IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

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

(AFR)

Civil Appeals No.232, 244, 247, 261 and 282 of 2020
(Against Judgments mentioned in Schedule-I of this Judgment).

Civil Appeal No.232 of 2020	Government of Khyber Pakhtunkhwa through Secretary Forest, Peshawar & Others V. Sher Aman
Civil Appeal No.244 of 2020	Government of Khyber Pakhtunkhwa through Chief Secretary KPK, Peshawar & Others V. Naeem Khan & Others
Civil Appeal No.247 of 2020	Government of Khyber Pakhtunkhwa, through Secretary Health, Peshawar & Others V. M. Kamran Khan & Others
Civil Appeal No.261 of 2020	Additional Chief Secretary, FATA, Peshawar & Others V. Bilal Ahmed & Another
Civil Appeal No.282 of 2020	Government of Khyber Pakhtunkhwa through Secretary Agriculture, Livestock & Cooperative Department Peshawar & Others V. Syed M. Iqbal & Others

For the Appellant(s): Mr. Shumail Ahmad Butt, AG KP
Mr. Atif Ali Khan, Ad AG KP
Barrister Qasim Wadood, Ad AG KP
Ms. 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. Shahid Kamal Khan, ASC
Mr. Ahmed Nawaz Chaudhry, AOR
(in CA No. 232 of 2020)

Mr. Khaled Rehman, ASC *(in CA No. 244 of 2020)*
Mr. Mukhtar Ahmad Maneri, ASC *(in CA No. 247 of 2020)*
Mr. Aftab Alam Yasir, ASC *(in CA No. 261 of 2020)*
Mr. M. Asif Yousafai, ASC *(in CA No. 282 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**") No. 232, 244, 247, 261 and 282 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. Similarly, in CA No. 282 of 2020, the Respondents were initially appointed on contract and his services were regularized w.e.f. 01.07.09 vide order dated 04.02.10. The earlier order of termination of the services of the said Respondents was withdrawn and they were employed on a daily wage basis vide order dated 26.02.10. Aggrieved, they approached the High Court. The High Court disposed of their petition vide order dated 12.04.16 with direction to the Appellants therein to reconsider the impugned order. Vide order dated 31.10.16. Consequently, the Respondents in CA 282 of 2020 were given fresh appointments. They approached the High Court once again by filing a Writ Petition which was allowed, and the Appellants were directed to regularize the Respondents from the date of their initial appointment on 01.07.09 vide order dated 04.02.10.

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. 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 excluded project employees. The Respondents were employed in projects and had agreed to the terms and conditions of their contracts when they were being appointed against their posts. At this stage, they cannot claim regularization against project posts because such posts were temporary in nature. He further

contends that the Respondents in CA 244 and 247 of 2020 were employees of SRSP/PPHI which is a creation of a Memorandum of Understanding ("**MoU**") between Sarhad Rural Support Corporation Limited, a company registered under the erstwhile Companies Ordinance 1984 vide registration certificate number 01.01.01 and the Respondents being employees of the company are governed by the principle of master and servant. Further, that the Company's project was closed, and the Respondents did not have any vested right to be regularized in service of the province, thereafter.

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 arbitrarily been terminated given that the Appellants were satisfied with their performance. Learned Counsel further submits that other similarly placed colleagues of the Respondents have been regularized by the Appellants and there is no reason why the Respondents should not be regularized. Lastly, it is submitted that the Respondents have been against their respective posts working to the entire satisfaction of their employers and deserve to be regularized.

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 in 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?

(ii) Were the Respondents in CA No. 244 and 247 governed by the principle of "Master and Servant"?

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

(iv) What would be the effect of the withdrawal of the regularization order of the Respondents in CA No. 282 of 2020?

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. In CA No. 232 of 2020, the Respondent was admittedly employed in the erstwhile N.W.F.P Forestry Sector Project, Peshawar on purely contract basis. His appointment on contract basis was subject to continuation of the project. This is evident from the office order dated 06.02.97 issued by the Conservator of Forests who was also the Director of the said Project. The words "subject to continuation of the project" clearly mean that the appointment of the Respondent was to last till the life of the Project. A perusal of the document dated 22.05.06 clearly establishes that the said project was to close on 30.06.06 and the Respondent was informed that his employment contract would expire 24.06.06. Keeping these facts and circumstances in mind, the learned High Court could not have "adjusted" the said

Respondent against the permanent post of a Forester, which was lying vacant in the Forest Department. Such posts are required to be filled in a transparent manner, after due advertisement, open competition, a level playing field for all eligible candidates, the best and most qualified of them being employed in accordance with a merit list prepared after fulfilling all necessary testing, interview and short-listing requirements. There is no concept of "adjusting" employees against permanent posts without following the process described above. The High Court cannot step into the shoes of the appointing authority. When the High Court is exercising jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, it cannot extend the scope of a contract that has been signed by an employee as the same goes against the spirit of the very concept of contract employment. The conclusion in this regard reached by the learned High Court is neither supported by law nor the relevant rules and is patently erroneous. When an employee accepts a post in a project, he is aware of the fact that the project will come to an end on its completion or cessation of its funding (as the case may be) and with that, his employment will also come to an end. Forcing the Government to "accommodate/adjust" such employees is not only a transgression of the powers vested with the High Court under Article 199, but is also a burden on the Government Exchequer which the court is not at liberty to place. There is nothing in the order dated 22.05.2006 passed by the competent authority which is illegal. We are therefore unable

to agree with the learned High Court that the Respondent in CA No. 232 of 2020 should have been adjusted against a permanent post, more so, when his employment had already been terminated, in accordance with the terms and conditions of his contract.

9. The Respondents in CA No. 261 of 2020 were appointed in the project "FATA Urban Centre Project" by the World Bank. The said Project was later wound up on 30.06.15, and, the Respondents were relieved from their services. The learned ASC appearing on behalf of the Respondents in CA 261 of 2020 contends that since the said Respondents were appointed after a transparent and fair process, they ought to have been adjusted against regular posts created in the subsequently established Municipal Committee of the erstwhile FATA. The learned High Court has opined that the constitution of a fresh Committee for fresh appointments would be "wastage of time and money" and that the Respondents have a preferential right to serve in the project till its life. We are unable to understand or agree with these conclusions reached by the High Court. Firstly, it is not the domain of the High Court to ascertain what and what does not constitute wastage of resources. This goes against the basic principle of separation of powers and entering the domain of executive policy making which under the scheme of our Constitution, falls in the domain of the executive. The role of the courts is to interpret the law and delve in matters involving policy issues. The learned High Court could not

have assumed the role of the executive or a policy maker and held that constituting a committee for fresh appointments would have been "wastage of time and resources". If a private organization or project, or the government thinks fit to constitute a committee, the only interference which may be warranted is in exceptional circumstances showing *mala fides* and/or arbitrary exercise of power by any of the members of a committee so constituted. The learned AAG has drawn our attention to two letters dated 08.12.15 /26.01.16 respectively. In the said letters, it has clearly been stated that recruitment must be completed in a transparent and efficient manner and in accordance with the prevailing rules/regulations. It is settled law that in order to join government service, proper procedures have to be followed which may include *inter alia* scrutiny by the Public Service Commission or any recruitment committee and an open and competitive process. Depriving other aspiring candidates of an opportunity to seek employment is neither transparent, nor efficient. Even otherwise, the letter dated 26.01.16 clearly states that under the prevailing project policy, transfers/adjustments could not be done and, the Director LG&DD, FATA Secretariat, Peshawar categorically stated that the process of appointment against approved posts be started afresh. We are unable to understand how the learned High Court reached the conclusion that it did, in the presence of settled law repeatedly and consistently laid down by this Court that contract employees have no vested right to be regularized. The case law referred to by the learned High Court is

distinguishable on facts as well as law and does not in any manner help the case of the Respondents. The findings of the learned High Court in this regard are therefore unsustainable.

WERE THE RESPONDENTS IN CA NO. 244 AND 247 GOVERNED BY THE PRINCIPLE OF "MASTER AND SERVANT?

10. The Sarhad Rural Support Program/Peoples Primary Healthcare Initiative (hereinafter referred to as "**SRSP/PPHI**") was created under a MoU between the Sarhad Rural Support Corporation Limited, a limited liability company registered under the erstwhile Companies Ordinance 1984, vide notification dated 01.01.01. The Respondents in CA No. 244 and 247 of 2020 were employed against their respective posts in SRSP/PPHI. The Respondents filed an application before the DSM of PPHI for regularization of their temporary service. Ultimately, the Respondents were regularized, however, their orders of regularization were cancelled on the ground that under the MoU, there was no provision for regularization of employees. Aggrieved, they approached the High Court. Their Writ Petition was allowed vide the impugned judgment and the Appellants were directed to regularize the Respondents against their respective posts.

11. We have gone through the Agreement between the Government of Khyber Pakhtunkhwa Health Department and SRSP for the Provision of Primary Healthcare (hereinafter referred to as "**Agreement**"). The Agreement states that SRSP

is a company incorporated under the Companies Ordinance 1984 having its registered office at House No. 129, Street No. 08, Defence Officers Colony, Peshawar Cantt. The learned AAG has submitted that the Respondents were employees of a private company, were paid by it and were never on the payroll of the Government. There is no provision in the MoU for regularization of SRSP/PPHI's employees, which is why the regularization orders of the Respondents were cancelled. The said fact is supported by findings of the inquiry dated 15.07.16 wherein it has been stated that the order of the District Health Officer, Peshawar dated 13.06.13 was beyond his powers and not covered under the rules. The learned AAG has stated that because of the findings in this inquiry, order dated 18.08.16 was passed and the status of the Respondents as civil servants which had been wrongly conferred by an official who had no power or authority to do so, was withdrawn and there was no illegality in such action. Similarly, the Respondent in CA No. 247 of 2020 was employed in SRSP as Chowkidar. He was relieved from his services on 12.04.15. He filed a Writ Petition in the Peshawar High Court which was allowed on the ground that since other similarly placed colleagues of the said Respondent had been regularized, so should he.

12. It is an admitted fact that the Respondents were project employees, who were working for SRSP/PPHI which is a creation of a MoU between the Government of Khyber Pakhtunkhwa and the Sarhad Rural Support Corporation

Limited. It was essentially an outsourcing exercise where funds were to be provided by the Government in lieu of services rendered by the company by hiring its own staff. For all intents and purposes, it was an arms length transaction. The appointment orders of the Respondents mention that they were appointed on contract in the PPHI project, which has not been denied by the Respondents' Counsel. The learned High Court has held that since the Respondent in CA No. 244 of 2020 had been appointed on regular basis through a Departmental Selection Committee, therefore, his regular appointment could not be changed. We are unable to agree with this conclusion. Firstly, the MoU is the foundation on which the PPHI project was to be built. We have examined the said MoU and find that there is no provision/section related to regularization of employees therein. Secondly, the Appellants have corrected the wrong committed by them by initiating an inquiry and after recording findings, cancelling the regularization of the Respondents which they are empowered to do. There was a mistake committed by the DSM and it was promptly corrected by the Appellants by issuing the order cancelling the regularization of the Respondents. The learned High Court has erred in holding that an inquiry was not conducted. The record shows that a proper inquiry was conducted. A copy of the inquiry report was sent to the DHO and DG Health Services vide letter dated 15.07.16. A Departmental Appeal was also filed by the Respondents against orders passed on the basis of such inquiry report. As such, the conclusions reached by the

learned High Court in this regard are contrary to the record and factually incorrect.

13. Even otherwise, the Respondents were contractual employees of a project which was governed by a MoU. They were employees of a corporate entity. In our opinion, they were governed by the principle of "Master and Servant". The stance taken by the learned High Court is overly simplistic and against the principles of employment law. It is the prerogative of the employer to decide the terms and conditions of an employee's contract. It is not for the court to step into the shoes of the employer and force him to employ someone for whom there is no available post and even if there is one, without following due process, procedure and criteria. The relationship is governed by the principle of master and servant and except in exceptional circumstances; disputes arising there from are beyond the jurisdiction and parameters of the powers of the High Court under Article 199 of the Constitution of the Islamic Republic of Pakistan. We have asked the learned ASC for the said Respondents to point us to any rule creating a right to regularization of the Respondents. He has been unable to do so. It is trite that regularization cannot take place without statutory backing. The Respondents, being contract employees, were governed by the principle of "Master and Servant" and could not approach the High Court to seek redressal of their grievances. Reliance in this regard is placed on ***Government of Khyber***

Pakhtunkhwa, Workers Welfare Board v. Raheel Ali Gohar (2021 PLC(CS)N 125 Supreme Court) where in it was held that:-

> *" In addition to these issues, we also find ourselves at odds with the fact that the present Respondents approached the High Court in its writ jurisdiction to seek regularization without there being any law conferring a right that may have been denied and was sought to be enforced by way of a petition under Article 199 of the Constitution. It is settled law that as contractual employees, the relationship between the Respondents and the Appellant is governed by the principle of master and servant. In these circumstances, the Respondents did not have the right to approach the High Court to seek redressal of their grievances relating to regularization. As noted above, in case of a contractual dispute the Respondents could have sought appropriate redressal of their grievances before a competent court of law. However, only by virtue of being contract employees, no automatic right of regularization has accrued in their favour." (Underlining is ours)*

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

14. Regularization is a policy matter which necessarily requires backing of the law. In the absence of any law, policy or rules, an employee cannot knock on the door of the High Court for regularization of his/her services. The learned High Court, despite the fact that there is ample material on the record that establishes that the Respondents had agreed to the terms and conditions of their contracts, regularized the services of the Respondents. The Project Policy governing the projects in which the Respondents were working clearly and unequivocally states that after the said projects come to an end, employees working in the said projects would have no right to claim regularization. The same stipulation is made in the service contracts of the Respondents. That being the case, the order of regularization lacked any legal basis or foundation. Reliance in this regard is placed on the case of

Khushal Khan Khattak University through Vice Chancellor and Others v. Jabran Ali Khan and Others (2021 SCMR 977) wherein, in an identical situation, this court held as follows:-

> *"The learned Counsel for the Respondents has not been able to show us any law which conferred a right upon the Respondents to be regularized. The assertion of the learned ASC that since others were regularized, the Respondents should also be regularized despite there being no statutory basis has not impressed us. As noted above, the Respondents could not claim regularization as a matter of right. Even otherwise, all the appointment orders of the Respondents clearly state that they would have no right to claim regularization. Therefore, the Respondents cannot disown the terms and conditions of their own employment contracts and claim permanent employment when at the very inception of their employment they had accepted contractual employment on the conditions that they would have no right to claim regularization". (Underlining is ours)*

15. The aforementioned excerpt makes it amply clear that the High Court in its Constitutional Jurisdiction cannot alter the scope of the terms that have been agreed upon by the parties and put an additional burden upon the employer. At best, a contract employee can approach the appropriate forum for recovery of damages against an employer for breach of contract, if a case is made out against the employer. The High Court cannot in exercise of constitutional jurisdiction assume the role of the appointing authority and direct employers to amend/alter terms and conditions in favour of employees which have been agreed upon by the said employee.

16. It is not denied by either side 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 grant relief to the Respondents. It has specifically been 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. We find the view of the learned High Court is neither supported by the law nor the policy of regularization and is patently erroneous. Further, it is not in consonance with the settled principles of law on the subject and is therefore unsustainable.

17. 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 project employees cannot claim regularization and that the posts in questions would be filled per the rules of the KPPSC or the DSCs. 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 on the basis of vague theories without relying on or even identifying 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 valid basis, showing 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 this Court. The impugned judgments are unfortunately lacking the aforenoted factors and are found to be unsustainable.

WHAT WOULD BE THE EFFECT OF THE WITHDRAWAL OF THE REGULARIZATION ORDER OF THE RESPONDENTS IN CA 282 OF 2020?

18. The Appellant in CA No. 282 of 2020 was appointed in the project known as Expansion of Breed Improvement Service in KP. Subsequently, the said project was closed on 30.06.09 and as per the project policy of 2008, the Respondent was issued one month prior notice vide order dated 26.05.09. The project was subsequently converted to the regular budget vide notification dated 27.01.10 w.e.f. 01.07.09. The Respondent's services were regularized w.e.f. 01.07.09 vide order dated 04.02.10, however, the said regularization order was cancelled and the Respondent was appointed on daily wage basis vide order dated 26.02.2010. Ultimately, the Respondent was given fresh appointment on regular basis pursuant to an order of the Peshawar High Court vide order dated 31.10.16. The Respondent filed a Writ Petition, which was allowed vide the impugned judgment and the learned High Court ordered regularization from the date of initial appointment.

19. We are unable to agree with the conclusions reached by the learned High Court in the impugned judgment that he was entitled to be regularized from the date

of his initial appointment on contract basis. It is settled law that regularization requires backing of law, rules or policy. In absence of any of the same, an employee cannot claim regularization. The learned High Court has regularized the Respondent w.e.f. 01.07.2009 and has revalidated the office order dated 04.02.2010. The High Court lacks the power to pass an order of this nature, for the simple reason that the order on which the learned High Court has placed reliance to regularize the Respondent has been cancelled. The effect of such cancellation is that the said order is no more in the field. We have examined the order dated 12.04.16 passed in WP No. 501-P/2013 on which the learned Counsel for the said Respondents has placed reliance. There is nothing in the order directing the Appellants to regularize the Respondents from 01.07.09. The only direction in the said order is to grant personal hearing to the Respondents. The Appellants complied with the said order and offered fresh appointment on the basis of the order dated 31.10.16. Nothing has been shown to us which could establish any illegality in the said order. The learned High Court has transgressed its powers under Article 199 of the Constitution of the Islamic Republic of Pakistan to revive a document which is otherwise dead, and confer rights on the Respondents which otherwise do not exist either in law or in fact and that too in retrospective effect.

20. The impugned judgments of the learned High Court proceed on erroneous grounds have jurisdictional

errors and are suffering from legal defects which warrant interference of this Court. The learned Counsel for the Respondents has been unable to persuade us to endorse the view taken by the learned High Court which was found to be legally and factually unsustainable.

21. For the reasons recorded above, these appeals are allowed. Accordingly, the impugned judgments listed below in Schedule-I are set-aside.

SCHEDULE-I

APPEAL	DATE	COURT
Civil Appeal No.232 of 2020	17.02.2015	Peshawar High Court, Peshawar
Civil Appeal No.244 of 2020	11.01.2017	Peshawar High Court, Peshawar
Civil Appeal No.247 of 2020	12.04.2014	Peshawar High Court, Peshawar
Civil Appeal No.261 of 2020	25.10.2017	Peshawar High Court, Peshawar
Civil Appeal No.282 of 2020	08.11.2018	Peshawar High Court, Peshawar

Chief Justice

Judge

Judge

Announced in Open Court on 18.10.2021 at Islamabad

Judge

*Haris LC/**

~~Not~~ Approved for Reporting