

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Writ Petition No. 749/2018.

Kumail Abbas Jaffri

Versus

**Managing Director/CEO Oil & Gas Development Company Ltd.,
Islamabad, etc.**

Petitioner by: Mr. Ali Nawaz Kharal, Advocate.

**Respondents by: Barrister Saad Shuaib Wyne and Mr. Wasi
Ullah Khan Surrani, Advocates.**

Date of Hearing: 21.02.2019.

MOHSIN AKHTAR KAYANI, J:- Through this writ petition, the petitioner has assailed the office memorandum dated 26.12.2017, issued by Human Resource Department, Head Office, Oil & Gas Development Company Ltd. (OGDCL), whereby pay of the petitioner has been re-fixed.

2. Learned counsel for the petitioner contends that petitioner was initially appointed as Assistant Joint Venture Officer (EG-II) vide order dated 16.05.2011 on contract basis and his services were regularized vide order dated 20.03.2013, whereas respondents' authorities have issued the impugned office memorandum for re-fixation of pay through which salary of the petitioner was re-fixed during the period when the petitioner was serving in OGDCL as contracting officer on contract basis, the Board of Directors in their 147th meeting have settled/decided to award 40% increment to all employees, whether contractual or regular w.e.f. 01.02.2013, vide Board decision dated 27.02.2013, however, the Board again in their 153rd meeting held in August, 2013 revisited its terms of

increment and withdrew the increment to the extent of contractual employees, however, retrospective application to the extent of petitioner has not been approved; that petitioner's services have already been regularized, therefore, withdrawal of notification is not applicable to the extent of petitioner.

3. Conversely, learned counsel for the OGDCL contends that instant writ petition is not maintainable as the OGDCL Employees Service Rules, 2002 are non-statutory in character and as such the relationship of petitioner and respondents is master and servant; that the interpretational claim of petitioner is not made out as Board of Directors is empowered to rectify their own mistake as 40% increment in the basic pay was to be given to the extent of regularized employees only and it has no nexus to the contractual employees and the same has mistakenly applied to the extent of contractual employees and after the realization, it was withdrawn.

4. Arguments heard, record perused.

5. From the perusal of record, it has been observed that petitioner is mainly aggrieved with the order dated 26.12.2017, which is as under:-

OFFICE MEMORANDUM

*Subject: **RE-FIXATION OF PAY AS PER AUDIT OBSERVATION***

Ref. Audit Observation vide letter No.GAC/OM-12/2016-17 dated 27-11-2017, regarding over payment of pay & allowances in pursuance of BOD's decision in the meeting held on August 20, 2013 to withdraw the 40% increase in the pay of contractual officers with effect from 01-01-2013. The revised / re-fixed pay of Mr. Kumail Abbas Jafery (E#300804) Accountant, is as under:-

6. As per the stance of the petitioner his services have been regularized w.e.f. 20.03.2013 being Assistant Joint Venture Officer (EG-II) and after regularization of his services, he has been governed under the OGDCL Employee's Service Rules, 2002 as referred in Para-2 of letter

dated 25.04.2013, however, issue started with the petitioner in this case when Board of Directors in their 153rd meeting held on 06.08.2013 made the following observations:-

The Directors recalled that alongwith regular officers, the officers working on contract were also allowed 40% pay raise in their basic salaries though there was no provision of such salary raise in their employment contracts. The Directors noted that the Management in their recommendations did not bring this important fact ON RECORD, nor did the Management seek or recommend raise in their salaries from the Board over and above their terms of contract.

The directors after considered deliberations were of the unanimous view that 40% pay raise to contractual officers was not permissible as they were not eligible for the same. The Board decided to withdraw the same w.e.f. the date it was allowed i.e. January 01, 2013 and recovery be made of enhanced salary so received by the contractual officers.

7. On the basis of said decision of the Board impugned office memorandum dated 26.12.2017 was issued and the beneficial effect of 40% increase pay of the contractual officers w.e.f. 01.01.2013 stood withdrawn and revised and re-fixed pay has been notified.

8. In my humble estimation, the Board is competent to rectify their mistake as and when it came into their notice and in this case the Board in their subsequent 153rd Meeting has withdrawn and recalled 40% increased pay mainly on the ground that the recommendations placed in previous Board meeting were not deliberated as to whether the Board can go beyond the terms of employment of contractual employees, whose terms and conditions have already been settled in their employment contract. The decision of the OGDCL Board is also under challenge before this Court in terms of judicial review mainly on the ground that the employee, who has already received the benefit given by the department, even if by mistake, it creates a right in terms of principle of *locus poententiae*. However, in order to reach at just conclusion of the case, respondents'

side has relied upon 2013 SCMR 552 (Chandi Prasad Uniyal and others

Vs. State of Uttarakhand and others), wherein it was held that:-

16. We are concerned with the excess payment of public money which is often described as "tax payers money" which belongs neither to the officers who have effected over-payment nor that of the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. Question to be asked is whether excess money has been paid or not may be due to a bona fide mistake. Possibly, effecting excess payment of public money by Government officers, may be due to various reasons like negligence, carelessness, collusion, favouritism etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment.

17. We are, therefore, of the considered view that except few instances pointed out in Syed Abdul Qadir case (2009 AIR SCW 1871) (supra) and in Col. B.J. Akkara (Retd.) case (2006 AIR SCW 5252) (supra), the excess payment made due to wrong/irregular pay fixation can always be recovered.

18. Appellants in the appeal will not fall in any of these exceptional categories, over and above, there was a stipulation in the fixation order that in the condition of irregular/wrong pay fixation, the institution in which the appellants were working would be responsible for recovery of the amount received in excess from the salary/pension. In such circumstances, we find no reason to interfere with the judgment of the High Court. However, we order the excess payment made be recovered from the appellant's salary in twelve equal monthly installments starting from October, 2012. The appeal stands dismissed with no order as to costs. I.As. Nos.2 and 3 are disposed of.

9. The petitioner has also relied upon AIR 2015 SC 696 (State of Punjab vs. Rafiq Masih), wherein the Supreme Court of India has laid down certain parameters for recovery of such excess payments made to an employee and the Court held that it would be iniquitous, arbitrary and harsh to recover the excess payment mainly on the ground that the lower

cadre employees will be subject to ordeal of any such recovery and it would also be a breach of mandate contained in Article 14 of the Constitution of India, and same is the position with retired employees, who are close to retirement or retired, although exception of one year was created by the Court. However, in all other cases, the Supreme Court of India has observed that if wrongful payment is detected within the period of five (05) years, it would be open for employer to recover the same. Likewise, this Court is mindful of the fact that giving 40% pay raise by OGDCL Board has neither anything to do with petitioner or other similarly placed employees, nor the decision of the Board was obtained on the basis of any incorrect information, misrepresentation or fraud on the part of employees.

10. I have also gone through the case law reported as PLD 1999 SC 1026 (Federation of Pakistan vs. Shaukat Ali Mian), PLD 1969 SC 407 (FOP through Ministry of Finance vs. Muhammad Himayatullah Farukhi), and 2015 SCMR 1418 (Mst. Basharat Jehan vs. D.G. FGEL, Rawalpindi), wherein it was held by the apex Court that once a decisive step has been taken, the same could not be withdrawn for the reason that vested rights have been created, which could not be destroyed as legal bar would come into play under principle of *locus poenitentiae*.

11. While considering the above background, the OGDCL Board is the best judge to decide all these questions and in terms of Section 21 of General Clauses Act, 1897, the OGDCL Board is the competent authority who can revisit their mistake regardless of the fact whether the order was initially passed under an accidental error and the same was not a result of any collusion of an official and as such, the OGDCL Board in their 153rd

meeting has rightly withdrawn the pay raise given to the employees beyond their terms of contracts.

12. Besides the above referred factual aspect and law, the other important issue is the maintainability of the instant writ petition, especially when the respondents' side claim that terms & conditions of the OGDCL Employee's Service Rules, 2002 are non-statutory and as such respondents have relied upon 2013 SCMR 1707 (Pakistan Defence Officers' Housing Authority Vs. Lt. Col. Jawaid Ahmed), 2011 SCMR 408 (Muhammad Nadeem Arif Vs. IGP, Punjab, Lahore), PLD 2011 SC 44 (Pakcom Ltd. Vs. Federation of Pakistan), 2011 PLC (CS) 623 (Pakistan Telecommunication Co. Ltd. Vs. Iqbal Nasir), whereby it has unanimously been held that the rule of master and servant is inapplicable where there is violation of statutory provisions or any other law. Reliance is placed upon 2007 PLC(CS) 1046 (Muhammad Dawood and others Vs. Federation of Pakistan).

13. The principles laid down by the Superior Courts in the above mentioned case are as under:-

50. *The principles of law which can be deduced from the foregoing survey of the precedent case-law can be summarized as under:-*

(i) *Violation of Service Rules or Regulations framed by the Statutory bodies under the powers derived from Statutes in absence of any adequate or efficacious remedy can be enforced through writ jurisdiction.*

(ii) *Where conditions of service of employees of a statutory body are not regulated by Rules/Regulations framed under the Statute but only Rules or Instructions issued for its internal use, any violation thereof cannot normally be enforced through writ jurisdiction and they would be governed by the principle of 'Master and Servant'.*

14. Keeping in view the above referred law, this Court is fortified with the judgment passed by Division Bench of this Hon'ble Court dated

19.04.2017 in case numbered as ICA No.41/2016 (OGDCL vs. Maj. R. Matloob Ahmad Baig), wherein it has been held that the rules of service of employees of the OGDCL are non-statutory, hence, instant writ petition is not maintainable coupled with the fact that issue raised by petitioner through instant petition relates to petitioner's contract service, though he is presently regular employee of OGDCL, hence the writ petition is also not maintainable on this score. Whereas, it is also established that the OGDCL Board is competent to revisit their earlier decisions on the basis of any error, omission, or need basis and such decision of the OGDCL Board is not permissible to be challenged under constitutional jurisdiction, therefore, the instant writ petition is misconceived and the same is hereby **DISMISSED.**

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on _____

JUDGE

Zahid