

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

I.C.A.No.507 of 2014
National Highway Authority
Versus
Saqlain Mehdi and another

Date of Hearing:	12.06.2017
Appellant by:	M/s Rizwan Faiz Muhammad, and Abid Hussain Ranjha, Advocates
Respondent by:	M/s Abdur Rehman Siddiqui, and Ch. Asghar Ali, Advocates

MIANGUL HASSAN AURANGZEB, J:- Through the instant Intra Court Appeal, the appellant, National Highway Authority (“N.H.A.”), impugns the judgment dated 30.06.2014 passed by the learned Single Judge-in-Chambers, whereby respondent No.1 and 2's W.P.No.1999/2009 (earlier numbered as W.P.No.764/2009), was allowed.

2. Learned counsel for the appellant submitted that respondent No.1 served as Assistant Director (Administration) (BS-17) on contract basis at the N.H.A from 20.03.2000 to 19.03.2003 whereas respondent No.2 was appointed as Assistant Director (Engineering) (BS-17) at the N.H.A. on contract basis on three occasions between 05.11.1996 and 14.01.2005; that the respondents' applications for the regularization of their services were turned down by the N.H.A.; that respondent No.1's appeal to the Federal Service Tribunal against the N.H.A.'s decision not to regularize his services was dismissed, vide judgment dated 10.02.2004; that respondent No.1's petition for leave to appeal against the said judgment of the Federal Service Tribunal was dismissed by the Hon'ble Supreme Court, vide judgment dated 30.09.2004; that upon the expiry of the respondents' contractual employments in the years 2003 and 2005, they were no longer employees of the N.H.A.; that in 2007, the respondents applied to the Federal Minister for Communications for their reinstatement in service; that vide order dated 14.11.2007, the Federal Minister for

Communications dispose of the respondents' application and directed that they should be 'accommodated'; that on 17.09.2008, the respondents were appointed as Assistant Directors (BS-17) on contract basis for a period of two years; that the respondents wanted to be appointed on regular basis in BS-18 with effect from the date when they were initially appointed on contract basis; that an appeal in this regard was submitted by the respondents to the Federal Minister for Communications; that vide order dated 22.04.2009, the respondents' appeal was allowed and they were ordered to be appointed on the regular strength of N.H.A. in BS-18 with effect from the date when they were initially appointed on contract basis; that on 04.01.2010, the Federal Minister for Communications revisited his earlier decision dated 22.04.2009 and left the respondents' appeals to be decided by the N.H.A.; and that the Executive Board of the N.H.A. turned down the respondent's appeals.

3. Learned counsel for the appellant further submitted that after the decision dated 22.04.2009 of the Federal Minister for Communications, the respondents filed writ petition No.1999/2009 before this Court for the implementation of the said decision; that in the said writ petition, the fact about the judgment dated 10.02.2004 passed by the Federal Service Tribunal and the judgment dated 30.09.2004 was not disclosed; that the order dated 22.04.2009 passed by the Federal Minister for Communications was politically motivated and void; that the said order was against Rule 12 of the National Highway Authority (Appointment, Promotion and Transfer) Regulations, 2002; that in view of the judgment dated 10.02.2004 passed by the Federal Service Tribunal, and the judgment dated 30.09.2004 passed by the Hon'ble Supreme Court, respondent No.1 could not be considered to be a regular employee of N.H.A. with effect from the date when he was initially appointed on contract basis; that respondent No.2's case on merits was exactly the same as that of respondent No.1; that the respondents were not appointed by the appellant through a competitive process; that the respondents

should have been satisfied with the regularization of their services pursuant to the recommendations of the Cabinet Sub-Committee for regularization of contractual employees in statutory bodies; that the respondents' appointments on 17.09.2008 on contract basis were fresh appointments for all intents and purposes; and that the Executive Board of the appellant had already rejected the respondents' request to treat their appointment with effect from the dates when they were initially appointed on contract basis. Learned counsel for the appellant prayed for the impugned judgment dated 30.06.2014 to be set aside and for the respondents' writ petition to be dismissed.

4. On the other hand, learned counsel for the respondents submitted that the intra court appeal against the judgment dated 30.06.2014 was not maintainable; that the said appeal was barred under the *proviso* to Section 3(2) of the Law Reforms Ordinance, 1972; that the law applicable to the proceedings with respect to which the writ petition was filed by the appellant was N.H.A. Administrative Regulations, 2002, which have been made by the Executive Board of the National Highway Authority in exercise of the powers conferred by the National Highway Authority Act, 1991; that the said law provided for a right of appeal against the decision of the Executive Board of N.H.A. which had decided to turn down the respondents' appeals seeking their appointment to be made in BS-18 with effect from the date when they were initially appointed on contract basis; and that since the said law provided for a right of appeal, the instant intra court appeal was not maintainable. Learned counsel for the respondents prayed for the intra court appeal to be dismissed. Learned counsel for the respondents did not make any submissions on the merits of the case.

5. We have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

6. We propose first to deal with the objection of the learned counsel for the respondents regarding the maintainability of this

appeal. N.H.A. Administrative Regulations, 2002 have been made by the Executive Board of the National Highway Authority in exercise of the powers conferred by the National Highway Authority Act, 1991 ("N.H.A. Act"). The said Regulations also provide for "Conduct, Discipline and Appeals." Section 32 of the N.H.A. Act provides that the Authority may make regulations, not inconsistent with the rules, on all matters for which regulations are expedient. "Authority" is defined as the National Highway Authority.

7. Section 32 of the N.H.A. Act does not require the Regulations made by the N.H.A. to be approved by the Federal Government. It is an admitted position that the Federal Government has not approved the said Regulations. Perusal of these Regulations, especially the chapter on "Conduct, Discipline and Appeals" shows that they deal appeals that are filed by the employees of N.H.A. against *inter alia* imposition of penalties under the discipline rules etc. As per these Regulations, an appeal against the decision of the Chairman, N.H.A. lies to the President of N.E.C. whereas an appeal against the decision of the President of N.E.C. lies to the Federal Service Tribunal. Although there is a right of appeal provided in the said Regulations, the vital question that needs to be answered is whether or not the said Regulations are statutory. If a right of appeal is provided under rules or regulations which are not statutory in nature, they could not be termed as "law" so as to prevent an appellant from filing an intra court appeal.

8. In the case of Muhammad Zaman Vs. Government of Pakistan (2017 SCMR 571), the Hon'ble Supreme Court held that since the State Bank of Pakistan Officers (Pension-cum-Gratuity) Regulations, 1980 were non-statutory, therefore, the employees of the State Bank of Pakistan could not invoke the Constitutional jurisdiction of the High Court for a direction for the grant of periodical increases in pension in line with those granted by the Federal Government. In the said judgment, it was *inter alia* held that in order to determine whether the Rules or Regulations of a

statutory body were statutory or otherwise, it had to be seen whether the Rules or Regulations *“deal with instructions for the internal control or management, or they are broader than and are complimentary to the parents statute in matters of crucial importance.”* The former were held to be statutory whereas the latter were to be non-statutory. N.H.A. Administrative Regulations, 2002 dealing with procedure for appeals filed by the employees of the N.H.A. are clearly for the internal control and management of the N.H.A. Since the said Regulations are not statutory, we hold that the instant appeal is not barred by the *proviso* to Section 3(2) of the Law Reforms Ordinance, 1972.

9. We now proceed to decide this appeal on merits. The facts essential for the disposal of this Intra Court Appeal are that on 15.03.2000, respondent No.1 (Saqlain Mehdi) was appointed by the N.H.A. as Assistant Director (Administration) (BS-17) on contract basis for a period of one year. About two weeks later, the N.H.A. issued office order dated 30.03.2000, whereby respondent No.1's said contractual appointment was made for a period of three years. It appears that respondent No.1 along with other similar contractual employees expressed their desire to the N.H.A. for the regularization of their services. Respondent No.1's contractual employment came to an end on 19.03.2003. Having not received any favourable response from the N.H.A., respondent No.1, on 19.03.2003, submitted an appeal to the President of Pakistan seeking the regularization of his services. The said appeal was turned down on 10.06.2003. Thereafter, respondent No.1 preferred an appeal before the Federal Services Tribunal against the order of the President of Pakistan dismissing respondent No.1's appeal for the regularization of his services. Vide judgment dated 10.02.2004, respondent No.1's appeal was dismissed by the Federal Services Tribunal. The said judgment dated 10.02.2004 was challenged by respondent No.1 before the Hon'ble Supreme Court in Civil Petition No.973/2004. Vide judgment dated 30.09.2004, the said petition was dismissed. In the said judgment dated 30.09.2004, it was observed that

respondent No.1 had no vested right in claiming regularization of his contractual employment, and that respondent No.1's request for regularization was rightly turned down.

10. Respondent No.2 (Muhammad Qasim Khan) was appointed as Assistant Director (Engineering) (BS-17) at the N.H.A. on contract basis for a period of two years from 05.11.1996 to 04.11.1998. He was appointed on contract basis for two more terms i.e. from 05.11.1998 to 04.11.1999, and from 15.01.2000 to 14.01.2005.

11. After a long period of silence, respondents No.1 and 2 submitted an appeal before the President of the National Highway Council ("N.H.C.)/Federal Minister for Communications. On 14.11.2007, the President of N.H.C. accepted the said appeal, and recommended that said respondents along with other similarly placed officers be "accommodated" against suitable posts commensurate with their qualifications and experience. It is pertinent to reproduce herein below that operative paragraphs of the said decision:-

"2. I heard the grieved officer in presence of Additional Secretary Communications, (NHA Representative) Director Personnel, Section Officer (Roads) in my office on November 13, 2007 and have also gone through the relevant record. I deem it appropriate and in the interest of justice to accept the appeal by the officer.

3. While going through the relevant record, I was saddened to note that these officers who have a meritorious record were not give due justice. On the other hand, most of the colleagues of these six grieved officers were accommodated.

4. It is also incumbent that these officers to not suffer because of the injustice done to them in the past. I therefore, am pleased to recommend that these officers be accommodated against suitable posts commensurating with the qualification & experience.

5. The appeal of the above mentioned persons stand disposed off."

12. The decision of the President of N.H.C. makes no mention of the judgments of the Federal Service Tribunal and the Hon'ble Supreme Court.

13. Subsequently, respondents No.1 and 2 filed writ petitions No.7/2008 and 45/2008, respectively, praying for the implementation of the recommendations of the President of N.H.C.

The said writ petitions were disposed of vide order dated 25.03.2008 directing the N.H.A. to consider the respondents' case in the light of the directive of the Chairman of N.H.A., and to pass a speaking order after granting an opportunity of a hearing to the respondents. Consequently, vide office orders dated 17.09.2008, respondents No.1 and 2 were appointed as Assistant Directors (BS-17) on contract basis for a period of two years with effect from the date of their joining. On 22.09.2008, the respondents submitted their joining reports. The contesting parties are at variance on the question whether or not the joining report was submitted without prejudice to the respondents' right to seek their appointment to be on regular basis with effect from the date when they were initially appointed. It appears that the term of the respondents' contractual employment was extended from time to time.

14. On 03.02.2009, respondent No.1 submitted an application to the President of N.H.C., seeking the regularization of his services with effect from 27.03.2000 with all back benefits. On the said application, the President of N.H.C. made the following note in hand:-

"The officer has met all the criteria for induction. I would like to hear him in person, in presence of the MOC and National Highway Authority officials. Please give date and time."

15. On 25.02.2009, respondent No.2 submitted an appeal on the same lines as respondent No.1. On 22.04.2009, the President of N.H.C. directed that respondent No.1's services be *"reinstated in the regular mainstream of National Highway Authority with immediate effect and all back benefits."* In the said letter dated 22.04.2009, it was explicitly stated that respondent No.1 would be *"deemed to be a regular employee of the National Highway Authority w.e.f. March 27, 2000."* It was also directed that respondent No.2's services be reinstated on one pay scale higher i.e. BS-18 on the appellant's regular strength. The last two paragraphs of the said letter dated 22.04.2009 is reproduced herein below:-

“4. Before I conclude, I would like to endorse the decision of Former President National Highway Council dated 14-11-2007, whereupon he directed that the young officers should not suffer because of injustice done to them in the past. I therefore am pleased to direct that Mr. Saqlain Mehdi along with his two above mentioned colleagues Engineer Muhammad Qasim and Engineer Zafar Yaqoob Khan who did not accept the terms and conditions of their respective contract offered by NHA in September, 2008 and joined their duties "Without Prejudice" be reinstated on a scale one pay grade higher than the substantive scale of their respective posts. This would mean appointing them at par with their other colleagues against the sanctioned post's of Deputy Director(s) in BPS-18 on NHA regular strength on the basis of their qualification and experience, in light of the self explanatory JUDGEMENT(S) passed by the Honourable Chief Justice, Islamabad High Court in Writ Petition(s) No.07/2008 & 45/2008, Well acknowledged DECISION of the Former President National Highway Council dated 14-11-2007 and ORDERS of the Federal Secretary Communications dated 11-09-2008.

“5. This DECISION shall have effect notwithstanding anything to the contrary contained in NHA, Appointment & Promotion Rules in Force or in any order of the Chairman NHA or NHEB. It may also be noted that this case is UNIQUE. Hence it will NOT AT ALL be quoted as a PRECEDENT in any other case in future.”

16. On 04.01.2010, the President of N.H.C. revisited his decision dated 22.04.2009 and allowed N.H.A. to decide the respondents' cases in accordance with the relevant Rules. The Executive Board of N.H.A. considered the said decision dated 22.04.2009 regarding the respondents' permanent induction of services in the regular strength of the appellant but rejected the respondents' appeal on the ground that the case was not covered under the Rules. The applicable Regulations, being the National Highway Authority (Appointment, Promotion and Transfer) Regulations 2002, made in exercise of the power conferred under Section 32 of the National Highway Authority Act, 1991. Rule 12 of the said rules provides as follows:-

“12. Regularization. Your contract appointment shall not confer any vested right for regularization for contractual appointment in the Authority and you will also not agitate in any Court of Law for its regularization irrespective of length of contract employment.

17. Since the respondents' services were not regularized in BS-18, and with effect from the date when they were initially appointed on contract basis, they, on 14.05.2009, filed writ

petition No.1999/2009 before this Court. The prayer clause of the said writ petition is reproduced herein below:-

“In the circumstance, therefore, it is most respectfully prayed that the instant petition may kindly be accepted and an appropriate writ very graciously be issued to the respondents to give effect to the directive/order of respondent No.2 dated 22.04.2009 passed on appeal filed by the petitioners, in letter & spirit, to meet of the ends of justice. Any other relief, which this Hon'ble Court in the circumstances may deem just & proper, also very graciously awarded to the petitioners.”

18. During the pendency of writ petition No.1999/2009, the N.H.A., on 12.10.2011, regularized the respondents' services in BS-17. This was done pursuant to the recommendations of the Cabinet Sub-Committee on the regularization of contractual employees. In the said writ petition, the present respondents chose not to make any mention of the judgment dated 10.02.2004 passed by the Federal Service Tribunal, and the judgment dated 30.09.2004 passed by the Hon'ble Supreme Court. Vide judgment dated 30.06.2014, the learned Single Judge-in-Chambers allowed the said writ petition, and directed the appellant to implement the orders/directions dated 22.04.2009 passed by the President of N.H.C. The said judgment dated 30.06.2014 has been impugned by the appellant in the instant intra-court appeal.

19. In the impugned judgment dated 30.06.2014, it has been held *inter-alia* as follows:-

“10. Likewise, another issue which is very much important, the petitioner cannot claim their period of contractual employment for the purpose of seniority. Contractual employment by itself is not an employment considered to be initial or permanent employment. Though probation period for contract employment was fixed as referred above but that was only limited to the extent of their contract period, not for whole service. Therefore, by virtue of law and rules, service of petitioners would be reckoned from regular employment and not from the earlier employment on contract basis. Therefore, apprehension of respondents in this regard is redundant.”

20. Now, the respondents have not impugned the said judgment dated 30.06.2014. Therefore, they cannot seek their regularization with effect from the date when they were initially appointed on contract basis. The question that remains to be

determined is whether they have a legitimate claim to be appointed in BS-18 instead of BS-17. Respondent No.1 in his application/appeal before the President of N.H.C. (culminating in the order dated 14.11.2007) as well as his appeal dated 03.02.2009 to the President of N.H.C (culminating in the order dated 22.04.2009) concealed the *factum* as to dismissal of his appeal by the Federal Service Tribunal and the dismissal of his petition by the Hon'ble Supreme Court. Paragraphs 2 and 3 of the judgment dated 30.09.2004 are reproduced herein below:-

“2. Saqlain Mehdi was appointed in the National Highway Authority on 15.03.2000 on contract basis for a period of one year which, after short duration, was extended to a period of three years. The case, along with others with recommendation of committee concerned, was forwarded to the Chairman, National Highway Authority for regularization but the same was turned down ultimately. His appeal before the Tribunal also failed.

3. Not only that the petitioner had no vested right in claiming regularization of his contract job and not only that it was rightly turned down but at present, the services of the petitioner stand terminated on the expiry of contract in dispute. The petitioner being no more in service, the instant petition has become infructuous and is dismissed accordingly. Leave to appeal refused.”

(Emphasis added)

21. Had the President of N.H.C. been aware of the said judgments of the Federal Service Tribunal and the Hon'ble Supreme Court, he would certainly not have reinstated the respondent (whose contractual employment had long expired), and would have also not taken them on the regular strength of the N.H.A. in BS-18 with effect from the date when they were initially appointed on contract basis. The President of N.H.C.'s remarks to the effect that the respondents had been treated unjustly would not have been made had the said judgment of the Hon'ble Supreme Court been brought to his notice. Since respondent No.1 concealed the fact about the dismissal of his appeal by the Federal Service Tribunal and his petition by the Hon'ble Supreme Court in his applications to the President of N.H.C. as well as the writ petitions filed before this Court, the said conduct and attitude of respondent No.1, in my view, disentitled him from invoking the extra ordinary jurisdiction of this Court. It is well settled that the

grant of a writ is in the discretion of the Court and the Court will decline to exercise the discretion where the conduct of the petitioner is such that it would be inequitable and unjust to grant him relief. S.M. Murshed J. in the case of Messrs Momin Motor Co. Vs. Regional Transport Authority, Dacca (PLD 1962 Dacca 310) observed that *“Courts would be reluctant to exercise their discretionary powers of issuing such writs, if the petitioner’s conduct is found to be such as would disentitle him so as to obtain the relief prayed for.”* In the case of Shahid Chanzaib Vs. C.D.A. (2017 YLR 411), this Court has held as follows:-

“16. In the proceedings under Article 199 of the Constitution, which is an extra ordinary constitutional jurisdiction, the conduct of the litigant plays an important role. Where a petitioner does not come with clean hands or the Court finds that he is not a bona fide petitioner or where his conduct is dubious, the Court may decline to go into the merits of the matter.”

22. Respondent No.2’s case, on its merits, is on no better footing as that of respondent No.1. The fact remains that on both occasions when the respondents were appointed in the N.H.A on contract basis, it was not as a result of a competitive process. Their re-appointment on contract basis in 2007 by the President of N.H.C. was in ignorance of the above referred decisions of the Federal Service Tribunal and the Hon'ble Supreme Court. The respondents should thank their lucky stars that they are still serving in BS-17 in the N.H.A., and that also on regular basis after the decision of the Cabinet Sub-Committee. For the respondents now to seek their regularization with effect from the date when they were initially appointed on contract basis with all back benefits or to seek their appointment in BS-18 instead of BS-17, reminds us of the saying: “Give someone an inch and he'll take a yard.” This is used in circumstances when one has been granted a favour but attempts to ask for more.

23. In view of the above, we are of the opinion that the respondents had no vested right to seek appointment on regular basis in BS-18 with effect from the date when they were initially appointed on contract basis. The President of N.H.C. had no authority to grant the respondents the sort of relief as was given

to the respondents vide order dated 22.04.2009. As it is, the said order was recalled by the President of N.H.C. on 04.01.2010 and the matter was referred for a decision to N.H.A. The Executive Board of N.H.A., being the competent authority, turned down the respondents' appeals/applications. Even though the President of N.H.C., on 04.01.2010, had revisited his earlier order dated 22.04.2009 (i.e. after the filing of the writ petition by the respondents), this subsequent development was of significant importance. The decision of the Executive Board of N.H.A., rejecting the respondents' appeals/applications dated 03.02.2009 and 25.02.2009 has not been challenged by the respondents.

24. In view of the foregoing discussion, Intra Court Appeal No. 507/2014 is allowed; the impugned judgment dated 30.06.2014 is set-aside; and consequently, writ petition No.1999/2009 is dismissed as having been found to be devoid of merit. There shall be no order as to costs.

(AAMER FAROOQ)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 29/08/2017

(JUDGE)

(JUDGE)

APPROVED FOR REPORTING

Qamar Khan*