionary, Ninth Edition to get the drift of true connotation of the expression and terminology "per incuriam":--
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> > "There is at least one exception to the rule of stare decisis. I refer to judgments rendered per incuriam. A judgment per incuriam is one which has been rendered inadvertently. Two examples come to mind: first, where the judge has forgotten to take account of a previous decision to which the doctrine of stare decisis applies. For all the care with which attorneys and judges may comb the case law, errare humanum est, and sometimes a judgment which clarifies a point to be settled is somehow not indexed, and is forgotten. It is in cases such as these that a judgment rendered in contradiction to a previous judgment that should have been considered binding, and in ignorance of that judgment, with no mention of it, must be deemed rendered per incuriam; thus, it has no authority . The same applies to judgments rendered in ignorance of legislation of which they should have taken account. For a judgment to be deemed per incuriam, that judgment must show that the legislation was not invoked." Louis-Philippe Pigeon, Drafting and interpreting legislation 60 (1988). "As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concern, so that in such cases some features of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can probably be held to have been decided per incuriam, must in our judgment, consistently with the stare decisis rule which is an essential part of our law, be of the rarest occurrence." Rupert Cross & J.W. Harris, Precedent in English Law 149 (4th ed. 1991).

12. In view of the foregoing it is manifest that the Petition is not maintainable, hence the same is dismissed *in limine* along with the pending miscellaneous applications.

JUDGE

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