2021 S C M R 116

[Supreme Court of Pakistan]

Present: Mushir Alam, Faisal Arab and Munib Akhtar, JJ

Syed MUDDASAR SHAH TERMIZI and others---Appellants

Versus

PESHAWAR HIGH COURT, PESHAWAR through Registrar, Peshawar and others ---Respondents

Civil Appeals Nos. 731 to 733 of 2016 and C.M.As. Nos.723 and 3199 of 2018, decided on 4th November, 2020.

(Against the order dated 19.12.2015 passed by K.P.K. Sub ordinate Judiciary Service Tribunal, Peshawar, in S.As. Nos.10, 12 and 16 of 2014)

(a) Khyber Pakhtunkhwa Civil Servants Act (LXXI of 1973)---

----Ss. 8 & 19(4), proviso [as substituted through the Khyber Pakhtunkhwa Civil Servants (Amendment) Act (III of 2013)]---Khyber Pakhtunkhwa Judicial Service Rules, 2001, R. 5(e)---West Pakistan Civil Services Pension Rules, 1963, Rr. 1.5 & 2.2---Seniority---Civil Judges-cum-Magistrates appointed on contract basis regularized in service after appearing in competitive examination---Inter-se seniority of such judges was to be reckoned from the date of their regularization in service and not from their initial appointment on contract basis---Regularization of service through deeming provision of S. 19(4) of the Khyber Pakhtunkhwa Civil Servants Act, 1973 was confined to pensionary benefits alone and could not be stretched to affect the seniority inter-se of persons who were already members of the judicial service.

In the present case, all the appellants/judicial officers were initially appointed on contract basis, which, on expiry, was renewed. However, the appellants, after qualifying their exams, and on the recommendation of the Provincial Public Service Commission, were appointed on a regular basis. The substituted proviso to sub section (4) to section 19 of Khyber Pakhtunkhwa Civil Servants Act, 1973, by the Khyber Pakhtunkhwa Civil Servants (Amendment) Act, 2013 merely construed and treated the appellants' appointment from the date of initial appointment on contract as regularized and removed the disparity between two sets of employees, namely who were initially appointed through the Provincial Public Service Commission and those who, though appointed initially on contract, were later regularized through the conduit of Commission for the purposes of calculating pension and gratuity.

Section 19 of Khyber Pakhtunkhwa Civil Servants Act, 1973 dealt exclusively with the matter of Pension and Gratuity and did not affect seniority. Under the proviso to subsection (4) of section 19, 'those who are appointed in the prescribed manner to a service or post on or after the 1st of July, 2001 till 23rd July, 2005 on contract basis shall be deemed to have been appointed on a regular basis". The legislature clearly intended for the deeming provision to be applicable in the

eventuality of calculating the pension and gratuity for civil servants. The intention was clear to remove the disparity in calculating such pension between employees who were initially appointed on a contractual basis, and later regularized, in comparison to the civil servants who had been employed directly through the Provincial Public Service Commission.

Deeming clause provided under sub section (4) to section 19 of Khyber Pakhtunkhwa Civil Servants Act, 1973 could not be allowed to spill over to other provisions of the said Act to reckon seniority in length of service and or for any other collateral purpose. The legislature intended for seniority to be governed under section 8 of the Khyber Pakhtunkhwa Civil Servants Act, 1973, and other enabling provisions, for which a separate mechanism was clearly provided.

(b) Interpretation of statutes---

----Deeming provision in a section of the statute---Interpretation and effect.

While interpreting a deeming provision in a statute, the court was bound to ascertain for what purpose, object, and between what persons the statutory fiction was to be resorted to.

Begum B.H. Syed v. Mst. Afzal Jehan PLD 1970 SC 29 and Mehreen Zaibun Nisa v. Land Commissioner, Multan and others PLD 1975 SC 397 ref.

Deeming provision was restricted to the section it was attached to and it could not be interpreted to spill over to other provisions of the statute. Such provision was to be strictly construed within the framework of the provisions of the statute it was attached to, unless otherwise provided.

Commissioner of Income Tax and Wealth Tax Sialkot Zone v. Messrs Thapur (Pvt.) Sialkot 2002 PTD 2112; Muhammad Mubeen-us-Salam and others v. Federation of Pakistan through Secretary, Ministry of Defence and others PLD 2006 SC 602 and All Pakistan Newspaper Society and others v. Federation of Pakistan and others PLD 2012 SC 1 ref.

(c) Khyber Pakhtunkhwa Civil Servants Act (LXXI of 1973)---

----S. 8---Contract employees subsequently regularized in service---Seniority---Scope---Seniority could not be calculated for contract employees form the date of their initial contractual appointment---Seniority could only be determined when civil servants were commissioned into regular service

Muhammad Afzal Sohail and 11 others v. Government of Punjab and others 1983 SCMR 859 and M.N. Rizvi P.C.S. v. Province of West Pakistan 1977 SCMR 365 ref.

Amjad Ali, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Appellants

Aftab Alam Yasir, Advocate Supreme Court along with Syed Mudassar Shah Termzi for Appellants (in C.M.As. 723 and 3199 of 2018).

Zahid Yousaf Qureshi, Additional A.G., Khyber Pakhtunkhwa, Khalid Rehman L.A PHC and Samil Jan, AR for Respondents.

Date of hearing: 23rd May, 2018.

JUDGMENT

MUSHIR ALAM, J.---The present appeal before us is under Article 212(3) of the Constitution of Pakistan, 1973 against the decision of the K.P.K Subordinate Judiciary Service Tribunal dated 19.12.2015. The Appellants were initially appointed on a one-year contract for the post of Civil Judge-cum Judicial Magistrate in Khyber Pakhtunkhwa. The contracts of the Appellants were then extended for another year after which they appeared in the competitive examination and were eventually appointed on a regular basis on the recommendation of the Public Services Commission. The departmental representation and so also the service appeal seeking retrospective service benefit essentially the claim of seniority from date of taking charge, on being appointed on contract failed.

2. The Appellants before us claim their appointment to be on a regular basis from the date of their initial appointment firstly due to amendment in section 19(2) by the Khyber Pakhtunkhwa Civil Servants (Amendment) Act, 2005 and by substituting section 19 thereof through Khyber Pakhtunkhwa Civil Servants (Amendment) Act, 2013. According to them, they are entitled to all the benefits attached to their appointment, including seniority, which, they claim, should be reckoned from the date of their assumption of charge of the post of Civil Judge-cum Judicial Magistrate, stemming from contractual appointment.

3. The Learned counsel for the Appellants, and some of the Applicants, whom applied to be joined as a party to the appeals were also heard as a common legal point is involved and they would swim and sink with the fate of the Appellant. The learned counsel, and so also applicants in person, in a benign manner, could not hide the reasons to agitate the issue of regularization from the initial date of respective contractual appointments. According to them, their seniority will be affected if they are not given retrospective recognition firstly in terms of amendment brought in subsection (2) of section 19 in Civil Servants Act, 1973, through amending Act of 2005 and secondly by substitution of section 19, more particularly the proviso added to subsection (4) to section 19 thereof, of the Khyber Pakhtunkhwa Civil Servants Act, 1973 as substituted by Khyber Pakhtunkhwa Civil Servants (Amendment) Act III of 2013.

4. It is matter of record that the Appellants were initially appointed as Civil Judge-cum-Judicial Magistrates on a contract basis for a period of one year on 16.05.2002 (C.A. 731/16 @ page 32), 25.06.2001, (C.A. 732/16 @ page 33), and 25.06.2001, (C.A. 733/16 @ page 34). The appointment was purely on contract basis till the availability of candidates recommended by the NWFP Public Service Commission, as it was known then. It was further liable to be terminated on a 15-day notice or 15 days pay in lieu thereof (condition No. VII). On the expiry of initial period of one-year contract, their services were further extended for a period of one year vide notification dated 25.06.2003 and 14.05.2002 respectively.

5. It appears from the record that all 'contract appointees' judicial officers were required by the High Court to take competitive exams. All the contract appointees Judicial Officers appeared in the competitive exams conducted by the Public Services Commission without any reservation and those who qualified, including the Appellants, were appointed on a regular basis by the Peshawar High Court on

the recommendation of NWFP Public Service Commission vide notification dated 01.06.2004 (C.A. 732/16 @ page 37) and 25.06.2003 (C.A. 733/16 @ page 40).

6. It may be noted that the members of District Judiciary are Civil Servants and are governed under the Khyber Pakhtunkhwa Civil Servants Act, 1973. Appointments to judicial posts in Khyber Pakhtunkhwa used to be made under the West Pakistan Civil Service (Judicial Branch) Rules, 1962, which was overtaken by Khyber Pakhtunkhwa Judicial Service Rules 2001, ("Rules 2001") and a new regime for the appointments Judicial officers was introduced. Under the current regime, the regular appointment to a post of Civil Judge-cum Judicial Magistrate could be made on the basis recommendation of the Khyber Pakhtunkhwa Public Service Commission (PSC) which is based on the result of a competitive examination. However, the proviso thereto carves out an exception for the recruitment on a contract basis by the High Court on the recommendation of a Provincial Judicial Selection Board. It may, by way of clarification, be noted that Civil Servant as defined under section 2(b) of the Khyber Pakhtunkhwa Civil Servant Act, 1973 means:

> "a person who is a member of Civil Service of the Province or who holds a civil post in connection with the affairs of the Province, but does not include
>
> (i).....
>
> (ii) a person who is employed on contract, or work charged basis or who is paid from contingency."

7. Prior to the introduction of Contract Policy dated 26th October 2002, issued by the province of Khyber Pakhtunkhwa, (hereinafter abbreviated as KP), there was a singular and uniform pension and gratuity regime applicable to the 'civil servants' under section 19 of KP Civil Servant Act, 1973 which is reproduced as follows:

> 19. Pension and Gratuity.
>
> 1) On retirement from service, a civil servant shall be entitled to receive such pension or gratuity as may be prescribed.
>
> 2) In the event of the death of a civil servant, whether before or after retirement, his family shall be entitled to receive such pension, or gratuity, or both, as may be prescribed.
>
> 3) No pension shall be admissible to a civil servant who is dismissed or removed from service for reasons of discipline but Government may sanction compassionate allowance to such a civil servant, not exceeding two-thirds of the pension and gratuity, which would have been admissible to him had he been invalidated from service on the date of such dismissal or removal.
>
> 4) If the determination of the amount of pension or gratuity admissible to a civil servant is delayed beyond one month of the date of his retirement or death, he or his family, as the case may be, shall be paid provisionally such anticipatory pension, or gratuity as may be determined by the prescribed authority, according to the length of service of the civil servant which

qualifies for pension or gratuity, and any over-payment consequent upon such provisional payment shall be adjusted against the amount of pension or gratuity finally determined as payable to such civil servant or his family.

8. It so happened that section 19 of the KP Civil Servant Act, 1973, that deals with "Pension and gratuity", was amended through NWFP Civil Servants (Amendment) Act, 2005 which came into force at once, e.g. 23rd July 2005, whereby the pensionary regime had undergone change and in terms of amended subsection (2) provided as follows:

"(2) A person though selected for appointment in the prescribed manner to a service or post on or after the 1st day of July 2001, till the commencement of the said Act, but appointed on contract basis, shall with effect from the commencement of said Act, be deemed to have been appointed on regular basis. All such persons and the persons appointed on regular basis to a service or post in the prescribed manner after the commencement of said Act shall, for all intent and purposes be civil servant, except for purposes of pension or gratuity. Such a Civil servant shall, in lieu of pension and gratuity, be entitled to receive such amount contributed by him towards the contributory provident fund, along with the contribution made by the Government to his account in said fund, in the prescribed manner:

Provided that in the event of death such a civil servant, whether before or after retirement, his family shall be entitled to receive the said amount, if it has already not been received by such deceased civil servant."

9. Section 19 was further substituted vide the Amendment Act, III of 2013, dated 22.01.2013, which was given retrospective effect from the 30th day of June 2001, by virtue of which a "deeming proviso" was added to subsection (4) to section 19, which carved out an exception to the civil servants appointed on regular basis. By the deeming provision, through fiction of law, a situation contrarily to the existing or stated fact is presumed.

10. It is matter of record that, the first proviso to subsection (4) of section 19, as substituted by KPK Amendment Act, 2013, which by virtue of deeming clause is deemed to have taken effect from the 30th day of June, 2001, provides that:

"Provided that those who are appointed in the prescribed manner to a service or post on or after the 1st of July, 2001 till 23rd July, 2005 on contract basis shall be deemed to have been appointed on a regular basis."

11. The statute that governs pension, as applicable to Judicial Officers of Khyber Pakhtunkhwa, is the West Pakistan Civil Service Pension Rules, 1963. These rules continue to remain in force in Khyber Pakhtunkhwa by virtue of Article 19 of the Province of West Pakistan (Dissolution) Order, 1970. Pensionary benefit under Rule 1.5 "shall not apply to (ii) Government Servant engaged on contract which contains no stipulation for pension under these Rules" and under Rule 2.2 "subject to any special rules the service of Government Service begins to qualify for pension when he takes over charge of the post to which he is first appointed".

12. The Appellant's first representation claiming benefit of retrospective appointment with effect from their initial contract appointment was rejected in the meeting of the Administrative Committee of the High Court, held on 02.06.2014, both on merits and on the ground of limitation. It was held by the KP Service Tribunal (High Court) that subsection (2) to section 19 of the NWFP Civil Servants (Amendment) Act, 2005 is not applicable to the case of the Petitioner as they were no more on contract at the time of the promulgation of the deeming proviso noted above as the Appellants had already undergone through a process of regular appointment as prescribed under Rule 5(e) of the Rules 2001. It was also mentioned that by doing so, the seniority of judicial officers who had been appointed earlier on a regular basis would be disturbed.

13. The Learned counsel for the Appellants has heavily relied upon the judgment of this court in the case of Government of NWFP (now KP) and others v. Kaleem Shah and the unreported judgment in the case of Government of NWFP and others v. Abdullah Khan and others in C.A. 834/10 and three other appeals, dated 1.3.2011 (copy placed on record in C.M.A. No. 4326/18). In the cited case, the contract appointments made were treated as regular appointments from the date of promulgation of the amendment in section 19(2) of the NWFP Civil Servant Act, 1973, through Act of IX of 2005. However, the judgment relied upon did not dilate upon the consequences, in terms of seniority, and other benefits incidental thereto, of regularization of such employees and limited its application to Pension and Gratuity of the regularized employees. Hence, it lends no support to the Appellants case.

14. The Appellants have, in their written arguments, also relied upon case of Ahmad Din v. Government of KP Agricultural, Live Stock and Co-operative Department Peshawar, in which the service of ad-hoc and contract employees, by virtue of section 3 of KP Employees (Regularization of Service) Act 2009, were ordered to be treated at par with similarly placed employees and be regularized. This cited case is also distinguishable on the ground that the deeming clause contained in section 3 unequivocally regularized the employees of the High Court, who were either appointed on contract or ad-hoc basis or held their posts on the 31st December, 2008. Whereas, in the case at hand, the deeming clause contained in the proviso to subsection (4) of section 19 is limited in its application to Pension and Gratuity benefits acceded to the Appellants.

15. In the cases at hand, as noted, all the Judicial officers were initially appointed on contract, which, on expiry, was renewed. However, the Appellants, after qualifying their exams, and on the recommendation of the KP Public Service Commission, were appointed on a regular basis. The substituted proviso to sub section (4) to section 19, by the Amending Act of 2013, merely construed and treated the Appellants appointment from the date of initial appointment on contract as regularized and removed the disparity between two sets of employees, namely who were initially appointed through the public service commission and those who, though appointed initially on contract, were later regularized through the conduit of Commission as noted above for the purposes of calculating pension and gratuity.

16. It may be noted that section 19 deals exclusively with the matter of Pension and Gratuity and does not affect the seniority position. Under the proviso to subsection (4) of section 19, the Petitioners those who are appointed in the prescribed manner to a service or post on or after the 1st of July, 2001 till 23rd July, 2005 on contract basis shall be deemed to have been appointed on a regular basis". The legislature clearly intended for the deeming provision to be applicable in the eventuality of calculating the pension and gratuity for Civil Servants. The intention was clear to remove the disparity in calculating such pension between employees who were initially appointed on a contractual basis, and later regularized, in comparison to the Civil Servants who had been employed directly through the Public Services Commission.

17. While interpreting a deeming provision in a statute, the court is bound to ascertain for what purpose, object, and between what persons the statutory fiction is to be resorted the deeming provisions has been enacted, as in Begum B.H Syed v. Mst. Afzal Jehan which stated as follows:

> "Where the statute says that you must imagine the state or affairs; it does not say that having done so you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs. This is the classic observation of Lord Asquith in East End Dwelling Company Ltd. v. Finsbury Borough Council (1952 AC 109). But at the same time it cannot be denied that the Court has to determine the limits within which and the purposes for which the Legislature has created the fiction."

18. Deeming provisions were then interpreted by this Court in the case of Mehreen Zaibun Nisa v. Land Commissioner, Multan and others wherein the effect of deeming clauses was summed up as follows:

(i) "When a statute contemplates that a state of affairs should be deemed to have existed, it clearly proceeds on the assumption that in fact it did not exist at the relevant time but by a legal fiction we are to assume as if it did exist.

(ii) Where a statute says that you must imagine the state of affairs, it does not say that having done so you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

(iii) At the same time, it cannot be denied that the Court has to determine the limits within which and the purposes for which the Legislature has created the fiction.

(iv) When a statute enacts that something shall be deemed to have been done which in fact and in truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to."

19. Another principle that is attracted is that the deeming provision is restricted to the Section it is attached to and it cannot be interpreted to spill over to other provisions of the statute. Such provision is to be strictly construed within the framework of the provisions of the statute it is attached to, unless otherwise

provided, as in the case Commissioner of Income Tax and Wealth Tax Sialkot Zone v. Messrs Thapur (Pvt.) Sialkot.

20. A similar position was adopted by this Court in a full bench judgment in the case of Muhammad Mubeen-us-Salam and others v. Federation of Pakistan through Secretary, Ministry of Defence and others wherein the principle laid down in Mehreen Zaibun Nisa v. Land Commissioner. Multan and others was upheld and it was observed that:

> "... a deeming clause only permits to imagine a particular state of affairs but it does not mean that such imagination can be allowed to be overwhelmed, when it comes to the inevitable corollaries of that state of affairs, therefore, merely on the basis of imagination, status of a person cannot be converted, without ensuring compliance of the basic requirements."

21. This Court has also observed that deeming clauses cannot be extended beyond the section by which it is created in the case of All Pakistan Newspaper Society and others v. Federation of Pakistan and others which reads as follows:

> "In the case of Mubeen-us-Salam v. Federation of Pakistan (PLD 2006 SC 602), it has already been observed that the purpose of importing a deeming clause is to place an artificial construction upon a word/phrase that would not otherwise prevail and sometimes it is to make the construction certain. It was further held that a deeming clause is a fiction, which cannot be extended beyond the language of the section by which it is created or by importing another fiction."

22. Therefore, the deeming clause provided under subsection (4) to section 19 cannot be allowed to spill over to other provisions of the KP Civil Servants Act, 1973 which has clearly provided for provisions to govern the civil servant regime in KPK. The legislature intended for seniority to be governed under section 8 of the KP Civil Servants Act, 1973, and other enabling provisions, for which another mechanism was clearly provided.

23. In addition, the jurisprudence of this Court has also established that seniority cannot be calculated for contract employees form the date of their initial contractual appointment. Seniority can only be determined when civil servants are commissioned into regular service. In the case of Muhammad Afzal Sohail and 11 others v. Government of Punjab and others, having somewhat similar facts to the case at hand, 29 extra posts of civil judges were created, some of which were filled in 1963 and the remaining in 1964 without competitive exams. However, later in 1968, the extra civil judges eventually qualified competitive exams as per the requirement laid down under the West Pakistan Civil Service (Judicial Branch), 1962. The Governor then, being the Competent Authority, absorbed and regularized their ad-hoc appointment, vide order Notification dated 28.2.1970, which inter alia had effect from 1st January 1970. The said order was silent as to their seniority vis-a-vis the existing members of service. The matter was resolved through a Notification dated 16.12.1974 when they were extended seniority with effect from 1.1.1970. A seniority list dated 5.7.1975 was published by which the absorbed civil judges were placed junior to Respondents Nos.2 to 50, which was challenged. This

Court, after considering the provisions of section 9 of the West Pakistan Civil Service Judicial Branch, Rules 1962, in para 14 held:

> "The above rule provides for the determination of seniority inter se of the members of the service in the various grades whether appointed initial recruitment or otherwise. However, since it has been found that the appellants were not members of the service until their absorption into the service as per order of the Governor Punjab, dated 16.12.1974 with effect from 1.1.1970, the Rule on the face of it is not attracted as it calls for the determination of the seniority inter se of the persons who are already members VI' the serving."

24. In another similar case adjudicated upon by this Court reported as M.N. Rizvi, P.C.S. v. Province of West Pakistan, wherein, the Appellant was appointed on the temporary post of 'Extra Assistant Commissioners in the Punjab Civil Service (Executive Branch) Cadre'. It was mentioned in the letter that it must be clearly understood that this temporary appointment will give you no right to permanent appointment in any capacity in the service of the government.' The Appellant accepted these conditions and was appointed as a temporary Extra Assistant Commissioner on 24.03.1947. While these posts were created only temporarily for a period of 2 years, they were extended time and again. The post of the Appellant was extended twice until the Appellant pressed his claim for retention of service, which was denied by the Chief Adviser. Instead, competitive examinations were conducted wherein the Appellant succeeded and 'he was likely to be brought on the regular P.C.S. (Executive Branch) Cadre' before the 30th of June 1951.

25. As a result of the competitive examination, five candidates, including the Appellant therein, were selected and formal orders of appointment were issued on the 4th of August, 1951. The Appellant made various representations to the Government for refixation of his pay and for his seniority to be calculated from the date of first joining of his temporary service. The Government dismissed the representation and concluded that he was `not a member of the service prior to July, 1951'. This Court, in a 5-Member bench, concluded:

> "It is, no doubt, true that there is no relationship between the mode of appointment and the fixation of seniority, but seniority cannot commence until a person has entered the service. In the present case, as we have already pointed out, the Appellant had not entered the regular- service by his first appointment in 1947, for that was outside the regular cadre to which the Punjab Civil Service (Executive Branch) Rules applied. It is also conceded on behalf of the Appellant that the rules as to seniority did not apply to temporary officials. It is difficult, therefore, to appreciate how the rules as to seniority become applicable with retrospective effect as soon as the person is taken on regular service."

26. In the light of above, and keeping in sight the legislative transformation of section 19 and addition of proviso to subsection (4), as reproduced above, it is clear that by fiction of law, through deeming proviso, initial appointments of the Judicial officer that was made on contract basis between the period "1st of July, 2001 till

23rd July, 2005 on contract basis shall be deemed to have been appointed on a regular basis." The Appellant, for the purposes of pensionary benefit, are extended out such privilege and not for any other purposes. The deeming proviso cannot be used for the purposes of reckoning seniority in length of service and or for any other collateral purposes, which are catered for in other provisions of the KP Civil Servants Act, 1973 and rules made there under.

27. Thus, it is clear that the regularization of service through deeming Provisions, as carried out in the provision of section 19 of the Act of 1973, is confined to pensionary benefit alone and cannot be stretched to affect the seniority inter-se of persons who are already members of the judicial service. In this view of matter and jurisprudence as developed by this court right from the case of Muhammad Afzal Sohail. That the appeals are partly allowed and the appellant and all those judicial officers appointed between the period "1st of July, 2001 till 23rd July, 2005 on contract basis shall be deemed to have been appointed on a regular basis only for the purposes of computing pensionary and monetary privilege and benefits held out under substituted provision of section 19 ibid and not for any other purposes including seniority, which shall be governed under the relevant provisions of Act, 1973 and seniority rules made thereunder.

MWA/M-58/SC Order accordingly.

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