IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present
Mr. Justice Mushir Alam
Mr. Justice Mazhar Alam Khan Miankhel
Mr. Justice Munib Akhtar

Civil Appeals No.26-K & 27-K of 2018
(On appeal from the judgment dated 12.3.2018 passed by the High Court of Sindh, at Karachi in C.P.No.D-6555/16 and C.P.D-931/17)

Maj. (R) Syed Muhammad Tanveer Abbas
(C.A.26-K/18)

Mansoor Pasha (C.A.27-K/18) ...Appellant(s)

vs.

Federation of Pakistan through its Secretary, Ministry of Interior and another
(in both cases) ...Respondent(s)

For the Appellant(s) (in both cases). : Malik Naeem Iqbal, ASC.

For NADRA : Hafiz S.A. Rehman, Sr. ASC.

For the Federation Mr. Tariq Khokhar, Addl. AG

Date of hearing: 13.09.2018

ORDER

Munib Akhtar, J.: These two appeals are taken up together since the same issues are involved and they were disposed of by the impugned judgment. The appellants were employees, on contract basis, of the National Database and Registration Authority ("NADRA"), constituted as a statutory body under the eponymous Ordinance of 2000 ("2000 Ordinance"). They obtained employment in 2010 and 2005 respectively. In 2012, NADRA initiated a scheme whereby contractual employees hired on or before 28.02.2011 (or perhaps 2012; there appears to be some confusion in the record, though nothing as such turns on this) were given two options. One option was to continue in service as contractual employees but on terms and conditions revised to a certain extent as per the option

form (Option I). The other was to be "regularized" (Option II). Option I was referred to as the "Existing Pay Scale" (or EPS) option, whereas Option II was referred to as the "Basic Pay Scale" (or BPS) option. Both the appellants took Option I.

2. As presently relevant, the difference between the two options, as set out in the option form that was circulated among the employees, was as follows:

Sr. #	Contents	EPS (Option I)	BPS (Option II)
1.	Service Tenure	Open ended contract	Till superannuation
2.	Termination clause	Three months' notice by either side	As per Govt. Rules

It is to be noted that the original contracts between NADRA and the appellants had, in each case, provided for termination on thirty days' notice or payment in lieu thereof, without assigning any reason. After the exercise of Option I, this clause became one that provided for three months' notice, the other conditions thereof remaining unchanged.

3. It appears that the appellant in CA 26-K/2018 was issued a notice of termination of contract on 24.10.2016. His services were terminated with immediate effect and he was offered three months' salary in lieu of notice, along with payment of gratuity and certain other emoluments, the details of which need not detain us. The appellant in CA 27-K/2018 was also issued a notice of termination on 24.10.2016, which was (other than obvious differences in the amounts specified therein) identical to the notice issued to the other appellant.

4. Being aggrieved by the aforesaid termination of their services, both appellants filed separate constitutional petitions in the High Court, which were heard together and disposed of by a common judgment, impugned herein. NADRA took an objection as to the maintainability of the petitions, and the learned Division

Bench took up this matter first as a preliminary point. NADRA has framed the National Database and Registration Authority Employees (Service) Regulations, 2002 ("2002 Regulations") in exercise of powers conferred by s. 45 read with ss. 35 and 37 of the 2000 Ordinance. The question framed by the learned Division Bench as the preliminary point was whether the aforesaid regulations were "non-statutory rules of service and a writ could be maintained in respect of service by NADRA employee?" After considering various provisions of the 2000 Ordinance and certain judgments of this Court, including in particular *Pakistan Defence Officers Housing Authority v. Itrat Sajjad Khan and others* 2017 SCMR 2010 ("*DHA* case") and *Chairman NADRA and another v. Muhammad Ali Shah and others* 2017 SCMR 1979 ("*NADRA* case"), the learned High Court concluded that the 2002 Regulations were non-statutory and hence the writ petitions filed by the appellants were not maintainable since they related to the terms and conditions of their service. The petitions were accordingly dismissed.

5. Being aggrieved by the aforesaid, the appellants filed leave petitions before this Court, which were taken up together and leave granted vide order dated 12.07.2018. Reference was specifically made in the leave granting order to the two judgments of this Court noted above.

6. Learned counsel for the appellants, after referring to the facts substantially as above, submitted that the appellants' circumstances came within the *DHA* case. It was submitted that in the writ petition out of which CA 26-K/2018 arose there was a specific prayer seeking relief by way of declaration that the termination clause of the contract be declared *ultra vires*. Learned counsel also placed reliance on a judgment of the Lahore High Court reported as *Samina Kanwal v. Director Punjab Forestry Research Institute Faisalabad* (2011 PLC (CS) 1553). Learned counsel submitted that the termination letters had (as he put it) come out of the blue, and sought to rely on what was referred to as

the exemplary service record of the appellants. It was submitted that statutory authorities performing public functions could not act in an unreasonable, arbitrary and capricious manner and in this regard NADRA was no different from the Pakistan Defence Officers Housing Authority ("DHA"), whose action of termination of service had been struck down by this Court in the *DHA* case. It was submitted that the termination clause involved in that case was identical in all material respects to the clauses applicable to the appellants. Learned counsel also relied on the well known case of *Pakistan Defence Officers Housing Authority and others v. Jawaid Ahmed* (2013 SCMR 1707), and referred to para 50(iv) thereof. It was prayed that the appellants were entitled to appropriate relief.

7. Learned counsel for NADRA opposed the appeals and prayed for their dismissal. It was submitted that the option given to the employees in 2012 bifurcated them into two categories, contractual employees and regular employees. Learned counsel highlighted the differences between the terms and conditions offered to the two categories. It was submitted that the very scheme now before the Court had already been considered in the *NADRA* case. Referring to various passages from this judgment, it was submitted that it applied on all fours to the appellants' case, and a categorical observation had been made therein to the following effect (para 12, pg. 1989): "... till such time that the employees were regularized they would continue to be governed by the terms and conditions of the contract which they had with NADRA" and that the "writ or constitutional jurisdiction of the High Court under Article 199 of the Constitution could not be invoked by a contractual employee of a statutory organization, such as NADRA". Since the appellants were contractual employees their petitions were rightly dismissed by the learned High Court as not maintainable. As regards the *DHA* case, learned counsel submitted that that was distinguishable and turned on its own facts. It was submitted that the employee there had been a regular employee, in contrast to the case at hand where the appellants were admittedly contractual employees. The learned Addl. AG adopted the submissions made by learned

counsel for NADRA. Learned counsel for the appellants exercised the right of reply.

8. We have heard learned counsel as above and considered the record and the case law relied upon. In our view, the appeals at hand can essentially be decided by a consideration of the *DHA* case (on which primary reliance was placed by the appellants) and the *NADRA* case (which was relied upon by NADRA, and indeed also served as the main plank on which the impugned judgment rests). We first take up the *NADRA* case. It is indeed correct that the option involved in the present appeals was also in consideration in that case. However, the facts before the Court were rather different. The NADRA employees involved (who were respondents before this Court) were no doubt contractual employees who were given the option in 2012 in the same manner as the present appellants. However, the grievance that those respondents took to the Peshawar High Court was that they contended that the terms and conditions as regards "equivalency" offered to the employees for Option II (which, it appears, those respondents wanted to exercise) was not as had allegedly been promised at a meeting held on 23.02.2012. It was held in this Court (see para 8) that firstly, the meeting was non-compliant with the relevant provisions of the 2000 Ordinance but that secondly, even if the first point be put to one side, what was decided at the meeting was merely recommendatory and not binding in any manner at all. However, the relief granted by the learned High Court was to alter the terms offered by NADRA in relation to Option II in respect of the "equivalency" and for the re-designation of the respondents' pay scales in the manner as directed by the High Court. It was held that such relief could not have been granted. It was concluded as follows (para 12; emphasis supplied):

> "The private respondents herein, who were the petitioners before the High Court, however, challenged certain terms/components of NADRA's. letter dated March 6, 2012; in doing so they undermined their own status of becoming regular or permanent employees of NADRA. If they did not accept NADRA's letter dated March 6, 2012, or any part thereof, they would remain as

> contractual employees of NADRA. *The High Court could not renegotiate, alter and/or amend the terms of regularization that were offered by NADRA for the simple reason that the High Court did not have jurisdiction to do so. Therefore, till such time that the employees were regularized they would continue to be governed by the terms and conditions of the contract which they had with NADRA*. The writ or constitutional jurisdiction of the High Court under Article 199 of the Constitution could not be invoked by a contractual employee of a statutory organization, such as NADRA .... It was only after the terms and conditions offered by NADRA had been accepted and the Option Form had been submitted that the status of a contractual employee would convert to that of a regular employee of NADRA. Before accepting the terms offered by NADRA and submitting the Option Form the status of a contractual employee would remain as such and he/she would not be able to seek recourse to the constitutional jurisdiction of the High Court."

It was only in the foregoing context that this Court held that the writ petitions were not maintainable and ought to have been dismissed by the High Court. In the present case, the appellants in fact selected the option offered in terms of the NADRA scheme, albeit they took Option I. The question now before the Court is whether in terms of that option, the termination clause operated in the manner as done by NADRA. The factual situation involved in the two cases is therefore rather different. The present appeals cannot therefore, with respect, be dismissed simply and only on the basis of the *NADRA* case.

9. We now turn to consider the *DHA* case. The employee was inducted into service by DHA in 1999. After some years certain differences arose and her services were "dispensed" with in 2012. The Service Rules 2008, which applied to the employee, provided as follows in material part:

> "**8. Termination/Resignation/Dismissal from Service** ...
>
> b. Rules for Governing Termination/Dismissal/Resignation
>
> (1) The Administrator may dispense with the services of an employee by giving him one month's notice or one month's pay in lieu thereof. Similarly, an employee may resign from service by giving one month's notice or by paying one month's pay in lieu thereof. ..."

In this Court, two questions were considered: firstly, whether DHA was a "person" within the meaning of Article 199(1)(a)(ii), read with clause (5) thereof, of the Constitution; and if so, whether the

2008 service rules were statutory in nature or otherwise. The first question was answered in the affirmative, which meant that the writ petition in the High Court was maintainable. As regards the second, it was concluded that the service rules were non-statutory in nature. It was then observed as follows (emphasis supplied):

> "15. No doubt the employees of statutory corporations in absence of violation of law or any statutory rules of service cannot press into service constitutional jurisdiction of the High Court and after we have come to the conclusion that the service rules framed by the appellant were not statutory but for their internal guidance and, therefore, their enforcement through writ jurisdiction does not appear to be in consonance with the law settled by this Court.... *However, the question which escaped the attention of the High Court and needs our consideration is as to whether Rule 8(b)(1) of the Service Rules framed by the appellant in 2008 for their employees which authorizes the Administrator to dispense with the services of an employee by giving him one month's notice or a month's pay in lieu thereof without assigning any reason or providing an opportunity of hearing is violative of the principle of natural justice, which always has been treated as violation of law*. The said rule further appears to be against the principles of public policy which requires the public functionaries to maintain transparency and to exercise their powers in good faith in the public interest and not on the basis of personal likes or dislikes or on the basis of whims and fancies and, therefore, it needs to be examined as to whether such rule could be allowed to be retained in the service rules (though non-statutory) of the appellant a statutory body...."

It was noted that the employee, after completing her period of probation, served DHA as a "regular employee for almost two decades", but that her "services were dispensed with without assigning any reason or providing an opportunity of hearing" (para 16). It was further observed as follows (*ibid*):

> "The contention of the ASC for the appellant [i.e., DHA] that the respondent was a contract employee and as per her appointment letter her services could be terminated on one month's notice as recorded in the leave granting order is against the record/appointment letter of the respondent. The respondent of course was a regular employee as the only condition in her letter of appointment was of successful completion of probationary period of one year which was completed by her in the year 2000. Additionally this ground was not raised before us by the ASC for the appellant and admitted her to be regular employee whose services were dispensed with under Rule 8(b)(1). The admitted fact on record reflected that both the appellant as well as the respondent had grievances against each other ... There is nothing on record to show nor the learned counsel for the appellant was able to disclose that in view of a specific provision available in the service rules for initiating disciplinary proceedings against the regular employee in the shape of Rule 8(b)(4) why the Administrator had to resort to the provision of Rule 8(b)(1) if there was no bias of personal likes or dislikes or that such decision was not based on whims and fancies or carried no mala fide. The

> provisions of Rule 8(b)(1) which empower a statutory corporation/public functionary to terminate the services of its employees without cause, of course, clearly violates the principle of natural justice/law and, therefore, its retention in the service rules of the appellant cannot be allowed being ultra vires the Constitution and the law."

After citing from the case of *Muhammad Ashraf Tiwana v. Pakistan and others* 2013 SCMR 1159, it was finally concluded as follows:

> "18. In view of what has been discussed above and the fact that we have declared the provision of Rule 8(b)(1) as ultra vires the Constitution, therefore, declare the letter dated 11th September, 2012 whereby the services of the respondent were dispensed with, as illegal and without lawful authority. The respondent would be deemed to be in service and entitled to all consequential benefits. However, the appellant would be at liberty to initiate proceedings, if deemed fit, against the respondent in terms of Rule 8(b)(4) or any other provision but strictly in accordance with law. The appeal in above terms, stands decided."

10. When the *DHA* case is compared with the appellants' case, there are certain obvious similarities, the first and most important being of course that both involved situations of termination from service. Apart from that, in our view, as held by this Court in relation to DHA, there can hardly be any doubt that NADRA is also a "person" within the meaning of Article 199(1)(a)(ii) read with clause (5) thereof. Equally, it is also clear that the 2002 Regulations, like the DHA service rules of 2008, were non-statutory in nature. It also cannot be in doubt that the termination clauses involved in the present appeals are in all material respects the same as Rule 8(b)(1) of the DHA service rules. This is apparent on a bare reading of the said provisions. The crucial question therefore is whether the termination clauses involved here can be treated in the same manner as Rule 8(b)(1), and the same or similar relief accorded the present appellants?

11. It will be recalled that learned counsel for NADRA, seeking to distinguish the *DHA* case, laid emphasis on the fact that, according to him, the present appellants were only contractual employees whereas the respondent in the cited decision was a "regular" employee. The basis for this submission is clearly para 15 of the *DHA* case, which has been reproduced above in material

part. The options offered to the NADRA employees in terms of the 2012 scheme were contained in its letter of 06.03.2012 (also set out in para 3 of the *NADRA* case). The subject was "Regularization of NADRA Employees" and para 1 of the scheme stated as follows: "The regularization of NADRA contractual employees has been approved by Competent Authority with effect from 29 February 2012". Reading the contents of the scheme as a whole, we are of the view that by regularization was meant those employees who took Option II. The employees, such as the appellants, who took Option I remained, as before, contractual employees. It follows that the equivalence, if any, between the respondent in the *DHA* case and the NADRA employees would be with those who took Option II, and not those who selected Option I. We are therefore, with respect, unable to agree with learned counsel for the appellants that their case was at par with that of the respondent in the *DHA* case.

12. Learned counsel for the appellants had also sought to rely on the fact that the revised terms of the contract as per Option I made the contract "open ended" (see para 2 herein above), i.e., without any fixed term or duration. It was also submitted that in the letter of 06.03.2012, above the table setting out the respective terms and conditions of the two options, it was stated as follows: "NADRA is offering employment till superannuation under following two options for all those contractual employees hired on/before 28 February 2011". Relying on this sentence learned counsel submitted that the intent even as regards Option I was that under all normal circumstances the employee was to be retained till the age of retirement and that the termination clause had therefore to be applied accordingly. More precisely, it was submitted on the foregoing basis that a termination without notice or assigning any reasons was impermissible. We have carefully considered this submission, which is certainly not without apparent merit or plausibility. In the end however, it cannot be accepted. The reason is that the contract did have a terminus. It was simply that it was not set out (as is otherwise customary) with reference a particular

period of time (i.e., specific years etc.). The period was however there: the age of superannuation. The "open ended" nature of the contract cannot, with respect, be construed in the manner as submitted by learned counsel.

13. As noted above, learned counsel also relie on a decision of the Lahore High Court, *Samina Kanwal v. Director Punjab Forestry Research Institute Faisalabad* 2011 PLC (CS) 1553. We may note that a leave petition was filed in this Court against the aforesaid decision, being CA 980/2011. It was disposed of by order dated 20.02.2014. The challenged judgment was set aside and the matter remanded to the Lahore High Court for decision afresh. It appears that the matter (ICA 281/2010) is still pending in that Court. In such circumstances it will not be appropriate for us to comment upon the same here.

14. In view of the foregoing discussion, our conclusion ultimately is that the appellants cannot be granted relief in terms of the proceedings and remedy (i.e., constitutional petition) as sought by them. Whether they would have had a case sounding in a civil suit, with appropriate injunctive or other remedy being sought there, is a point not in issue here, and which therefore need not be considered in these appeals.

15. Accordingly, these appeals fail and are hereby dismissed. There will be no order as to costs.

Judge

Judge

Judge

Announced in open Court today 13.5.2019 at Islamabad.

Judge

NOT APPROVED FOR REPORTING