

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE ANWAR ZAHEER JAMALI, CJ
MR. JUSTICE SH. AZMAT SAEED

CIVIL APPEALS NOS.06 AND 724 OF 2016

(On appeal from the judgment of the Federal Service Tribunal, Islamabad dated 27.4.2015 passed in Appeal No.842(R)CS of 2009 and dated 10.6.2015 passed in Appeal No.799(R)CS of 2014)

Federation of Pakistan through
Secretary, Ministry of Foreign Affairs, ... Appellant (s)
Islamabad and others (in both cases)

Versus

Ali Naseem (in CA No.06/2016)

Abdul Ghafoor Malik and another (in CA No.724/2016)

... Respondent (s)

For the Petitioner(s) : Mr. Nayyab Hassan Gardezi,
Standing Counsel
Raja Abdul Ghafoor, AOR
Mr. Fayyaz Ahmed, AD (Legal)

For the Respondents : Hafiz S.A. Rehman, Sr. ASC
(in CA No.06/2016)

Mr. Mahmood A. Sheikh, AOR
(in CA No.724/2016)

Date of Hearing : 11.07.2016

JUDGMENT

SH. AZMAT SAEED, J.- Through this judgment, it is proposed to decide Civil Appeals No.06 and 724 of 2016, involving common questions of law and facts.

2. The brief facts necessary for adjudication of the *lis* at hand are that the Respondents in both the instant Civil Appeals were variously employed locally in the Pakistani Missions Abroad, whose services were terminated. After rejection of the Departmental Appeals filed by the present Respondents, both separately invoked the jurisdiction of the learned Federal Service Tribunal, Islamabad (FST), wherein their respective appeals were accepted by way of the impugned judgments. The Appellants unsuccessfully had taken up the plea before the learned Tribunal that the Respondents were not Civil Servants; hence, they were not entitled under the law to file the Appeals before the learned FST.

3. In Civil Appeal No.6 of 2016, Respondent Ali Naseem was apparently employed on 12.8.1991 by the Embassy of Pakistan in Paris, France as a Stenotypist and vide letter dated 25.09.2000, his services were terminated with

effect from the said date. The said Respondent filed a Departmental Appeal, which was eventually rejected on 16.07.2009, which order was challenged in Appeal before the learned FST. The learned FST accepted the Appeal vide judgment impugned dated 27.04.2015. Aggrieved, the present Appellants filed Civil Petition for Leave to Appeal No.1865 of 2015 before this Court, wherein Leave to Appeal was granted vide Order dated 05.01.2016. Hence, this Civil Appeal.

4. Abdul Ghafoor Malik Respondent in Civil Appeal No.724 of 2016, was appointed on temporary basis with effect from 23.01.1990 as Local Messenger in the Welfare Wing, Consulate General of Pakistan, Jeddah, Saudi Arabia. Such employment was extended periodically. Having been found guilty of misconduct, inefficiency as well as causing "suffering to a Pakistani National", the services of Respondent Abdul Ghafoor Malik were terminated vide Office Order dated 23.11.2014 issued by the Consulate General of Pakistan, Jeddah, Saudi Arabia. The Respondent Abdul Ghafoor Malik filed a Departmental Appeal, which was rejected on 30.11.2014. Aggrieved, the said Respondent filed an Appeal before the learned FST, which has been allowed vide impugned judgment dated 10.6.2015. The present Appellant

challenged the impugned Judgment by filing Civil Petition for Leave to Appeal No.2560 of 2015, wherein Leave to Appeal was granted vide Order dated 04.03.2016.

5. The learned Standing Counsel contended on behalf of the Appellants that the Respondents in both the Civil Appeals were employed locally abroad in Pakistani Missions by the Heads of the said Missions on temporary basis through Contracts of Employment subject to the laws of the host countries specifically catering for termination upon notice. Such appointments are covered by the Financial Management at Missions Abroad Volume-II, Chapter - IX Locally Recruited Staff and Clause 9.1 thereof refers to Contracts of Employment of such Staff, whose services can be terminated upon notice. Thus, the nature of the employment of the Respondents was squarely covered under Section 2(1)(b)(ii) of the Civil Servants Act, 1973, whereby a person employed on contract is excluded from the definition of "Civil Servant", hence in view thereof, the Respondents were not Civil Servants for the purposes of Civil Servants Act, 1973 and therefore, they were neither Civil Servants in terms of Section 2(a) of the Service Tribunals Act, 1973 nor could invoke the jurisdiction of the learned FST, hence, the impugned judgments are without jurisdiction and

liable to be set aside. The learned Standing Counsel drew our attention to some judgments of the learned FST, whereby the persons locally employed by Pakistani Missions Abroad have been held not to be Civil Servants entitled to invoke the jurisdiction of the learned FST.

6. The learned counsel for the Respondents controverted the contentions raised on behalf of the Appellants by contending that the Respondents were appointed against sanctioned posts in connection with the affairs of the Federation i.e. Ministry of Foreign Affairs. The Respondents were appointed for an indefinite period, who had served for a considerable period of time, hence, were Civil Servants, whose services could not be terminated without following the prescribed procedure. In this behalf, he referred to Sl. No.2 (Termination of Services of Temporary Government Servants) of Estacode (Civil Establishment Code) (Edition 2007 Vol-I). Hence, it was contended, the Respondents were clothed with the legal attribute necessary for invoking the jurisdiction of the learned FST for redressal of their grievances. The learned counsel also made reference to some judgments of the learned FST, whereby, according to him, persons similarly

employed were treated as Civil Servants and held entitled to invoke the jurisdiction of the learned FST.

7. Heard and the available record perused.

8. Section 4 of the Service Tribunals Act, 1973 provides that any Civil Servant aggrieved of an order may file an appeal before the learned FST. Section 2(a) of the said Act provides that a Civil Servant is a person who is or has been a Civil Servant within the meaning of Section 2(1)(b) of the Civil Servants Act, 1973. The term of "Civil Servant" has been defined in Section (2)(1)(b) of the Civil Servants Act, 1973, in the following terms:-

"2. Definitions.—(1) In this Act, unless there is anything repugnant in the subject or context,--

(b) "Civil Servant" means a person who is a member of an All-Pakistan Service or of a civil service of the Federation, or who holds a civil post in connection with the affairs of the Federation, including any such post connected with defence, but does not include -

(i) a person who is on deputation to the Federation from any Province or other authority;

(ii) a person who is employed on contract, or on work-charged basis or who is paid from contingencies; or

(iii) a person who is a "worker" or "workman" as defined in the Factories Act, 1934 (XXV of 1934),

or the Workmen's Compensation Act, 1923 (VIII of 1923);

9. A perusal of the aforesaid provisions makes it clear and obvious that a person holding a civil post in connection with the affairs of the Federation would be a Civil Servant. However, exceptions thereto have been created so as to exclude, *inter alia*, a person, who is employed on contract as is apparent from Section 2(1)(b)(ii) of the Civil Servants Act, 1973 reproduced hereinabove.

10. The Respondents in the instant appeals belonged to a specific category of employees of the Federation engaged and appointed locally in the Pakistani Missions Abroad. The appointment of this category of employees is not effected in accordance with the standardize procedure provided for appointment of Civil Servants under the Civil Servants Act, 1973 and the Rules framed thereunder, more particularly, the Civil Servants (Appointment, Promotion & Transfer) Rules, 1973. They were not appointed through the Public Service Commission or the Selection Boards mentioned therein nor thereafter transferred to the Pakistani Diplomatic Missions. Such appointees from a separate category of employees recruited locally by the Heads of the Missions functioning

outside the Pakistan. The authority of such Heads of Missions can be traced to the Financial Management at Missions Abroad Chapter IX page 131, more particularly, clause 9.1 thereof, which is reproduced hereunder for ease of reference:-

"Financial Management at Missions Abroad
Chapter – IX, Page 131

"9.1 Tenure of Service

9.1.1 Heads of Missions are empowered to recruit staff locally on temporary basis against sanctioned posts. Such staff is not eligible for permanent employment. Their temporary employment should be in accordance with the prevailing practice or law of the country concerned. If there is no such law governing temporary employment the service of local recruits will be terminated on a fortnight's notice on either side. The services of such local recruits can be terminated by the Head of Mission in accordance with the terms of the service contracts signed between the Mission and the employee. [MOFA No.M(11)-7/31/51, dated 18.08.1952 and No.Rules-1/6/73, dated 20.06.1973]"

11. A perusal of the aforesaid instructions reveals that the recruitment of local staff by the Heads of Missions is only to be effected through Employment Contracts. The Heads of Missions do not appear to be authorized to recruit any local staff otherwise than on contract.

12. The learned counsel for the Respondents was unable to show any specific provision for recruitment of local staff for Missions Abroad permitting recruitment otherwise

through a contract. However, the learned counsel for the Respondents made a Reference to the Estacode Civil Establishment Code (Edition 2007) entry titled Termination of Services of Temporary Government Servants, which incidentally was relied upon by the learned FST in one of the impugned judgment. The same is reproduced herein below for ease of reference:-

Estacode Civil Establishment Code (Edition 2007) Volume I, Page 458

“Termination of Services of Temporary Government Servants

A Civil Servant is not necessarily in temporary employment merely because of a statement in the order of appointment that his appointment will be purely temporary and liable to termination at any time without any notice or reasons being assigned. No Civil Servant is a temporary employee as long as the employment is for an indefinite period or against a post which continues to exist for an indefinite period. It is extremely difficult to attribute to the legislature an intention to clothe the authority concerned with arbitrary powers of terminating the services of a Civil Servant in their discretion without assigning any reason. The courts have always been reluctant to interpret these provisions in a manner as would justify the externment of an employee without any justification.

2. Further, after the enactment of Civil Servants Act, 1973, the services of a Civil Servant can either be terminated under Section 11 of the Act or under Government Servants (E&D) Rules, 1973. It is not possible to spell out any power to terminate the services of an employee without notice and without assigning any reason from the provision of sub section (3) of Section 11 of Civil Servants Act, 1973, especially in the presence of the provisions of sub-section (1)

thereof regarding termination of service during the initial or extended period of probation. If an employee has passed through the period of probation to the satisfaction of the competent authority, he is no longer a temporary employee within the meanings of sub-section (3) if his employment is for an indefinite period or against a post which continues to exist for an indefinite period.

3. In the light of above advice of the Justice Division services of an employee can no more be terminated without notice and without assigning reason.

[Authority.- Extract from Estt. Division O.M. No.31/64-86-R-3 dated 20-4-1987]."

13. We are afraid that the aforesaid entry in the Estacode is of no real assistance to the point of view canvassed on behalf of the Respondents as the instructions presupposes that the Government Servant in question is a Civil Servant (and not a contract employee) and primarily, pertains to temporary employees and not to persons locally recruited by the Heads of Missions outside Pakistan. It reiterates the provisions of Civil Servants Act, 1973 whereunder, as has been noted above, persons employed on contract do not fall within the definition of Civil Servants.

14. Abdul Ghaffar Respondent in Civil Appeal No.724 of 2016 was employed through contract of employment for a fixed period, which was extended from time to time. The last of such documents of the Consulate General of Pakistan

Jeddah dated 01.1.2014 is available at page 30 of the paper-book. The relevant portion thereof is reproduced hereunder for ease of reference:

“Employment Contract

Mr. Abdul Ghafoor, a Pakistan national appointed as a local-based **Messenger** at this Consulate General on purely temporary / **contract basis** with effect from **23.01.1990**. His employment contract is hereby renewed for another year with effect from **1 January 2014 to 31 December 2014**. His appointment is governed under the following terms and conditions until further order:-

Pay & Allowances	He will draw basic pay at the rate of SR.3,000/- per month. In addition to the monthly salary, he will be entitled to a monthly conveyance allowance @ SR.400/- (fixed) + Local Compensatory Allowance @ 15% of basic pay .
Leave	He will be entitled to leave in accordance with the prevailing rules and regulations of this Mission, as may be amended from time to time.
Other Employment	He will not engage in any other work elsewhere for monetary or other considerations. He will not attend any school or college or other courses of instruction without prior permission of the Mission.
Discipline/ Conduct	During his employment in the Mission, he will

	be required to perform such duties as officially required. Refusal or reluctance to perform the duties assigned by the reporting officer or the Head of Chancery will constitute an act of misconduct which may lead to termination of services forthwith.
Non-Disclosure	He will not publish or broadcast anything pertaining to or having bearing on Pakistan's relations with other countries or anything relating to the Mission or to his work; nor divulge any information which comes to his attention in the Mission, during the tenure of his contract or even after he ceases to be in the employment of this Mission.
Termination	His services can be terminated by either side giving one month's notice in writing or one month's salary in lieu thereof. However, his services would be liable to terminate immediately, without any compensation and notice, if he is found guilty of misconduct, insubordination, absence from duty without prior approval, serious dereliction of duty, material breach of rules and regulations or taking undue advantage of his position.
Renewal	The renewal of contract will be decided on the basis of achieving a

	minimum score of "Good" in his annual Performance Evaluation Reports.
Gratuity	He will be entitled to end-of-service gratuity @ 15 days for each completed years of service, subject to maximum of Pak. Rs.175,000/- (or as amended by the Government of Pakistan from time to time) after completion of five years of service which is the minimum qualifying period of the entitlement to gratuity.

This issues with the approval of the Head of Mission."

15. Similar document with respect to other Respondent is also on record and its relevant portion reads as follows:-

"Reference to your application and your interview at this Embassy, you are appointed as Stenotypist with effect from 12-8-1991 on the following terms and conditions.

1. You will receive a pay of FF.4100/- per mensem and conveyance allowance.
2. You will be on probation for a period of three months. If your work is not found satisfactory during this period your services will be terminated forthwith without any notice. On completion of this period notice for the termination of services on either side will be fourteen days or salary in lieu thereof. In case of dismissal because of misdemeanour, no notice will be necessary.
3. No Social security will be paid by the Embassy but you will be entitled to a Health Insurance Policy paid by the

Embassy should you so desire and provided you do not already enjoy similar facilities under any other scheme.

4. You will earn leave at two and a half days per month which will be granted in proportion to the period of service rendered. Leave will not be carried over from one calendar year to another. You will be also entitled to seven days of casual leave plus thirteen days of medical leave each. The latter can be claimed only on medical grounds.

5. You will be considered for an increase after completion of one year service.

6. Other conditions of service will be according to the rules and regulations framed by the Embassy from time to time.

7. The appointment is being made subject to the conditions that you are free from any chronic, mental or physical disorder and that if such a condition came to light subsequently, your services are liable to be terminated without any notice.

8. You will be entitled to end of service gratuity as per rules framed by the Ministry of Foreign Affairs, Government of Pakistan."

16. A perusal of the aforesaid documents indicates that the same are inconsonance with the Financial Management at Missions Abroad reproduced hereinabove. The Respondents have been employed locally through a contract of employment, as envisaged therein and contained a termination clause as mentioned in the said instructions,

which is generally alien to the terms and conditions of service of Civil Servants regularly appointed.

17. An over view of the aforesaid leaves no manner of doubt that the Respondents may be holding a civil post in connection with the affairs of the Federation, but who were not employed on regular basis through the usual procedure as prescribed for the appointment of Civil Servants under the Civil Servants Act, 1973 and the Rules framed thereunder. They are appointed locally by the Heads of the Missions of Pakistan abroad purportedly in exercise of the powers conferred upon them by the Financial Management at Missions Abroad reproduced hereinabove. Such instructions only permit appointment of local staff on contract basis. The documents evidencing their appointments appear to be employment contracts. Thus, it is self evident that the Respondents were appointed on Contract basis. Hence, in view of Section 2(1)(b)(ii) of the Civil Servants Act, 1973, the Respondents were not Civil Servants, therefore, in view of Section 4 read with Section 2(1) of the Service Tribunals Act, 1973 were not entitled to invoke the jurisdiction of the learned FST, hence the impugned judgments dated 27.4.2015 and

10.6.2015 are without jurisdiction, therefore, not sustainable in law.

18. In view of the above, these appeals are liable to be allowed and the impugned Judgments dated 27.4.2015 and 10.6.2015 are also liable to be set aside.

19. These are the reasons of our short order of even date, which reads as follows:-

“We have heard arguments of Mr. Nayyab Hassan Gardezi, learned Standing Counsel on behalf of Federation and Hafiz S. A. Rehman, learned Sr. ASC for the Respondents. For the reasons to be recorded separately, both these appeals are allowed and impugned judgments are set aside.”

Chief Justice

Judge

Bench-V

Islamabad, the

11th July, 2016

‘NOT APPROVED FOR REPORTING’

Safdar