IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT: Mr. Justice Anwar Zaheer Jamali, CJ.
Mr. Justice Mian Saqib Nisar.
Mr. Justice Amir Hani Muslim.
Mr. Justice Iqbal Hameedur Rahman.
Mr. Justice Khilji Arif Hussain.

CIVIL APPEAL NO. 1072/2005.
(On appeal against the judgment dated 29.12.2003 passed by the Federal Service Tribunal, Islamabad, in Appeal No. 6(P)/CS/2003)

Chairman, Pakistan Railway, Government of Pakistan, Islamabad, etc. Appellant(s)

Versus

Shah Jehan Shah Respondent(s)

AND

CIVIL APPEAL NO. 686/2012.
(On appeal against the judgment dated 09.04.2012 passed by the KPK Service Tribunal, Peshawar, in Appeal No. 1539/2009)

Mst. Robina Shaheen Appellant(s)

Versus

Director Education (E &SE), KPK, Peshawar, etc. Respondent(s)

For the Appellant(s)
(in C. A. 1072/2005): Hafiz S. A. Rehman, Sr. ASC

(in C. A. 686/2012): Mr. Riaz Sherpao, ASC
Mir Adam Khan, AOR

For the Respondent(s)
(in C. A. 1072/2005): Mr. Abdur Rehman Siddiqui, ASC

For Respondent No. 5
(in C. A. 686/2012): Mr. Ijaz Anwar, ASC
Mr. M. S. Khattak, AOR

On behalf of KPK: Mr. Waqar Ahmed Khan, Addl. AG

Date of Hearing: 14.03.2016 and 15.03.2016

...

JUDGMENT

MIAN SAQIB NISAR, J:- These appeals, by leave of the Court, involve a similar question of law, hence are being disposed of together. The key question involved herein is whether persons who have rendered more than five years' service in a temporary establishment are entitled to the grant of pensionary benefits within the meaning of Article 371-A of the Civil Service Regulations *(CSR)*, and a re-visitation of the judgment of this Court reported as **Mir Ahmad Khan v. Secretary to Government and others (1997 SCMR 1477)**.

Civil Appeal No.1072/2005:

2. This appeal entails the facts in that the respondent was appointed as an Assistant Executive Engineer (BPS-17) in Pakistan Locomotive Factory Risalpur, Pakistan Railways on 11.7.1989 on an *ad hoc* basis whereafter his employment was converted into a contract employment for two years with effect from 1.7.2000. Subsequently, due to the respondent's failure to qualify for regularization before the Federal Public Service Commission, his services were terminated on 4.9.2002. He filed a departmental appeal on 8.10.2002 for the grant of pensionary benefits which *(departmental appeal)* was dismissed *vide* order dated 9.1.2003. Subsequently, the respondent approached the learned Federal Service Tribunal *(Tribunal)* challenging not the termination of his services or the conversion of services from *ad hoc* to contractual, rather only non-payment of pensionary benefits. The learned Tribunal while relying upon the case of **Mir Ahmad Khan** *(supra)* accepted the respondent's service appeal on 29.12.2003 through the impugned judgment holding as follows:-

> *"7. In view of the clear provision available in Civil Service Regulations as CSR 371-A(i) and in the light of the judgment of Honourable Supreme Court, reproduced below, there is no ambiguity that the Appellants who have put in more than 10 years of uninterrupted service were entitled to pension as per rules……*
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> *9. In view of the rulings of Honourable Supreme Court, we accept the appeals, set aside the impugned orders and direct the respondents to give pension to the Appellants as admissible to them under CSR 371-A (i). They are also entitled to receive their other legal dues like General Provident (GP) Fund etc. However, Respondents would be at liberty to detect any valid/legal dues outstanding against them from amount payable to them."*

Aggrieved of the above order, the appellants approached this Court, and leave was granted on 15.9.2005 in the following terms:-

> *"……Since interpretation of a number of provisions of Civil Service Regulations as to entitlement to pension of the government servants, which will have impact on a large number of cases, is involved leave is granted to consider whether temporary service rendered by the three respondents qualified for pension"?"*

Subsequently, this Court on 21.2.2012 was of the view that a larger bench should hear the matter for the following reason(s):-

> *"……The learned counsel for the appellant states that admittedly respondent is not a Civil Servant and he*

> *cannot claim pensionary benefits thus the judgment in the case of Mir Ahmed Khan (ibid) needs to be revisited in that if such wide interpretation is given to Regulations 371-A all contractual and temporary employees working in the Government Department would become entitled to pensionary benefits on termination of their employment, without being regularly employed. Since Mir Ahmed Khan's case was decided by three members' Bench, the matter be placed for consideration of the Hon'ble Chief Justice for placing the case before a larger Bench."*

3. The basic argument of the learned counsel for the appellants was that Article 371-A was an enabling, as opposed to charging provision, and that the use of the word "count" in Article 371-A of the CSR, as opposed to "eligible" or "qualify", does not mean that government servants who have rendered more than five years' continuous temporary service in a temporary establishment are entitled to the grant of pension, rather that such period of service would be only be counted/added for the purposes of calculating pension, which the government servant has to nevertheless qualify for by fulfilling the three conditions of qualification for pension as provided in Article 361 of the CSR. In support of his arguments, he made reference to various Articles of the CSR and Fundamental Rules *(FR)*. Learned counsel attempted to buttress his submissions by drawing an analogy with the judgment reported as **Federation of Pakistan and others v. Rais Khan (1993 SCMR 609)**, in which it was held that the period of *ad hoc* service followed by regular service in the same scale shall be counted towards length of service prescribed for promotion or move-over in the next higher scale, thus in the same manner, the period of temporary service

of more than five years would be counted towards pension if it was followed by regular service.

4. On the other hand learned counsel for the respondent argued that the word "count" can be used interchangeably with "qualify" or "eligible", and in fact "count" is more often than not the precise word used for the purposes of pensionary benefits. Further, the appellants' interpretation of Article 371-A of the CSR that the period of temporary service of more than five years would be counted towards pension if it was followed by regular service would only be true if the said article specifically provided "temporary followed by permanent service", but this is not the case. Further, the words "except as otherwise provided" in Article 368 of the CSR gives sanction to the grant of pensionary benefits to temporary employees. In support of his arguments, learned counsel placed reliance upon two office memorandums issued by the Ministry of Finance at Serial No.5 and 6 of Chapter V of Section VI of the Compendium of Pension Rules and Orders.

5. Heard. Before resolving the proposition at hand, we find it expedient to reproduce the relevant articles of the CSR which read as under:-

> *"361. Except as otherwise provided in these Regulations, the service of an officer does not qualify for pension unless it conforms to the following three conditions:-*
>
> *First.- The service must be under Government.*
>
> *Second.- The employment must be substantive and permanent.*
>
> *Third.- The service must be paid by Government.*

These three conditions are fully explained in the following Section.

368. Except otherwise provided in these Regulations services does not qualify unless the officer holds a substantive office on a permanent establishment.

369. An establishment, the duties of which are not continuous, but are limited to certain fixed periods in each year, is not a temporary establishment. Service in such an establishment, including the period during which the establishment is not employed, qualifies; but the concession of counting as service the period during which the establishment is not employed does not apply to an officer who was not on actual duty when the establishment was discharged, after completion of its work, or to an officer who was not on actual duty on the first day on which the establishment was again re-employed.

*370. An officer transferred from a temporary to a permanent appointment can **count** his service in the temporary office, it, though at first created experimentally or temporarily, it eventually becomes permanent.*

*371. An officer without a substantive appointment officiating in an office which is vacant, or the permanent incumbent of which does not draw any part of the pay or count service, may, if he is confirmed without interruption in this service, **count** his officiating service.*

*371-A. Notwithstanding anything contained in Articles 355(b), 361, 368, 370 and 371 of these Regulations, **temporary and officiating service, in***

> ***the case of Government servants*** *who retired on or after the 1st January, 1949, or* ***who joined service thereafter, shall count for pension according to the following rule****:-*
>
> *(i)* ***Government servants borne on temporary establishments who have rendered more than 5 years continuous temporary service shall count such service for the purpose of pension or gratuity excluding broken periods of temporary service, if any, rendered previously****, and*
>
> *(ii)* ***Continuous temporary and officiating service of less than five years immediately followed by confirmation shall also count for gratuity or pension, as the case may be****."*
>
> *(Emphasis supplied)*

We begin with the basics. The CSR pertains to salary, leave, pension and travelling allowance of those serving in the civil departments. Despite the nomenclature used, i.e. Civil Service Regulations, the application of the CSR is not restricted to "civil servants" as defined in the Civil Servants Act, 1973 *(Act)*, but also applies to "government servants". Interestingly, "government servants" has neither been specifically defined in the Act nor in the CSR. However, we are not treading those waters, rather leaving it for an appropriate case, as the applicability of the CSR to the respondent is not disputed in the instant matter. Although we would like to observe that whether or not a particular article of the CSR applies only to a civil servant or extends to the broader pool of government servants would ultimately depend on the particular wording of the article under consideration. The CSR

classifies pension into four basic types:- compensation pension, invalid pension, superannuation pension and retiring pension. In order to be able to claim pensionary benefits, one must fulfill the three conditions of qualifying service for pension stipulated in Article 361 of the CSR:- (i) the service must be under the Government; (ii) the employment must be substantive and permanent; and (iii) the service must be paid by the Government. An interpretation of the provisions pertaining to the second condition is relevant to the matter at hand. Article 368 of the CSR provides that the officer must hold a **substantive office** on a **permanent establishment**. Articles 370 and 371 of the CSR in essence allow for temporary and officiating services respectively, to be **counted** towards an officer's service **if such service** ***(temporary or officiating)*** **becomes permanent**.

6. Article 371-A(i) allows for governments servants who have rendered temporary service for more than five years at a temporary establishmentto **count** such service for the purposes of their pension *(or gratuity)*, but the temporary service must be continuous, and excludes broken periods of temporary service rendered previously. By way of example, Article 371-A(i) would attract to a government servant who rendered continuous temporary service at a temporary establishment for six years and was subsequently confirmed at the end of his temporary service, those six years would be **counted** towards his service for the purposes of pensionary benefits. The said article would also encompass the situation where a government servant rendered continuous temporary service at a temporary establishment for six years but was not confirmed at the end of his temporary service, rather two years after his temporary service ended he was taken back and

confirmed, then again those six years would be **counted** towards his service for the purposes of pensionary benefits, **excluding** the broken period of two years *(the interregnum)*. On the other hand, Article 371-A(ii) provides that government servants who have rendered temporary and officiating service for less than five years **immediately** followed by confirmation shall also count for gratuity or pension *(as the case may be)*, which *(service)* must also be continuous. By way of illustration, where a government servant rendered continuous temporary or officiating service for three years and was subsequently **immediately** confirmed, those three years would be **counted** towards his service for the purposes of pension. However, due to the inclusion of the word "immediately" and the omission of the words "excluding broken periods of temporary service" in clause (ii) of the Article 371-A, in a situation where a government servant rendered continuous temporary or officiating service for three years but was not confirmed at the end of his temporary service, rather two years after his temporary service ended he was taken back and subsequently confirmed, then those three years would **not be counted** towards his pensionary benefits. However, it is important to note that Article 371-A presupposes that such a government servant, whether falling under clause (i) or (ii), is otherwise entitled to pension *(or gratuity, as the case may be)*. In other words, Article 371-A cannot be used as a tool to bypass the conditions for qualifying service of pensionary benefits, and such government servant has to fulfill the minimum number of years for grant of pension. This is due to the use of the word "count" as opposed to "qualify" or "eligible", as rightly argued by the learned counsel for the appellant. As per the settled rules of interpretation, when a word has not been defined in the

statute, the ordinary dictionary meaning is to be looked at. Chambers 21st Dictionary defines "count" as "*to find the total amount of (items), by adding up item by item; to include*". Oxford Advanced Learner's Dictionary of Current English (7th Ed.) defines "count" as "*to calculate the total number of people, things, etc. in a particular group; in include sb/sth when you calculate a total; to consider sb/sth in a particular way; to be considered in a particular way*". Thus in light of the above, service rendered for more than five years as contemplated by Article 371-A would only be **added**, **included**, or **taken into account** for the purposes of pensionary benefits, and not make such government servant qualify for pension *per se*. This interpretation is bolstered by logic, reason and common sense. If we were to accept the reasoning of the learned Service Tribunal in the impugned judgment and the arguments of the learned counsel for the respondents, it would create a bizarre and anomalous situation, where a government servant who has rendered temporary service in a temporary establishment for, let us say, seven years, would be entitled to pensionary benefits, and on the other hand, a government servant rendering services as a regular employee for fifteen years would not *(yet)* have completed the requisite number of years to qualify for grant of pension. It is absurd, ludicrous and inconceivable that a government servant, who is in regular employment, would become entitled to pension after serving the minimum years of qualifying service as prescribed by the law, whereas while interpreting Article 371-A, a government servant who has served as a temporary employee could be given preference over a regular employee, and after a minimum service of only five years would automatically become entitled to pension. Holding so would be against the object and spirit of the concept of pension which has been

discussed by this Court in **Regarding pensionary benefits of the Judges of Superior Courts from the date of their respective retirements, irrespective of their length of service as Judges (PLD 2013 SC 829)** as follows:-

> *"…pension is not the bounty from the State/employer to the servant/ employee, but it is fashioned 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. Therefore, the right to pension has to be earned and for the accomplishment thereof,* ***the condition of length of service is most relevant and purposive****."*
>
> *(Emphasis supplied)*

Thus, we are not inclined to interpret Article 371-A in such a way so as to render the provisions stipulating minimum years for grant of pensionary benefits superfluous and redundant. As far as the provisions of Article 371-A are concerned, which is a non-obstante clause to Articles 355(b), 361, 368, 370 and 371 stipulated therein, suffice it to say that such article by itself does not provide for the **entitlement** for the purposes of pension, rather, at the cost of repetition, it is restricted to the **counting** of the period of a minimum of five years which has been rendered by the temporary employee that once he is appointed on a permanent basis, such period shall be **taken into account** for the object of calculating his entitlement to pension with respect to the requisite minimum period under the law. Therefore we are not persuaded to hold the words *"Notwithstanding anything contained in Articles 355(b), 361, 368, 370 and 371 of these Regulations…"* in Article 371-A

to allow those who do not fulfill the requisite conditions for qualifying for pension to bypass such conditions, so as to render the articles of the CSR providing for such conditions unnecessary and surplus. Therefore, we are of the candid view, that Article 371-A of the CSR would not *ipso facto* or *simpliciter* allow government servants rendering temporary service in a temporary establishment for more than five years to be entitled to grant of pension, rather such period would only be **counted** towards such government servants' pension **if otherwise entitled** to pension.

7. It is not disputed that the respondent rendered continuous temporary serviceand that his length of service was continuous and for more than five years. However, the question that needs to be answered is whether he was working in a "temporary establishment" or not. "Temporary establishment" has not been defined in the CSR, the Fundamental and Supplementary Rules issued by the Government of Pakistan, the ESTA Code or the Compendium of Pension Rules and Orders. In this context Article 369 of the CSR mentions temporary establishment but only explains what it is not and thus is not very helpful. Therefore as mentioned earlier in the opinion, as per the settled rules of interpretation, the dictionary meaning of the words has to be resorted to. The Concise Oxford Dictionary (6th Ed.) has defined "temporary" as *"lasting, meant to last, only for a time"*, and "establishment" as an *"organized body of mean maintained for a purpose"*. Chambers 21st Century Dictionary defines "temporary" as *"lasting, acting or used, etc for a limited period of time only"*, and "establishment" as *"a public or government institution"*. Oxford Advanced Learner's Dictionary of Current English (7th Ed.) defines "temporary" as *"lasting or intended to last or be used only for a short*

time; not permanent" and "establishment" as *"an organisation, a large institution..."* In light of the above dictionary meanings, "temporary establishment" can be said to mean an organisation or institution which is not permanent, rather effective for a certain period only. Admittedly the respondent was serving in Pakistan Locomotive Factory Risalpur, Pakistan Railways, which does not in any way fall within the meaning and purview of "temporary establishment". Thus the respondent could not reply upon Article 371-A of the CSR. Besides, if hypothetically speaking Pakistan Locomotive Factory Risalpur was a temporary establishment, even then the respondent would not be able to take the benefit of Article 371-A *(supra)* as he otherwise does not qualify for pensionary benefits having not been subsequently taken into permanent employment, which is *sine qua non* for the grant thereof.

8. Adverting to the law laid down in the case of **Mir Ahmad Khan** *(supra)* wherein it was held:-

> *"Admittedly the appellant put in more than ten years' temporary service before his services were terminated he was, therefore, entitled to pensionary benefits under Regulation 371-A(i) of Civil Service Regulations."*

In light of the discussion in paragraph No.6, the judgment delivered in **Mir Ahmad Khan**'s case *(supra)* is declared to be *per incuriam*.

9. In view of the foregoing, we find that the respondent was not entitled to the grant of pensionary benefits in terms of Article 371-A of the CSR, and the learned Service Tribunal had erroneously allowed him pension by wrongly relying upon the case of **Mir Ahmad Khan** *(supra)* which is declared to be *per incuriam.*

10. The above are the detailed reasons for our short order of even date whereby the appellants' appeal was accepted and the impugned judgment was set aside, which reads as follows:-

> *"We have heard the arguments of learned ASCs for the parties. For the reasons to be recorded later, this appeal is allowed, the impugned judgment of the Federal Service Tribunal dated 29.12.2003 is set aside and the service appeal preferred by the respondent is dismissed."*

Civil Appeal No.686/2012:

11. The brief facts of the instant appeal are that the appellant was a Professional Teaching Certification *(PTC)* Teacher in the Commissionerate for Afghan Refugees, Peshawar *(Commissionerate)*, from 28.2.1987 to 17.1.2005, i.e. approximately 18 years. During her employment at the Commissionerate, she applied for two months leave on 20.1.2004, after which she was appointed as a PTC Teacher in the Schools and Literacy Department, Government of Khyber Pakhtunkhwa *(department)* and she assumed charge of her post on 25.11.2004 and tendered her resignation with the Commissionerate on 10.1.2005. Thereafter she filed a departmental appeal to respondent No.1 claiming that her 18 years' service with the Commissionerate be counted for the purposes of her pension, which *(departmental appeal)* was accepted *vide* order dated 24.6.2008. However, the said order stated that her 10 years' service be counted towards calculation of her pension, as opposed to 18 years, which the appellant was dissatisfied with thus she filed a corrigendum application for correction of the said mistake. However, in response, the department on 20.7.2009 informed the appellant that her

prior service with the Commissionerate could not be counted towards her pension. Aggrieved, the appellant filed an appeal before the learned Khyber Pakhtunkhwa Service Tribunal which was dismissed *vide* the impugned judgment dated 9.4.2012 whereafter she approached this Court. Leave was granted on 5.7.2013 in the following terms:-

> *"……Prima facie, it is difficult to understand that admittedly when the petitioner had served for a period of about 18 years in the Commissionerate and thereafter joined the Education Department and initially the Education Department had also accepted her claim allowing computing of her previous service for the purpose of pension then what prevailed with the department subsequently in disallowing continuity. In view of the judgment cited by the learned counsel in the case of Zafar Shah (2003 SCMR 686) in such like circumstances, continuity for the purpose of extending the benefit of pension is permissible.*
>
> *3. Inter alia, to examine this aspect of the case, leave to appeal is granted in this case……"*

Subsequently on 19.9.2013, it was decided that this case was to be heard along with Civil Appeal No.1072/2005 before the larger bench as they both involved similar questions of law.

12. Learned counsel for the appellant primarily submitted that the time spent at the Commissionerate is to be counted towards her pension in terms of Article 371-A of the CSR.

13. On the other hand, learned counsel for the respondents stated that due to the special facts and circumstances prevalent at that time, the decision rendered in the case of **Mir Ahmad Khan** *(supra)* is

good law, however in the instant matter, the appellant is not entitled to inclusion of the period she spent as an employee of the Commissionerate for the purposes of pensionary benefits for the reason that she was in fact a project employee of a non-governmental organisation called Basic Education for Afghan Refugees *(BEFARe)*, and not an employee of the Federal Government, and that she had resigned from the Commissionerate on 10.1.2005 after which she joined the department.

14. Learned Additional Advocate General, KPK adopted the arguments of Mr. Hafiz S. A. Rehman, learned counsel for the appellants in Civil Appeal No.1072/2005.

15. Heard. The appellant's main grievance is that the eighteen years she spent at the Commissionerate be counted towards her service at the department for the purposes of the grant of pensionary benefits as per Article 371-A of the CSR, suffice it to say that the Commissionerate for Afghan Refugees does not in any way fall within the meaning of "temporary establishment" as defined in Civil Appeal No.1072/2005 above to mean an organisation or institution which is not permanent, rather effective for a certain period only as described. Even otherwise, the appellant's service with the department was temporary and on a contract basis, and there is nothing on the record which suggests that she was subsequently confirmed or made permanent within the department. Therefore keeping in view the interpretation of Article 371-A of the CSR explained above with regard to Civil Appeal No.1072/2005 in that the said article would not *ipso facto* allow government servants rendering temporary service in a temporary establishment for more than five years to be entitled to grant

of pension, rather such period would only be **counted** towards such government servants' pension **if otherwise entitled** to pension, we are of the opinion that the appellant is not entitled to pensionary benefits as claimed by her.

16. In light of the above, we find no infirmity in the impugned judgment warranting interference by this Court, therefore this appeal is dismissed as being devoid of merit.

Chief Justice

Judge Judge

Judge Judge

Announced in open Court
At **Islamabad** on **14-4-2016**
Approved for reporting
*Ghulam Raza/**