

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE GULZAR AHMED, HCJ
MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE MUNIB AKHTAR

CIVIL APPEAL NO.268 OF 2020.

*(Against the order dated 04.04.2018 passed
by the Peshawar High Court, Peshawar in
Constitutional Petition No. 3139-P of 2017).*

Government of Khyber Pakhtunkhwa through Secretary
Administration Department and others.

...Appellant(s)

VERSUS

Liaquat Ali.

...Respondent(s)

For the Appellant(s):

Mr. Shumail Ahmad Butt,
Advocate General Khyber
Pakhtunkhwa.

Mr. Atif Ali Khan, Addl. A.G. KPK
Barrister Qasim Wadood, Addl.
A.G. KPK with

Irum Shaheen, DD, HED

Mr. Asif Khan, Litigation Officer,
HED.

Mr. Amin Jan, AD, Fisheries

Mr. Gulzar Mahmood, AD
Fisheries KPK.

Engr. Falak Niaz, AD(Dost)

Rajbar Khan, SDO, PHE, KPK

Mr. Saadullah, Asstt. Secretary,
BOR, KPK

Mr. Faheem Ullah Khan, Sr. Law
Officer, KPPSC

Mr. Assad Ullah Khan, SO, P&D
Department.

Mr. Amanatullah Qureshi, Dy.
Secy., Finance Deptt. KPK

For the Respondent(s):

Mr. Khaled Rahman, ASC.

Date of Hearing:

25.11.2020.

JUDGMENT

GAJAZ UL AHSAN, J.:- Through this judgment we intend to decide Civil Appeal No. 268 of 2020.

2. Through the instant Appeal, the Appellant has challenged the Judgment dated 04.04.2018 passed in Constitutional Petition No. 3139-P/2017 by the Peshawar High Court, Peshawar. The Respondent had, through the Constitutional Petition, sought his regularization, which was allowed and the Appellant was directed thereby to regularize the services of the Respondent.

3. The brief facts giving rise to this *lis* are that the Respondent was employed on contract basis as an Electrician in the Benevolent Fund Cell, Khyber Pakhtunkhwa, Administration Department, vide order dated 10.09.2009. His contract was extended from time to time, and, the last period of its extension was from 01.07.2017 to 31.12.2017. On 24.10.2009, the Khyber Pakhtunkhwa Employees (Regularization of Services) Act, 2009 (hereinafter referred to as the ("2009 Act") was promulgated. Under Section 3 of the 2009 Act certain employees could be regularized, provided, certain conditions in the 2009 Act were fulfilled. Resultantly, other contract employees, except the Respondent, were regularized. The Respondent assailed this through a Constitutional Petition in the Peshawar High Court, Peshawar which was allowed in, *inter alia*, the following terms: -

"The Respondents are directed to regularize the Petitioner against his working position forthwith strictly in accordance

with the provisions of the North-West Frontier Province Employees (Regularization of Services) Act, 2009 (NWFP-Act No. XVI of 2009)”

4. Leave to appeal by this Court was granted vide order dated 09.03.2020 in the following terms: -

“The Learned Advocate General, Khyber Pakhtunkhwa contends that all the Respondents in these Petitions were employed either on Project posts or on contract basis or were employees under Section 42 of the Companies Act, 2017 and in no circumstances their services were to be regularized. He contends that this very aspect of the matter has time and again come before this Court where it has been held that such employees could not be regularized. He further contends that in all the impugned judgments, the learned High Court has merely allowed writ petitions on the basis of similarly placed persons without applying its mind to the same. He adds that even the laws under which their appointments were made were not adverted to. He submits that Respondents who are employees on project of contract employees or Section 42 employees were not liable to be regularized and thus their regularization by the learned High Court through the impugned judgment in these petitions was altogether illegal. In support of his contentions, the learned Law Officer has referred to a three Member judgment of this court dated 24.06.2014 passed in Civil Appeal No. 687 of 2014 (Government of Khyber, Agricultural, Livestock and Cooperative Department through its Secretary and others v. Ahmad Din and another).

2. We note that some of the petitions are time barred and in one of the petitions even no application for condonation of delay has been filed. The learned Law Officer states that such will be done by the petitioners.

3. The contentions raised by the learned Additional Advocate General, Khyber Pakhtunkhwa need consideration. Therefore, subject to limitation, leave to appeal is granted in these petitions to consider inter alia the same. The appeal stage paper books shall be filed within a period of one month with permission to the parties to file additional documents, if any. As the matter relates to service, the office is directed to fix the same expeditiously preferably after three months.

4. In the meantime, operation of the impugned judgment(s) shall remain suspended.”

5. Learned Advocate General, Khyber Pakhtunkhwa (hereinafter referred to as “KPK”) submits that, the contract of the Respondent outlines that he was a project employee with no vested right to regularization. He further contends

that, being a project employee, he was not entitled to regularization under 2009 Act. He further submits that the Respondent was on a stop-gap arrangement till the appointment of a regular appointee on the post against which the Respondent was appointed and so the Respondent could not have been regularized by the learned High Court vide the impugned judgment. He adds that the Respondent did not fall within the prescribed age limit of the regular post being overage and thus could not have been regularized.

6. Learned Counsel for the Respondent submits that although the Respondent was appointed on contract; the said appointment was against a budgetary post. He further contends that the appointment was made vide appointment order dated 10.09.2009 which was before the date of promulgation of the 2009 Act being 24.10.2009 therefore, the Respondent was entitled to be regularized. He adds that, by not regularizing the Respondent, the principle of similar treatment of persons was violated and, the Respondent was discriminated against.

7. Before we enter into a detailed discussion on the controversy, for the purpose of clarity and in order to focus the controversy, we consider it appropriate to formulate the questions which require our determination. These are as follows: -

- (i) Whether the Respondent is an "employee" as per the definition provided in Section 2(b) of The Regularization Act and so is covered by the said Act;

- (ii) Could the Respondent have been regularized under Section 3 of The Regularization Act?; and
- (iii) Whether the Respondent could be regularized if he was overage?

Whether the Respondent is an "employee" as per the definition provided in Section 2(b) of The Regularization Act and so is covered by the said Act?

8. Section 2(b) of The Regularization Act provides the definition of an employee as an *ad hoc* or contractual employee appointed by the Government. The said definition excludes project employees, employees appointed on work charge basis and, employees paid out of contingencies. Section 2(c) defines "Government" as the Government of KPK. A perusal of the Appointment Order dated 10.09.2009 shows that it is signed by the Secretary to Government of KPK Government, Administration Department, Benevolent Fund Cell. The said Secretary is a member of the Board of Management constituted by the Chief Secretary of KPK under Section 6 of The KPK Government Servants Benevolent Fund Ordinance, 1972 (hereinafter referred to as the ("1972 Ordinance"). Nowhere does the Appointment Order or the 1972 Ordinance does it mention that the Respondent was appointed on work charge basis, or was otherwise appointed in a project, or was paid out of a contingency funds. Nonetheless, no contention to this effect has been raised by the Appellants. This is enough to show that the Respondent was appointed by the KPK Government on contract and is an

employee for the purposes of Section 2(b) and therefore covered by The Regularization Act.

Could the Respondent have been regularized under Section 3 of The Regularization Act?

9. Section 3 of The Regularization Act is reproduced below for ease of reference: -

"3. Regularization of Services of certain employees. -- All employees including recommendees of the High Court appointed on contract or ad hoc basis and holding that post on 31st December 2008 or till the commencement of this Act shall be deemed to have been validly appointed on regular basis having the same qualification and experience of a regular post:

Provided that the service promotion quota of all service cadre shall not be affected."

10. This above section provides three pre-conditions for regularization. The first is that the appointment must have been made on contract or ad hoc basis. The second condition is that the employee must have been holding the said post on 31st December 2008 or, till the commencement of The Regularization Act. The Third condition is that the appointee must have the qualification and experience required for a regular post.

11. Section 1(2) of the 2009 Act provides that it shall come into force at once. The learned High Court in the impugned judgment has held that the 2009 Act was promulgated on 24.10.2009. It has further held and not

denied by either side, that the Respondent was appointed on 10.09.2009. The learned High Court has therefore correctly concluded that Section 3 allows for the regularization of Respondent because he was appointed on contract before the promulgation of the 2009 Act. The record establishes that the Respondent clearly falls within the purview of Section 3 and fulfills all conditions. If the law entitles the Respondent to regularization, any action to the contrary constitutes denial of a right conferred by law. Even otherwise, the contention of the learned Advocate General to the effect that the terms and conditions of the Appointment Order provide that the Respondent could not claim regularization, is untenable. The language of the Act overrides such contractual disclaimers and if it is shown that a person falls within the purview of the Act and fulfills the pre-conditions, he can seek regularization.

12. The impugned judgment notes that the Additional Advocate General did not raise any contention regarding the eligibility of the Respondent for regularization under The Regularization Act. As such, at this stage, we cannot allow a change of stance on the part of the Appellant.

Whether the Respondent could have been regularized, provided that he was overage?

13. The learned Advocate General has argued that the Respondent being overage and appointed on a stop gap arrangement, could not have been regularized. We find ourselves unable to agree. The NWFP Benevolent Fund

Service Rules were promulgated on 30.06.1988 (hereinafter referred to as ("The Benevolent Fund Rules"). The Respondent was appointed vide appointment order dated 10.09.2009. Not only was the Respondent initially appointed on the said date, his services were extended from time to time and at the time of filing of the Constitutional Petition in 2017, he was still in service. Once having employed the Respondent, fully knowing his age and extending his contractual employment for years on end, the Appellant cannot now turn around and claim that the Respondent cannot be granted relief because he was overage at the time he was appointed, specially where no foul play or concealment has even been alleged on part of the Respondent. It is settled law that nobody should be allowed to benefit from their own default.

14. Even otherwise, we have repeatedly asked the learned Advocate General whether a challenge was thrown to the Order of the Benevolent Fund Cell, Administration Department, KPK Government dated 12.04.2019, regularizing the services of the Respondent. In response, it has been stated that, such order was not challenged, withdrawn or cancelled. It is therefore clear that, the said Order dated 12.04.2019 still holds the field. We are therefore of the view that the direction of the learned High Court to the Appellant to regularize the Respondent is based on the correct legal and factual position.

15. The impugned judgment of the learned High Court is well reasoned, proceeds on the correct factual and legal premises and has correctly applied the applicable law, rules and regulations to the facts and circumstances of the cases before us. No legal, jurisdictional defect, error or flaw in the impugned judgment has been pointed out to us that may furnish valid basis or lawful justification to interfere in the same. The Learned Advocate General KPK has not been able to persuade us to take a view different from the High Court in the facts and circumstances of the instant Appeal. We accordingly affirm and uphold the impugned judgment of the learned High Court

16. For reasons recorded above, we find no merit in the present Appeal. The same is accordingly dismissed.

Sd/- CJ
Sd/- J
Sd/- J

ISLAMABAD.

Haris LC.

Not approved for reporting

Announced in Court on 18.01.2021