

IN THE HIGH COURT OF SINDH KARACHI

Before :

Mr. Justice Nadeem Akhtar

Mr. Justice Adnan-ul-Karim Memon

Constitutional Petition No. D – 3478 of 2018

Bashir Ahmed V/S Federation of Pakistan & 03 others

Date of hearing : 19.02.2020.

Date of decision : 02.03.2020

Mr. M.R Sethi, advocate for the petitioner.

Mr. Sanaullah Noor Ghauri, advocate for respondents 2 to 4.

Mr. Muhammad Nishat Warsi, DAG.

J U D G M E N T

ADNAN-UL-KARIM MEMON, J. – Through the instant petition, the petitioner is seeking addition of the period, served with Civil Aviation Authority (`CAA`) on daily wages, against the substantive post of Storekeeper, with the period served as a regular employee, for the purpose of pensionary benefits.

2. The concise facts of the case are that the petitioner was hired on 04.8.1990 by CAA on daily wages as Storekeeper (Ex-Supporting Staff SG-04), however, in compliance of the order dated 08.10.2009 passed by the Hon'ble Supreme Court of Pakistan in Human Rights Case Nos.3423-K of 2007 and 7444 of 2009, his service was regularized with effect from 2009 vide letter dated 20.01.2010 and since then he served as a regular employee till his retirement on 15.08.2018 upon superannuation.

3. Learned counsel for the petitioner, Mr. M.R Sethi, has contended that the instant case pertains to pensionary benefits of the petitioner, which have not been paid by the respondent-CAA without any rhyme or reason, thereby compelling the petitioner to approach this Court and argued that the petitioner served with CAA for about twenty (20) years against the substantive post as on daily wages basis and eight (08) years as a regular employee (total 28 years) without any break in service ; the career of petitioner during the aforesaid period was unblemished ; after his regularization and then attaining the age of superannuation, the respondent-CAA is not ready and willing to include the period of daily wages employment of the petitioner in his regular service so as to disqualify him from meeting the criteria of qualifying service for superannuation pension. He added that Rule 2.3 of the West Pakistan Civil Servants Pension Rules, 1963, is also relevant in this case in order to resolve the controversy, which is reproduced herein below:-

“Temporary and Officiating Service- Temporary and officiating service shall count for pension as indicated below:

(i) Government servants borne on temporary establishment who have rendered more than five years continuous temporary service shall count such service for the purpose of pension or gratuity; and

(ii) Temporary and officiating service followed by confirmation shall also count for pension or gratuity”.

Sub Rule-(i) of the *ibid* rule provides that a government servant who has rendered more than 5 years temporary service shall be counted for the purpose of pension or gratuity while sub Rule-(ii) provides that temporary officiating service followed by confirmation shall also be countable for pension and gratuity ; in the case of the petitioner, he was appointed on 04.08.1990 as contingent government servant in CAA against the budgetary post while his service was regularized in the year 2009 vide letter dated 20.01.2010. His temporary service which was followed by his regularization shall also be counted for pensionary benefits ; as per Chapter-IV, Rule 4.4 of the *ibid* Rules, a civil servant becomes entitled to pension after qualifying service of not less than 10 years as per formula provided thereunder ; as per record, his total length of service is 28 years ; and, thus petitioner was / is entitled to the pensionary benefits on the aforesaid analogy. He lastly argued that the case of the petitioner relates to the pensionary benefits, but he has been deprived of the same, which is violation of his fundamental right, as such the instant petition is maintainable under Article 199 of the Constitution of Islamic Republic of Pakistan 1973. In support of his contentions, he has relied upon the decisions rendered by the Hon'ble Supreme Court of Pakistan in the cases of *Defence Housing Authority versus Lt. Col Jawaid*, 2013 SCMR 1707, and *Muhammad Rafi and other versus Federation of Pakistan and others*, 2016 SCMR 2146.

4. In opposition, Mr. Sanaullah Noor Ghouri, learned counsel for respondents 2 to 4, has argued that the instant petition is not maintainable on the ground that CAA does not have statutory Regulations of service; the petitioner is not entitled to discretionary relief under Article 199 of the Constitution ; his service was regularized in year 2010 by accepting the terms and conditions of regularization ; he did not possess minimum length of service viz. 20 years as regular employee to be entitled for superannuation pension, thus, the petitioner is estopped to claim such pensionary benefits through the present constitutional petition. He next contended that the entire service dues

have already been paid to the petitioner and there is nothing on the part of respondents to pay him. In support of his contentions, he replied upon in the case of Pakistan Airline Pilots Association and others V/S Pakistan International Airline Corporation and another, **2019 SCMR 278**. He lastly prayed for dismissal of the instant petition.

5. Mr. Muhammad Nishat Warsi, learned Deputy Attorney General, representing the respondent No.1 supported the contentions of respondents 2 to 4 without filing comments.

6. We have heard arguments of the parties and have carefully perused the record as well as case law cited at the bar.

7. The pivotal questions involved in the present proceedings are whether instant petition is maintainable under Article 199 of the Constitution? Whether Civil / Government / public servant is entitled to have protection of previous service rendered as temporary / contingent basis in another organization for the purposes of fixation and counting of previous service for pension and whether petitioner has length of service to claim retiring / superannuation pension from CAA?

8. To commence, we would address the question of the jurisdiction of this Court with regard to maintainability of the captioned petition under Article 199 of the Constitution. Undoubtedly, Service Regulations of Civil Aviation Authority are Non-Statutory Rules of Service and admittedly the same were framed by the Authority of CAA pursuant to Section 27 of the Pakistan Civil Aviation Authority Ordinance, 1982. The issue of maintainability of constitutional petition on account of Non- Statutory Rules of Service of CAA has already been settled by the Hon'ble Supreme Court in the case of Muhammad Rafi and another vs. Federation of Pakistan and others, **2016 SCMR 2146**, as such no further deliberation on our part is required. However, in the given circumstances, we are fully fortified by the view enunciated by the Hon'ble Supreme Court in para 50 of the judgment delivered in the case of Pakistan Defence Housing Authority vs. Lt. Col. Javed Ahmed, **2013 SCMR 1707**, "that an aggrieved person can invoke constitutional jurisdiction of this Court against a public authority". The issue of statutory and non-statutory rules of service of CAA, the same has been elaborately dealt with by the Hon'ble Supreme Court of Pakistan in the case of Muhammad Rafi (supra) wherein it has been held that an aggrieved person could invoke the constitutional jurisdiction of this Court against a public authority if he satisfies that the act of authority was violative of the service regulations

even if they were non-statutory. Accordingly, we are of the view that this petition is maintainable.

9. The second issue is with regard to protection of previous service in the respondent-CAA on contingent basis for the purposes of fixation and counting of previous service for pension. This protection is provided under Fundamental Rule 22-A, which is fully applicable in the case of CAA in the light of CAA Service Regulations-2014.

10. To elaborate further on the proposition in hand, we have noticed that Regulation No.34 of Civil Aviation Authority Employees Pay and Pension Regulations – 2014 clearly spells out that qualifying service of an employee shall commence from the date he takes the charge of the post to which he is first appointed either substantively or in temporary capacity. Provided that temporary service is followed without interruption by substantive appointment in the same or other service cadre or post.

11. It is a well-settled law that right to claim pension is a right connected with the tenure of service which under the applicable pension rules has to be served by an employee in order to make him eligible for pension. So in order to claim pension, a minimum qualifying service is the threshold that has to be crossed first which would then entitle an employee to claim pension.

12. The above discussed principle is clearly depicted in the provisions of the CAA Service Regulations-2014 which provide seven categories or classes of pension. These have been described as under:

*(i) **Superannuation Pension** which becomes payable on attaining 60 years of age ;*

*(ii) **Retiring Pension** where an employee opts to retire after putting in 25 years qualifying service or such less time as has been prescribed for any special class of employees or is compulsorily retired by the authority competent to remove him from service ;*

*(iii) **Invalid Pension** where an employee on account of bodily or mental infirmity has been permanently incapacitated from rendering further service. The death of an employee before his retirement can be equated with this last category i.e. Invalid Pension ;*

*(iv) **Compensation Pension** which is granted to an employee on account of abolition of his permanent post or on account of change in the nature of duties of his post and who has not opted to accept another post;*

(v) **Compulsory retirement pension** is admissible to an employee who is compulsorily retired from service only on a condition of imposition of major penalty under the disciplinary regulations and ;

(vi) **Compassionate allowance** where the Authority shall forfeit the pension and gratuity of an employee who is dismissed or removed from service.

(vii) **Family Pension** any claim for family pension shall be regulated by the provisions of these Regulations in force at the time when an employee retires or is discharged or is allowed to resign from service or dies, as the case may be.

13. For all these seven categories of pension, the condition precedent is rendition of minimum length of service. Therefore, rendering of qualifying service is a prerequisite for claiming pension. Unless an employee of CAA renders minimum qualifying service he cannot become entitled to claim superannuation pension or any other privilege that is attached with pensionary rights as discussed supra. On the aforesaid proposition, we are fortified by the decision rendered by the Hon'ble Supreme Court of Pakistan in the case of Sakina Riaz V/S University of Karachi and others, **2018 SCMR 1272**.

14. To commence with the third proposition, prima facie, the petitioner has twenty eight (28) years' service to his credit which is qualifying length of service for superannuation pension. However, the contingent period of the petitioner had already been brought on normal budget by regularizing his previous service by the order of the Hon'ble Supreme Court of Pakistan as discussed supra which entitled him to entire twenty eight (28) years' service benefits. Even otherwise if an employee who, during the period of probationary / ad-hoc service, was eligible to be confirmed against any post, retires from service before being confirmed, shall not, merely by reason of such retirement be refused confirmation to such post or any benefit accrued therefrom.

15. To add further, Article 371-A of Civil Service Regulations is clear in its terms that a government servant not employed in a substantive permanent capacity who has rendered more than five years continuous temporary service counts such service for the purpose of pension or gratuity excluding broken period of service, if any, rendered previously. Continuous temporary and officiating service of less than five service immediately followed by confirmation shall also count for gratuity or pension, as the case may be.

16. Record reflects that petitioner was appointed in the year 1990 as Storekeeper (Ex-Supporting Staff SG-04) on daily wages basis against a substantive post and he continuously served as such and then his daily wages

employment was converted into regular service in the year 2010 with retrospective effect, and therefore, according to Articles 358, 371-A, 423 and 474 (b) of Civil Service Regulations, his previous service is countable to his regular service for the purpose of service / pensionary benefits and other fringe benefits.

17. In view of the foregoing legal position of the case, petitioner is entitled to claim entire twenty eight (28) years' service / pensionary dues by counting his previous service for the purpose of retiring / superannuation benefits. Even otherwise under Section 474 (b) of CSR petitioner's case is fully covered under the aforesaid regulation. On the aforesaid proposition, we are fortified with the decisions of the Hon'ble Supreme Court in the cases of Nafees Ahmad V/S Government of Pakistan and others, **2000 SCMR 1864**, Ch. Muhammad Azim V/S The Chief Engineer, Irrigation and others, **1991 SCMR 255**, and Chairman, Central Board of Revenue and others V/S Nawab Khan and others, **2010 S C M R 1399**.

18. Adverting to the plea raised by learned counsel for the respondent-CAA that CAA is an autonomous body and thus Civil Service Regulations are not applicable in the service of CAA, we are not inclined to agree with the aforesaid proposition for the simple reason that under Regulation No. 3.38 of Civil Aviation Service Regulations – 2000 followed by CAA Service Regulations-2014 provide that the federal government rules relating to retirement from service and admissibility of terminal benefits including pension, gratuity, invalidation etc. as applicable to federal government employees shall mutatis mutandis apply to CAA employees. The next point is that the service of petitioner had commenced from the date of regularization and not from the date of initial appointment on contingent basis. Be that as it may, the commencement of service under CAA shall commence from the working day on which an employee reports for duty in any appointment, even though on temporary post. Even the qualifying service for the aforesaid purpose is provided under Regulation 34 of Civil Aviation Authority Employees Pay and Pension Regulations-2014. Regulation 35 also provides service on probation against a post if followed by confirmation in the same or another post shall be counted in the qualifying service. Since the petitioner served with the respondents in the year 1990 and his service was regularized by the Hon'ble Supreme Court of Pakistan, the principle set forth by the Hon'ble Supreme Court of Pakistan in the case of Messrs State Oil Company Limited V/S Bakht

Sidique and others, 2018 SCMR 1181, is providing guidance on the issue involved in the matter, excerpt whereof is as under:

“3..... However, at this stage, we would like to observe that the employment of the respondents shall be regularized with effect from the date when they approached the learned High Court through the Constitution petition but for their pensionary benefit and other long term benefits, if any, available under the law, they would be entitled from the date when they have joined the service of the petitioner. All the petitions are accordingly dismissed.” [Emphasis added]

19. The case law cited by learned counsel for the respondent-CAA is on the issue of Master and Servant relationship as well as non-statutory rules of service of PIAC, whereas in the present case the Hon'ble Supreme Court in the case of Muhammad Rafi supra has already held that writ petition is maintainable against CAA, thus the respondents cannot be benefited from the judgment of the Hon'ble Supreme Court rendered in the case of PIAC supra.

20. In view of the above discussion, this petition is allowed with no order as to costs and the respondents are directed to include daily wages employment of petitioner as his substantive service in regular for the purpose of service dues and other allied pensionary benefits. Respondents are further directed to complete the entire exercise and settle the service dues of the petitioner within sixty (60) days from the date of this judgment.

JUDGE

JUDGE

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