

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE EJAZ AFZAL KHAN

MR. JUSTICE QAZI FAEZ ISA

CIVIL PETITION NO. 261-K OF 2016

*(On appeal from the judgment dated 22.03.2016
in C.P No. D-696 of 2015 passed by the High
Court of Sindh, Karachi)*

Azhar Hayat

...Petitioner

Versus

Karachi Port Trust through Chairman and others

...Respondents

For the Petitioner:

Mr. Farrukh Zia Sheikh, Advocate Supreme Court
Mr. Abdul Aziz Khan, Advocate-on-Record (**absent**)

For Respondent Nos. 1&2:

Mr. Khalid Javed Khan, Advocate Supreme Court
Mr. K. A. Wahab, Advocate-on-Record (**absent**)

Date of Hearing:

9th June 2016.

JUDGMENT

QAZI FAEZ ISA, J.- Through this petition leave to appeal has been sought against the order dated 22nd March 2016 of a Division Bench of the High Court of Sindh at Karachi whereby it dismissed the petition filed by the petitioner.

2. The petitioner had filed a suit (Suit No. 1615 of 2014) in the High Court under the original civil jurisdiction of the Sindh High Court whereby he sought a declaration that he was permanently absorbed as General Manager (Operations) in the Karachi Port Trust (“KPT”), he also sought to restrain KPT and the Federal Government from “confirming” summary dated 14th May 2014 and Notification dated 17th June 2014 and from terminating him from the KPT’s service. The suit (vide order dated 6th February 2016) was converted into a constitutional petition and numbered as C. P. No. D-696 of 2016. The petition however was dismissed by the impugned order.

3. Mr. Farrukh Zia Sheikh, the learned counsel for the petitioner, stated that the petitioner was serving as a senior officer in the Pakistan Navy when he was appointed as General Manager (Operations) of the KPT vide Notification dated 27th March 2008 for a period of three years, however, since the petitioner was to retire from the Navy on 14th October 2012 it was decided by the competent authority to permanently absorb the petitioner into the service of KPT as its General Manager (Operations), however, by another 'Summary' dated 14th May 2014 and Notification dated 17th June 2014 the petitioner's "*contract period*" was "*determined for two years from 15.10.2012 to 14.10.2012*", which was against the earlier decision of the competent authority. The learned counsel further stated that Notification dated 28th September 2012 had mistakenly stated that the petitioner had been "*re-employed on contract basis*". It was alternatively contended that the Notification dated 28th September 2012 had referred to paragraph 2 (b) of No. 4/85 of the Joint Services Instruction ("**JSI**"), which provision provided for permanent absorption, thus confirming that the petitioner had not been employed on contract. According to the learned counsel the High Court had misconstrued the decision of the competent authority and also misinterpreted the applicable legal provisions. Reliance was placed on the cases of Basharat Jehan v Director-General, Federal Government Education (2015 SCMR 1418) and Shameer v Board of Revenue (1981 SCMR 604) to contend that once the decision to absorb the petitioner had been taken an irrevocable right had accrued in his favour therefore the principle of *locus poenitentiae* would have no application.

4. On the other hand Mr. Khalid Javed Khan, representing the KPT Chairman and its Board who are arrayed as the respondent Nos.1 and 2 respectively, opposed the petition and stated that the impugned order is well reasoned and in accordance with law. The learned counsel stated that the petitioner had earlier filed a constitutional petition, being C.P. No. D-2602 of 2014, with respect to the same subject-matter, which was dismissed as "*not pressed*" on 19th August 2014, therefore, the subsequent petition on the same subject-matter could not be filed as stipulated in sub-rule (3) of Rule 1 of Order XXIII of

the Code of Civil Procedure (“**the Code**”). He next contended that Notification dated 28th September 2012, through which the petitioner had been “*re-employed on contract basis*”, had not been challenged before the High Court therefore the petitioner could not contend that his employment with the KPT was other than contractual. As regards the purported ‘decision’ of the competent authority, relied upon by the petitioner, the same had clearly referred to paragraph 2(b) of No. 4/85 of the Joint Services Instructions (“**JSI**”) and Serial No. 214 (b) of the Civil Establishment Code (“**Estacode**”) which provide that an officer may be “*considered*” for permanent absorption “*by retiring him from the parent service*”; however, since the petitioner had not sought his early retirement from the Navy therefore it could not be stated that he was permanently absorbed in KPT. The learned counsel also took us through the different provisions of the JSI and the Estacode with regard to officers of the armed forces who can be seconded in civil posts “*for a period up to three years*” which may be extendable “*in exceptional circumstances*” by another year, but, the same also provided that, “*no extension in service will be allowed to officers who complete age / service limits for retirement during secondment*”. The learned counsel further urged that if there was any ambiguity in the said ‘decision’ and the Notification/s or the same conflicted with any provision of the JSI / Estacode the latter will prevail.

5. We have heard the learned counsel and have gone through the record and the different provisions of the JSI and Estacode with their assistance. The petitioner’s case is based on the “Summary for the Prime Minister” dated 31st July 2012 and the approval of paragraph 4 thereof by the Prime Minister, which is reproduced hereunder:

“Approval of the Prime Minister is solicited for re-employment/permanent absorption of Local Rear Admiral Azhar Hayat SI (M) P No. 2041 as General Manager (Operations) BS-21 in Karachi Port Trust, Karachi after retirement from Naval Services in accordance with JSI 4/85 para 2(b) (Annex-VIII) and Sr. No.214 (b) of Esta Code (Annex-IX)”

It would also be appropriate to reproduce the Notification dated 27th March 2008 whereby the petitioner was first appointed, the Notification dated 28th September 2012 whereby he was re-employed and Notification dated 17th June 2014 which prescribed his period of contract, respectively as under:

“GOVERNMENT OF PAKISTAN
MINISTRY OF PORTS AND SHIPPING

Islamabad, the **27th March, 2008**

NOTIFICATION

No.I(12)/2008-P&S-I. In pursuance of Prime Minister's Secretariat's U O No. 1236/PSPM/08, dated 22nd March, 2008. P. No. 2041 Commodore (Ops) Azhar Hayat SI (M) is posted as General Manager (Ops) in Karachi Port Trust (KPT) under the Ministry of Ports & Shipping, on secondment basis for a period of three years with immediate effect on standard terms and conditions contained in JSI-4/85, as amended from time to time in place of P. No. 1624 Rear Admiral Agha Danish SI (M), General Manager (Ops) who has been allowed repatriation before completion of normal secondment tenure.”

“No. 4/2/2008-E-4
GOVERNMENT OF PAKISTAN
CABINET SECRETARIAT
ESTABLISHMENT DIVISION

Islamabad, the **September 28, 2012**

NOTIFICATION

With the approval of the Competent Authority, P.No. 2041, Local Rear Admiral Azhar Hayat SI (M), is re-employed on contract basis, as General Manager (Operations) (BS-21) in Karachi Port Trust, Karachi under Ministry of Ports and Shipping, from the date of his retirement from Naval Service, in terms of para 2(b) of JSI 4/85 and provision of Section 44 of the Karachi Port Trust Rules, 2011.”

“No. 4/2/2008-E-4
GOVERNMENT OF PAKISTAN
CABINET SECRETARIAT
ESTABLISHMENT DIVISION

Islamabad, the **June 17th, 2014**

NOTIFICATION

This Division's Notification of even number dated 28.09.2012 is modified to the extent that the contract period of Local Rear Admiral Azhar Hayat SI (M), presently working as General Manager (Operations) (BS-21) in Karachi Port Trust, Karachi under Ministry of Ports and Shipping is determined for two years from 15-10-2012 to 14-10-2014.”

Since paragraph 2, No.4/85 of the JSI and Serial No.214, Part V, Chapter 2 of Volume I of the Estacode have been referred to in the Notifications dated 27th March

2008 and 28th September 2008 it would be appropriate to also reproduce the same to better understand the case. It may be mentioned that both these provisions are identical.

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

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

“2. Tenure” of the JSI / “1. Tenure” of the Estacode:

- (a) Officers will normally be seconded for a period up to three years extendable, in exceptional circumstances, by one year by the Government, after which the officer will normally either be recalled to the parent service or released. No extension in service will be allowed to officers who complete age / service limits for retirement during secondment.
- (b) If the deputation of an officer tends to become indefinitely prolonged, permanent absorption of the officer concerned in the civil cadre by retiring him from the parent service, would be considered.
- (c) In case of an emergency, the parent service will have the option of withdrawing a deputed officer without notice, if necessary.
- (d) An officer will have the option to request for return to his parent service if he feels that his service career is adversely affected by continued deputation.”

6. We shall first deal with the legal objections taken by the learned counsel for the respondents. The petitioner had filed C. P. No. D-2602/2014 which was “not pressed” on 19th August 2014 and then filed the suit on 26th August 2014 (which was converted into a petition) wherein the earlier petition filed by the petitioner was mentioned in paragraph 13 by stating that, “*the same has been withdrawn by the Plaintiff as fresh cause of action has accrued to the Plaintiff.*” The respondents had objected to the subsequent filing of the suit-petition as the requisite permission had not been obtained from the court when it was not pressed and dismissed. The impugned order took notice of this fact, but the learned judges did not non-suit the petitioner on this ground even though he could have been because sub-rule (3) of Rule 1 of Order XXIII of the Code stipulates that where the plaintiff withdraws from a suit without being given permission to institute a fresh suit in

respect of the same subject-matter or such part of claim he would be precluded from doing so. There is another significant defect in the pleadings of the petitioner; he did not assail Notification dated 28th September 2012 which had clearly stated that the petitioner was “*re-employed on contract basis*”. However, since the petitioner was not non-suited on either of these two grounds by the High Court we have also considered the case of the petitioner on merits.

7. The petitioner was seconded to KPT as its General Manager (Operations) for a period of three years vide Notification dated 27th March 2008 whilst he was an officer serving in the Navy, wherefrom he retired on 14th October 2012. The main question for our consideration is the scope of the JSI / the Estacode and in particular whether permanent absorption in such cases is permissible. The afore quoted provisions of JSI / Estacode stipulate that officers may be seconded for a period of up to three years and only in exceptional circumstances such period can be extended by another year. The learned counsel for the petitioner has placed much emphasis on paragraph (b) of the quoted provisions. Clause (b) however is an exception to paragraph (a) and is also not a self-executing provision; as an incumbent has to seek his retirement from his parent service, which in the case of the petitioner was the Pakistan Navy. The petitioner replied in the negative to our query as to whether the petitioner had sought early retirement from the Navy or had been retired from the Navy before the due retirement date in order to be considered for permanent absorption in KPT. Since the petitioner did not seek his retirement from the Pakistan Navy nor was prematurely retired there from the question of his permanent absorption in the civil cadre / KPT would not arise. We are cognizant that Notification dated 28th September 2012 referred to paragraph (b) yet at the same time the said Notification also states that the petitioner was “*re-employed on contract basis*”, which is not only incompatible but also destructive of the petitioner’s contention that he was permanently absorbed in KPT.

8. How officers of the armed forces are to be inducted in the civil cadre are covered in some detail in the Estacode. In this regard reference may also be made to serial 231,

Part V, Chapter 2 of Volume I of the Estacode, which provides for the “Induction / Re-employment of Officers of Armed Forces of Pakistan in Civil Posts”, relevant paragraphs wherefrom are reproduced hereunder:

“Sl. No. 231

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

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

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

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

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

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

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

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

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

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

Admittedly, the foregoing paragraphs of Sl.231 with regard to the re-employment of the petitioner have not been complied with. The petitioner has also failed to show that the stated High Powered Selection Board had selected him. Therefore, the petitioner’s contention that he was properly appointed in KPT, let alone permanently adsorbed therein has not been established.

9. The impugned order considered the relevant provisions of the JSI and Estacode and had correctly concluded that the petitioner had been appointed on contract for a specific term and upon expiry of the stipulated term he had no right to claim any further extension, let alone contend that he had been permanently absorbed in KPT. We are in agreement with the conclusion arrived at by the learned Judges of the High Court, consequently, this petition is dismissed and leave to appeal is declined.

Judge

Judge

Bench-III
Announced in Open Court
at Islamabad

On 16th June 2016

By Justice Qazi Faez Isa
APPROVED FOR REPORTING
(Zulfiqar)