# IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

#### PRESENT:

Mr. Justice Munib Akhtar Mr. Justice Athar Minallah

Mr. Justice Syed Hasan Azhar Rizvi

# Civil Petition No.1353-L of 2023

[Against the Judgment dated 20.02.2023 passed by the Federal Service Tribunal, Lahore in the Appeal No.8(L)/2020]

Chairman/Dean Sheikh Zayed Hospital, ...Petitioner(s) Lahore.

Versus

Amjad Mehmood Khan.

...Respondent(s)

For the Petitioner(s) : Mr. Imran Aziz, ASC

For the Respondent(s) : Mr. Aurangzeb Mirza, ASC (via

video link from Lahore)

Date of Hearing : 12.09.2024

### **JUDGMENT**

Syed Hasan Azhar Rizvi, J. Through this petition, the petitioner has called in question the judgment dated 20.02.2023 ("Impugned Judgment") passed by the Federal Service Tribunal, Lahore whereby Appeal No.8(L)/2020 preferred by the respondent was allowed.

- 2. Facts in brief are that the respondent was appointed to the post of Anaesthetist (BS-18) on 03.04.1988, initially for a period of two years on contract basis. *Vide* notification dated 11.11.1992, upon the recommendation of the Departmental Promotion and Selection Committee, the competent authority regularized his contract appointment in BS-18 and thereafter he was promoted to BS-19, *vide* order dated 19.04.2004.
- 3. On attaining the age of superannuation respondent retired on 20.11.2007. However, his contract period of 4 ½ years was not included in the calculation of his pensionary benefits.

Upon learning that the department had excluded his contract period from the pension calculations, the respondent filed a representation on 27.10.2014 seeking recalculation of his pension. This representation was dismissed on 19.02.2015. The respondent submitted another representation on 07.05.2019, which remained undecided by the department within the prescribed statutory period. Consequently, the respondent invoked the jurisdiction of the Punjab Service Tribunal after 90 days, but the appeal was dismissed for want of jurisdiction *vide* order dated 15.11.2019. The respondent then filed an appeal before the Federal Service Tribunal, which was allowed through the impugned judgment. Hence, this petition.

- 4. Learned counsel for the petitioner contends that the decision of the Federal Service Tribunal is tainted with illegality and infirmity; that the respondent retired on 20.11.2007, whereas the first representation was filed on 27.10.2014, which was timebarred and that, under the applicable service laws, the contractual period is not counted towards pension entitlement, therefore, petitioner prays that the impugned judgment may be set aside.
- 5. On the contrary, the learned counsel for the respondent contends that the impugned judgment is well-reasoned and based on a proper interpretation of the law; that the respondent was unaware of the department's failure to include the contract period towards the pension calculation and he filed the representation immediately upon gaining this knowledge. Furthermore, pensionary benefits constitute a recurring cause of action, thus, the representation is not time-barred.

- 6. We have heard the contentions advanced by the learned counsel for the parties and have gone through the material available on the record.
- 7. As far as issue of time barred representation is concerned, it has been rightly noted by the learned Federal Service Tribunal that pension constitutes a recurring cause of action. It has been consistently held by this court that claims constituting payment of lawful dues constituted a recurring cause of action and delay, if any, would not automatically vitiate a claim. Reference may be made to the case of <u>Abdul Jabbar vs. Pakistan Railways</u> (2018 PLC (CS) 375) wherein it has been ruled that:-

10. Though it has been repeatedly held by this Court that pension is in fact a deferred part of the pay of an employee while he was putting his best efforts in rendering service to his employer during his hay days and this part is deferred to be paid to him periodically or otherwise to meet his old age needs as such pensionary benefits were neither a bounty nor a concession from any one and in the latter case are paid month wise and therefore, grievance in respect thereof provides a recurring cause, consequently, the limitation could not come in the way of such relief. Reference can readily be made to the case of Chief Executive Progressive Paper Ltd./The Chairman National Press Trust, Islamabad v. Sh. Abdul Majeed (2005 PLC (C.S.) 1439). However, in our opinion, where such pensionary benefit is altered or interpreted to the disadvantage of a civil servant or his pension is reduced or his maximum pension is withheld including an additional pension admissible to him under the rules then his grievance to that extent has to be regulated in terms of Rule 4(1) of the Civil Servant (Appeal) Rules, 1977."

Moreover, in the case of <u>Umar Baz Khan vs. Jehanzeb</u> (PLD 2013 SC 268) it has been observed that the bar of laches cannot be overemphasized in the cases where the relief claimed is based on a recurring cause of action and that no court could dismiss a *lis* on account of laches if such a decision would perpetuate injustice.

8. An examination of jurisprudence of foreign Courts also reflects that pension is considered as a recurring cause of action. Supreme Court of India in the cases of *M.R. Gupta Vs. Union of* 

India & Ors. [(1995) 5 SCC\_628] and Union of India & Ors. Vs.

Tarsem Singh [(2008) 8 SCC 648] has similarly recognized that the right to pecuniary benefit in service jurisprudence in the form of pay or pension is a recurring cause of action.

- 9. With regard to the contention of learned counsel for the petitioner that contract period cannot be counted towards service for purpose of pension, Article 371-A of the Civil Service Regulations (CSR) being relevant is reproduced below:-
  - **"371-A.** Notwithstanding anything contained in Articles 355(b), 361, 368, 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 5 years immediately followed by confirmation shall also count for gratuity or pension, as the case may be.

#### [Emphasis Added]

At this juncture, it is needless to observe that the use of the phrase <u>'temporary service'</u> in Article 371-A of CSR includes contractual service.

- The perusal of the Article 371-A of CSR reveals that clause (i) stipulates that government servants employed in temporary positions who have rendered <u>more than five years of continuous temporary service</u> are entitled to have such service counted towards their pension or gratuity. The use of the term "continuous" indicates that only uninterrupted service exceeding five years qualifies, and any prior broken periods of temporary service are to be excluded from the calculation.
- 11. In the present case, since temporary service (contract period) of respondent was 4 ½ years therefore clause (ii) is

applicable. Clause (ii) provides for situations where a government servant has rendered <u>less than five years of continuous temporary or officiating service.</u> In such instances, the period of service shall also be counted towards pension or gratuity, provided that it is immediately followed by confirmation/regularization as a permanent employee.

- 12. Perusal of the notification dated 11.11.1992 reveals that the contract appointment of the respondent was regularized. The record reveals that the respondent's service from his contractual appointment to regularization and retirement was continuous and uninterrupted and this has not been disputed by the petitioner. The only grievance of the petitioner is that the contractual period should not be counted for the calculation of pension. However, established law and decisions of this Court clearly state that the contractual period must be included towards the calculation of pension provided the case falls either under clause (i) or clause (ii) of Article 371-A of the CSR.
- 13. In the case of <u>Chairman</u>, <u>Pakistan Railway</u>, <u>Government of Pakistan</u>, <u>Islamabad and others v. Shah Jehan Shah</u>

  (PLD 2016 Supreme Court 534) this court has interpreted Article 371-A of the CSR and observed as follows:-
  - ...... 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. ..."

- 14. This decision was affirmed in the case of <u>M/o Finance</u> through Secretary, etc. v. Syed Afroz Akhtar Rizvi & others ( 2021 SCMR 1546 ) wherein it has been observed that:-
  - "6. .... An analysis of the said provisions and judgments of this Court more specifically a relatively recent judgment of this Court in Shah Jahan Shah's case shows that the following general principles apply to employees who have worked against contractual posts which were subsequently converted into regular posts for the purpose of grant and calculation of pension:
  - I. an employee who was employed on contractual basis and is subsequently regularized may be entitled to pensionary benefits provided;
  - i) he is eligible for pension having served for the qualifying period (10 years) as a regular employee.
  - ii) for the purpose of calculating pensionary benefits his service as a contractual employee can be factored in to provide him any financial benefit that may be due to him.
  - iii) the period spent in employment as a contractual employee and as a regular employee cannot be aggregated in order to determine his eligibility for entitlement to pension.
  - iv) eligibility to receive pension is directly related to rendering qualifying service as a regular employee. Unless an employee has performed services in a regular appointment for the duration of the qualifying period (10 years), he is not entitled to receive pension".

Thus, the law is clear that the contractual period, being temporary service, is recognized by Article 371-A of the CSR for inclusion in the calculation of pension provided that the contractual period is followed by regularization or confirmation without any gap or interruption, in accordance with clause (ii) of Article 371-A of the CSR. Therefore, Federal Service Tribunal has rightly allowed the appeal of the respondent.

15. In view thereof, we find that impugned judgment is well-reasoned and has considered all legal and factual aspects of the matter. The petitioner has failed to make out a case warranting

any interference. Consequently, this petition, being devoid of merit, is dismissed and leave refused.

Bench-II Islamabad 12.09.2024 Not APPROVED FOR REPORTING Paras Zafar, LC\*