IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

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

Civil Appeals No.249, 250, 255 & 257 of 2020
And
Civil Appeals No.273, 285, 289 & 301 of 2020

Against judgments dated 04.10.2017, 22.11.2017, 22.11.2017, 25.10.2017, 04.10.2017, 29.11.2018, 22.01.2019 & 14.03.2019 of Peshawar High Court passed in Writ Petitions No.1298-P/17, 287-M/13, 1800/17, 2234-P/17, 449-P/15, 3289-P/17, 818-B/17 & 6347-P/17.

CA.249 of 2020	Government of Khyber Pakhtunkhwa through Secretary Agriculture, Livestock & Cooperative Department Peshawar & Others Vs. Saeed-ul-Hassan & Others
CA.250 of 2020	District Officer On Farm Water Management Dir Lower & Others Vs. Shahzada
CA.255 of 2020	Government of Khyber Pakhtunkhwa through Chief Secretary, Civil Secretariat, Peshawar & Others Vs. Muhammad Imran Humayun Khan
CA.257 of 2020	Government of Khyber Pakhtunkhwa through Chief Secretary, Peshawar & Others Vs. Muhammad Yasir Jamshed & Others
CA.273 of 2020	Government of Khyber Pakhtunkhwa through Chief Secretary, Peshawar & Others Vs. Muhammad Irfan & Another
CA.285 of 2020	Government of Khyber Pakhtunkhwa through Secretary Agriculture, Livestock, & Cooperative Department Peshawar & Another Vs. Iltaf
CA.289 of 2020	Government of Khyber Pakhtunkhwa through Secretary Agriculture, Livestock, & Cooperative Department Peshawar & Others Vs. Matiullah
CA.301 of 2020	Government of Khyber Pakhtunkhwa through Chief Secretary, Civil Secretariat, Peshawar & Others Vs. Muhammad Arif & Another

For the Appellant(s): Mr. Shumail Ahmad Butt, AG KP
Mr. Atif Ali Khan, Addl.AG, KP
Barrister Qasim Wadood, Addl.AG, KP
Irum Shaheen, DD, HED

Asif Khan, Litigation Officer, HED
Amin Jan, AD, Fisheries
Gulzar Mahmood, AD Fisheries KP
Engr. Falak Niaz, AD (Dost)
Rajbar Khan, SDO, PHE, KP
Sadullah, Asst. Secretary, BOR, KP
Faheem Ullah Khan, Sr. LO, KPPSC
Assad Ullah Khan, SO, P&D Deptt.
Amanatullah Qureshi, Dy. Secy. FDKP.

For the Respondent(s): Mr. Muhammad Asif Yousafzai, ASC
in CA No. 249 of 2020
Mr. Nasir Mahmood-P, ASC
in CA No. 250 of 2020
Mr. Khalid Rehman, ASC
in CA No. 257 of 2020
Mr. Muhammad Ijaz Khan Sabi, ASC
in CA No. 273 of 2020
Mr. Naveed Akhtar, ASC and
Mr. M. Sharif Janjuha, AOR
in CA No. 285 of 2020
R-2 in Person (w/o enter appearance)
in CA No. 301 of 2020

Date of Hearing: 25.11.2020

JUDGMENT

IJAZ UL AHSAN, J.- Through this single Judgment, we intend to decide Civil Appeals (hereinafter referred to as "**CA**") Nos.249, 250, 255, 257, 273, 285, 289 and 301 of 2020 as they involve a common question of law.

2. Through the instant Appeals, the Appellants have challenged the judgments of different benches of the Peshawar High Court mentioned in Schedule I of this Judgment. The Respondents had, through their Constitutional Petitions, challenged the decisions of the Appellants to terminate the services of the Respondents from their respective posts. Their Petitions were allowed, and the Appellants were ordered to reinstate and regularize the Respondents against their respective posts.

3. The necessary facts giving rise to this *lis* are that the Respondents were appointed on contract basis in different

projects against different posts. Their services were extended from time to time. They were subsequently terminated from service on completion of the respective projects in which they were appointed. They filed Constitutional Petitions to challenge this action of the Appellants which were allowed and, the Appellants were directed to reinstate and regularize the Respondents in their respective posts. Certain other Respondents then filed Constitutional Petitions for similar treatment which were also allowed, and the Appellants were ordered to treat the said Respondents at par with others who had been regularized pursuant to the orders passed by the High Court.

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

> *"The learned Additional 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 further contends that in all impugned judgments, the learned High Court has merely allowed writ petitions on basis of similarly placed persons, but without at all adverting to the facts and circumstances of each case separately and 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 the Respondents who are employees on projects or 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 the 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, Agriculture, 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 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 impugned judgment(s) shall remain suspended."

5. Learned Additional Advocate General, Khyber Pakhtunkhwa (hereinafter referred to as "**AAG**") appearing for the Appellants contends that the Respondents were employed on contract basis, in different projects. As such, they had no automatic right to regularization. Therefore, the learned High Court has erred in allowing them regularization on sympathetic grounds which action has no legal basis. The Project Policy dated 02.07.08 (the "**Project Policy**") issued by the Government of Khyber Pakhtunkhwa (hereinafter referred to as "**KP**") specifically states that all the Respondents employed in projects would stand terminated from service upon completion of their respective projects. He adds that, clause 10(vi) of the Project Policy specifically ousts any project employee from claiming regularization and, the posts converted to the regular side were to be filled through the prescribed procedure as determined by the KP Public Service Commission (hereinafter referred to as "**KPPSC**"). He maintains that the provisions of the KP Regularization Act 2009 (hereinafter referred to as "**2009 Act**") did not apply to the Respondents as the said Act specifically excludes the class of employees to which the Respondents belong.

6. The Learned ASC for the Respondents on the other hand submits that the Respondents were validly appointed to their respective posts and as such, could not have been

arbitrarily terminated given the Appellants were satisfied with their performance. Learned Counsel further submits that the projects in which the Respondents were employed had been converted to the regular side and as such, the Respondents had a right to be regularized against their respective posts. As such, the learned High Court has correctly held that they ought to be regularized. Further, that the Appellants could not have advertised the posts against which the Respondents were working, and such action amounts to exploitation and discrimination because others who were similarly placed were appointed on regular basis whereas, the Respondents were left out.

7. We have heard the learned AAG and the learned ASC for the Respondents. It is an admitted position that all the Respondents were appointed on contract basis, in different projects of KP. The issues which fall for determination before this Court are as follows: -

(i) *Could the Appellants terminate the services of the Respondents after the period of the respective projects in which the Respondents were appointed had elapsed; and*

(ii) *Are the Respondents covered by the 2009 Act; and*

(iii) *What is the effect of the terms and conditions of the appointment orders of the Respondents; and*

(iv) *What is the principle to be applied when giving relief in the cases of similarly placed employees?*

COULD THE APPELLANTS TERMINATE THE SERVICES OF THE RESPONDENTS AFTER THE PERIOD OF THE RESPECTIVE PROJECTS IN WHICH THE RESPONDENTS WERE APPOINTED HAD ELAPSED.

8. The learned ASC for the Respondents has submitted before us that the employment of the Respondents

was governed by the Project Policy issued by the Government of KP. We have gone through the Project Policy. It categorically states that those employed in different projects would stand relieved from employment upon completion of the Project in question. Clause 10 (v) of the Project Policy is reproduced herein below for ease of reference: -

> *"On completion of the project, the services of the project employees shall stand terminated. However, they shall be re-appointed on need basis, if the project is extended over any new phase or phases"*

A bare perusal of the afore-noted clause of the Project Policy makes it clear that employees, who were employed in a project, would stand terminated, on the completion of the project. The only exception is that the said employees would be re-appointed on need basis *if* the project is extended over any *"new phase or phases"*. The record reveals that the Respondents were terminated *after* the projects in which they were appointed came to an end or, were converted to the regular side. The learned High Court in the impugned judgments has held that the Respondents had a vested right to be regularized, on the basis of satisfactory service, because of the conversion of different projects to the regular side. We are unable to agree with the view taken by the High Court for the reason that it is by now a settled principle of law that, long or satisfactory contractual service does not confer a vested right for regularization as conversion from contractual to regular appointment requires statutory support. We note that, even in those Appeals before us where posts were created on the regular side, such as CA No. 255 of 2020 and CA 301 of 2020, the posts in question

were limited. If the Government has created a limited number of posts on the regular side, the learned High Court could not have stepped into the shoes of the appointing authority and order the regularization of each Respondent irrespective of availability of regular posts. Appointments on the regular and newly created posts was to be made through advertisement, open competition through a transparent process via the KP Public Service Commission. It was essentially a policy matter within the domain of the Executive. The High Court therefore erred in law in interfering with the same for no valid or justifiable reason.

9. The creation of a post or posts on the regular side does not confer, in the absence of any statutory support, an automatic right of regularization in favour of the employees employed on contractual basis against project posts. Therefore, we hold that the conclusion reached by the High Court in this regard is not sustainable.

10. Further, clause 10(vi) of the Project Policy reads as under:-

> *"In case the project posts are converted into regular budgetary posts, the posts shall be filled in accordance with the rules prescribed for the post through the Public Service Commission or the Department Selection Committee, as the case may be. Ex-Project employee shall have no right of adjustment against the regular posts, however, if eligible, they may also apply and compete for the posts with other candidates"*

The afore-noted clause of the Project Policy makes three stipulations. First, that the project posts converted to the regular side shall be filled in accordance with the rules prescribed by the KPPSC or the Departmental Selection

Committee. Second, that a project employee shall have *no right of adjustment against the regular post.* Third, if eligible, a project employee may apply for the post in question for regular appointment in accordance with the rules i.e. through KPPSC or DSC, as the case may be. The learned High Court has held that the Respondents had the right to be regularized on the posts which were created on the regular side, and not appointing the Respondents amounts to discrimination. We are unfortunately unable to agree either with the reasons given nor with the conclusion reached. We note that all posts created on the regular side were to be filled in accordance with the procedure of the KPPSC or DSC. The aforenoted provision makes is clear that ex-project employees could not claim regularization as a matter of right. Nothing is on record to suggest that the Respondents applied for the regular posts again, however, they approached the learned High Court in Constitutional Jurisdiction directly for their reinstatement and subsequent regularization which, the learned High Court did, without considering the aforenoted Project Policy which held the field and the vires of which or, any provision thereof, was not under challenge.

11. We note that, in CA 257 of 2020, the regular posts in question were created in the KPPSC and not the project in question. This is evident from the letter dated 02.05.2017 of the Government of KP, Finance Department. The said letter further states that the incumbents of the posts which were to be shifted to the regular side would not be entitled to

regularization and, the regular posts would be filled in accordance with the law. We note that the learned High Court has circumvented and, literally changed the tenor of this letter altogether by inserting in it, that which was never there, nor was it intended to be there. Even otherwise, if posts are sanctioned by the provincial government, it does not mean that anyone may be appointed against the same arbitrarily or whimsically without regard to any policy, procedure or legal basis.

ARE THE RESPONDENTS COVERED BY THE 2009 ACT?

12. Section 2(b) of the 2009 Act defines 'employee' as follows:-

> *"employee means an ad hoc or a contract employee appointed by Government on ad hoc or contract basis or second shift/night shift but does not include the employees for project post or appointed on work charge basis or who are paid out of contingencies"*

The aforenoted provision of the 2009 Act has three conditions. First, that the employee in question has to be appointed by the government. Second, that the employee has to be appointed on *ad hoc* or contract basis or second shift/night shift. Thirdly, an employee to be able to benefit from the 2009 Act must not have been employed against a project post or, appointed on work-charge basis or, be paid out of contingencies. The impugned judgments ignore the definition of 'employee' and the exclusions incorporated therein which has led to an erroneous conclusion being drawn.

13. Section 3 of the 2009 Act lays down further guidelines as to who may be regularized. The said Section is reproduced as:-

> *"**Regularization of services of certain employees.** — All employees including recomendees of the High Court appointed on contract or ad hoc basis 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 for a regular post".*

A bare perusal of the aforementioned provision makes it clear that those employees who have been appointed by the Government on or before 03.12.08 or till the commencement of the 2009 Act i.e., 24.10.09 (hereinafter referred to as "**Cut-off Dates**") would be entitled to regularization. We have gone through the record and note that all of the projects in which the Respondents were employed were converted to the regular side after the Cut-off Dates. The learned High Court has incorrectly applied and stretched the application of the 2009 Act to cover the Respondents without any lawful basis. It needs no repetition that the job and jurisdiction of the High Court is to interpret the law, test its vires on the touchstone of the Constitution and examine the legality of executive / administrative actions in exercise of its powers of judicial review. Reading provisions or interpreting existing provisions in a manner which has the effect of virtually adding new provisions constitutes excessive and arbitrary exercise of jurisdiction and encroaches upon the domain of the executive and legislative authority. Such *modus operandi* militates against the fundamental principle

of trichotomy of powers which is a cornerstone of the Constitution.

14. It is clear and obvious to us that project employees have specifically been excluded from the purview of the 2009 Act. We note that in CA No. 257 of 2020, the learned High Court has itself noted that the Respondents in the said CA are not covered by the 2009 Act. Yet they were directed to be regularized on sympathetic grounds without any lawful basis, foundation or justification.

15. In CA No. 285 of 2020, the project in question, namely, *"Expansion of Breed Improvement Service in NWFP"* was converted to the regular side *after* the services of the Respondent (Mr. Iltaf) were terminated w.e.f. 30.06.09. The said Respondent was issued a notice of termination which was in line with the Project Policy, before his services were terminated. The High Court has in our opinion incorrectly applied the principle of non-discrimination and similar treatment for similarly placed employees and has directed that the Respondent in question be regularized. We note that the learned High Court, without applying judicial mind to ascertain the facts and circumstances of each case, has passed an *omissus* order directing the regularization of all the Respondents without adverting to the record on a case to case basis, or applying the law to each case. Where the 2009 Act itself excludes project employees and also mentions Cut-off dates, we are at a complete loss to understand how and on what basis the High Court concluded that that the

Respondent was eligible for regularization. Even otherwise, the services of the Respondent were validly and lawfully terminated before the said project was converted to the regular side i.e. vide notification dated 27.01.10. As such, there was no question of regularization.

16. The learned High Court has, in one of the Impugned Judgments, on the question of deleted posts, held that the Appellants were duty bound to convert all posts to the regular side without deleting any one of them. As noted above, executive policy making is not the domain of the High Court in the scheme of the Constitution and, is the prerogative of the executive to ascertain on the basis of its need, requirement, available resources and fiscal space, which posts it wishes to keep and which it wishes to abolish. Separation of powers is a well-entrenched principle of jurisprudence which requires that the Court cannot step into the shoes of the Executive. As such, when the posts of the Respondents in CA No. 273 of 2020 have been deleted by the Finance Department, the learned High Court could not have ordered the Appellants to reinstate the Respondents on non-existent posts.

WHAT IS THE EFFECT OF THE TERMS AND CONDITIONS OF THE APPOINTMENT ORDERS OF THE RESPONDENTS?

17. The learned AAG has submitted before us that all of the Respondents were appointed on temporary posts as stipulated in their employment contracts. We note that the learned High Court has not adverted to this aspect of the

case and has simply applied the principle of similarly placed employees to give relief to the Respondents. It has been specifically mentioned in the appointment orders of the Respondents that they cannot claim regularization and further, that they are employed on contract for a specific period of time. In this view of the matter, the learned High Court has incorrectly applied the law to the cases of the Respondents and as such, we find the view of the learned High Court to be erroneous, and not in consonance with the settled principles of law on the subject.

18. The Respondents have themselves conceded that they were employed in different projects on temporary basis. This fact has been admitted before us. The employment of the Respondents was governed by the Project Policy which specifically provides that ex-project employees cannot claim regularization and that the posts in questions would be filled per the rules of the KPPSC or the DSC. We are therefore of the view that the learned High Court has erred in law in ignoring the Project Policy and ordering regularization of the Respondents without relying on any statutory instrument which may have created a right in their favour. Discretionary Jurisdiction under Article 199 of the Constitution cannot be exercised in a vacuum. It must be grounded on a valid basis of violation of specific and enforceable legal or constitutional rights. The discretion must be exercised in a structured and calibrated manner with due regard to parameters put in place by the Constitution as well as by this Court. The

impugned judgments are unfortunately lacking all the aforenoted factors and are found to be unsustainable.

WHAT IS THE PRINCIPLE TO BE APPLIED WHEN GIVING RELIEF IN THE CASES OF SIMILARLY PLACED EMPLOYEES?

19. The learned High Court in all the Appeals before us has applied the principle of similar treatment of similarly placed persons and has found the Respondents eligible for Regularization. It is settled principle of law that each case turns on its own facts and circumstances. When the record is clearly suggestive of the fact that the Respondents could not be regularized, and there were valid and sustainable reasons to do so, the principle of similar treatment of similarly placed employees could not blindly and indiscriminately circumvent the record to regularize those employees who are otherwise not entitled to regularization. Further, some judgments were mechanically rendered without examining the specific facts and circumstances of individual cases by relying on earlier judgments directing regularization and those too in incorrect and erroneous basis. This, by itself, furnishes justification to set aside such judgments. Even otherwise, the rule of similar treatment for similarly placed persons has wrongly and incorrectly been applied in the instant cases.

20. The Court is supposed to interpret the law and apply it in letter and spirit. The Court cannot go beyond what the law is, and what interpretation permits. Courts lack jurisdiction to provide remedies which are otherwise not in

the law or the Constitution by inventing remedies of their own. This is a dangerous trend which threatens to weaken the very fabric of constitutionalism and rule of law and, this must be discouraged. The learned High Court cannot alter, amend or renegotiate the terms and conditions of the appointment orders of the Respondents for the simple reason that it does not have jurisdiction to do so.

21. For the reasons recorded above, these appeals are accordingly allowed, and the impugned judgments being unsustainable . . . are therefore set-aside.

Chief Justice

Judge

Judge

ANNOUNCED IN COURT ON 21.04.21 AT ISLAMABAD.

JUDGE

SCHEDULE I

APPEAL	DATE	COURT
CA No. 249 of 2020	04.10.2017	Peshawar High Court, Peshawar
CA No. 250 of 2020	22.11.2017	Peshawar High Court Bench at Mingora (Dar-ul-Qaza) Swat
CA No. 255 of 2020	22.11.2017	Peshawar High Court, Peshawar
CA No. 257 of 2020	25.10.2017	Peshawar High Court, Peshawar
CA No. 273 of 2020	04.10.2017	Peshawar High Court, Peshawar
CA No. 285 of 2020	29.11.2018	Peshawar High Court, Peshawar
CA No. 289 of 2020	22.01.2019	Peshawar High Court, Bannu Bench
CA No. 301 of 2020	14.03.2019	Peshawar High Court, Peshawar

APPROVED FOR REPORTING