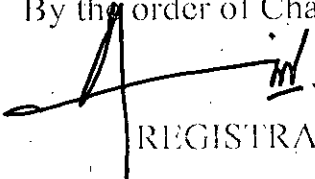


FORM OF ORDER SHEET

Court of _____

Appeal No. 182/2024

S.No.	Date of order proceedings	Order or other proceedings with signature of judge
1	2	3
1	25/01/2024	<p>The appeal of Mr. S.M. Asaad Halimi presented today by Mr. Noor Muhammad Khattak Advocate. It is fixed for preliminary hearing before Single Bench at Peshawar on _____ Parcha Peshi is given to counsel for the appellant.</p> <p>By the order of Chairman  REGISTRAR</p>

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL
PESHAWAR.

SERVICE APPEAL No. 182 /2024

S.M ASAAD HALIM

VS

HEALTH DEPARTMENT

INDEX

S. NO.	DOCUMENTS	ANNEXURE	PAGE
1.	Memo of appeal with affidavit	1-10
2.	Stay Application	11-12
3.	Copy of the relevant referred Section	A	13-14
4.	Copy of the relevant referred Section	B	15
5.	Copy of the relevant referred Rule	C	16
6.	Copy of the relevant referred Rule	D	17-18
7.	Copy of the relevant referred Rule	E	19
8.	Copy of the relevant referred Rule	F	20
9.	Copy of the First Impugned proviso dated 07-12-2017	G	21
10.	Copy of the Second Impugned proviso dated 16-01-2023	H	22-23
11.	Copy of departmental appeal	I	24-27
12.	Copy of Judgment dated 20.12.2023	J	28-32
13.	Copies of charge sheet & statement of allegations	K	33-37
14.	Copy of Judgment "PLJ 2011 Tr.C 57".	L	38-39
15.	Copy of Judgment "2017 PLC CS 250".	M	40-41
16.	Copy of Judgment "990 PLC (C.S) 232".	N	42-46
17.	Copy of Judgment "2005 PLC (C.S) 551".	O	47-48
18.	Copy of Judgment "2010 PLC (C.S) 1".	P	49-52
19.	Copy of Judgment "2016 UC 591".	Q	53-55
20.	Copy of the referred law	R	56-58
21.	Copy of Judgment "2016 PLC CS 424"	S	59-60
22.	Copy of Judgment "2004 SCMR 158".	T	61-66
23.	Copy of suspension order dated 07-02-2023	U	67
24.	Copy of Judgment "2017 SCMR 339".	V	68-71
25.	Copy of Judgment "2016 PLC CS 287".	W	72-79
26.	Copy of Judgment "2018 PLC (C.S) 657".	X	80-84
27.	Vakalatnama	-----	85

APPELLANT

THROUGH:

NOOR MOHAMMAD KHATTAK
ADVOCATE SUPREME COURT

①

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL
PESHAWAR.

SERVICE APPEAL No. 182 /2024

S.M ASAAD HALIMI Chief Drug Inspector (BS-19),
Directorate General Drug Control & Pharmacy Services,
Old Fata Secretariat Warsak road, Peshawar.

.....**APPELLANT**

VERSUS

- 1- The Chief Minister through Principal Secretary, Chief Minister Secretariat Khyber Pakhtunkhwa Peshawar.
- 2- The Chief Secretary, Khyber Pakhtunkhwa Peshawar.
- 3- The Secretary Establishment Khyber Pakhtunkhwa Peshawar.
- 4- The Secretary to Government of Khyber Pakhtunkhwa, Health Department, Khyber Pakhtunkhwa Peshawar.

.....**RESPONDENTS**

APPEAL UNDER SECTION -4 OF THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL ACT, 1974 IN PURSUANCE OF THE JUDGMENT DATED 20-12-2023 RENDERED IN WP NO.3218-P/2023 AGAINST THE IMPUGNED AMENDED PROVISOS NOTIFIED VIDE DATED 07-12-2017 & 16-01-2023 RESPECTIVELY BY APPENDING THEM IN THE "EFFICIENCY & DISCIPLINE RULES, 2011" WHILE ISSUED IN SHEER VIOLATION OF THE VARIOUS SUPERIOR COURT'S JUDGMENTS & LAWS REFERRED IN THE PRAYERS OF THE INSTANT APPEAL, AND AGAINST NO ACTION TAKEN ON THE DIRECTIONS CONTAINED IN THE AFOREMENTIONED JUDGMENT EVEN AFTER THE EXPIRY OF ONE MONTH PERIOD AS STIPULATED BY HONORABLE PESHAWAR HIGH COURT PESHAWAR.

PRAYERS:

THAT ON ACCEPTANCE OF THIS APPEAL, THE FIRST IMPUGNED PROVISO DATED "07.12.2017" WHICH HAS BEEN FURHTER APPENDED/ADDED TO RULE "2" OF THE "EFFICIENCY & DISCIPLINE RULES, 2011" MAY VERY KINDLY BE SET ASIDE AS THE SAME IS CONSIDERABLY SERIOUS BECAUSE IT REFERS TO A CONSTRUCTION WHICH THROUGH & THROUGH IS IN VIOLATION OF SECTION "5" OF THE "CIVIL SERVANT ACT, 1973", AS WELL AS IS IN CONTRADICTION TO THE INTRA RULES i.e RULE "2", SUB RULE "1", CLAUSE (C) WITH RULE "2", SUB RULE "1", CLAUSE (F) SUB CLAUSE (i), & WITH RULE "5", SUB RULE "2" OF THE "EFFICIENCY & DISCIPLINE RULES, 2011", READ WITH RULE "4" OF THE "APPOINTMENT PROMOTION & TRANSFER RULES, 1989".

2

IN LIGHT OF THE JUDGMENTS CITED AS "PLJ 2011 Tr.C 57", "2017 PLC CS 250", "1990 PLC (C.S) 232", "2005 PLC (C.S) 551", "2010 PLC (C.S) 1", "2016 UC 591", "2017 SCMR 339", "2016 PLC CS 287" & "2018 PLC (C.S) 657". THAT THE RESPONDENTS MAY ALSO BE DIRECTED TO CONCLUDE THE IMPUGNED DISCIPLINARY PROCEEDINGS ALREADY INITIATED UNDER THE GARB OF THE AFOREMENTIONED IMPUGNED PROVISO, WHILE SERVING OF A VAGUE & ILLEGAL CHARGE SHEET & STATEMENT OF ALLEGATIONS BY AN INCOMPETENT AUTHORITY [(NON-APPOINTING AUTHORITY)] IN UTTER VIOLATION OF RULE "5" SUB RULE "2" OF THE "EFFICIENCY & DISCIPLINE RULES, 2011", TO THE APPELLANT BUT NOT TO ISSUE ANY FINAL ORDER TILL THE FINAL DISPOSAL/DECISION OF THE INSTANT APPEAL.

THAT FURTHERMORE, THE SECOND IMPUGNED PROVISO DATED "16.01.2023", APPENDED/ADDED TO RULE "6" AFTER SUB RULE "1" MAY VERY KINDLY BE SET ASIDE, HENCE ISSUED IN SHEER VIOLATION OF THE JUDGMENTS REPORTED IN "2016 PLC CS 424", "2004 SCMR 158", "2017 SCMR 339", "2016 PLC CS 287" & "2018 PLC (C.S) 657" RESPECTIVELY READ WITH "SECTION 15 OF THE WEST PAKISTAN (KPK) GENERAL CLAUSES ACT, 1956 [(ANALOGOUS TO THE "SECTION 16" OF THE "GENERAL CLAUSES ACT", 1897)]".

ANY OTHER REMEDY WHICH THIS AUGUST TRIBUNAL DEEMS FIT THAT MAY ALSO BE AWARDED IN FAVOUR OF THE APPELLANT.

R/SHEWETH:

ON FACTS:

Brief facts giving rise to the present appeal are as under:-

- 1- That, the Civil Servant Act, 1973 (hereinafter to be called "CSA, 1973") is an act to regulate the appointment of persons to, and the terms and conditions of service of persons in, the service of the Khyber Pakhtunkhwa and there are twenty seven (27) various Sections contained in it.
- 2- That, the Section "5" of the "CSA, 1973" provides as that, "Appointment" to a civil service of the province or to a civil post in connection with the affairs of the province shall be made in the prescribed manner by the Governor or by a person authorized by the Governor in that behalf.
(Copy of the ibid Section attached as Annexure....."A").
- 3- That, the Section "26" of the "CSA, 1973" provides as that, the Governor or any person authorized by the Governor in this behalf,

may make such rules as appear to him to be necessary or expedient for carrying out the purposes of this Act.

(Copy of the ibid Section attached as Annexure....."B").

4- That, the respondents No.1, 2 & 3, (hereinafter to be called "Rules making Authority") have framed Efficiency & Discipline Rules, 2011 (hereinafter to be called "E & D Rules") while exercising the powers to make Rules under **Section "26"** of the "CSA, 1973".

5- That, the rule "2" of the "E & D Rules", provides definitions of different word & phrases. According to rule 2 sub rule (1), clause (c) of the "E & D Rules", the term "appointing authority" means an authority declared or notified as such by an order of Government under the Khyber Pakhtunkhwa Civil Servant Act, 1973 and the rules made thereunder or an authority as notified under the specific laws/rules of Government.

(Copy of the ibid rule attached as Annexure....."C").

6- That, further dilating upon the term "appointing authority", according to rule "4" of the (Appointment, Promotion & Transfer) Rules, 1989, (hereinafter to be called "APT Rules, 1989") framed under the "CSA, 1973", is the Authority competent to make appointment to posts in various basic pay scales listed against each.

(Copy of the ibid rule attached as Annexure....."D").

7- That, according to rule "2", sub rule (1), clause (f), sub clause (i) of the "E & D Rules", the term "Competent Authority means the respective Appointing Authority". In light of rule "4" of the "APT Rules, 1989" read with rule "2", sub rule (1), clause (f), sub clause (i) of the "E & D Rules", the term "appointing authority" will be hereinafter referred to as "competent authority" while in the same analogy, the "non-appointing authority" as "incompetent authority" under the rules ibid. As the Chief Minister is the "appointing authority" of the Civil Servants of BS-18 & above, hence therefore he is the only "competent authority" to deal with the disciplinary proceedings & other official business/matters (Terms & Conditions) while no one else at any cost.

(Copy of the ibid rule attached as Annexure....."E").

8- That, according to rule "5", sub rule (2) of the "E & D Rules", the charge sheet or statement of allegations or the show cause notice, as the case may be, shall be signed by the competent authority.

(Copy of the ibid rule attached as Annexure....."F").

9- That, the "Rules making Authority" mala fidely amended the "E & D Rules" by further appending/adding an impugned proviso (hereinafter to be called "First Impugned Proviso") in rule "2",

sub rule (1), clause (f) sub clause (i) of the "E & D Rules" vide dated 07-12-2017, which is reproduced for perusal as under,

"provided further that where Chief Minister is the Appointing Authority, the Chief Secretary shall be the competent authority for the purpose of these rules except rules 14 & 15".

(Copy of First Impugned Proviso attached as Annexure....."G").

10-That, the "First Impugned Proviso" further appended whimsically to the above under reference rule badly hits the intents & spirits of the legislature by overriding the statutory provision of sub clause (i) in clause (f), sub rule (1) of rule "2", of the "E & D Rules" read with rule "4" of "APT Rules, 1989", while empowering the Chief Secretary as "competent authority" on behalf of the Chief Minister. It manifests injustice & malafide intentions that how come, only in case of the disciplinary proceedings of the civil servants of BS-18 & above (while leaving rest of the all their other terms & conditions in relation to their appointments, promotions, etc.) the "Rules making Authority", has authorized, an "incompetent authority" i.e Chief Secretary to supersede the Chief Minister ("competent authority") while empowering the former one as "competent authority", which is in intra contradiction to the aforementioned prevailing law & rules.

11-That, in the same analogy, the "Rules making Authority", made another impugned amendments vide dated 16th January 2023, namely in rule "6", after sub rule (1), by adding/appending a new proviso (hereinafter to be called "Second Impugned Proviso"), which is reproduced for perusal as under,

"Provided that in cases where the Chief Minister or Chief Secretary is the competent authority, the Administrative Secretary may suspend the Government servant and submit charge sheet and statement of allegations, forthwith, to the competent authority for signature and initiation of disciplinary proceedings, in accordance with these rules.

(Copy of Second Impugned Proviso attached as Annexure....."H").

12-That, the "Rules making Authority" have once again made a whimsical amendment without the observance of the fact, material on record, prevailing rules & laws and illegally authorized the concerned Administrative Secretary regarding the suspension of such Government/Civil Servants, to whom the competency of appointment of the civil servant is not attracted to his highness on account of being an "incompetent authority".

5

13-That, the appellant also preferred a departmental appeal vide dated 13-02-2023, to the "Rules making Authority", regarding the both impugned provisos made vide dated 07-12-2017 & 16th January 2023 respectively in the "E & D Rules" in order to revisit the same in light of the prevailing law & rules read with reported judgments of the Superior Courts but the same was not replied/ communicated so far till date.

(Copy of appeal attached as Annexure....."I").

14-That, the appellant feeling aggrieved from the inaction of "Rules making Authority", filed a petition vid WP No. 3218-P/2023, through which the Honorable Chief Justice of Peshawar High Court directed vide dated 20-12-2023, the appellate authority to decide the matter strictly in accordance with law within stipulatory period of one month but the same was also defied and was not decided so far, hence the appellant is before this August Tribunal through instant appeal in pursuance of the aforementioned judgment.

(Copy of the referred judgment attached as Annexure....."J").

GROUNDS:

- A- That, the mala fidely amending and notifying of "E & D Rules" while further adding/appending the "First Impugned Proviso" vide dated 07-12-2017, by the "Rules making Authority" in an arbitrary and discriminatory manner, transgressing over the parent statute i.e Statutory provision of Section "5" of CSA, 1973, read with rule "2", sub rule (1), clause f, sub clause (i) of E & D Rules read with rule "4" of APT Rules, 1989, through a whimsical & impugned amendment in respect of "appointing authority" i.e "competent authority", while empowering the Chief secretary as "competent authority" for the purpose of rules ibid instead of Chief Minister for the civil servants holding BS-18 & above, is in sheer violation of law and laid down procedures.
- B- That, according to reading in juxtaposition of rule "2" sub rule (1), clause (c), rule "2", sub rule (1), clause (f), sub clause (i), rule "5" sub rule (2) of the "E & D Rules" and the above "First Impugned Proviso" with each other, the Chief Secretary has been made "competent authority" in sheer violation of Section "5" of the "CSA, 1973", read with rule "4" of the "APT Rules, 1989" on behalf of Chief Minister to the extent of initiating the disciplinary proceeding and to sign the Charge sheet & statement of allegations but at the same time, the same authority has been made "incompetent authority" i.e "non-appointing authority" under the rules ibid to sign the Show Cause Notice for such civil servants who are holding BS-18 & above which is self-intra contradictory, variable and impracticable. The referred matter of controversy may be better understood from initiating

disciplinary proceeding, while signing and subsequently serving of the Charge Sheet & Statement of Allegations by an **"incompetent authority"** i.e Chief Secretary (Respondent No.2) upon the appellant, which may stand vitiated the whole proceedings, as the Show Cause Notice will be eventually signed by the Chief Minister **"competent authority"** , hence it is in sheer violation of the referred laws & rules and therefore the very vires of the Charge Sheet & Statement of Allegations served upon the appellant are also hereby impugned.

(Copies of charge sheet & statement of allegations are attached as Annexure..... "K").

C- That, according to judgment reported in **"PLJ 2011 Tr.C 57"**, which has referred the matter of jurisdiction of the **"competent authority"** regarding the initiating of the disciplinary proceedings as that,

"Only the Appointing Authority is Competent and has jurisdiction to initiate disciplinary proceedings against the civil servant"

(Copy of cited judgment attached as Annexure..... "L").

D- That, it has been held in a judgment cited as **"2017 PLC CS 250"**, that,

"Authority which had power to appoint anybody enjoyed the power to proceed against an appointee under the relevant provisions of law"

(Copy of cited judgment attached as Annexure....."M").

E- That, in the case of **"First Impugned Proviso"** of the **"E & D Rules"** made vide dated 07-12-2017, while declaring the Chief Secretary as **"competent authority"** only to the extent of initiating disciplinary proceeding against the civil servants of BS-18 & above on behalf of Chief Minister (**while leaving rest of the all their terms & conditions in relation to their appointments, promotions, etc.**), is a whimsical, sketchy, slipshod, vague, cursory illusive , elusive, unfair & non judicious amendment and is in utter violation of cited judgments reported in **"PLJ 2011 Tr.C 57"**, & **"2017 PLC CS 250"**, in the instant matter, hence non sustainable in the eye of law and liable to be struck down.

F- That, according to a judgment reported in **"1990 PLC (C.S) 232"**, which has referred the matter of jurisdiction regarding the delegation of power to an authority vide citation **"e"** while holding so that,

"Although a delegated power could not be further delegated , yet, where the rule was subject to exception that when the law itself provided for further delegation, that delegation, if made, would be as valid as the delegation made by the law itself."

(Copy of cited judgment attached as Annexure....."N").

7

- G- That, it has been held in a judgment cited as "2005 PLC (C.S) 551", vide citation "c" regarding the limitation of delegation of power as that,
"A delegatee cannot further delegate his powers.
(Copy of cited judgment attached as Annexure....."O").
- H- That, it has also held in judgment titled as "2010 PLC (C.S) 1", vide citation "f" under the legal maxim as that,
"Delegatus non potest delegare, i.e delegated powers cannot be further delegated.
(Copy of cited judgment attached as Annexure....."P").
- I- That, according to judgment "2016 UC 591", it has been held vide citation "h" regarding delegation of power that,
"A statutory delegatee cannot sub delegate his or her powers.
(Copy of cited judgment attached as Annexure....."Q").
- J- That, the Chief Minister & Chief Secretary have been made competent through delegation of powers in their respective hierarchy to make appointments of the civil servants in various basic pay scales listed against each under rule "4" of "APT Rules, 1989" read with Section "5" of CSA, 1973, but the former being a statutory delegatee under the referred rules & law, cannot further delegate whimsically his powers to make the latter one as further competent without referring any specific provision of law relating to the extent of disciplinary proceedings of civil servants BS-18 & above, hence the matter under reference seems just like putting the cart before the horse, being violative of the judgments cited as "1990 PLC (C.S) 232", "2005 PLC (C.S) 551", "2010 PLC (C.S) 1" & "2016 UC 591", respectively.
- K- That, according to the "Second Impugned Proviso" made vide dated 16th January 2023, in the form of adding/appending a new proviso in rule "6", after sub rule (1) in the "E & D Rules", while authorizing the concerned Administrative Secretary to suspend such a Government Servant, for whom the Chief Minister or Chief Secretary as the case may be, is the "competent authority", being also in contradiction and against the law, facts, norms of natural justice, materials on the record & unconstitutional, hence not tenable and liable to be set aside.
- L- That, according to "Section "15" OF THE West Pakistan (KPK) General Clauses Act, 1956 [(analogous to "Section "16" of the "General Clauses Act", 1897)], while prescribing therein the powers & Functionaries which is reproduced as under,
"Power to appoint to include power to suspend or dismiss".
(Copy of the referred law attached as Annexure....."R").

M- That, the Honorable Peshawar Court has also held in a judgment cited as "2016 PLC CS 424" vide citation (c) through administration of justice as that,

"Authority having power to appoint had also the power to suspend".

(Copy of cited judgments attached as Annexure....."S").

N- That, as per dictum laid down by the Honorable Supreme Court of Pakistan in the case cited as "2004 SCMR 158" vide citation (b) while referring & interpreting the Section 16 of "General Clauses Act", 1897, as that,

"Power to appoint includes power to suspend or dismiss".

(Copy of cited judgments attached as Annexure....."T").

O- That, in the "Second Impugned Proviso" of the "E & D Rules" made vide dated 16-01-2023, while authorizing the Administrative Secretary as "competent authority" ("appointing authority") to suspend a Government Servant while exercising powers on behalf of Chief Minister or Chief Secretary as the case may, is a whimsical amendment, abuse of powers and in violation of cited judgments reported in "2016 PLC CS 424", "2004 SCMR 158" read with "Section 15" of "West Pakistan (KPK) General Clauses Act", 1956, hence non sustainable in the eye of law and liable to be struck down.

P- That, the respondent No.2 ("Chief Secretary") have suspended the services of the appellant vide dated 07-02-2023, by presuming his highness as a "competent authority" under the garb of the "Second Impugned Provisos" which is in fact not competent to do so, as the prevailing rules, laws & reported judgments do not empower/permit the aforementioned authority for carrying out such a mal exercise and thus the action taken is without jurisdiction, abuse of powers, hence the exercise ibid is a Coram non iudice.

(Copy of suspension order vide dated 07-02-2023 attached as Annexure....."U").

Q- That, regarding the Proviso, the Honorable Supreme Court has held in a judgment reported in "2017 SCMR 339" while interpreting the statutes vide citation (b) as under,

"Generally a proviso was an exception to or qualified the main provision of law to which it was attached.... Proviso was to be strictly construed and it applied only to the particular provision to which it was appended. ... Proviso was limited to the provision which immediately precedes it..... Purpose of a proviso was to qualify or modify the

scope or ambit of the matter dealt with in the main provision, and its effect was restricted to the particular situation specified in the proviso itself. ... Before a proviso could have any application, the section or provision itself must apply.

(Copy of the cited judgment attached as Annexure....."V").

R- That, it has held vide citation (b) in a judgment titled as "2016 PLC CS 287" "that Policy or notification could not override statutory rules framed by Government under the statute. In case of consistency between notification and statutory rules, the rules shall prevail".

(Copy of the judgment ibid attached as annexure....."W").

S- That, the both of the impugned provisos may deem to be tainted with mala fide and against the principles of natural justice being discriminatory, as the stakeholders were also not kept in loop while making such amendments. It was held by Supreme Court of Pakistan vide citation (a) in a judgment reported in "2018 PLC (C.S) 657, as that "Terms & Conditions of service could not be unilaterally altered by the employer to the disadvantage of the employees".

(Copy of the cited judgment attached as Annexure....."X").

T- That, as per dictum laid down by the Honorable Supreme Court of Pakistan in the case cited as "PLD 2011 SC 927", the Honorable Supreme Court of Pakistan has dilated upon the principle of administration of justice in the following words,

"when a procedure has been provided for doing a thing in a particular manner that thing should be done in that matter and in no other way or it should not be done at all; indeed it impliedly prohibits doing of thing in any other manner; the compliance of such thing in no way could be either ignored or dispensed with. If the act complained of is without jurisdiction or is in excess of authority conferred by statute or there is abuse or misuse of power, court can interfere.

U- That, as per dictum laid down by the Honorable Supreme Court of Pakistan in the case cited as "PLD 2010 SC 483", the Honorable Supreme Court of Pakistan as follow;

"When the Supreme Court deliberately and with intention of setting the law, pronounces the question, such pronouncement is the law declared by the Supreme Court within the meaning of Article 189 of the Constitution and is binding on all Courts in Pakistan. It cannot be treated as mere obiter dictum.

10

V- That, the appellant seeks permission to advance other grounds and proofs at the time of hearing.

It is therefore, most humbly prayed that the appeal of appellant may kindly be accepted as prayed for.

Asaad Halimi
APPELLANT
S.M ASAAD HALIMI

THROUGH:

N.M. Khattak
NOOR MOHAMMAD KHATTAK
ADVOCATE SUPREME COURT

AFFIDAVIT:

I, S.M ASAAD HALIMI CHIEF DRUG INSPECTOR (BS-19) Directorate General Drug Control & Pharmacy, Old Fata Secretariat Services Warsak Road, Khyber Pakhtunkhwa Peshawar Health Department, do hereby solemnly affirm that the contents of this Appeal are true and correct to the best of my knowledge and belief and nothing has been concealed from this Honorable Court/Tribunal.

Asaad Halimi
DEPONENT

(11)

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL
PESHAWAR.

SERVICE APPEAL No. _____ /2024

S.M ASAAD HALIMI VS HEALTH DEPARTMENT

APPLICATION FOR SUSPENSION OF OPERATION OF THE IMPUGNED CHARGE SHEET, STATEMENT OF ALLEGATIONS, SUSPENSION ORDER DATED 07.02.2023, ISSUED IN UTTER VIOLATION OF PREVAILING LAWS & RULES AS WELL AS OF THE JUDGMENTS CITED AS " PLJ 2011 Tr.C 57", "2017 PLC CS 250" IN PURSUANCE OF THE BOTH IMPUGNED PROVISOS TILL THE FINAL DISPOSAL OF THE ABOVE TITLED APPEAL.

R/SHEWETH:

- 1- That, the above mentioned appeal along with this application has been filed by the appellant before this august Service Tribunal in which no date has been fixed so far.
- 2- That, the appellant filed the above mentioned appeal against the impugned proviso dated 07.12.2017 & 16-01-2023, whereby the appellant has been served with unlawful charge sheet, statement of allegations & his services have been placed under suspension vide dated 07-02-2023, in utter violation of the rule "2", sub rule (1), clause (f) sub clause (i), rule "5", sub rule (2) of the "E & D RULES, 2011", 2011", read with rule "4" of the "APT Rules, 1989"
- 3- That, all the three ingredients necessary for the stay is in the favor of the appellant;
- 4- That, the impugned charge sheet, statement of allegations & suspension order vide dated "07.02.2023" have been issued deliberately, having mala fide intention of harassment and is in utter disregard of the various Courts judgments cited as "PLJ 2011 Tr.C 57", "2017 PLC CS 250" respectively in pursuance of the both impugned provisos by an incompetent authority, which is also violative of the prevailing & notified relevant rules & Law.

It is therefore, most humbly prayed that on acceptance of this application, the operation of the impugned charge sheet, statement of allegations & suspension order dated "07.02.2023" in respect of appellant may very kindly be suspended till the final disposal of the above titled service appeal.



Applicant

THROUGH:


NOOR MOHAMMAD KHATTAK
ADVOCATE SUPREME COURT

12

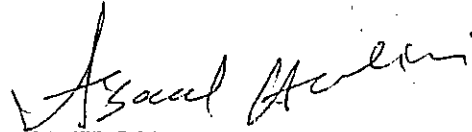
BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL
PESHAWAR.

SERVICE APPEAL No. _____ /2024

S.M ASAAD HALIMI . VS HEALTH DEPARTMENT

AFFIDAVIT.

I, S.M ASAAD HALIMI CHIEF DRUG INSPECTOR (BS-19) Directorate General Drug Control & Pharmacy, Old Fata Secretariat Services Warsak Road, Khyber Pakhtunkhwa Peshawar Health Department, do hereby solemnly affirm that the contents of this **Application** are true and correct to the best of my knowledge and belief and nothing has been concealed from this Honorable Court/Tribunal.


DEPONENT

CHAPTER-I

CONSTITUTIONAL PROVISIONS REGARDING TERMS AND CONDITIONS OF SERVICE OF CIVIL SERVANTS.

Appointments to service of Pakistan and conditions of service.

240. Appointment to service of Pakistan and conditions of service.---Subject to the Constitution, the appointments to and the conditions of service of persons in the service of Pakistan shall be determined---

- (a) in the case of the services of the Federation, posts in connection with the affairs of the Federation and All-Pakistan Services, by or under Act of Majlis-e-Shoora (Parliament); and
- (b) in the case of the services of a Province and posts in connection with the affairs of a Province, by or under Act of the Provincial Assembly.

Explanation.--- In this Article, "All Pakistan Service" means a service common to the Federation and the Provinces, which was in existence immediately before the commencing day or which may be created by Act of Majlis-e-Shoora (Parliament).

Existing rules etc. to continue.

241. Existing rules, etc., to continue.---Until the appropriate Legislature makes a law under Article 240, all rules and orders in force immediately before the commencing day shall, so far as consistent with the provisions of the Constitution continue in force and may be amended from time to time by the Federal Government or, as the case may be, the Provincial Government.

Khyber Pakhtunkhwa

Civil Servants Acts, 1973

(Khyber Pakhtunkhwa Act No. XVIII of 1973)

An Act to regulate the appointment of persons to, and the terms and conditions of service of persons in, the service of the Khyber Pakhtunkhwa

[Gazette of Khyber Pakhtunkhwa, Extraordinary, Page No. 287N-287V, 12th November, 1973]

Preamble.---WHEREAS it is expedient to regulate by law, the appointment of persons to, and the terms and conditions of service of persons in, the service of the Khyber Pakhtunkhwa, and to provide for matters connected therewith or ancillary thereto;

It is hereby enacted as follows:---

✓

14

ESTA CODE [Establishment Code Khyber Pakhtunkhwa]

5

- (i) "rules" means rules made or deemed to have been made under this Act ;
- (j) "selection authority" means the Khyber Pakhtunkhwa Public Service Commission, a departmental selection board, departmental selection committee or other authority or body on the recommendations of, or in consultation with which any appointment or promotion, as may be prescribed, is made;
- (k) "temporary post" means a post other than a permanent post.
- (2) For the purpose of this Act, an appointment, whether by promotion or otherwise, shall be deemed to have been made on regular basis if it is made in the prescribed manner.

CHAPTER-II

TERMS AND CONDITIONS OF SERVICE OF CIVIL SERVANTS

3. Terms and Conditions.---The terms and conditions of service of a civil servant shall be as provided in this Act and the rules.

4. Tenure of office of civil servants.---Every civil servant shall hold office during the pleasure of the Governor.

5. Appointment.---Appointment to a civil service of the Province or to a civil post in connection with the affairs of the Province shall be made in the prescribed manner by the Governor or by a person authorised by the Governor in that behalf.

6. Probation.---(1) An initial appointment to a service or post referred to in section 5, not-being an adhoc appointment, shall be on probation as may be prescribed.

(2) Any appointment of a civil servant by promotion or transfer to a service or post may also be made on probation as may be prescribed.

(3) Where, in respect of any service or post, the satisfactory completion of probation includes the passing of a prescribed examination, test or course or successful completion of any training, a person appointed on probation to such service or post who, before the expiry of the original or extended period of his probation, has failed to pass such examination or test or to successfully complete course or the training shall, except as may be prescribed otherwise--

- (a) if he was appointed to such service or post by initial recruitment, be discharged; or
- (b) if he was appointed to such service or post by promotion or transfer, be reverted to the service or post from which he was promoted or transferred and against which he holds a lien or, if there be no such service or post, be discharged:

23. Saving.---Nothing in this Act or in any rule shall be construed to limit or abridge the power of the Governor to deal with the case of any civil servant in such manner as may appear to him to be just and equitable:

Provided that, where this Act or any rule is applicable to the case of a civil servant, the case shall not be dealt with in any manner less favorable to him than that provided by this Act or such rules.

[23A. Indemnity.---No suit, prosecution or other legal proceeding shall lie against a civil servant for anything done or intended to be done in good faith in his official capacity under this Act or the rules, instructions or direction made or issued thereunder.]

23B. Jurisdiction barred.---Save as provided under this Act and the Service Tribunal Act, 1974 (Khyber Pakhtunkhwa Act No. I of 1974), or the rules made thereunder, no order made or proceedings taken under this Act, or the rules made thereunder by the Governor or any officer authorised by him shall be called in question in any Court and no injunction shall be granted by any Court in respect of any decision made, or proceedings taken in pursuance of any power conferred by or under this Act or the rules made thereunder.]

24. Removal of difficulties.--- If any difficulty arises in giving effect to any of the provisions of this Act, the Governor may make such order, not inconsistent with the provisions of this Act, as may appear to him to be necessary for the purpose of removing the difficulty:

Provided that no such power shall be exercised after the expiry of one year from the coming into force of this Act.

25. Appointment of persons on contract, etc.--- The Governor or any person authorised by the Governor in that behalf may, on such terms and conditions as he may specify in each case, appoint persons on contract basis, or on work-charged basis, or who are paid out of contingencies:

Provided that all such employees who were working in any such capacity immediately before the commencement of this Act shall continue to be so employed on the same terms and conditions on which they were appointed.

26. Rules.---(1) The Governor or any person authorised² by the Governor in this behalf, may make such rules as appear to him to be necessary or expedient for carrying out the purposes of this Act.

1. Sections 23A and 23B inserted by Khyber Pakhtunkhwa Ordinance No. XIV of 2002 dated 02-05-2002.

2. The Governor has authorised the Chief Minister Khyber Pakhtunkhwa to make rules by Notification No.SOR1(S&GAD)1-206/74/Vol.V dated 18.4.1989 which reads as under:---
"In exercise of the powers conferred by sub-section (1) of Section 26 of the Khyber Pakhtunkhwa Civil Servants Act, 1973 (Khyber Pakhtunkhwa Act XVIII of 1973), the Governor of the Khyber Pakhtunkhwa is pleased to authorise the Chief Minister, Khyber Pakhtunkhwa to make rules for carrying out the purposes of the said Act".

"C"

16

**Khyber Pakhtunkhwa
Government Servants (Efficiency and Discipline) Rules, 2011.**

[Khyber Pakhtunkhwa Government Gazette, Extraordinary, Page No. 162-173,
16th September, 2011]

Notification No. SO(REG-VI) E&AD/2-6/2010.dated 16-09-2011.---In exercise of the powers conferred by section 26 of the Khyber Pakhtunkhwa Civil Servants Act, 1973 (Khyber Pakhtunkhwa Act No. XVIII of 1973), the Chief Minister of the Khyber Pakhtunkhwa is pleased to make the following rules, namely:

1. Short title, application and commencement.—(1) These rules may be called the Khyber Pakhtunkhwa Government Servants (Efficiency and Discipline) Rules, 2011.

(2) These shall apply to every person who is a member of the civil service of the Province or is the holder of a civil post in connection with the affairs of the Province and shall also apply to or in relation to a person in temporary employment in the civil service or post in connection with affairs of the Province.

(3) These shall come into force at once.

2. Definitions.—(1) In these rules, unless the context otherwise requires, the following expressions shall have the meanings hereby respectively assigned to them, that is to say-

(a) "accused" means a person in Government service against whom action is initiated under these rules;

(b) "appellate authority" means the authority next above the competent authority to which an appeal lies against the orders of the competent authority;

(c) "appointing authority" means an authority declared or notified as such by an order of Government under the Khyber Pakhtunkhwa Civil Servants Act, 1973 (Khyber Pakhtunkhwa Act No. XVIII of 1973) and the rules made thereunder or an authority as notified under the specific laws/rules of Government;

(d) "charges" means allegations framed against the accused pertaining to acts of omission or commission cognizable under these rules;

(e) "Chief Minister" means the Chief Minister of the Khyber Pakhtunkhwa;

(f) "competent authority" means-

- (i) the respective appointing authority;
- (ii) in relation to a Government servant of a tribunal or court functioning under Government, the appointing authority or the Chairman or presiding officer of such tribunal or court, as the case may be, authorized by the appointing authority to exercise the powers of the competent authority under these rules;

Provided that where two or more Government servants are to be proceeded against jointly, the competent authority in relation to the accused Government servant

17

~~13~~

[(g) "Provincial Selection Board" means the Board constituted by Government for the purpose of selection of civil servants for promotion or transfer to posts in respect whereof the appointing authority under rule 4 is the Chief Minister and shall consist of such persons as may be appointed to it by Government from time to time.]

(2) Words and expressions used but not defined in these rules shall have the same meanings as are assigned to them in the Khyber Pakhtunkhwa Civil Servants Act, 1973 (N.W.F.P Act XVIII of 1973) or any other statutory order or rules of Government for the time being in force.

3. **Method of Appointment.**---(1) Appointment to posts shall be made by any of the following methods, namely:-

- (a) by promotion or transfer in accordance with the provisions contained in Part-II of these rules; and
- (b) by initial recruitment in accordance with the provisions contained in Part-III of these rules.

(2) The method of appointment, qualifications and other conditions applicable to a post shall be such as laid down by the Department concerned in consultation with the Services and General Administration Department and the Finance Department.

4. **Appointing Authority.**---The authorities competent to make appointment to posts in various basic pay scales shall be as follows:-

S.No	Posts	Appointing Authority
1.	(a) Posts in Basic Pay Scale 18 and above including posts in Basic Pay Scale 17 borne on any of the following services; <ul style="list-style-type: none"> (i) Former Provincial Civil Service (Executive Branch); (ii) Former Provincial Civil Service (Judicial Branch); and (iii) Provincial Civil Secretariat Service. 	Chief Minister

1. Clause "(g)" substituted by Notification No. SORI(S&GAD)4-1/80/Vol.II dated 14-01-1992.
 2. Substituted by Notification No.SOSRI(S&GAD)4-1/75(Vol.I) dated 22-08-1991.

TESTED
 to be true copy
 Adv *[Signature]*

S.No	Posts	Appointing Authority
	[(b) Posts in Basic Pay Scale 17, other than those covered by (a) above and the post of Deputy Superintendent of Police; and]	Chief Secretary
	[(c) Posts of Deputy Superintendent of Police	Provincial Police Officer // Inspector-General of Police]
2.	Posts in Basic Pay Scale 16	<p>(a) In the case of Secretariat of the Government of Khyber Pakhtunkhwa, the Chief Secretary.</p> <p>(b) In case of High Court, the Chief Justice; and</p> <p>(c) In the case of Attached Department:</p> <p>(i) the Head of Attached Department concerned; and</p> <p>(ii) In any other case the Secretary of the Department concerned.</p>
3.	Posts in Basic Pay Scales [6 to 15].	<p>(a) In the case of civil Servants borne on ministerial establishment of Civil Courts subordinate to High Court, the officer authorised as such by the Chief Justice; and</p> <p>(b) In other cases--</p> <p>(i) -an officer declared under the relevant Delegation of Powers Rules, which shall to this extent be deemed as operative; or</p> <p>(ii) Where no such appointing authority has been declared, the Secretary to</p>

1. Substituted for "Posts in Basic Pay Scale 17 other than those covered by (a) above" by Notification No. SOR-III(E&GAD)2(144)03, dated 22-09-2003.[PLD 2004 NWPF St. 61]
2. Added by SOR-III(E&GAD)2(144)03, dated 22-09-2003.[PLD 2004 NWPF St. 61]
3. Subs. By Notification No. SOR VI/E&AD/1-3/2015 dated 19.01.2016

ATTESTED

10

"E"

19

290

**Khyber Pakhtunkhwa
Government Servants (Efficiency and Discipline) Rules, 2011.**

[Khyber Pakhtunkhwa Government Gazette, Extraordinary, Page No. 162-73,
16th September, 2011]

Notification No. SO(REG-VI) E&AD/2-6/2010.dated 16-09-2011.---In exercise of the powers conferred by section 26 of the Khyber Pakhtunkhwa Civil Servants Act, 1973 (Khyber Pakhtunkhwa Act No. XVIII of 1973), the Chief Minister of the Khyber Pakhtunkhwa is pleased to make the following rules, namely:

1. Short title, application and commencement.—(1) These rules may be called the Khyber Pakhtunkhwa Government Servants (Efficiency and Discipline) Rules, 2011.

(2) These shall apply to every person who is a member of the civil service of the Province or is the holder of a civil post in connection with the affairs of the Province and shall also apply to or in relation to a person in temporary employment in the civil service or post in connection with affairs of the Province.

(3) These shall come into force at once.

2. Definitions.—(1) In these rules, unless the context otherwise requires, the following expressions shall have the meanings hereby respectively assigned to them, that is to say-

(a) "accused" means a person in Government service against whom action is initiated under these rules;

(b) "appellate authority" means the authority next above the competent authority to which an appeal lies against the orders of the competent authority;

(c) "appointing authority" means an authority declared or notified as such by an order of Government under the Khyber Pakhtunkhwa Civil Servants Act, 1973 (Khyber Pakhtunkhwa Act No. XVIII of 1973) and the rules made thereunder or an authority as notified under the specific laws/rules of Government;

(d) "charges" means allegations framed against the accused pertaining to acts of omission or commission cognizable under these rules;

(e) "Chief Minister" means the Chief Minister of the Khyber Pakhtunkhwa;

(f) "competent authority" means-

(i) the respective appointing authority;

(ii) in relation to a Government servant of a tribunal or court functioning under Government, the appointing authority or the Chairman or presiding officer of such tribunal or court, as the case may be, authorized by the appointing authority to exercise the powers of the competent authority under these rules;

Provided that where two or more Government servants are to be proceeded against jointly, the competent authority in relation to the accused Government servant

(4) Subject to sub-rule (3), where the holding of departmental inquiry during judicial custody is not possible or where holding of such departmental inquiry has effect of impeding the course of justice in criminal proceedings or prejudicing the trial, the competent authority may defer such inquiry till release on bail or termination of criminal proceedings, as the case may be.

(5) In addition to the minor or major penalties, as the case may be, where a Government servant is convicted of any embezzlement or where any pecuniary loss is caused to Government or organization in which he is employed or posted, such embezzled amount and the amount due shall be recovered from such accused from his pay or any other amount payable to the accused in whole or in part, as provided in the financial rules:

Provided that if the amount, due from any such Government servant cannot be wholly recovered from the pay or any other amount payable to him, such amount shall be recovered under the law for the time being in force.]

5. **Initiation of proceedings.**—(1) If on the basis of its own knowledge or information placed before it, the competent authority is of the opinion that there are sufficient grounds for initiating proceedings against a Government servant under these rules it shall either:-

(a)

proceed itself against the accused by issuing a show cause notice under rule 7 and, for reasons to be recorded in writing, dispense with inquiry:

Provided that no opportunity of showing cause or personal hearing shall be given where-

- (i) the competent authority is satisfied that in the interest of security of Pakistan or any part thereof, it is not expedient to give such an opportunity; or
- (ii) a Government servant has entered into plea bargain under any law for the time being in force or has been convicted on the charges of corruption which have led to a sentence of fine or imprisonment; or
- (iii) a Government servant is involved in subversive activities; or
- (iv) it is not reasonably practicable to give such an opportunity to the accused; or

(b)

get an inquiry conducted into the charge or charges against the accused, by appointing an inquiry officer or an inquiry committee, as the case may be, under rule 11:

Provided that the competent authority shall dispense with the inquiry where-

- (i) a Government servant has been convicted of any offence other than corruption by a court of law under any law for the time being in force; or
- (ii) a Government servant is or has been absent from duty without prior approval of leave:

Provided that the competent authority may dispense with the inquiry where it is in possession of sufficient documentary evidence against the accused or, for reasons to be recorded in writing, it is satisfied that there is no need to hold an inquiry.

(2) The charge sheet or statement of allegations or the show cause notice, as the case may be, shall be signed by the competent authority.

ATTESTED
18
Adv

9 (21)

**GOVERNMENT OF
KHYBER PAKHTUNKHWA
ESTABLISHMENT DEPARTMENT
(REGULATION WING)**

Dated Peshawar, the 07.12.2017

NOTIFICATION

(Policies) E&AD/1-41/2017.- In exercise of the powers conferred by Section 26 of the Khyber Pakhtunkhwa Civil Servants Act, 1973 (Khyber Pakhtunkhwa Act No. XVIII of 1973), the Chief Minister of the Khyber Pakhtunkhwa is pleased to direct that in the Khyber Pakhtunkhwa Government Servants (Efficiency and Discipline) Rules 2011, the following amendment shall be made, namely:

AMENDMENT

In rule 2, in sub-rule(1), in clause (f), in sub-clause (ii), the full-stop appearing at the end of first proviso shall be replaced by colon and thereafter the following proviso shall be added, namely:

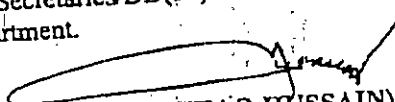
"Provided further that where Chief Minister is the Appointing Authority, the Chief Secretary shall be the competent authority for the purpose of these rules except rules 14 & 15."

Secretary to
Government of the Khyber Pakhtunkhwa
Establishment Department

ENDST: NO & EVEN DATE

Copy is forwarded to:-

1. Additional Chief Secretary, Govt. of Khyber Pakhtunkhwa, Planning & Development Department.
2. Additional Chief Secretary (FATA), FATA Secretariat Peshawar.
3. The Senior Member Board of Revenue, Khyber Pakhtunkhwa.
4. All Administrative Secretaries to Govt. of Khyber Pakhtunkhwa.
5. The Principal Secretary to Governor, Khyber Pakhtunkhwa.
6. The Principal Secretary to Chief Minister, Khyber Pakhtunkhwa.
7. All Divisional Commissioners in Khyber Pakhtunkhwa.
8. All Heads of Attached Departments in Khyber Pakhtunkhwa.
9. All Autonomous/Semi-Autonomous Bodies in Khyber Pakhtunkhwa.
10. All Deputy Commissioners in Khyber Pakhtunkhwa/Political Agents in FATA.
11. The Registrar Peshawar High Court, Peshawar.
12. The Registrar, Khyber Pakhtunkhwa Service Tribunal, Peshawar.
13. The Secretary, Khyber Pakhtunkhwa Public Service Commission, Peshawar.
14. All Additional Secretaries/Deputy Secretaries/DD(IT)/ Section Officers in Establishment & Administration Department.


(MUSHTAQ HUSSAIN)
Deputy Secretary (Policies)

ATTESTED

to be true
Adv.



GOVERNMENT OF KHYBER PAKHTUNKHWA
ESTABLISHMENT & ADMINISTRATION
DEPARTMENT
(REGULATION WING)

"H" 22

17

NOTIFICATION

Dated Peshawar the 16th January, 2023

No. SO(Polices)E.&AD/2-6/2022. In exercise of the powers conferred by Section 26 of the Khyber Pakhtunkhwa Civil Servants Act, 1973 (Khyber Pakhtunkhwa Act No. XVIII of 1973), the Chief Minister of Khyber Pakhtunkhwa is pleased to direct that in the Khyber Pakhtunkhwa Government Servants (Efficiency & Discipline) Rules 2011, the following further amendment shall be made, namely:

AMENDMENTS

1. In rule 4, in sub rule (1), in clause (b), in sub-clause (i),

(i) for the first proviso, the following shall be substituted, namely:

"Provided that on restoration to original pay scale or post, the penalized Government servant shall be placed below the erstwhile juniors promoted to higher post during subsistence of the period of penalty"; and

(ii) in the second proviso, the semi-colon, appearing at the end, shall be replaced by a colon and thereafter the following new proviso shall be added, namely:

"Provided also that this penalty shall not be imposed upon the Government servant, who has been appointed against the post by initial recruitment."

2. In rule 6, after sub-rule (1), the following proviso shall be added, namely:

"Provided that in cases where the Chief Minister or Chief Secretary is the competent authority, the Administrative Secretary may suspend the Government servant and submit charge sheet and statement of allegations, forthwith, to the competent authority for signature and initiation of disciplinary proceedings, in accordance with these rules."

3. For rule-9, the following shall be substituted, namely:

"9. Procedure in case of willful absence--- Notwithstanding anything to the contrary contained in these rules, in case of willful absence from duty by a Government servant for seven or more days, a notice shall be issued by the Administrative Secretary in case the competent authority is Chief Minister or Chief Secretary and in all other cases by the competent authority concerned, through registered acknowledgement on his home address directing him to resume duty within fifteen (15) days of issuance of the notice. If the same is received back as undelivered or no response is received from such Government servant, within stipulated time, a notice shall be published in at least two leading newspapers, directing him to resume duty within fifteen (15) days of the publication of the notice, failing which an ex-parte decision shall be taken by the competent authority against him. On expiry of the stipulated period given in the notice, major penalty of removal from service may be imposed upon such Government servant by the competent authority";

"Provided that upon publication of the notice in the newspaper, pay of such Government servant shall be stopped"

16/01/2023

CamScanner

Scanned with CamScanner

ATTESTED

to true copy
Adv

23

18

4. In rule-11, in sub-rule (7),-

(i) the full stop, appearing at the end, shall be replaced by a colon and thereafter the following proviso shall be added, namely:

"Provided that the Inquiry Officer, Inquiry Committee or hearing officer, as the case may be, shall record cogent reasons for recommending exoneration of the accused."; and

(ii) after sub-rule (7), as so amended, the following new sub-rule (8) shall be added, namely:

"(8) On receipt of the inquiry report from the Inquiry Officer or Inquiry Committee, as the case may be, the Administrative Department concerned shall submit the case to the Chief Minister or Chief Secretary, if so required, within fifteen (15) days for orders."

5. In rule 14, in sub-rule (4), in clause (b), for the word "seven", the word "ten" shall be substituted.


6. In rule 15, the full stop, appearing at the end, shall be replaced by a colon and thereafter the following proviso shall be added, namely:

"Provided that the hearing officer shall submit the report to the competent authority within twenty one (21) days of affording opportunity of personal hearing to the accused;"

CHIEF SECRETARY,
KHYBER PAKHTUNKHWA.

ENDST: NO & EVEN DATE
Copy is forwarded to the:-

1. Additional Chief Secretary, Govt. of Khyber Pakhtunkhwa, Planning & Development Department.
2. Senior Member Board of Revenue, Khyber Pakhtunkhwa.
3. All Administrative Secretaries to Govt. of Khyber Pakhtunkhwa.
4. Principal Secretary to Governor, Khyber Pakhtunkhwa.
5. Principal Secretary to Chief Minister, Khyber Pakhtunkhwa.
6. All Divisional Commissioners in Khyber Pakhtunkhwa.
7. All Heads of Attached Departments in Khyber Pakhtunkhwa.
8. All Autonomous/Semi Autonomous Bodies in Khyber Pakhtunkhwa.
9. All Deputy Commissioners in Khyber Pakhtunkhwa.
10. Registrar Peshawar High Court, Peshawar.
11. Registrar, Khyber Pakhtunkhwa Service Tribunal, Peshawar.
12. Secretary, Khyber Pakhtunkhwa Public Service Commission, Peshawar.
13. All Additional Secretaries, Deputy Secretaries and Section Officers in Establishment & Administration Department.
14. Manager, Printing and Stationery Department, Peshawar with the request to publish the same in the official gazette.


(AMIR-UL-HAQ)
Deputy Secretary (Secretary)

CS CamScanner

Scanned with CamScanner

ATTESTED
to be true copy
Adv

"I"

24

r/S/C.S Khyber Pakhtunkhwa
Diary No 578 (w/e)
Date: 15-02-2023

To,

Dated: 13-02-2023

The Chief Minister,
through Principal Secretary Chief Minister Secretariat,
Khyber Pakhtunkhwa Peshawar.

Subject: APPEAL FOR REVIEWING THE IMPUGNED AMENDMENTS MADE IN THE "E & D RULES 2011" REGARDING THE APPENDING OF NEW PROVISOs IN RESPECT OF "RULES 2 & 6".

Respected Sir,

Consequent upon fresh appointments of the undersigned as a Provincial Drug Inspectors (BPS-17) by Health Department on the recommendation Public Service Commission Khyber Pakhtunkhwa since 16th April 1993, the undersigned has completed about 29 years of Civil Service at his credit and the undersigned submit as under on the subject cited above.

1) That, consequent upon the powers conferred by Section 26 of the Khyber Pakhtunkhwa Civil Servant Act, 1973, the Chief Minister of Khyber Pakhtunkhwa is pleased to direct that in the Khyber Pakhtunkhwa Government Servants (Efficiency & Discipline) Rules 2011, the following amendment shall be made namely, vide a notification dated 07-12-2017, as follow:

In Rules 2, sub-rule (1), in clause f, sub clause (ii), the full stop appearing at the end of the first proviso shall be replaced and thereafter the following proviso shall be added, namely:

"Provided further that where the Chief Minister is the competent authority, the Chief Secretary shall be the competent authority, for the purpose of these rules except rules 14 & 15."

(Copy of the relevant Proviso vide dated 07-12-2017 attached as Annexure..... "A").

2) That, the above proviso added to Rules 2, sub-rule (1), of clause f, sub clause (ii), and is in contradiction to the intra rules i.e, rule 2, sub rule 1, clause c of the E & D rule, which states that appointing authority means an authority declared or notified as such by an order of Government under the Khyber Pakhtunkhwa Civil Servant

25

Act, 1973 and the rules framed thereunder or an authority as notified under the specific laws/rules of Government. So only the appointing authority is competent enough as defined under the E & D Rules 2011, and has jurisdiction to initiate disciplinary proceedings against the civil servant while no one else under the ibid rules, hence such impugned proviso clearly violates the intents & spirits of the legislature .

3) That, according to judgment reported in "PLJ 2011 Tr.C 57", which has held that only the Appointing Authority is Competent to initiate disciplinary proceedings against the civil servant. In case of departure from doing so, the whole proceeding/case shall stand vitiated.

(Copy of cited judgment attached as Annexure.... "B").

4) That, it has been held in a judgment cited as "2017 PLC CS 250" that,

"Authority which had power to appoint anybody enjoyed the power to proceed against an appointee under the relevant provisions of law".

(Copy of cited judgment attached as Annexure..... "C").

5) That, again the establishment department vide dated 16-01-2023, issued a notification while stating therein that, the powers conferred by Section 26 of the Khyber Pakhtunkhwa Civil Servant Act, 1973, the Chief Minister of Khyber Pakhtunkhwa is pleased to direct that in the Khyber Pakhtunkhwa Government Servants (Efficiency & Discipline) Rules 2011, the following further amendment shall be made, namely:

2. In 6, after sub rule (1), the following proviso, shall be added namely:

"Provided that in cases where the Chief Minister or Chief Secretary is the Competent Authority, the Administrative Secretary may suspend the Government Servant and submit charge sheet & statement of allegations, forthwith, to the

competent authority for signature and initiation of disciplinary proceedings, in accordance with these rules. (Copy of the relevant new appended Proviso attached as Annexure..... "D").

6) That, the above Proviso is in contradiction to General Clauses Act. As per "Section 15" of "The West Pakistan (KPK) General Clauses Act", 1956, analogous to "Section 16" of the "The General Clauses Act", 1897, the authority which has been vested with the statutory power to appoint also to include power to suspend or dismiss. It is crystal clear that on no accounts any other authority who is not empowered (competent) to appoint, cannot also suspend or dismiss the same. (Copy of ibid Section attached as Annexure..... "E").

7) That the Apex Court has held in a judgment cited as "2004 SCMR 158" that, "Power to appoint includes power to suspend or dismiss" (Copy of the cited judgment attached as Annexure..... "F").

8) That, amending of the impugned E & D Rules, 2011, regarding the appending of new Proviso in respect of Rules "2 & 6" vide dated 07-12-2017 & 16-01-2023 respectively, without taking in confidence of the stakeholders is colorable exercise & abuse of executive powers while passing orders unilaterally which could not ever be considered fairly, judiciously and in a bonafide manner. The same may deem to be tainted with mala fide and against the principles of natural justice being discriminatory. It has been held by Supreme Court of Pakistan in a judgment cited as 2018 PLC (C.S) 657 that Terms & Conditions of service could not be unilaterally altered by the employer to the disadvantage of the employees. (Copy of the cited judgment attached as Annexure..... "G").

9) That, according to "Article 4" of the Constitution read with Section "24-A" of General Clauses Act, 1897, the Public Functionaries are duty bound to decide application of the citizens after judicial application of mind with reasons and High Court had ample

27

jurisdiction to give direction to the Public functionaries to act strictly in accordance with law.

Keeping in view entire of the above, it is therefore humbly requested that the aforesaid latest amendment made in the E & D Rules, 2011 in respect of the new Proviso appended to Rule 2 & 6, might have issued in the ignorance of the APT Rules, 1989 and judgment reported in 2004 SCMR 158 read with Section 15 of General Clauses Act 1956, hence the same may kindly be cancelled/ withdrawn in the interest of natural justice and oblige please.

Syed Muhammad Asaad Halimi,
Chief Drug Inspector (BS-19),
District D.I.Khan.
Cell No. 0333-9120525.

Copy to

- 1) PS to Chief Secretary Khyber-Pakhtunkhwa Peshawar.
- 2) PS to Secretary Establishment Pakhtunkhwa Peshawar.

Syed Muhammad Asaad Halimi,
Chief Drug Inspector (BS-19),
District D.I.Khan.
Cell No. 0333-9120525.

BEFORE THE HON'BLE HIGH COURT, PESHAWAR.

WRIT PETITION NO. _____/2023.



- 1) S.M. Asaad Halimi (Chief Drug Inspector BS-19) Chief Drug Inspector (BS-19) Dera Ismail Khan.
- 2) Syed Welayat Shah (Chief Drug Inspector BS-19) currently posted as Chief Hospital Pharmacist Naseer Ullah Khan Babar Memorial Hospital Peshawar.
- 3) Muhammad Tayyab Abbas Chief Drug Inspector (BS-19) Abbotabad.
- 4) Zia ul Haq Drug Inspector District Hangu.
- 5) Zia Ullah Drug Inspector (BS-17) District Bannu.
- 6) Dr. Safi Ullah Medical Officer (BS-17) District Mardan.
- 7) Dr. Zeeshan Medical Officer (BS-17) District Mardan.

..... PETITIONERS

VERSUS

- 1- The Chief Minister through Principal Secretary to Government Khyber Pakhtunkhwa, Chief Minister Secretariat, Peshawar.
- 2- The Govt. of Khyber Pakhtunkhwa, through the Chief Secretary Khyber Pakhtunkhwa, Peshawar.
- 3- The Secretary Establishment Government of Khyber Pakhtunkhwa, Peshawar.

.....RESPONDENTS

**WRIT PETITION UNDER ARTICLE 199 OF THE
CONSTITUTION OF ISLAMIC REPUBLIC OF
PAKISTAN, 1973 AS AMENDED UPTO DATE**

R/SHEWETH:**ON FACTS:**

Brief facts giving rise to the present writ petition are as under:

**ATTESTED
EXAMINER
Peshawar High Court
Peshawar**

PESHAWAR HIGH COURT, PESHAWAR.

29

FORM OF ORDER SHEET



Date of Order or Proceeding	Order or other proceedings with Signature of Judge
2	3
20.12.2023	<p><u>W.P NO. 3218-P of 2023.</u></p> <p><u>Present: -</u> Mr. Noor Mohammad Khattak, advocate for petitioners.</p> <p>Ms. Shehnaz Tariq, AAG for respondents.</p> <p>***</p> <p><u>MOHAMMAD IBRAHIM KHAN, CJ.-</u> Through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, S.M Asaad Halimi, Chief Drug Inspector (BS-19) and 06 others seek the following relief:-</p> <p><i>"It is most humbly and respectfully prayed before this honorable Court that on acceptance of this writ petition,</i></p> <p>i. <i>An appropriate writ may kindly be issued to declare the first impugned proviso notified vide dated 07.12.2017 while declaring Chief Secretary to be competent authority on behalf of Chief Minister, being violative of Rule (2), sub rule (1), clause (f) sub clause (i) of</i></p>

ATTESTED
EXAMINER
Peshawar High Court
Peshawar

the E&D Rules read with rule 4 of APT Rules, 1989, as ineffective upon the rights of the petitioners, without mandate of law, illegal, unlawful, unconstitutional, impracticable, invalid, incompetent, void ab initio, coram non judice and ultra vires in light of the judgments rendered in PLJ 2011 Tr.C 57, 2017 PLC CS 250, 2017 SCMR 339 & 2016 PLC CS 287 respectively narrated under the roof of grounds.

ii. Furthermore, an appropriate writ may also be kindly issued to declare the second impugned proviso notified vide dated 16.01.2023, appended/ added to rule 6 after sub rule (1) while empowering the Administrative Secretary regarding the suspension of a Government Servant instead of the relevant

ATTESTED
EXAMINER
Peshawar High Court
Peshawar

competent authority, reported in 2004 SCMR 158 & 2016 PLC CS 424 respectively read with Section 16 of General Clauses Act, 1897 as ineffective; upon the rights of petitioners, without mandate of law, illegal, unlawful, unconstitutional, impracticable, invalid, incompetent, void ab initio, -coram non judice and ultra vires"

2. During the course of arguments, learned counsel for petitioners stated that petitioners have filed an appeal dated 13.02.2022 before the appellate authority i.e. Chief Minister, Khyber Pakhtunkhwa, however, same has not yet been decided. As such, he requested that directions may be issued to the appellate authority to decide the *ibid* appeal of petitioner within a certain timeframe.

3. In view of above, while this petition is disposed of, the appellate authority is directed to decide the above referred appeal of the petitioners strictly in accordance with law within a period of one month from receipt of copy of this order, by issuing a speaking order. Thereafter, if the petitioners are still aggrieved,

ATTESTED
EXAMINER
Peshawar High Court
Peshawar

32

they may approach proper forum for redressal of their grievance.

Announced:
20.12.2023.

Handwritten signature
CHIEF JUSTICE

Handwritten signature
JUDGE

CERTIFIED TO BE TRUE COPY

EXAMINER
Peshawar High Court, Peshawar
Authorized Under Article 167 of
the Qanoon-e-Shahadat Act 1934

26 DEC 2023

26208

22-12-2023

Date of Presentation of Application

No of Pages

5 - P

Copying fee

20-112

Cost

26-12-2023

Date of Receipt

26-12-2023

Signature of Receiver

131

Zia*

D.B

Hon'ble Mr. Justice Mohammad Ibrahim Khan, C.J.
Hon'ble Mr. Justice Shakeel Ahmad, J.

CHARGE SHEET

"K"

33

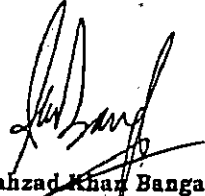
I, Dr. Shahzad Khan Bangash, Chief Secretary, Khyber Pakhtunkhwa, as the Competent Authority do hereby charge you, Syed Asaad Halmi, Chief Drug Inspector (BPS-19), currently posted as Chief Drug Inspector, DI Khan, as under;

That you, while posted as Chief Drug Inspector (BPS-19) at District Kohat, have committed the following act of omission/commission:-

- I. As per record, 80 inspections/visits of medical Stores/Distribution setups were shown conducted by you in your Monthly Progress Report (MPR) but despite such a poor performance, no record was found in support of your inspections/visits.
- II. As per record, no samples of drugs/medicines were taken/drawn by you for the purpose of test analysis as per your Monthly Progress Report(s)/record examined which indicates that you had no performance while posted at Distt. Kohat.
- III. No mechanism of attendance or activity plan was available on record to substantiate your work/performance.
- IV. Issuance of No Objection Certificates (NOCs) to a qualified person is required to be issued by the inspector after ascertaining that the registration of the applicant is not engaged in any medicine store of that district. No record was maintained but NOCs were issued by you for granting licenses in other districts.
- V. It was noticed that no NOC either from Khyber Pakhtunkhwa Pharmacy Council or from concerned Districts was obtained by you before issuance/renewal of Drug Sale License as per instruction of the Government which resulted in the issuance of either fake or duplicate Drug Sale Licenses.
- VI. Handing over/taking over record was not present as reported by your successor. The data of cases under investigation or completed, Drug Sale Licenses, cases submitted to Provincial Quality Control Board (PQCB), NOCs, cases of Drug Court, FIRs data, Cases Property and documentary evidences were found missing to carry out a full and comprehensive audit.
- VII. During your tenure at Distt. Kohat you have not reported any seizure or confiscated any drug/medicine on Form-6 or Form-4, as required under the Drug Rules, 1982.
- VIII. Under the Drugs Act, 1976, Drug Inspectors have to convey seizure of

34

2. By reasons of the above you appear to be guilty of "Inefficiency, Misconduct & Corruption" under Rule-3 of the Khyber Pakhtunkhwa Government Servants (Efficiency and Discipline) Rules, 2011 and have rendered yourself liable to all or any of the penalties specified in Rule-4 of the Rules *ibid*.
3. You are required to submit your written defense within ten (10) days and not more than 14 days of the receipt of this Charge Sheet to the Inquiry Officer / Inquiry Committee as the case may be.
4. Your written defense, if any, should reach the Inquiry Officer/ Committee within the specified period, failing which, it shall be presumed that you have no defense to put in and in that case *ex-parte* action shall be taken against you.
5. Intimate whether you desire to be heard in person.
6. A Statement of Allegations is enclosed.


(Dr. Shahzad Khan Bangash)
Chief Secretary,
Khyber Pakhtunkhwa.

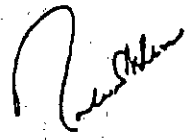
DISCIPLINARY ACTION

35

I, Nadeem Aslam Chaudhry, Chief Secretary, Khyber Pakhtunkhwa, as the Competent Authority, am of the opinion that Syed Asaad Hallmi, Chief Drug Inspector (BPS-19), currently posted as Chief Drug Inspector, D.I. Khan has rendered himself liable to be proceeded against, as he has committed the following Acts/ Omissions within the meaning of Rule-3 of the Khyber Pakhtunkhwa Civil Servants (Efficiency and Discipline) Rules, 2011.

STATEMENT OF ALLEGATIONS

- A. Eighty (80) inspections/visits of Medical Stores/Distribution setups were shown conducted in his Monthly Progress Report (MPR) but despite such poor performance, no record was found in support of his inspections/visits.
- B. No samples of drugs/medicines were taken/drawn for the purpose of tests/analysis as per his Monthly Progress Report(s) or record examined which indicates that he had no performance while posted at Distt. Kohat.
- C. No mechanism of attendance or activity plan was available on record to substantiate his work/performance.
- D. Issuance of No Objection Certificates (NOCs) to a qualified person is required to be issued by the inspector after ascertaining that the Registration of the applicant is not engaged in any medicine store of that district. No record was maintained but NOCs were issued for granting licenses in other districts.
- E. It was noticed that no NOC either from Khyber Pakhtunkhwa Pharmacy Council or from concerned Districts was obtained before issuance/renewal of Drug Sale License as per instructions of the Government which resulted in the issuance of either fake or duplicate Drug Sale Licenses.
- F. Handing over/taking over record was not present as reported by his successor/Drug Inspector. The data of cases under investigation or completed, Drug Sale Licenses, cases submitted to Provincial Quality Control Board (PQCB), NOCs issued, cases of Drug Court, FIRs, Case Property and documentary evidences were missing to carry out a full and comprehensive audit.
- G. During his tenure at Distt. Kohat, he has not reported any seizure of drugs or has confiscated any drug/medicine on Form-6 or Form-4, as required under the Drug Rules, 1992.



Scanned with CamScanner

- H. Under the provisions of The Drugs Act, 1970, Drug Inspectors have to convey seizure of the seized stock of drugs/medicines to the Competent Authority but no such correspondence/presentation was found in the record that could indicate the quantity of the seized stock.
- I. No Medical Stores were shown sealed in his tenure at District Kohat.
- J. No sample(s) were failed by the Drug Testing Laboratory (DTL) from July, 2016 to June, 2020 as per his Monthly Progress Report which indicates his poor performance and least interest in drawing drug samples from market for the purpose of test/analysis.
- K. A random examination of Drug Sale Licenses, issued by him, shows gross irregularities that tantamount malpractice on his part, committed during his tenure at Kohat.
- L. No inspection proforma/checklist has been found filled by him which is mandatory for the grant and renewal of DSL during its issuance manually.
- M. Statements of the following eighteen (18) proprietors/owners of drug stores at district Kohat have been received wherein they have been issued Drug Sale Licenses by taking bribes:

S#	Name Of Medical Store	Amount Taken	Issued by
1	Hafiz Surgical	150000	Syed Asaad Halimi, Chief Drug Inspector Kohat
2	Malak Akbar Medical Store	150,000/-	-do-
3	Basit Medical Store	80,000/-	-do-
4	Adil Medicose	130,000/-	-do-
5	Abbas Medicose	192,000/-	-do-
6	Shaheen Enterprises	200,000/-	-do-
7	Ayub Medicose	115,000/-	-do-
8	Rehman Medicines	50,000/-	-do-
9	All Medicose	132,000/-	-do-
10	Life Pharmacy	110,000/-	-do-
11	Family Care Pharmacy	210,000/-	-do-
12	Abu Baker Medicose	145,000/-	-do-
13	Abdul Aziz Medicose	80,000/-	-do-
14	Hamdan Enterprises	160,000/-	-do-
15	Amir Medicose	100,000/-	-do-
16	Health Ways	14,000/-	-do-
17	Khan G Medicose	160,000/-	-do-
18	Siddique Surgical	150,000/-	-do-
Total Amount		2,328,000/-	

- N. The gross irregularities, abuse of power and misuse of authority, surfaced during random checking at the office of CDI Kohat, is alarming and a threat to the lives of general public because hundreds of outlets/stores at Dist. Kohat are selling drugs without the observance of legal formalities/quality check.



0. The Chief Drug Inspector Kohat has failed in the performance of his duties, assigned to him under the relevant law, during his tenure of more than 3 years and 5 months at District Kohat.

2. For the purpose of inquiry against the said accused with reference to the above allegations an Inquiry Officer/Inquiry Committee, consisting of the following, is constituted under Rule 10(1) (a) of the ibid rules.

a. Mr. Jamil Gul (PCS 56, BS-20)

b. Dr. Shiraz Jamal (BS-20)

3. The Inquiry Officer/Inquiry Committee shall, in accordance with the provisions of the ibid rules, provide reasonable opportunity of hearing to the accused, record its findings and make, within 60-days of the receipt of this order, recommendations as to punishment or other appropriate action against the accused.

4. The accused and a well conversant representative of the Department shall join the proceedings on the date, time and place fixed by the Inquiry Officer/Committee.

(Nadeem Anam Chaudhry)
Chief Secretary, Khyber Pakhtunkhwa,
(Competent Authority).

PLJ 2011 Tr.C. (Services) 57
[Punjab Service Tribunal, Lahore]

Present: Justice (Rtd.) Muhammad Jehangir Arshad, Chairman

GHULAM MURTAZA WATTOO--Appellant

versus

CAPITAL CITY POLICE OFFICER, LAHORE and 2 other--Respondents

Appeal No. 1242 of 2010, decided on 11.10.2010.

Punjab Employees Efficiency, Discipline and Accountability Act, 2006--

---S. 2(1) & 5--Civil servant--Initiating of disciplinary proceedings--Awarded penalties on different dates--Jurisdiction of competent authority--Question of--Whether SSP investigation was competent authority for initiating of disciplinary proceedings--Appeal was accepted purely on ground of lack of jurisdiction on part of SSP investigation, who being not appointing authority of civil servant as SI was neither competent authority nor had the jurisdiction to initiate disciplinary proceedings against the civil servants--Only appointing authority was competent to initiate such proceedings which was in present case CCPO himself--Appeals were allowed. [P. 59] A

Mr. Salman Riaz Chaudhry, Advocate for Appellant.

Mr. Hamayun Akhtar Sahi, Dy. Distt. Attorney Muhammad Saleem Chughtai, DSP/Legal IGP, Lahore Departmental representative for Respondents.

Date of hearing: 11.10.2010.

Judgment

Since common questions of law viz jurisdiction of the competent authority to pass the impugned order is involved, therefore all these appeals are disposed of through this single order--

- (i) Ghulam Murtaza Wattoo Vs Capital City Police Officer, Lahore etc. (Service Appeal No. 1242/2010);
- (ii) Ghulam Murtaza Wattoo Vs Capital City Police Officer, Lahore etc. (Service Appeal No. 1370/2010);
- (iii) Ghulam Murtaza Wattoo Vs Capital City Police Officer, Lahore etc. (Service Appeal No. 1371/2010);
- (iv) Ghulam Murtaza Wattoo Vs Capital City Police Officer, Lahore etc. (Service Appeal No. 1372/2010);
- (v) Ghulam Murtaza Wattoo Vs Capital City Police Officer, Lahore etc. (Service Appeal No. 1373/2010);
- (vi) Ghulam Murtaza Wattoo Vs Capital City Police Officer, Lahore etc. (Service Appeal No. 1374/2010);
- (vii) Ghulam Murtaza Wattoo Vs Capital City Police Officer, Lahore etc. (Service Appeal No. 1375/2010);
- (viii) Ghulam Murtaza Wattoo Vs Capital City Police Officer, Lahore etc. (Service Appeal No. 1376/2010);
- (ix) Ghulam Murtaza Wattoo Vs Capital City Police Officer, Lahore etc. (Service Appeal No. 1377/2010);
- (x) Ghulam Murtaza Wattoo Vs Capital City Police Officer, Lahore etc. (Service Appeal No. 1378/2010);
- (xi) Ghulam Murtaza Wattoo Vs Capital City Police Officer, Lahore etc. (Service Appeal No. 1379/2010).

2. The appellant while posted as Sub-Inspector on different Police Stations of Lahore was proceeded against departmentally by Senior Superintendent of Police, Investigation, Lahore namely Zulfiqar Hameed and was also awarded different penalties on different dates and the departmental appeals filed by the appellant were also dismissed by the Capital City Police Officer, Lahore. Hence these appeals.

3. The sole point requiring determination in this case is whether for the purpose of Lahore City SSP Investigation was the competent authority for initiation of disciplinary proceedings against the appellant in terms of Section 2(1) read with Section 5 of the Punjab Employees Efficiency, Discipline and Accountability Act, 2006. The contention of the appellant is that as in the case of appellant/SI, CCPO, Lahore was the appointing authority, therefore in terms of the above noted provisions of Punjab Employees Efficiency, Discipline and Accountability Act, 2006, as well as Notification issued by the Chief Minister, Govt. of Punjab on 16.11.2006 only the appointing authority being competent authority could initiate disciplinary proceedings against the appellant, therefore the order passed by SSP Investigation, Lahore imposing different penalties on the appellant was without lawful authority and of no legal effect and as the basic order was void, hence subsequent order of CCPO, Lahore in the capacity of departmental appellate authority was also illegal, void and without jurisdiction as held by the apex Court in PLD 1958 SC 104 and PLD 1990 1070.

ATTESTED
[Signature]
[Name]
[Designation]

4. In view of the above noted facts, Mr. Zulfiqar Hameed, SSP Investigation Lahore was asked to submit report showing his authority to pass the impugned order, however Mr. Zulfiqar Hameed, SSP Investigation failed to submit any report to this effect.

5. Without commenting upon the merits of the case lest it could prejudice either of the parties this appeal is accepted purely on the ground of want of jurisdiction on the part of Mr. Zulfiqar Hameed, SSP Investigation, Lahore who being not appointing authority of the appellant as SI was neither competent authority nor had the jurisdiction to initiate disciplinary proceedings against the appellant. Only the appointing authority was competent to initiate such proceedings which was in the present case CCPO, Lahore himself.

6. Resultantly all these appeals are allowed, the impugned orders of the authorities below are set aside being without lawful authority. However, Capital City Police Officer, Lahore if so advised can still initiate fresh proceedings against the appellant in accordance with law.

(R.A.) Appeals allowed.

ATTESTED
to be true
[Signature]

2017 P.L.C (C.S.) 250

[Lahore High Court]

Before Shujaat Ali Khan, J

Dr. MASOOD-UR-RAUF

Versus

UNIVERSITY OF THE PUNJAB through Vice-Chancellor, Lahore

Writ Petition No.6901 of 2010, decided on 2nd October, 2015.

(a) University of the Punjab Act (IX of 1973)---

---Ss. 15(3) & 43---Punjab University Employees (Efficiency and Discipline) Statutes, 1975, Paras. 12, 15 & 17---University employee---Probationer---Unsatisfactory performance---Termination of service---Non-statutory service rules---Show cause notice, issuance of---Regular inquiry---Efficacious remedy---Petitioner-employee was appointed as Senior Medical Officer (Dental) in BS-18 in the University but during probation his service was dispensed with due to unsatisfactory performance---Contention of petitioner-employee was that Syndicate being the competent authority, no adverse order could be passed without its recommendation---Validity---Where nature of the rules governing terms and conditions of service of an employee were non-statutory, constitutional petition against order of Authority was barred---Rules/regulations governing terms and conditions of service of the employee of University were non-statutory---Action taken by the authority could not be considered as arbitrary, capricious or fanciful for exercise of constitutional jurisdiction in the present case---Authority which had power to appoint anybody enjoyed the power to proceed against an appointee under the relevant provisions of law---When services of probationer were terminated on the basis of poor performance then he was not entitled for any show cause notice---No show cause notice was required to be issued prior to proceedings against the petitioner-employee---Employee would acquire certain rights only after successful completion of probation period---Not only remedy of appeal or review but that of revision had also been catered for an aggrieved employee of the University---When remedy of appeal, review or revision had been provided then no one could be allowed to by-pass the same simply for the reason that same was not efficacious---Constitutional petition being not maintainable was dismissed in circumstances.

Anwar Hussain v. Agricultural Development Bank of Pakistan and others PLD 1984 SC 194; Dr. Ghulam Mustafa Chaudhary v. Dr. Muhammad Ashiq Khan Durrani, Vice Chancellor, B.Z University Multan and 2 others 2000 PLC (C.S.) 385; Islamia University, Bahawalpur through Vice Chancellor v. Dr. Muhammad Khan Malik PLD 1993 Lah. 141 and Pakistan Defence Officers' Housing Authority and others v. Col. Syed Jawaid Ahmad 2013 SCMR 1707 ref.

Masood Ahmed Bhatti and others v. Federation of Pakistan through Secretary M/O Information Technology and Telecommunication and others 2012 SCMR 152; Riaz Hanif Rahi v. Saeed uz Zaman Siddiqui and 4 others 2011 SCMR 948; Executive Council, Allama Iqbal Open University, Islamabad through Chairman and another v. M. Tufail Hashmi 2010 SCMR 1484; Ijaz Hussain Suleri v. The Registrar and another 1999 SCMR 2381; University of the Punjab Lahore and 2 others v. Ch. Sardar Ali 1992 SCMR 1093; Muhammad Siddique Javaid Chaudhary v. Government of West Pakistan 1974 PLC 243; Engineer Majeed Ahmed Memon v. Liaquat University of Medical and Health Sciences Jamshoro through Principal Executive and 3 others 2010 PLC (C.S.) 856; Muhammad Iqbal Khan Niazi v. Lahore High Court, Lahore through Registrar 2003 PLC (C.S.) 285; Miss Saima Gardezi v. President, First Women Bank Ltd and 2 others 2007 PLC (C.S.) 1033; Ch. Muhammad Hussain Naqshbandi v. Government of the Punjab and others 2004 SCMR 44; Rehan Saeed Khan and others v. Federation of Pakistan and others 2001 PLC (C.S.) 1275; Ch. Muhammad Hussain Naqshbandi v. Government of the Punjab and others 2003 PLC (C.S.) 1421 and Mrs. Abida Perveen Channar v. High Court of Sindh 2011 PLC (C.S.) 836 rel.

ATTESTED

21-Jul-23, 11:41 A.
to the file

(b) Constitution of Pakistan---

---Art. 199--- Constitutional petition--- Maintainability--- University employee---Non-statutory service rules---Scope---Where nature of the rules governing terms and conditions of service of an employee were non-statutory then constitutional petition against an order of Authority was barred---Constitutional petition was only maintainable in the cases where no alternate remedy was provided to the aggrieved person.

(c) Constitution of Pakistan---

---Art. 199---Constitutional jurisdiction of High Court---Scope---High Court could determine the legality of an order passed by a government functionary or an administrative tribunal irrespective of the fact whether rules governing terms and conditions of civil servant were statutory or non-statutory if impugned order was patently illegal.

(d) Civil service---

---Authority which had power to appoint anybody enjoyed the power to proceed against an appointee under the relevant provisions of law.

(e) Civil service---

---Probationer---When services of any probationer were terminated on the basis of poor performance then he was not entitled for any show cause notice.

Ch. Abdul Sattar for Petitioner.

Malik Muhammad Awais Khalid for Respondents.

ORDER

SHUJAAT ALI KHAN, J.--- Through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has assailed orders dated 1.6.09.2008 and 23.09.2010 passed by the Vice Chancellor, University of the Punjab, Lahore (hereinafter to be referred as "V.C").

2. Shorn of unnecessary details, the petitioner was appointed as Senior Medical Officer (Dental) in BS-18 by the V.C. vide Office Order No.18540-51/Est.II dated 01.09.2006 issued by the Registrar. Initially, he was on probation for two years. Later on, vide Office Order No.32316-22/Est.II dated 16.09.2008, his probation period was extended, for further two years w.e.f. 11.09.2008 as his performance was not up to the mark and finally the competent Authority viz. Chancellor, through order dated 29.03.2010 dispensed with services of the petitioner on account of unsatisfactory performance. Aggrieved of the orders regarding extension of his period of probation as well as termination of services, the petitioner has filed the instant petition.

3. Learned counsel for the petitioner, while opening his arguments, submits that since the V.C. was not the competent Authority in the matter of the petitioner as he was serving in BS-18, the orders impugned in this petition are coram-non-judice; that as a matter of fact, the competent Authority in the matter of the petitioner was Syndicate and without any recommendation by it, no adverse order could be passed against the petitioner; that the impugned orders being violative of universally acknowledged principle of audi-alteram-partem is not sustainable; that since the petitioner's services were dispensed with on account of allegation of poor performance, the same could not be done without following the procedure of regular inquiry; that the mala fide on the part of the respondents is manifest from the fact that just after a day of termination of the petitioner, somebody else was inducted as Senior Medical Officer (Dental) in place of the petitioner. In support of his oral submissions learned counsel for the petitioner has referred to the cases of Anwar Hussain v. Agricultural Development Bank of Pakistan and others (PLD 1984 Supreme Court 194), Dr. Ghulam Mustafa Chaudhary v. Dr. Muhammad Ashiq Khan

ATTESTED

10/07/23

1990 P L C (C.S.) 232

"N"
42

[Federal Service Tribunal]

Before Salahuddin Chaudhri and Rasheed-ud-Din Arshad Members

Mian IRSHADUL HAQUE

versus

GOVERNMENT OF PAKISTAN through Secretary, Ministry

of Housing and Works and 2 others

Appeal No. 32(L) of 1986, decided on 5th March, 1989.

(a) Service Tribunals Act (LXXI of 1973)--

--S.4---Appeal before Service Tribunal--Competency--Limitation--Impugned notification issued on 11-10-1984---Civil servant contested notification by making representation to the department on 7-11-1984 which was rejected on 4-3-1985-- Civil servant could have filed appeal within thirty days of the rejection of his representation viz. upto 3-4-1985 by the latest---Even if civil servant did not receive the letter of rejection of his representation, then the appeal should have been filed within 120 days from 7-11-1984 the date of filing representation-- Appeal having been filed on 9-2-1986 was thus clearly barred by time.

(b) Civil Servants Act (LXXI of 1973)--

---S. 22---Limitation Act (IX of 1908), S. 5---Service Tribunals Act (LXX of 1973), S. 4---Condonation of delay in filing appeal before Service Tribunal---Civil servant had been pursuing his remedy before High Court---Deduction of period spent in pursuing the remedy before High Court could not be allowed because last date for filing appeal before Service Tribunal had already expired when civil servant sought remedy from the High Court---Fresh representation after rejection of earlier representation does not enlarge time limit as S. 22 of the Civil Servants Act envisages only one representation---Appeal filed within 120 days of fresh filing of representation would, thus, be barred by time.

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

---S. 25(2)---General Clauses Act (X of 1897), S. 21---Alteration of rules of promotion---Competency---Rule-making power available under Civil Servants Act, 1973, also envisages the amendment or repeal of earlier Rules---There being no legal guarantee against the change in existing Rules, it cannot be said that rules of promotion cannot be altered---Provisions of S. 21, General Clauses Act, 1897 are also to the same effect.

Central Board of Revenue v. Asad Ahmed Khan P L D 1960 S C 81 ref.

(d) Civil service--

---Appointment---Promotion---Method of appointment includes appointment by promotion.

(e) Civil Servants Act (LXX of 1973)--

---S. 25---Civil Servants (Appointment, Promotion and Transfer) Rules, 1973, R.3(2)---Service Tribunals Act (LXX of 1973), S. 4---Vires of R. 3(2) of Civil Servants (Appointment, Promotion and Transfer) Rules, 1973---Civil servant's plea that as S. 25 of the Civil Servants Act, 1973, empowered the President to make the Rules and that R. 3(2) of Civil Servants (Appointment, Promotion and Transfer) Rules, 1973 which empowered the Ministry or Division concerned to lay down the method of appointment and the qualifications and other conditions applicable to a post, was ultra vires the Act itself because an authority to whom power to make rules is delegated cannot further delegate the same, repelled-- Held, although a delegated power could not be further delegated, yet, where the rule was subject to exception that when the law itself

43

provided for further delegation, that delegation, if made, would be as valid as the delegation made by the law itself--Provision of R.3(2) of Civil Servants (Appointment, Promotion and Transfer) Rules was thus not ultra vires of S. 25 of Civil Servants Act, 1973.

Section 25 of the Civil Servants Act clearly provides that not only the President but also any person authorised by the President in this behalf, can make rules necessary or expedient for carrying out the purposes of the Act. Sub-rule (2) of rule 3, therefore, cannot be held to be ultra vires for having been made by an authority to whom the power has not been delegated. The power was delegated validly by the President to the Ministry and Division concerned under the authority of section 25(1) of the Civil Servants Act, 1973, which cannot on any basis be challenged.

Ch. Khurshid Ahmed for Appellant.

Ch. Mushtaq Masood for Respondent No. 2.

Hafiz Tariq Naseem and Aftab Mahmood, D.R. for Respondents Nos. 1 and 3.

Date of hearing: 22nd September, 1988.

JUDGMENT

SALAHUDDIN CHAUDHRI (MEMBER).--Under the Central Engineering Service Class-I Recruitment Rules published on the 14th of August, 1951 the Central Engineering Service, Class-I comprised a number of superior posts as follows:--

- (1) Executive Engineer
Electrical Engineer
- (2) Administrative (Selection Posts)
 - (a) Superintending Engineer
 - (b) Chief Engineers.

These rules were repealed by SRO-897(1)/84 of 11-10-1984 wherein under the heading "Conditions for Promotion" the following Rule 3 was enacted:

"CONDITIONS FOR PROMOTION"

3. Promotion to posts in column 1 below shall be made by selection from amongst the persons who hold the posts specified in column 2 on a regular basis and possess the experience prescribed in column 3:

Name and Basic Post Scale of the post	Persons Eligible	Condition of Eligibility
1. Director General (BPS-21).	Chief Engineer (BPS-20)	22 years service in BPS-17 and above or 17 years service in BPS-18 in case of direct recruits in BPS-18 or 10 years service in BPS-19 in case of direct recruits in BPS-19 or 5 years service in BPS-20 in case of direct recruits in BPS-20.
2. Chief Engineer (BPS-20)	(1) Deputy Chief Engineer (BPS-19) (2) Superintending Engineer (Civil) & (Electrical/Mechanical) (BPS-19)	17 years service in BPS-17 and above or 12 years service in BPS-18 in case of direct recruits in BPS-18 or 5 years service in BPS-19 in case of direct recruits in BPS-19.

44

3. Deputy Chief Engineer (BPS-19) plus special pay of Rs.100 p.m.	Superintending Engineer (Civil) & Electrical/Mechanical) (BPS-19)	14 years service in BPS-17 and above or 9 years service in BPS 18 in case of direct recruits in BPS-18.
4. Superintending Engineer (Civil) (BPS-19)	Executive Engineer (Civil) (BPS-18)	12 years service in BPS-17 and above or 7 years service in BPS 18 in case of direct recruits in BPS-18.
5. Superintending Engineer (E/M) (BPS-19)	Executive Engineer (E/M) (BPS-18)	12 years service in BPS-17 and above or 7 years service in BPS 18 in case of direct recruits in BPS-18.
6. Executive Engineer (Civil) (BPS-18)	Assistant Executive Engineer (Civil) (BPS-17)	5 years service in BPS-17 and person initially appointed to BPS-17 must have passed the prescribed Departmental Examination.
7. Executive Engineer (E/M) (BPS-18)	Assistant Executive Engineer (E/M) (BPS-17)	5 years service in BPS-17 and person initially appointed to BPS-17 must have passed the prescribed Departmental Examination.
8. Assistant Executive Engineer (Civil) (BPS-17)	Sub-Engineer (Civil) (BPS-16)	3 years service in BPS-16.
9. Assistant Executive Engineer (E/M) (BPS-17)	Sub-Engineer (E/M) (BPS-16)	-Do -

The appellant Mian Irshadul Haque, Executive Engineer (E/M) challenged the vires of these rules through a representation made on 7-11-1981 on the ground that the alteration in the rules had adversely affected his chances of promotion. This representation was rejected on 20-3-1985. The order of rejection was conveyed to the Superintending Engineer, Central Civil Circle, PWD, Lahore. This is in the following words:--

"I have the honour to enclose a copy of Works Division letter No.F.11(294)65-ElI, dated 4-3-1985 on the subject cited above and to state that the recruitment rules are quite clear which provide separate cadres of Executive Engineer (Civil) and Executive Engineer (E/M) and their further line of promotion accordingly. He would, therefore, be considered for promotion to the post of Superintending Engineer (E/M) as and when a vacancy occurs. The Officer may be informed accordingly. Moreover, the Works Division, Islamabad has also observed that endorsement of representation direct to the Secretary, Establishment Division is contrary to the instructions contained in the Civil Servants (Appeal) Rules, 1977 and as such the officer may be asked to explain his conduct as well.

This issues with the approval of the Director-General."

The appellant then filed a Writ Petition No. 3705/85 in the Lahore High Court in October, 1985, which was disposed of on 27-1-1986 observing that as the matter related to the terms and conditions of the service of the appellant, the High Court could not entertain the petition in view of the bar placed by Article 212 of the Constitution of the Islamic Republic of Pakistan. The Court further observed that the proper forum to obtain remedy was the Service Tribunal. The appellant then made a second representation on 31-1-1986 in which he challenged the vires of SRO-897(1)/84, dated 11-10-1984 and also the promotion of Abdul Waheed Khan, respondent No. 2, who had in accordance with the aforesaid revised Rules, been promoted to the post of Superintending Engineer by notification dated 18-4-1985. The present appeal under section 4 of the Service Tribunals Act, 1973, was filed on 9-2-1986. The relief sought in the appeal is that Notification No.SRO-897(1)/84, dated 11-10-1984 which has changed the channel of promotion to the post of Superintending Engineer be declared to be mala fide, illegal and ultra vires and that the appellant be promoted to the post of Superintending Engineer with effect from 18-4-1985, the date from which respondent No. 2 was promoted. The appellant also claims seniority accordingly.

2. The extracts from 1951 Rules and from the Notification dated 11-10-1984 as reproduced above, show that the difference, in so far as relevant to the instant case, in effect was that whereas under the 1951 Rules the promotions to the post of Superintending Engineers could be

made from amongst the Executive Engineers (Civil) and Executive Engineers (E/M) on selection basis, under Rules notified on 11-10-1984, a departure was made to the extent that to the post of Superintending Engineer (Civil) only the Executive Engineers (Civil) could be promoted, while for promotion to the post of Superintending Engineer (E/M) only the Executive Engineers (E/M) could be considered. The appellant's case is that by providing separate channels of promotion for the Civil and Electrical Engineers, the chances of promotion of the appellant have been adversely affected for the reason that the posts of Executive Engineers (Civil) are far in excess of the posts of Executive Engineers (E/M) thus providing a larger scope of promotions to the Civil Engineers.

3. While the appeal was pending before the Service Tribunal, the appellant prayed for deletion of the name of the respondent No. 2 and also filed an amended appeal wherein the name of the said respondent was omitted. Respondent No. 2, however, opposed the amendment and a Bench of this Tribunal, by a short order dated 21-4-1987, left open the decision on the objection. We first propose to decide whether respondent No. 2 is or is not a necessary party. As already stated, in his original appeal, the appellant had claimed promotion with effect from 18-4-1985 which in effect is the same date from which the respondent No. 2 was promoted. In other words, the appellant claims promotion in place of respondent No. 2. Additionally if the revised Rules of 1984 are struck down as illegal, then the rights of respondent No. 2 would obviously be affected because he might not be found due for promotion with effect from 18-4-1985. The question no longer remains for further orders because respondent No. 2 was allowed to contest the appeal throughout.

4. A preliminary objection has been raised by the respondents that the appeal is not within time. We have already observed that the impugned notification was issued on 11-10-1984 and to contest it the appellant made a representation to the department on 7-11-1984. This was rejected on 4-3-1985. The latest date by which the appellant could come to the Tribunal was 3-4-1985. The appellant's stand, however, is that the order of rejection was never received A by him. Even if it was so, then the appeal should have been filed within 120 days from 7-11-1984. The last date for filing the appeal in this manner was 7-3-1985 which falls only four days after the date of rejection of the departmental representation. The present appeal having been filed on 9-2-1986 is thus clearly barred by time.

5. The learned counsel for the appellant, however, contends that there is an application for condonation of delay under section 5 of the Limitation Act and besides that, the period spent in pursuing the writ petition before the High Court is also to be excluded because the approach to that forum was made in good faith. It is pertinent to note that the writ petition had been filed in October, 1985 when the last date for filing the appeal before the Tribunal had already expired on 7-3-1985. The question of deducting the period spent in pursuing the remedy before the High Court, therefore, does not arise. So far as the application for condonation of delay under section 5 is concerned, the mainstay of the appellant is that on 31-1-1986 he filed a fresh representation which was not replied to and immediately thereafter without losing any time, he came to the Tribunal on 9-2-1986. It has been held in so many cases by this Tribunal and the Supreme Court itself that the filing of successive representations does not enlarge the time limit and that section 22 of the Civil Servants Act, 1973 envisages only one representation. That representation having been filed in October, 1985, the filing of fresh representation on 31-1-1986 does not give the appellant a fresh cause of action. In the circumstances, therefore, the appeal is held to be hopelessly barred by time and is liable to be dismissed as such.

6. Since the question involved in this appeal is of some importance, we propose to decide the stand taken by the appellant on merits as well. As already stated, the appellant has contended that the change in the rules had adversely affected the chances of his promotion which were available to him on joining the service and, therefore, the notification made in 1984 changing the rules is ultra vires. This stand, in our view, is legally incorrect. In the case of Central Board of Revenue v. Asad Ahmed Khan P L D 1960 (SC) Dacca 81, it was clearly annunciated that the rules altering the chances of promotion could be made by the Government as by doing so no vested right of a party is infringed.

7. It was then contended on behalf of the appellant that section 25(2) of the Civil Servants Act, 1973 saves all rules which are not inconsistent with the Act and that as such the Rules of 1951 being in the field, no deviation could be made there from. We find little substance in the claim that the rules which have been saved under section 25(2) ibid cannot be altered. In fact, the rules

46

making power available under the Civil Servants Act also envisages the amendment or repeal of the earlier rules. There being no legal guarantee against the change in the existing rules, the appellant cannot say that the rules of promotion cannot be altered. Such a stand would go counter to the provisions of section 21 of the General Clauses Act, 1897.

8. The next argument advanced by the learned counsel was that sub-rule (2) of rule 3 of the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973 gives power to the Ministry or Division concerned to lay down the method of appointment and the qualifications and other conditions applicable to a post and that it does not empower the Ministry or Division to alter the rules of promotion or seniority. We do not think there is any substance in this contention either inasmuch as the method of appointment, in our opinion, includes appointment by promotion. The Ministries and Divisions as such are competent to lay down qualifications and conditions not only for initial appointment but also for appointment by promotion. .

9. It was also argued that notification of 11-10-1984 was issued without obtaining approval of the FPSC. It was brought to our notice that there was some correspondence amongst the Works Division, Establishment Division and the Federal Public Service Commission. We need not go into details of this discussion because the notification itself in para. 9 shows that the same was issued in consultation with the Establishment Division and FPSC.

10. Lastly, it was contended that sub-rule (2) of rule 3 of the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973 offends the rule against excessive delegation of legislative powers. The learned counsel submitted that section 25 of the Civil Servants Act, 1973 empowers the President to make the rules and that sub-rule (2) of rule 3 *ibid* which empowers the Ministry or Division concerned to lay down the method of appointment and the qualifications and other conditions applicable to a post is ultra vires the Act itself because an Authority to whom power to make rules is delegated cannot further delegate it. No doubt a delegated power cannot be further delegated. Nevertheless this rule is subject to the exception that when the law itself provides for further delegation that delegation, if made, will be as valid as the delegation made by the law itself. Section 25 of the Civil Servants Act clearly provides that not only the President but also any person authorised by the President in this behalf, can make rules necessary or expedient for carrying out the purposes of the Act. Sub-rule (2) of rule 3 *ibid*, therefore, cannot be held to be ultra vires for having been made by an authority to whom the power has not been delegated. The power was delegated validly by the President to the Ministry and Division concerned under the authority of S. 25(1) of the Civil Servants Act, 1973, which cannot on any basis be challenged.

11. For the aforesaid reasons we find no substance in the argument that the Notification No.-SRO-897(1)/84, dated 11-10-1984 is ultra vires of the provisions of the Civil Servants Act, 1973, or any other law for the time being in force or for that matter the promotion of respondent No. 2, Abdul Waheed Khan, under the authority of the said notification is bad in law. The appeal is dismissed as time -barred as well as on merits.

12. No order as to costs.

13. Parties to be informed accordingly.

A.A./510/Sr. F.

Appeal dismissed.

2005 P L C (C.S.) 551

[Lahore High Court]

Before Syed Jamshed Ali, J

MERAJ DIN BHATTI

versus

CHAIRMAN, PUNJAB BOARD OF TECHNICAL EDUCATION, LAHORE and 4 others

Writ Petition No.6163 of 2002, heard on 7th January, 2004.

(a) Punjab Civil Servants (Efficiency and Discipline) Rules, 1975---

---Jurisdiction---Competent authority---Delegation of powers---Delegatee's powers to further delegate such powers---Chairman Board of Technical Education had imposed major penalty on the petitioner for his wilful absence from duty---Validity---Competent authority in relation to the petitioner was Secretary of the Board and not the Chairman---Petitioner was punished by incompetent authority---Petitioner's submission to jurisdiction of an authority did not confer jurisdiction on the said authority if none was possessed by it---Order of removal from service having not been passed by competent authority stood vitiated.

(b) Punjab Civil Servants (Efficiency and Discipline) Rules, 1975---

---Defect of jurisdiction---Curing the defect of jurisdiction---Original order having not been passed by competent authority stood vitiated---Order passed in appeal did not have the effect of curing the defect of jurisdiction.

(c) Punjab Civil Servants (Efficiency and Discipline) Rules, 1975---

---Delegation of power---Limitation---A delegatee cannot further delegate his powers.

Zafar Abbas Mashadi Syed for petitioner.

Sh. Shahid Waheed for Respondents.

Date of hearing: 7th January, 2004.

JUDGMENT

The petitioner, was employed in the Board of Technical Education Lahore, as Junior Clerk (BS-5). He was proceeded against under the Punjab Civil Servants (Efficiency and Discipline) Rules, 1975, (adopted by the said Board) on the charge of wilful absence from duty for the period from 8-10-1998 to 6-12-1998 and was removed from service vide order dated 14-9-1999 of the Chairman of the said Board. The petitioner approached this Court in W.P. No.21208-99 to assail the said order. Meanwhile, the appeal filed by the petitioner against the said order was decided vide order dated 4-2-2000. Accordingly, W.P. No.21208-1999 was withdrawn with permission to file a fresh petition to assail the original as well as the appellate order. These have been assailed in the present petition.

2. The learned counsel for the petitioner submits that in accordance with Delegation of Powers under the (E&D) Rules duly approved by the Board in the meeting held on 29-6-1998 and by the Controlling Authority vide letter dated 19-8-1998, the competent authority to impose major punishment on the petitioner, was the Secretary of the Board while the Chairman was the appellate authority. He submits that the basic order having been passed by an incompetent authority, even the order passed in appeal will not cure the defect of jurisdiction. And, both the orders stands vitiated.

3. The learned counsel for the respondent-Board has, however, defended the impugned orders. He submits that for officials in Grade 5 to 15, the Chairman of the Board was the competent authority, according to Regulation No.3 of Chapter III, of the Regulations of the Board which was neither amended nor the Chairman was deprived of the powers of the competent authority in relation to the petitioner by virtue of the delegation of powers being relied upon. He next submits that petitioner did not raise any objection before the Chairman to proceed against the petitioner and, therefore, he is estopped to raise it before this Court on the principle of aqisence. He next maintains that the delegator could lawfully exercise the powers of the delegatee. Reliance was placed on Tanvir Ahmed Khan v. Deputy Commissioner, Islamabad (1992 MLD 2146), Haji Muhammad Ismail and another v. Govt. of the Punjab through Secretary, Local Govt, and Rural Development and 13 others (1987 MLD 2157) and Punjab Road Transport Board and another v. Punjab Service Tribunal and 3 others (1982 SCMR 76).

4. The submissions made by the learned counsel for the parties have been considered. Regulation No.3 of Chapter III being relied upon was issued in 1981 as mentioned in para. 12 of the report and parawise comments submitted on behalf of the Board. The delegation of powers being relied upon by the learned counsel for the petitioner was approved by the Board on 29-6-1998 and by the controlling authority on 19-8-1998. The proceedings were initiated against the petitioner on 3-6-1999 when a show-cause notice and statement of allegations were served on the petitioner. On the said date, the delegation of powers under the E&D Rules had already been enforced, according to which the competent authority in relation to the petitioner was the Secretary of the Board and not the Chairman. The specific delegation of powers under the (E&D) Rules being later in point of time has the effect of overriding Regulation No.3 of Chapter III. As far as the next contention of the learned counsel for the respondents is concerned, it has no merit. The submission to the jurisdiction of an authority does not confer jurisdiction on the said authority if none is possessed by it. The question of jurisdiction is otherwise is a pure question of law going to the root of the matter and can be raised at any stage of the proceedings. As far as the next contention is concerned, it has no merit either. It is not a case in which the delegator has exercised the authority of the delegatee because the Chairman of the Board, as one of the functionaries of the Board is himself the delegatee, the delegator being the Board itself who had delegated powers under the E&D Rules to various functionaries of the Board including the Chairman. Therefore, I do not think it necessary to examine the judgments cited by the learned counsel for the respondents.

5. For what has been stated above, the impugned order of removal from service not having been passed by the competent authority stands vitiated and even the order passed in appeal does not have the effect of curing the defect of jurisdiction. Accordingly, this writ petition is allowed. The impugned removal order dated 14-9-1999 and the appellate order dated 4-2-2000 are declared as without lawful authority and of no legal effect, and the petitioner is directed to be reinstated in service. The intervening period shall be treated as the kind of leave due to the petitioner. It is clarified that the competent departmental authority shall be free to take fresh proceedings against the petitioner in accordance with law. No order as to costs.

2010 P.L.C (C.S.) 1

[Lahore High Court]

Before Mian Saqib Nisar, Iqbal Hameed-ur-Rahman and Umar Ata Bandial, JJ

MUHAMMAD SALEEM and 12 others

Versus

SECRETARY PROSECUTION, GOVERNMENT OF PUNJAB, LAHORE and another

Writ Petition No.9394 of 2008, decided on 4th December, 2009.

(a) Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act (III of 2006)---

---Preamble---Object and purpose of Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006.

(b) Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act (III of 2006)---

---S. 2(j)---Word "prescribed" occurring in S.2(j), Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006 means as prescribed by Rules and Regulations under the Act.

(c) Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act (III of 2006)---

---S. 8(3)(4)---Constitution of Pakistan (1973), Art.199---Constitutional petition---Dispensing with services of District Public Prosecutors etc.---Allegation of political victimization etc. by present Provincial Government---In the present case Selection Committee was constituted (prior to the present government) pursuant to the order, dated 11-12-2006 passed in Writ Petition 8456 of 2006; interviews commenced from 12-4-2007 and the process was completed by 12-4-2008 and by this time, the present regime had not taken over; anybody, who participated as a stranger (not member of the Committee constituted) in the interviewing process, was not during the time of the present government, rather prior thereto, neither there were any allegations in the main writ petition to which reference could be made nor (there) was any material on the record on account of which it could be judicially concluded if the Selection Committee was influenced and the interviews and the result had been manipulated by the present government, present government rather had simply acted on the result, which had been declared by the Selection Committee---Held, impugned action (dispensing with services) was neither the result of any mala fide, political victimization, dishonesty of purpose on behalf of the present Government (of the Province of Punjab) nor it was tainted with any ulterior motive/object to illegally displace the functionaries (petitioners) and/or to appointment at their place their persons---Such allegations were nothing except rhetoric, loud, bald, baseless and unsubstantiated.

(d) Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act (III of 2006)---

---Ss. 8(3)(4), 16 & 2(j)---Punjab Criminal Prosecution Service (Conditions of Service) Rules, 2007---Recruitment Policy/Contract Policy, 2004---Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974---Constitution of Pakistan (1973), Art.199---Constitutional petition---Maxim: res ipsa loquitur---Appointments and dispensing with services of District Public Prosecutors etc. and those retained in service---Nature---Appointment of said officials was subject to Rules and Regulations as mentioned in S.2(j) of Punjab Prosecution Service (Constitution, Functions and Powers) Act, 2006, which Rules/Regulations had not been framed till 27-7-2007 admittedly not when the advertisements were published on 12-7-2006 and 15-8-2006 and even when considerable number of appointments of said functionaries had already been made---Advertisements had

(2)

(50)

stated that appointments shall be on the contract basis and under the caption of "terms and conditions" it was provided that "all the recruitments will be made according to the Recruitment Policy/Contract Policy, 2004"---Appointments made under the Recruitment Policy/Contract Policy, 2004 could not be made to the posts of BS-11 and above without interview whereas all the posts in question were above the said scale---Interview could only be conducted by a Selection Committee meant for the purpose; if the selection was to be made at the Provincial level, by a Committee comprising of, where appointing authority was Chief Minister, the Administrative Secretary concerned being the Chairman, while two officers of the Department to be nominated by the Administrative Department with the approval of Minister Incharge and one officer of S&GAD to be nominated by the Regulations Wing---Before making the appointment of said functionaries no interview was ever conducted by any Committee of any sort, though such a Committee was claimed by the Government/Prosecution Department to have been formed---Recruitment Policy/Contract Policy, 2004 had further prescribed that though appointment on contract basis was excluded from the purview of the Provincial Public Service Commission, however, the department should preferably adopt the channel of Public Service Commission for "contract appointments" against posts, which otherwise fell within the purview of Public Service Commission by seeking relaxation of relevant rule from Chief Minister; besides, under the Policy, a Contract Appointment Regulation Committee had been constituted---Said process was also not followed qua the appointments in the present case--- Validity---Held, in the light of the judgment of the High Court (Lahore) passed in 'Writ Petition No.8456 of 2006, to hold their appointments as regular shall be a feign, a farce and a sham---Said appointments were nothing more but a stopgap, pro tempore, standby, interim, ephemeral and a transitory arrangement, which were meant for the moment, and for the time being, awaiting the appointments on the regular basis or if and when permissible (especially after the promulgation of Rules) on account of the "contract"---Appointments were subject to the fundamental, imperative and a condition sine qua non i.e. "that the appointment will be subject to review/confirmation by Selection Committee constituted for the purpose" and all the appointees shall only be eligible for the "contract employment" once they cross the threshold of the review/confirmation by the Selection Committee---Committee constituted pursuant to the judgment of High Court, which was accepted by all the stakeholders shall be deemed to be the one formed under the noted condition and therefore, all those who had passed through the test of the Committee may be retained by the Government in the service only as the "contractual employees", -whereas who failed to qualify their services could be dispensed with---All those who had failed to pass the interview, notwithstanding any recommendee of Public Service Commission shall have to go, as having been removed, instead of termination, which expression in the facts of the present case, was not apt to use---Some of the appointments had been made even before any advertisement was issued to initiate the process of recruitment, not only that there was no reference in the various summaries sent to the Chief Minister for the appointment of the petitioners/retainees specifying their qualifications, those summaries were not shown to accompany even the applications of the candidates, their profile or Curriculum Vitae (CV) from which the competent authority could evaluate, assess and determine their caliber for handling such an important office, all seemed to be either conspicuously missing or not established to have been looked into for the purpose of due application of mind of the competent authority, yet the appointments had been made---High Court expressed its sheer disappointment and felt perturbed at the way very important offices connected with the judicial system of the country had been filled, and observed that such significant State assignments surely were not a bounty, alms or a charity from the people in authority, rather should be awarded to those who were deserving and behaved to the office and in the present cases, all this had been done in vain and on this account maxim res ipsa loquitur (the thing speaks for itself) was duly attracted to the matter---Held further that constitutional petitions, which pertained to all those petitioners who were interviewed by the original Committee of four members and had failed were dismissed; those regarding the candidates/petitioners who were interviewed by three members of the original Committee and had failed excluding the numbers of the "stranger" were also dismissed---Constitutional petitions relating to the petitioners/candidates, who had been interviewed by the Committee in which either two original members or one original member participated, those were allowed with the direction to the authorities to constitute a fresh Committee, hold interview and to decide their cases, this shall also be applicable to all the persons who had been retained on account of the interview conducted by a Committee comprising of either two original members or one, those could also be reassessed and their cases be decided accordingly---Retainees who on

(3)

(51)

account of the data provided by the prosecution department had failed due to the exclusion of the marks granted to them by the 'stranger', the department shall treat such persons retainees as "fail"---All the Additional Prosecutors-General and Deputy Prosecutors-General mentioned in S.8(1) of the Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006 shall also be subjected to interview by the newly constituted Committee--
-Reasons detailed.

(e) Punjab Criminal Prosecution Service (Constitution Functions and Powers) Act (III of 2006)---

---Ss. 8 & 16---Appointments---Terms and conditions of service---Delegation of authority---
Scope and principles-Maxim delegatus non potest delegare: delegated authority cannot be redelegated---Applicability---Scope.

There are three kinds of the authorities, which. can be delegated/sub-delegated under the law: Firstly: Relating to the agencies regulated under the law of Contract/Agency, if the principal has expressly conferred upon his agent for further delegation of power/authority that can only be so delegated to the extent provided, otherwise not; in this behalf the legal principle about the sub-delegation by necessary implication on account of the specific nature of agency cannot be ruled out. Anyhow (subject to the above) a power of attorney should be strictly construed and applied. Secondly, the statutory authority, the rule, where the law requires an act to be done/performed in a particular manner it should be so performed and not otherwise, and that what cannot be done directly cannot be done indirectly, can be attracted. If the express provision of law has conferred power for the exercise of an authority by a particular person or body, it should only be exercised strictly in accord thereto. And if there is no provision for the delegation/sub-delegation in the law, under no rule or principle of law, such power could be exercised by any other person/body, on the basis of delegation by whom, such power is exercisable under the law. Thirdly, the administrative authority, which is not only akin to the above two, rather embeds the trails of both the categories. In the matter pertaining to statutory/administrative authority, there is a judicial consensus and a bias against the permissibility of the delegation of power, which is reflected in the maxim delegatus non potest delegare. The central question for the delegation/sub-delegation has always been (in cases of statutory and administrative powers) what was/is the intention of the law, which tilts towards non-delegation until so lucidly permissible. In the present case, power to form the Selection Committee vested with the Chief Minister, who had originally appointed the four members committee for the purposes thereof. In the order of the Chief Minister, which was in the nature of the approval of the summary, no power had been delegated to the members of the committee who in fact shall be deemed to be the nominees of Chief Minister's administrative authority to further delegate their power to anybody. Such delegation could neither be done collectively by the committee nor singularly by any member, may be the Prosecutor-General or the Secretary of the service. This could also not be so done in the garb of formulating any procedure for regulating the affairs or conducting the business of the Selection Committee, therefore, it was the originally constituted committee, which could only conduct the interview and none else. In this regard, the person .if any who participated in the proceedings of the committee was a 'stranger' and, therefore, his evaluation/allocation of marks could not be counted towards the selection process.

(f) Delegation of authority---

---Kinds---Scope and principles---Maxim: delegatus non potest delegare---Applicability---
Scope.

Farooq Amjad Mir, Dr. A. Basit, Dr. Khalid Ranjha, Tahir Mehmood Khokhar, Atir Mehmood, Muhammad Ahmad Qayyum, Muhammad Aslam Nagi, Irfan Malik, Khurram Khan, Ahmad Awais and Fahad Ahmad Siddiqui for Petitioners.

Mr. A.K. Dogar for the candidates, who passed the interview and retained by the Prosecution Department.

Kh. Haris Ahmad, Ahmad Rauf, Muhammad Raza Qureshi, Saad Rasul, Syed Zahid Hussain Bokhari, Prosecutor-General, Shaigan Shareef, Secretary to Government of Punjab, Prosecution Department, Lahore, Rana Maqbool Ahmad Khan, Secretary to Government of

Dates of hearing: 16th, 21st, 22nd, 27th, 28th, 29th, 30th April, 4th, 6th, 7th, 26th May, 23rd June, 7th July, 29th September, 1st 22nd, 26th, 28th, 30th October and 3rd November, 2009.

JUDGMENT

MIAN SAQIB NISAR, J.--- In the system meant for the dispensation of justice qua field of criminal law, the prosecution department undoubtedly has a pivotal, significant and a crucial role to play; earlier, the said department was part of the police service/ establishment and Prosecutor Sub-Inspectors (PSI) used to appear before the courts upto the sessions level in the police uniform, having no independence and impartiality; this was considered unbecoming to the office; thereafter, from amongst the lawyers the slots were filled by the government for various courts on the contract basis, yet on account of innumerable vices about the procedure of selection, efficiency, integrity and independence, an acute need was felt that a permanent prosecution service be established which should conform to the status, function and role of the office in the said system. Thus, in order to ensure the prosecutorial independence for better organization in the field, the Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006 (Act III of 2006) (hereinafter referred to as "the Act, 2006") was enforced on 8-4-2006; the object and the purpose of the service is conspicuously spelt out from the preamble of the Act, 2006, which reads:---

"Whereas it is expedient to establish an independent, effective and efficient service for prosecution of criminal cases, to ensure prosecutorial independence, for better coordination in the criminal justice system of the Province and matters incidental thereto."

2. It may be pertinent to mention here that including the Prosecutor-General there are various slots/posts envisaged by the Act, 2006 and sections 8(3)(4) of the Act, 2006 provide:--

"8. Appointments . --- (1) ..

(2)

() All the appointments, except that of the Prosecutor-General, to various posts in the Service, shall be made through initial recruitment in the manner as may be prescribed: (underlined for the emphasis)

Provided that at least fifty per cent appointments on the posts of Additional Prosecutor-General and Deputy Prosecutor-General shall be made through promotion.

(4) No direct recruitment shall be made on regular basis (underlined for the emphasis) to the posts of District Public Prosecutor, Deputy District Public Prosecutor, Assistant District Prosecutor, Additional Prosecutor-General and Deputy Prosecutor-General except on the recommendation of the Punjab Public Service Commission:

Section 2(j) of the Act, 2006 defines the word "prescribed" which 'B means, prescribed by rules or regulations made under the Act.

3. In order to fill up certain posts, mentioned above, on temporary contractual basis, two public advertisements were got published by the Prosecution Department in the newspapers on 12-7-2006 and 15-8-2006, and under the head 'terms and conditions', it was mentioned that "All the recruitments , will be made according to the Recruitment Policy/Contract Appointment Policy, 2004. Pursuant to the above, the petitioners (who are mostly the District Public Prosecutors, Deputy District Public Prosecutors and Assistant District Public Prosecutors) claim to have applied and appointed.

4. During the course of the above, on 26-7-2006, a Writ Petition No.8456 of 2006 was filed by Mr. Mushtaq Ahmad Mohal, Advocate challenging the aforesaid advertisements and the appointments being made pursuant thereto, mainly on the ground that the provisions of the Act, 2006 do not permit those on the basis of contract; the said writ petition came up for

vague and indefinite allegations nor should the person alleging mala fide be allowed a roving enquiry into the files of the government for the purposes of fishing out some kind of a case". In *Wazirzada v. Chief of Air Staff, Pakistan Air Force* [1998 SCMR 1579] it was observed that merely upon vague allegations no roving inquiry can take place. It is, therefore, obvious that an inquiry under section 37(1) cannot be initiated on the basis of vague and indefinite allegations nor on the basis of insufficient information or in absence of prima facie evidence. The impugned notices definitely do not confront the petitioner with the sufficient facts or prima facie evidence required to initiate an inquiry under section 37 of the Act of 2010.

42. For what has been discussed above, the impugned notices are declared as not having been issued under section 37(1) or (2) of the Act of 2010. However, the notices may be treated as forming the basis of conducting a study under section 37 of the Act of 2010. In case the Commission, after concluding the study, is of the opinion that there are sufficient facts and the complaint is substantiated by prima facie evidence alleging contravention of the provisions of Chapter II of the Act of 2010 then it may issue notices to the petitioners regarding the initiation of an inquiry and the sufficient facts or "prima facie" evidence on the basis of which an opinion has been formed shall also be disclosed therein. This judgment shall not preclude the Commission to issue a notice provided it discloses sufficient facts or prima facie evidence for initiating an inquiry.

13. The petitions are allowed in the above terms.

Impugned Notices Struck Down as Being Unlawful/Writ Petitions Accepted.

2016 UC 591

Before Athar Minallah, J. (Islamabad)

W.P. No. 805/2015 alongwith other seven W.Ps. accepted on 29.4.2016.

OIL AND GAS DEVELOPMENT COMPANY LIMITED
THROUGH MR. MUHAMMAD AZIZ, MANAGER
(PRICING)—Petitioner

versus

THE FEDERAL BOARD OF REVENUE THROUGH ITS
CHAIRMAN & 2 OTHERS—Respondents

(a) Sales Tax Act, 1990—

Ss. 30, 11. Power to issue show-cause notices under S. 11 delegated by Federal Board of Revenue to Commissioner Inland Revenue cannot be further delegated by him to Inland Revenue Officer as the law is settled that delegate cannot further delegate. Show-cause notices issued by Inland Revenue Officer in exercise of power illegally delegated to him by Commissioner Inland Revenue would be without jurisdiction. High Court striking down such without jurisdiction show cause notices by exercising its Constitutional jurisdiction under Art. 199. High Court leaving it open to Commissioner Inland Revenue to issue fresh show-cause notices under S. 11 in exercise of his power delegated to him by Federal Board of Revenue under S. 30. (P. 605,608)

(b) *Ibid*---

S. 11. Cases where provisions of S. 11(1)(2)(3)(4) would be attracted highlighted in para 9 of the judgment. The crucial expressions which distinguishes sub-sections (3) and (4) from sub-sections (1) and (2) are "tax not levied" or "short levied". Word "levy" used in these two expressions explained with reference to its definition in Black's Law Dictionary (8th Edition). From this definition it is obvious that the imposition, assessment and collection of a tax would fall within the ambit of "levy". As a corollary, the question whether the tax has been imposed, assessed or collected by the registered person would fall within the ambit of sub-sections (3) and (4) and therefore, any allegation relating thereto will be adjudicated thereunder. (P. 599,600,601,602,610,611)

(c) *Ibid*---

S. 11(1)(2)(4). Show-cause notices mentioning wrong sub-section of S. 11 would not become illegal as it is settled law that mentioning of a wrong provision of law would not affect the validity of the show-cause notice itself. (P. 602)

(d) *Interpretation of Statutes*---

It is settled law that redundancy cannot be attributed to the Legislature. Every word used in a statute must be given its true meaning and the provisions should be construed together in a harmonious manner. It is not legal or proper to apply one provision of law in isolation from the other provision. Surplusage or redundancy cannot be attributed to Legislature. (P. 600)

(e) *Sales Tax Act, 1990*---

S. 30. Federal Board of Revenue is empowered under S. 30 to delegate its powers under the Act to one of the

officers of Inland Revenue to exercise its powers and jurisdiction under sub sections (1)(2)(3)(4) of S. 11. However, the officer having been delegated powers of the Board under S. 30 cannot further delegate such officers to another Inland Revenue Officer. (P. 605)

(f) *Ibid*---

S. 30(3). There is a distinction between the expressions "functions" and "power", used in sub-section (3). Functions can only be performed by persons who are already vested with power and jurisdiction. Definitions of "power", "function" and "jurisdiction" examined in para 15 of the judgment with reference to their definitions in Black's Law Dictionary (8th Edition). (P. 606)

(g) *Delegation*---

It is settled law that a delegate cannot further delegate its powers unless expressly authorized under the law. In order to enable a delegate to delegate his powers and functions, there must be authority, express or implied. When power is delegated to a particular person, then that person alone can exercise the powers so delegated to him. He cannot further delegate powers delegated to him. (P. 608)

(h) *Delegation*---

It is well-settled law that a statutory delegate cannot sub-delegate his or her powers. De Smith's Judicial Review Seventh Edition referred (P. 608,609)

(i) *Notice/Show-cause notice*---

Notice/show-cause notice is not an adverse order. Writ Petition under Art. 199 to challenge notice show-cause notice

would not be competent subject to exception when it suffers from want of jurisdiction. (P. 610)

(j) Constitution of Pakistan, 1973—

Art. 199. Writ jurisdiction under Art. 199 exercised by High Court to strike down show cause notices suffering from want of jurisdiction. (P. 610,611)

Nasim Sikandar, Jawad Hassan, Barrister Omer Azad Malik, Abdul Shakoor Paracha, Huseeb Shukoer Paracha for petitioners.

Babar Bilal, Speed Ahmed Zaidi, Hafiz Munawar Iqbal and Malik Waris Khokhar for respondents.

Date of hearing: 18.4.2016.

JUDGMENT

ATHAR MINALLAH, J.—Through this consolidated judgment, I shall decide the instant petition alongwith the petitions listed in the Annexure-A hereto, as common questions of law and facts are involved.

2 The facts, in brief, are that the petitioner, in writ petition No. 805/2015, is a listed joint stock public limited company. The Government of Pakistan owns the majority of shares in the said company. The company is, *inter alia*, engaged in the exploration and production of oil and gas. The other petitioners are also juridical persons and, *inter alia*, engaged in the exploration and production of petroleum products under various concession agreements executed with the Government of Pakistan. The petitioners have assailed respective show-cause notices issued by the Inland Revenue Officer. However, the designation mentioned in the show

cause notice is 'Officer of Inland Revenue'. The show cause notices have been challenged, *inter alia*, on the ground that the officer who has issued the same is not vested with the power or jurisdiction of adjudication under the Sales Tax Act, 1990 (hereinafter referred to as the 'Act of 1990').

3 The learned counsel appearing on behalf of the petitioners have contended that, the show-cause notices have been issued by the respective Inland Revenue Officers; the Inland Revenue Officers were not empowered nor had the jurisdiction to issue a show cause notice under section 11 of the Act of 1990; the show-cause notices contain allegations which are not covered under sub section (1) or (2) of section 11 of the Act of 1990; the allegations mentioned in the show-cause notices relate to non levy or short levy of sales tax and, therefore, sub-sections (3) and (4) would be attracted; section 30 empowers the Federal Board of Revenue (*hereinafter referred to as the 'Board'*) to appoint in relation to an area, person or class of persons an Officer of Inland Revenue with a specific designation; the 'Officer of Inland Revenue' by itself is not a specific designation; under section 31 the powers are conferred on such Officer of Inland Revenue as the Board may by general or special order specify; allegation of power can only be exercised under section 32 of the Act of 1990, the person *i.e.* the Inland Revenue Officer who has issued the impugned show cause notices could not provide any notification whereby he has been empowered to exercise the powers of an Officer Inland Revenue under section 11 of the Act of 1990; the show cause notices are, therefore, without jurisdiction and void.

"R"

The General Clauses Acts (Federal and Provincial)

بِسْمِ اللّٰهِ الرَّحْمٰنِ الرَّحِیْمِ

56

~~24~~

The General Clauses Acts

[Federal and Provincial]
and Uptodate Case Laws with Amendments

Legislation

- ❖ The General Clauses Act, 1897.
- ❖ The Baluchistan General Clauses Act, 1956.
- ❖ The Punjab General Clauses Act, 1956.
- ❖ The Sindh General Clauses Act, 1956.
- ❖ The KPK General Clauses Act, 1956.

Efforts made by
Muhammad Khurram
LL.B., MCS

S/o Mr. Justice (r) Dr. Munir Ahmad Mughal

Special thanks to
Muhammad Hammad Munir &
Muhammad Fuwad Munir,
Advocates, High Court
Sons of Mr. Justice (r) Dr. Munir Ahmad Mughal

Insaaf Law Book House

CS CamScanner

ATTESTED
10/10/2024

57

Act or the Councils Rules for authorizing remedial action by the Council. Term of office of Members of the Committees ran Coterminously with the term of the Council because notwithstanding the Council's one time power to fix a shorter term of the Committees at the time of constituting them, the Council did not do so, & thereby confirmed the full term of five years for such Committees. Such accrued right of Chairmen & Members of the Committee could not be defeated by a majority vote in the Council without a suitable amendment in the Councils Rules to incorporate the right of the members of the Council to bring a motion of no confidence or of impeachment. His Lordship issued certain directions in such regard [Minority view]. Petition was dismissed accordingly & leave was refused. *Muhammad Shouib Shaheen Vs Pakistan Bar Council - {{PLD-2017-Sc-231}}*

15. Power to appoint to include power to appoint ex officio.

Where, by any ¹[Central Act] or Regulation, a power to appoint any person to fill any office or execute any function is conferred, then, unless it is otherwise expressly provided, any such appointment, if it is made after the commencement of this Act, may be made either by name or by virtue of office.

{Case-Law Study}

❖ Power to dismiss or remove from service etc:

✓ a Civil Judge was specifically delegated to the High Court & it is immaterial whether it was exercised or not. High Court, therefore, is competent to dismiss or remove from service or retire compulsorily or reduce in rank or suspend a Civil Judge. Principles. *Muhammad Iqbal Khan Niazi's case - {2003 PLC(CS) 285 SC}*

16. Power to appoint to include power to suspend or dismiss.

Where, by any ²[Central Act] or Regulation, a power to make any appointment is conferred, then, unless a different intention appears, the authority having ³[for the time being] power to make the appointment shall also have power to suspend or dismiss any person appointed ⁴[whether by itself or any other authority] in exercise of that power.

1 Subs. by A.O., 1937, for "Act of the G.G. in C."

2 Subs. by A.O., 1937, for "Act of the G.G. in C."

3 Ins. by the Repealing and Amending Act, 1928 (18 of 1928), s. 2. and Sch. I.

4 Subs. ibid., for "by it".

ATTESTED

to be

58

In all ¹[Provincial] Acts, unless there is anything repugnant in the subject or context:—

- (1) words importing the masculine gender shall be taken to include female; and
- (2) words in the singular shall include the plural, and vice versa.

POWERS AND FUNCTIONARIES

13. Power conferred to be exercisable from time to time.—

Where, by or under any ²[Provincial] Act, any power is conferred upon any authority, then that power may be exercised by such authority, from time to time or as occasion requires.

14. Power to appoint to include power to appoint ex-officio.—

Where by any ³[Provincial] Act, any power to appoint any person to fill any office or execute any function is conferred, then, unless it is otherwise expressly provided, any such appointment may be made either by name or by virtue of office.

15. Power to appoint to include power to suspend or dismiss.—

Where, by any ⁴[Provincial] Act, a power to make any appointment is conferred, then, unless different intention appears, the authority having for the time being power to make the appointment shall also have power to suspend or dismiss any person appointed whether by itself or any other authority in exercise of that power.

16. Substitution of functionaries.—

In any ⁵[Provincial] Act, it shall be sufficient, for the purpose of indicating the application of a law to every person or number of persons for the time being executing the functions of an office, to mention the official title of the officer at present executing the functions, or that of the officer by whom the functions are

- 1 Subs. by by the KPK (NWFP) Adaptation of Laws Order, 1975.
- 2 Subs. by by the KPK (NWFP) Adaptation of Laws Order, 1975.
- 3 Subs. by by the KPK (NWFP) Adaptation of Laws Order, 1975.
- 4 Subs. by by the KPK (NWFP) Adaptation of Laws Order, 1975.
- 5 Subs. by by the KPK (NWFP) Adaptation of Laws Order, 1975.

ATTESTED
 (Signature)
 (Date)

Case Judgement

2016 P L C (C.S.) 424

[Peshawar High Court]

Before Abdul Latif Khan and Syed Afsar Shah, JJ

ABDUL HAMEED

Versus

PROVINCE OF K.P.K. through Chief Secretary, Peshawar and 3 others

W.P.No.3062-F of 2014 decided on 24th December, 2014.

(a) Civil service---

---Suspension of employee---Scope---Petitioner had assailed order of his suspension through constitutional petition---Validity---Petitioner had been suspended by the department and yet no final order had been passed against him---Petitioner was civil servant against whom action under Khyber Pakhtunkhwa Government Servants (Efficiency and Discipline) Rules, 2011 was proposed to be initiated---Petitioner might be placed under suspension for a period of ninety days if in the opinion of the authority suspension was necessary or expedient---If period of suspension was not extended for a further period of ninety days within thirty days of the expiry of initial period of suspension then government servant would be deemed to be reinstated---Authority having power to appoint had also the power to suspend---If authority while holding the inquiry was satisfied that charge against the civil servant was connected with his position as a government servant or was likely to embarrass him in the discharge of his duties or he was involved in moral turpitude then he could be suspended pending the inquiry---Suspension of government servant was not a punishment---Suspension was only a temporary measure wherein petitioner was entitled to receive his full emoluments---If any penalty was imposed against the petitioner then he had got a right of appeal before the competent authority---Petitioner was entitled to file appeal against his suspension order before the concerned authority but he did not file the same---Suspension pending disciplinary action germane to the terms and conditions of service and appeal against such order was maintainable before Service Tribunal---Constitutional jurisdiction of High Court under Art.199 of the Constitution in such like matters was ousted---Suspension order of the petitioner had been issued by the authority which had been conveyed to him and same had attained finality---Petitioner had alternate remedy by approaching the proper forum i.e. Service Tribunal---Constitutional petition was not maintainable which was dismissed, however, petitioner would be at liberty to approach the proper forum for redressal of his grievance.

Government of N.W.F.P. v. I.A. Sherwani PLD 1994 SC 72 and Muhammad Sadiq Khokhar's case 1985-SCMR 63 rel.

(b) Civil service---

---Suspension of government servant meant that no work was to be taken from him during the period of suspension.

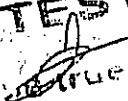
(c) General Clauses Act (X of 1897)---

---S. 16---Power to suspend an employee---Scope---Authority having power to appoint had also the power to suspend.

(d) Constitution of Pakistan---

1 of 3

21-Jul-23, 11:43

ATTESTED
 to 
 Adv

---Art. 199---Constitutional jurisdiction of High Court---Scope---Constitutional jurisdiction of High Court could only be invoked by an aggrieved person when there was no alternate or efficacious remedy available to him.

Shahzada Irfan Zia for Petitioner.

Syed Qaisar Ali Shah, A.A.-G. for Respondents.

ORDER

ABDUL LATIF KHAN, J.— Through instant petition, the petitioner seeks annulment of order dated 11.9.2014, whereby the petitioner was placed under suspension.

2. In essence, the petitioner was serving as Sub-Divisional Forest Officer (BPS-17) in the department of respondents, who was later on placed under suspension due to his illegal activities vide order/notification dated 11.9.2014, which order has been assailed by petitioner before this Court through filing the instant Constitution petition.

3. Admittedly the petitioner has been suspended by the department and yet no final order has been passed against him. He being employee of Provincial Government is a civil servant and a government servant against whom action under Khyber Pakhtunkhwa Government Servant (Efficiency and Disciplinary) Rules, is proposed to be initiated, may be placed under suspension for a period of ninety days if in the opinion of the competent authority, suspension is necessary or expedient and if the period of suspension is not extended for a further period of ninety days within thirty days of the expiry of initial period of suspension, the Government servant shall be deemed to be reinstated. As per Section 16 of the General Clauses Act, an authority having power to appoint, has also the power to suspend. So if an authority when holding an enquiry is satisfied that the charge against the public servant is connected with his position as a Government servant or is likely to embarrass him in the discharge of his duties or involves moral turpitude, he can suspend him pending the inquiry. Besides, suspension is not a punishment and suspension of a government servant during the course of his service simply means that no work is to be taken from him during the period of suspension. Suspension is only a temporary measure, wherein the petitioner is entitled to receive his full emoluments in view of the judgment of Hon'ble Supreme Court in case titled, "Government of N.W.F.P. v. I.A. Sherwani (PLD 1994 SC 72). If any penalty is imposed against the petitioner, then he has got a right of appeal before the competent authority. He was also entitled to file appeal against his suspension order before the concerned authority but he did not file the same.

4. It is not disputed that either the grievance of petitioner i.e. suspension pending disciplinary action germane to the terms and conditions of his service and appeal against such order is maintainable before a Service Tribunal. The jurisdiction of the High Court under Article 199 of the Constitution to scrutinize the same is ousted. The constitutional jurisdiction of the High Court, in such like matters, is ousted by explicit provision of Article 212 of the Constitution. In the instant case, suspension order of the petitioner has been issued by the authority, which has also been conveyed to the petitioner and the same has attained finality. There could be no cavil with the observation of Hon'ble Supreme Court of Pakistan in Muhammad Sadiq Khokhar's case (1985 SCMR 63), that if an order of suspension had attained finality, it would be questioned before the Service Tribunal and jurisdiction of this Court would be ousted. Moreso the writ jurisdiction can only be invoked by an aggrieved person when there is no alternate or efficacious remedy available to him. In the instant case, the petitioner has alternate remedy by approaching the proper forum i.e. Service Tribunal.

5. For the aforesaid reasons, the instant petition being not maintainable stand dismissed. However, the petitioner is at liberty to approach the proper forum for redressal of his grievance.

ZC/125/P

Petition dismissed.

21-Jul-23, 11:43 A

ATTESTED

19/07/23
A.A.-G.

property is not such where one can say that he deserves sympathy. The departmental authority is, therefore, directed to dismiss the petitioner from service.

S.A.K./A-442/S

Leave refused.

2004 S C M R 158

[Supreme Court of Pakistan]

Present: *Sh. Riaz Ahmed, C.J., Mian Muhammad Ajmal and Muhammad Nawaz Abbasi, JJ*

PAKISTAN INTERNATIONAL AIRLINES CORPORATION through Chairman and others---Petitioners

versus

SHAHZAD FAROOQ MALIK and another---Respondents

Civil Petitions Nos.140 and 141 of 2003, heard on 15th April, 2003.

(On appeal from the judgment dated 18-11-2002 of the Federal Service Tribunal, Islamabad passed in Appeals Nos.562(R)CE/2002 and 688(L)/CE-2000 respectively).

(a) Pakistan International Airlines Corporation Act (XIX of 1956)---

---S.10(2)---General Clauses Act (X of 1897), S.21---Power of Authority to remove employee from service---Scope---No adverse action could be taken against employee without observing principles of natural justice---Corporation could remove its employee, if appointed in violation of rules, but such action could be taken, when no decisive step had been taken in pursuance of appointment---Vested rights would accrue to employee, who after appointment was confirmed in service---Such rights of employee could not be interfered with only on the ground that he had been irregularly appointed by Corporation, unless there were other allegations against him in view of principle of locus poenitentiae. [pp. 161, 162, 163] A, B & D

Director Social Welfare, N.-W.F.P. v. Sadullah Khan 1996 SCMR 1350; P.I.A.C. v. Nasir Jamal Malik and others 2001 SCMR 934; Abdul Hafeez Abbasi and others v. Managing Director, P.I.A.C. and others 2002 SCMR 1034 and Chief Secretary, Government of Sindh v. Sher Muhammad Makhdoom PLD 1991 SC 973 ref.

ATTESTED

Refer to page 158

62

~~163~~

(b) General Clauses Act (X of 1897)---

---S.16---Power to appoint includes power to suspend or dismiss---
Scope---Authority has power to undo act done by it, but such provision would be subject to relevant laws and rules and would be applicable only in such cases, where under relevant law or rules, a different intention does not appear. [p. 162] C

(c) Pakistan International Airlines Corporation Act (XIX of 1956)---

---S.10(2)---Service Tribunals Act (LXX of 1973), S.4---Constitution of Pakistan (1973), Art.25---Termination of service---Authority terminated respondents from service, but allowed to continue in service other employees, who were similarly appointed---Service Tribunal set aside such order being discriminatory---Validity---Tribunal had rightly interfered with termination order of respondent in view of Art. 25 of the Constitution---Supreme Court dismissed petition and refused leave to appeal. [p. 163] E & F

Muhammad Yawar Ali, Advocate Supreme Court for Petitioners (in both Petitions).

M. Jaffar Hashmi, Advocate Supreme Court for Respondents (in both Petitions).

Date of hearing: 15th April, 2003.

JUDGMENT

MIAN MUHAMMAD AJMAL, J.---By this common judgment we propose to dispose of Civil Petitions Nos.140 and 141 of 2003 as they have arisen out of common judgment and involve identical questions of law and facts.

Facts of Civil Petition No.140 of 2003

2. Shehzad Farooq Malik, respondent after qualifying B.Sc. (Civil Engineering) from University of Engineering and Technology, Lahore moved an application to the Prime Minister's Secretariat, Islamabad for appointment in Pakistan International Airlines Corporation (hereinafter to be called PIAC), which was forwarded to the Managing Director, PIAC for suitable action, the same was referred to the Special Selection Board, who evaluated the respondent for appointment as Works Officer (Civil) in Pay Group-V in General Services Department and found him suitable for the said post with the recommendation that the condition of advertisement as per recruitment policy be dispensed with or relaxed, which recommendations were approved by the Managing Director, PIAC vide his order dated 18-10-1995. As a consequence thereof, the

SCMR

CamScanner

ATTESTED

to true copy
A.S.

respondent was offered appointment as Works Officer in Pay Group-V, who joined the duty on 28-6-1995 and was confirmed in service vide letter dated 20-8-1996.

3. On 20-3-1997, the respondent's services were terminated on the ground that his appointment was irregular as it was made without inviting applications through advertisement, without competition on merits and on the recommendations of the Prime Minister's Secretariat. The respondent filed Writ Petition No.8096 of 1997 challenging the termination order before the Lahore High Court, Lahore and at the time of its hearing the learned counsel for the PIAC undertook to withdraw the termination order, as such, the writ petition was disposed of. On 3-4-1997 the termination letter was withdrawn and the respondent was placed in surplus pool. The respondent again filed Writ Petition No.10639 of 1997 before the Lahore High Court, Lahore, impugning the order placing him in surplus pool, which was suspended, however, later on the writ petition was withdrawn by the respondent.

4. On 27-3-1998 the PIAC issued a notice to the respondent to show cause as to why his services be not terminated, which was assailed through Writ Petition No.6969 of 1998 but without any success. After dismissal of his writ petition, he submitted reply to the show-cause notice but it could not find favour with the authorities and ultimately on 10-5-2000 a termination order was issued against him. The respondent then filed Writ Petition No.9977 of 2000 impugning aforesaid termination order before the Lahore High Court which was admitted to regular hearing and the operation of the impugned order was suspended on 6-6-2000. In the written statement PIAC took an objection that remedy of appeal under Regulation 85 of the PIAC Employees (Service and Discipline) Regulations, 1985 was available to the respondent, as such, the writ petition was not maintainable. The said writ petition was remitted by the High Court vide its order dated 30-1-2002 to the Competent Authority with a direction to treat the same as an appeal and decide the same within a period of 30 days after affording opportunity of hearing to the respondent.

5. On 8-3-2002, the respondent in order to supplement the grounds taken in Writ Petition No.9977 of 2000, moved a supplementary representation before the PIAC competent authority, who after personally hearing the respondent rejected his representation for reinstatement vide its order dated 29-4-2002. He thereafter filed Appeal No.562(R)CE/2002 before the Federal Service Tribunal, Islamabad.

SCMR

ATTESTED

to be read by
A.S.

Facts of Civil Petition No. 141 of 2003

6. Ashfaq Hussain Shafi, respondent was appointed as Motor Transport Officer on 2-4-1996. His services were terminated, as such, he filed writ petition in the High Court and on assurance of the PIAC that his case will be dealt with in accordance with law, it was disposed of. Thereafter on 12-5-1998 a notice was issued to him, which was challenged through Writ Petition No.10450 of 1998. Thereafter he was directed through a notice dated 4-7-2000 to appear for personal hearing in the office of Director (Admn.), PIAC at Karachi on 11-7-2000, consequently, he appeared and explained his position that his appointment was made after observing all formalities and his appointment was duly approved by the Managing Director, PIAC, he completed his probationary period and was confirmed. However, his services were terminated vide order dated 17-7-2000 against which he filed appeal before the Federal Service Tribunal.

7. The Tribunal after hearing the parties and perusal of the record, accepted the appeals of both the respondents by a common judgment with the observations that the services of the employees cannot be terminated without any reasons unless there are allegations of misconduct against them. In support of its view the Tribunal has given six reasons firstly, that the illegality was committed by the PIAC itself, secondly, that no misconduct was alleged against the respondents, thirdly, that the respondents have been discriminated, inasmuch as, other persons who were similarly appointed have either been taken back or no action has been taken against them, fourthly, that the citizens cannot be deprived of their livelihood without following proper procedure of law, especially, when there was no allegation of misconduct against the respondents, fifthly, that the principle of locus poenitentiae was applicable and sixthly that the decision referred to by the PIAC from Indian jurisdiction was not applicable to the present case because the respondents were not shown to be relative of any of the Ministers or the persons who recommended their case rather the rule laid down in the case of Nasir Jamal Malik reported in 2001 SCMR 934, was applicable in the present case.

8. We have heard the learned counsel for the parties and have gone through the record with their assistance. The respondents in both the petitions were appointed in Group-V and were later on confirmed by the PIAC. Learned counsel for the petitioners mainly stressed that the respondents were appointed in violation of Recruitment Rules of PIAC and, as such, they cannot be allowed to remain in service. The question arises as to who violated the Rules in appointing the respondents. The

SCMR

65

answer is very obvious that it was the PIAC itself who violated its Rules and with the change of the Government it took a U turn and started grumbling that wrong has been committed in appointing the respondents. This Court has taken notice of such situation and has dealt with the same in its pronouncements from time to time. Reference can be made to Director, Social Welfare N.-W.F.P. v. Sadullah Khan (1996 SCMR 1350), PIAC v. Nasir Jamal Malik and others (2001 SCMR 934) and Abdul Hafeez Abbasi and others v. Managing Director, PIAC and others (2002 SCMR 1034), wherein it has been held that the management of the P.I.A.C. itself, in violation of its Rules and Regulations makes appointments and after the change of the regime takes about turn, terming such appointments to be irregularly made against the Rules. If the employers adhere to and observe codal formalities, follow their Rules and Regulations in letter and spirit and appoint the deserving people on merits, there would be no heart burning among the deserving people but unfortunately the employers themselves by violating and by passing the Recruitment Rules employ the blue eyed persons who are mostly undeserving and thereby deprive the deserving ones which create unrest in the society. It has been noted with concern that law of the land is supposed to be for the ordinary citizens of the country and those who consider themselves to be from the privileged class, do not care to abide by the same as they consider themselves to be above law and as such, occasionally they violate it without realizing its consequences. In such view of the matter it was observed by this Court in the case of Abdul Hafeez Abbasi (supra,) that 'in such situation besides proceedings against the beneficiaries of so-called illegal appointments, the officers who were responsible for implementing illegal directives should also be held equally responsible and severe action should be taken against them so that in future it may serve as a deterrent for other like-minded persons'.

9. No doubt section 10(2) of the Act empowers the Corporation to retire or remove any person at any time from its service without assigning any reason, after giving him an opportunity of being heard and not less than ninety days' notice or pay for the period by which such notice falls short of ninety days yet no adverse action can be taken against an employee without observing the principle of natural justice. Section 16 of the General Clauses Act, 1897 provides that the authority having power to make the appointment has also the power to suspend or dismiss any person appointed in exercise of that power. There is no cavil with the proposition that the authority has the power to undo the act done by it but such provision would be subject to the relevant laws and the Rules and would be applicable only in those cases where under

SCMR

GS CamScanner
 ATTESTED
 to be true copy
 Ady

the relevant law or the Rules a different intention does not appear. In the present case, the Corporation has its law and the Rules which govern the service under the Corporation. The authority could remove the employee who has been appointed in violation of the Rules but such action could be taken when no decisive steps had been taken in pursuance of the appointments. In the instant case, the respondents after their appointment were confirmed in service by the P.I.A.C., hence, valuable rights had accrued to them which could not be interfered with only on the ground that they were irregularly appointed by the P.I.A.C. itself unless there were other allegations against them, in view of the principle of locus poenitentiae. This Court in case of Chief Secretary, Government of Sindh v. Sher Muhammad Makhdoom (PLD 1991 SC 973) on the said principle held as under:--

"In this context, reference can be made to section 21 of General Clauses Act and guidelines laid down in the case of Pakistan v. Muhammad Himayatullah Farukhi (PLD 1969 SC 407), in which it is held that principle of locus poenitentiae is available to the Government or relevant authorities and further authority which is competent to make order has power to undo it, but such order cannot be withdrawn or rescinded once it has taken legal effect and created certain rights in favour of any individual. It appears that Service Tribunal has allowed appeals of the respondents mainly on this ground with cogent reasons in support thereof. View taken by the Service Tribunal is correct and we find no reason whatsoever to interfere with the impugned judgment, which is hereby upheld and leave is refused. In the circumstances, petitions are dismissed."

The respondents were also discriminated as others who were similarly appointed like them, were not terminated and were allowed to continue in service, as such, the Tribunal has rightly interfered with the termination orders of the respondents in view of Article 25 of the Constitution of Islamic Republic of Pakistan, 1973.

10. For the foregoing reasons, no case for interference with the well-reasoned judgment of the Tribunal has been made out. These petitions have no merits, which are accordingly dismissed and leave refused.

S.A.K./P-110/S

Leave refused.

CS CamScanner

ATTESTED

To be true
Adv.



GOVT. OF KHYBER PAKHTUNKHWA
HEALTH DEPARTMENT

Dated, Peshawar the 7th February, 2023

NOTIFICATION.

No. SOH-III/7-262/2023(Asaad Halimi). WHEREAS, Health Department constituted a Committee vide Notification No. SOH-III/7-262/2020, dated 24th June, 2020 to conduct a comprehensive audit of various districts including District Kohat for the purpose to evaluate the performance of Drug Inspectors and to unearth the reported discrepancies/mal practices/complaints regarding Drug Sale Licenses, NOCs issued to other districts, seized stock, pending cases for submission in the Provincial Quality Control Board and the Drug Court and data of FIRs in their respective Districts.

2. AND WHEREAS, the Audit Report has surfaced abuse of authority, irregularities and corrupt practices on part of Syed Muhammad Asaad Halimi, Chief Drug Inspector District Kohat.

3. AND WHEREAS, the Competent Authority (the Chief Secretary Khyber Pakhtunkhwa) has appointed Inquiry Committee under the Khyber Pakhtunkhwa Government Servants (Efficiency and Discipline) Rules, 2011

4. NOW THEREFORE, the Competent Authority (Chief Secretary Khyber Pakhtunkhwa) while considering the charges serious, has been pleased to suspend the services of Syed Muhammad Asaad Halimi, Chief Drug Inspector, D.I.Khan, under Rule-6 of the Khyber Pakhtunkhwa Government Servants (Efficiency and Discipline) Rules, 2011, with immediate effect.

SECRETARY TO GOVT. OF KHYBER PAKHTUNKHWA
HEALTH DEPARTMENT

Endst. of even No and Date.

Copy forwarded for information/necessary to the:-

1. Accountant General, Khyber Pakhtunkhwa, Peshawar.
2. Director General Drug Control & Pharmacy Services, Khyber Pakhtunkhwa, Peshawar.
3. PSO to Chief Secretary, Khyber Pakhtunkhwa.
4. District Accounts Officer, D.I.Khan.
5. Deputy Director (IT), Health Department.
6. PS to Secretary Health, Khyber Pakhtunkhwa.
7. The Officer concerned.

(Naseer Ahmad)
SECTION OFFICER-III

2017 S.C.M.R. 339

[Supreme Court of Pakistan]

Present: Mian Saqib Nisar, Faisal Arab and Ijaz ul Ahsan, JJ

COLLECTOR OF CUSTOMS APPRAISEMENT, COLLECTORATE, CUSTOMS HOUSE,
KARACHI---Appellant

Versus

Messrs GUL REHMAN, PROPRIETOR MESSRS G. KIN ENTERPRISES, GHAZALI STREET,
NASIR ROAD, SIALKOT---Respondent

Civil Appeal No. 450 of 2010, decided on 25th November, 2016.

(Against the order dated 18.3.2010 of the High Court of Sindh at Karachi passed in C.P. No. D-777/2008)

(a) Customs Act (IV of 1969)---

---Ss. 19A & 33(1), proviso---Customs duty, refund of---Importer seeking refund of customs duty and penalty paid by it on the basis of an order-in-original, which was subsequently set aside by Collector (Appeals)---Customs department refused to refund the amount by contending that the importer had already passed on the incidence of duty onto the end consumers, therefore, in terms of proviso to S. 33(1) of the Customs Act, 1969, the importer was not entitled to a refund---Legality---Language of S. 33(1) of the Customs Act 1969 made it clear that refund in terms thereof was to be allowed only where/if customs duty had been paid as a result of some inadvertence, error or misconstruction, which was not the position in the present case---Importer right from the beginning had agitated that the declaration made by it was correct and only 14% customs duty was applicable, whereas stance of the customs department was that imported goods attracted 25% customs duty---No inadvertence, error or misconstruction was involved in the declaration by the importer---Issue was conclusively resolved by the Collector (Appeals) in favour of the importer---Holistic reading of S. 33 of the Customs Act, 1969, clarified that where a refund became due as a result of any decision or judgment passed by a customs officer, Appellate Tribunal etc., the proviso to S. 33(1) would not be applicable, meaning thereby that the refund had to be made notwithstanding the fact that the incidence of customs duty had been passed onto the customer and therefore S. 19A of the said Act would not be attracted---Appeal filed by Customs department was dismissed accordingly.

(b) Interpretation of statutes---

---'Proviso' to a provision---Scope and purpose---Generally a proviso was an exception to or qualified the main provision of law to which it was attached---Proviso was to be strictly construed and it applied only to the particular provision to which it was appended---Proviso was limited to the provision which immediately precedes it---Purpose of a proviso was to qualify or modify the scope or ambit of the matter dealt with in the main provision, and its effect was restricted to the particular situation specified in the proviso itself---Before a proviso could have any application, the section or provision itself must apply.

Dr. Muhammad Anwar Kurd and 2 others v. The State through Regional Accountability Bureau, Quetta 2011 SCMR 1560; Interpretation of Statutes (11th Ed.), N.S. Bindra and K.E.S.C. Progressive Workers' Union through its Chairman and others v. K.E.S.C. Labour Union through its General Secretary and others 1991 SCMR 338 ref.

Raja Muhammad Iqbal, Advocate Supreme Court for Appellant.

Azhar Maqbool Shah, Advocate Supreme Court and Ahsan Hameed Lilla, Advocate Supreme Court for Respondent.

ATTESTED

10.07.2016
ACTY

Date of hearing: 25th November, 2016.

69

~~48~~

ORDER

MIAN SAQIB NISAR, J.—This appeal with the leave of the Court turns on whether the respondent is entitled to the refund of customs duty paid (along with the penalty), when, as per the case of the appellant the respondent was required to prove that the incidence of customs duty had not been passed onto the consumer in terms of the provisions of section 19A of the Customs Act, 1969 (the Act), which it failed to do.

2. The facts are that the respondent is an importer of fabrics and it made a declaration in the bill of entry that the imported goods were covered by heading 5407.5200 attracting 14% customs duty. The department controverted this declaration and claimed that instead the correct PTC heading would be 5903.1000, on which 25% customs duty was payable. Pursuant to a show-cause notice, an order-in-original dated 3.7.2006 was passed in which the latter heading was held to be applicable and the imported consignments were confiscated, an additional penalty was imposed and the respondent was given the option under section 181 of the Act to redeem the confiscated goods on payment of a fine. In order to get the consignments released the respondent made the requisite payments but simultaneously assailed the order-in-original before the Collector of Customs, Sales Tax and Federal Excise (Appeal) [Collector (Appeals)] who, vide order dated 8.12.2006, accepted the plea of the respondent and determined that the appropriate heading was indeed 5407.5200 and there was no mis-declaration by the respondent. The department has admitted before us today that they did not challenge this order and thus for all intents and purposes it attained finality. Be that as it may, on account of the favourable order of the Collector (Appeals) the respondent sought refund of the amount paid by it on the basis of the order-in-original dated 3.7.2006. The department declined to refund the said amount. Instead, vide another order-in-original dated 5.3.2008 the department held that as the incidence of the duty had been passed onto the consumer by the respondent therefore it was not entitled to any refund in terms of sections 33 and 19A of the Act. This order was successfully assailed by the respondents through a constitutional petition filed before the learned High Court of Sindh, resulting in the impugned judgment. Leave in this case was granted vide order dated 30.6.2010, however it is important to note that in the same order an admission on behalf of the learned counsel for the appellant was recorded in the following terms:-

"Raja Muhammad Iqbal, learned ASC for the petitioner contends that the petitioner department has no cavil to the classification of PTC heading made by appellate court of Collector of Customs in its order dated 8.12.2006."

The only plea taken at the time of granting leave and which prevailed with this Court was whether the amount paid by the respondent could be refunded according to the mandatory provisions of section 19A of the Act when the incidence of the duty had been passed onto the end consumer.

3. Learned counsel for the appellant, referring to section 33 of the Act, argued that the proviso contained therein is clear, which states that, "Provided that no refund shall be allowed under this section if the sanctioning authority is satisfied that incidence of customs duty and other levies has been passed on to the buyer or consumer". In this context he stated that according to section 19A of the Act, it was for the importer to prove that the incidence of duty had not been passed onto the consumer, thus, by virtue of this strict liability, the burden was on the respondent to prove the same, in the absence of which it would be presumed that the incidence of duty had been passed onto the consumer. Hence refund was impermissible under the law.

4. Heard. We find that section 33 of the Act has to be read as a whole in order to appreciate the letter and spirit of its proviso. The said section reads as under:-

"33. Refund to be claimed within one year.—(1) No refund of any customs-duties or charges claimed to have been paid or over-paid through inadvertence, error or misconstruction shall be allowed, unless such claim is made within one year of the date of payment:

21-Jul-25, 11:41 /

ATTESTED

to be signed

70

Provided that no refund shall be allowed under this section if the sanctioning authority is satisfied that incidence of customs duty and other levies has been passed on to the buyer or consumer.

(2) In the case of provisional payments made under section 81, the said period of one year shall be reckoned from the date of the adjustment of duty after its final assessment.

(3) In the case where the refund has become due in consequence of any decision or judgment by any appropriate officer of Customs of the Board or the Appellate Tribunal or the Court, the said period of one year shall be reckoned from the date of such decision or judgment, as the case may be."

5. Thus it is clear from the language of section 33(1) that refund in terms thereof is to be allowed only where/if customs duty has been paid as a result of some inadvertence, error or misconstruction, which is not the position in the present matter. Right from the beginning the respondent has agitated that the declaration made by it under PTC heading 5407.5200 was correct. There was no inadvertence, error or misconstruction involved in such declaration whereas it has been the stance of the department that this heading was incorrectly attributed to the goods. This issue was conclusively resolved by the Collector (Appeals) vide its order dated 8.12.2006 in favour of the respondent, which, as mentioned earlier, has attained finality.

6. Before proceeding further, we find it pertinent to discuss the purpose and scope of a proviso; in relation to the arguments submitted before us in respect of the proviso to section 33(1) of the Act. Generally a proviso is an exception to or qualifies the main provision of law to which it is attached. Its purpose is to qualify or modify the scope or ambit of the matter dealt with in the main provision, and its effect is restricted to the particular situation specified in the proviso itself. Further, it is a settled canon of interpretation that a proviso is to be strictly construed and that it applies only to the particular provision to which it is appended. Whilst holding that a proviso is limited to the provision which immediately precedes it, Shafiqur Rahman, J, in a four member judgment of this Court reported as K.E.S.C. Progressive Workers' Union through its Chairman and others v. K.E.S.C. Labour Union through its General Secretary and others (1991 SCMR 888) cited with approval, inter alia, the following principles:-

"(i) Wilberforce on Statute Law, page 303:

"A proviso is of great importance when the Court has to consider what cases come within the enacting part of a section and it is always to be construed with reference to the preceding parts of the clause to which it is appended."

(ii) Maxwell on the Interpretation of Statutes. Twelfth Edition by P. St. J. Langan, page 189:

"It will, however, generally be found that inconsistencies can be avoided by applying the general rule that the words of a proviso are not to be taken "absolutely in their strict literal sense," but that a proviso is "of necessity ...limited in its operation to the ambit of the section which it qualifies".

ATTESTED

to be true
Ad

71

~~71~~

(v) The Construction of Statutes by Earl T. Crawford, page 605:

"As a general rule, however the operation of a proviso should be confined to that clause or portion of the statute which directly precedes it in the statute."

(Emphasis supplied)

Therefore the proviso to section 33 has to be confined to the particular sub-section to which it is attached, i.e. subsection (1), and if the case does not fall within the purview of such subsection in that the customs duty was not paid as a result of inadvertence, error or misconstruction then obviously the proviso would not be relevant. Before a proviso can have any application, the section itself must apply. A holistic reading of section 33 of the Act, particularly the provisions of subsection (3), clarifies that where a refund becomes due as a result of any decision or judgment passed by a customs officer, Appellate Tribunal etc., the proviso to subsection (1) would not be applicable because no such proviso is attached to subsection (3), meaning thereby that the refund has to be made notwithstanding the fact that the incidence of customs duty had been passed onto the customer and therefore section 19A of the Act would not be attracted. Resultantly we do not find any merit in this appeal which is accordingly dismissed.

MWA/C-20/SC
dismissed.

Appeal

11/21/23

Case: MWA/C-20/SC

ATTESTED

10/10/23

7/21

2016 P L C (C.S.) 287

[High Court (A.J&K)]

Before M. Tabassum Aftab Alvi, J

ANSAR ALI and others

Versus

AZAD GOVERNMENT OF THE STATE OF JAMMU AND KASHMIR through Chief Secretary
Muzaffarabad and others

Writ Petitions Nos.1426 of 2011 and 690 of 2012, decided on 17th June, 2014.

(a) Azad Jammu and Kashmir Revenue Department, Patwari, Qanoongo, Naib Tehsildar Service
Rules, 1991—

---Azad Jammu and Kashmir Interim Constitution Act (VIII of 1974), S.44---Constitutional petition---
Appointment---Violation of promotion quotas against the post of Naib Tehsildar (BS-14) reserved for
ministerial staff of Revenue, Rehabilitation and Stamps Department and for children of the officers and
employees of Revenue Department, who were in service, retired or died during service---Prime Minister's
directions were overlooked for the appointment of the petitioners---Review petitions against the orders of
Prime Minister were rejected---Contention of the petitioners was that the authorities were not enforcing
the right of promotion of the petitioners against their respective quotas despite passing of orders by the
Prime Minister in this regard---Validity---Authorities had not controverted the claim for enforcement of
12% quota reserved for Revenue, Rehabilitation and Stamps Department and said quota had time and
again been violated, therefore, the matter was ordered to be placed before the appropriate selection
authority for consideration for promotion against the post of Naib Tehsildar as per rules---Claim of the
petitioner for enforcement of 6.50% quota reserved for children of officers and employees of Revenue
Department, who were in service, retired or died during service was contrary to statutory law; Secretary
Board of Revenue had reported that against 6.50% quota 04 posts were requisitioned to the Public Service
Commission, however, 02 were withdrawn from purview of the Public Service Commission and against
the said 02 posts departmental appointments were made and remaining 02 posts were filled through Board
of Revenue---Said quota had already been overflowed and no post was available for appointment against
6.50% quota, therefore, no relief could be extended to the petitioner---Illegal order of the Chief Executive
could not be enforced through constitutional jurisdiction---In case of inconsistency between notification
and statutory rules, the rules shall prevail---Constitutional petition filed for enforcement of 12% quota
reserved for ministerial staff of Revenue, Rehabilitation and Stamps Department was accepted and the
constitutional petition filed for enforcement of 6.50% reserved for children of the officers and employees
of Revenue Department was dismissed in circumstances.

Major Muhammad Aftab Ahmed v. Azad Jammu and Kashmir Government 1992 SCR 3071;
Muhammad Ejaz Khan and 12 others v. Mushtaq Ahmed Khan and 10 others 2010 SCR 201; Muhammad
Nadeem Anjum and others v. Inspector General of Police, Punjab, Lahore and others 2010 PLC (C.S) 924
rel.

(b) Interpretation of statutes—

---Policy or notification could not override statutory rules framed by Government under the statute---In
case of inconsistency between notification and statutory rules, the rules shall prevail.

Muhammad Ejaz Khan and 12 others v. Mushtaq Ahmed Khan and 10 others 2010 SCR 201;

Muhammad Naseem Arif and others v. Inspector General of Police, Punjab, Lahore and others 2010 PLC (C.S) 924 rel.

Mushtaq Ahmed Janjua for Petitioner (in Writ Petition No.690 of 2012).

Kh. Muhammad Naseem for Petitioner (in Writ Petition No.1426 of 2011).

Ch. Shoukat Aziz, Addl. A.-G. for Respondents (in both the Writ Petitions).

Nemo for pro-forma Respondents Nos.7 to 11 (in Writ Petition No.1426 of 2011).

73

73

JUDGMENT

M. TABASSUM AFTAB ALVI, J.— The supra titled writ petitions have been addressed under Section 44 of the Azad Jammu and Kashmir Interim Constitution Act, 1974.

2. As common questions of facts and law are involved in the captioned writ petitions, therefore, proposed to decide the same through this single judgment.

3. The precise facts of writ petition No.1426/2011 are that petitioner is first class State Subject of Azad Jammu and Kashmir, who is domicile holder of District Muzaffarabad and is qualified as B.A. It is claimed that on recommendation of respective selection committee, petitioner was inducted in Stamps Department as Junior Clerk B-5, vide order dated 03.07.1995. Thereafter, he was promoted as Senior Clerk B-7 in the said Department. It is maintained that according to "AJ&K Patwari, Qanoongo, Naib Tehsildar and Tehsildar Service Rules, 1991, 12% posts of Naib Tehsildars are reserved for promotion by selection from ministerial staff of Revenue, Rehabilitation and Stamps Department. It is further alleged that in Revenue Department of Azad Jammu and Kashmir numerous vacancies of Naib Tehsildars became available against 12% allocated quota of ministerial staff but always the same were filled in by initial recruitment or by promotion from other cadre while ignoring the qualified and experienced incumbents of Stamps Department. It is averred that as some posts of Naib Tehsildars were available in the Revenue Department for promotion against the quota reserved for departmental promotion, hence, father of petitioner submitted an application before the Minister Revenue, stating therein, that the petitioner may be promoted as Naib Tehsildar against 12% quota reserved for ministerial staff. The Revenue Minister, directed the competent authority to act upon the rules but needful was not done. It is claimed that many posts of Naib Tehsildars were sent to the Public Service Commission for advertisement against the rules, without determination of departmental quota on political motivation. It is further stated that through an order of the Prime Minister an approval for induction of Shehzad Sharif (co-petitioner) was issued which was objected to by the Board of Revenue and in this regard a summary for review was also filed for the purpose which was turned down. A successive review also met the same fate. The petitioner through the instant constitution petition has challenged orders of the Prime Minister Azad Govt. of the State of Jammu and Kashmir dated 06.07.2011 and 05.08.2011 pertaining to appointment of Shehzad (Co-petitioner) and solicited enforcement of 12% quota of ministerial staff with further direction to promote him as Naib Tehsildar B-14 against the aforesaid quota as per rules.

4. The writ petition has been resisted by respondents through written statement, wherein, it is stated that petitioner is not an aggrieved person within the meaning of Section 44 of the Azad Jammu and Kashmir Interim Constitution Act, 1974, however, contents of writ petition relating to 12% quota and violation have not been controverted.

5. The precise facts culminating into filing of writ petition No.690/2012 are that petitioner is 1st class State Subject of the Azad Jammu and Kashmir having qualification of BSIT (Honors) equivalent M.Sc, Computer Science. It is claimed that father of petitioner, was retired from the post of Additional Commissioner from Revenue Department. It is further maintained that an amendment was brought in Azad Jammu and Kashmir Revenue Department Patwari, Qanoongo, Naib Tehsildar and Tehsildar Service Rules, 1991, whereby 6.50% quota was allocated to the children of the officers and employees of Revenue Department.

APPROVED

25-Jul-

adgement

74

~~23~~

Department who are in service, retired or died during service, through competitive examination to be conducted by Public Service Commission, vide notification dated 02.04.2011. However, aforesaid notification was changed later on and on the basis of previous practice, respondent No.4 issued notification dated 15.01.2011 through which requirement of the Public Service Commission was relaxed and appointment of children of officers/employees of Revenue Department was declared to be made through Board of Revenue. In the light of the above notification Government had withdrawn 2 posts from the Public Service Commission pertaining to children of officers/employees of Revenue Department. The then Prime Minister for his appointment as Naib Tehsildar against 6.50% quota reserved for children of officers and employees of Revenue Department. The aforesaid application was, allowed by the Prime Minister and respondent No. 4 was directed to appoint petitioner accordingly, however, latter preferred an appeal/review against the order dated 03.04.2011 which was rejected and summary for appointment of petitioner was approved by the then Prime Minister on 06.07.2011. Against the aforesaid, order, respondent No.4 filed another review petition on 28.07.2011 which was also rejected vide order dated 05.08.2011. The orders supra were again challenged by Senior Member Board of Revenue, through review petition which also met the same fate vide order dated 24.12.2011. It is stated that the aforesaid orders of the Prime Minister were not acted upon by respondents Nos.4 and 5, hence, petitioner constrained to file the instant constitution petition.

6. The writ petition has been resisted by respondents through parawise comments which, on request of their learned counsel, were treated as written statement vide order dated 27.02.2013. It is averred that petitioner by twisting facts obtained orders from the Prime Minister for his appointment against the post of Naib Tehsildar B-14 by obtaining relaxation of Public Service Commission, however, as orders were contrary to law, therefore, successive review petitions were filed for recalling the aforesaid orders and prayed for dismissal of writ petition.

7. Mr. Mushtaq Ahmed Janjua, the learned counsel for petitioner Ansar Ali, submitted that as per The Azad Jammu and Kashmir Revenue Department Patwari, Qanungo, Naib Tehsildar and Tehsildar Service Rules, 1991, 12% quota is allocated for promotion from ministerial staff of Revenue, Rehabilitation and Stamps Department, which has continuously been violated by respondents, therefore, necessary direction may be issued for placing case of his client before appropriate selection committee for consideration to be promoted as Naib Tehsildar B-14 against the said quota. The learned counsel pressed into service that there is no any post for 6.50% quota reserved for children of officers and employees of Revenue Department, hence, writ petition of Shehzad Sharif is liable to be dismissed accordingly.

8. Kh. Muhammad Nasim and Sardar Abdul Sammie Khan, Advocates for petitioner, Shehzad Sharif vehemently argued that as per 6.50% quota reserved for children of officers and employees of Revenue Department necessary orders were passed by the Prime Minister Azad Govt. of the State of Jammu and Kashmir time and again, for appointment of their client as Naib Tehsildar B-14 against which

ATTESTED
 To be true
 A.C.

25-Jul-23, 12:30

75

~~75~~

orders successive review petitions were also rejected, hence, writ of mandamus be issued for implementation of the aforesaid orders with further direction to send the said petitioner for training forthwith and craved for acceptance of writ petition.

9. After hearing the learned counsel for parties at great length, I have perused the contents of writ petition, examined the appended record with utmost care and have given my earnest thought to the points raised by the learned counsel for parties.

10. A contemplate perusal of The Azad Jammu and Kashmir Revenue Department Patwari, Qanungo, Naib Tehsildar and Tehsildar Service Rules, 1991, reveals that 43.50% quota pertaining to posts of Naib Tehsildars B-14 is allocated for initial recruitment on the basis of general merit, while 6.50% quota is reserved for children of officers and employees of Revenue Department who are in service, retired or died during service. However, 38% quota has been reserved for promotion of Qanungos, whereas 12% quota has been allocated for promotion of ministerial staff of Revenue, Rehabilitation/ Stamps Department. The posts of Naib Tehsildars B-14 regarding initial recruitment against 43.50% quota are liable to be filled in through competitive examination to be conducted by the Public Service Commission, whereas 6.50% quota of Children of officers and employees of Revenue Department are liable to be filled in through Board of Revenue. The promotion quota is, however, liable to be filled in through appropriate selection committees. The petitioner Ansar Ali relates to 12% quota reserved for Revenue, Rehabilitation and Stamps Department. The official respondents have not controverted his claim and it appears that the aforesaid quota has time and again been violated. The validity of orders of the Prime Minister, however, shall be dealt with at later part of this* judgment. Therefore, by accepting his writ petition it is directed that his matter shall be placed before the appropriate selection authority for consideration to be promoted against the disputed post of Naib Tehsildar B-14 as per rules.

11. The claim of petitioner Shehzad Sharif for appointment against the disputed post of Naib Tehsildar B-14 is contrary to statutory law. As per report of Secretary Board of Revenue dated 06.12.2013 against 6.50% quota 04 posts were requisitioned to the Public Service Commission, however, 02 were withdrawn from perview of the Public Service Commission and against aforesaid 02 posts departmental appointments were made. Against remaining 02 posts of the aforesaid quota two more candidates were appointed through Board of Revenue. As per report supra 02 candidates against 6.50% quota were also appointed as Naib Tehsildars B-14 on temporary basis. It appears that the aforesaid quota has already been overflowed. As there is no post available for appointment against 6.50% quota of officers and employees of Revenue Department, hence, no relief can be extended to petitioner Shahzad Sharif accordingly.

12. The learned counsel for petitioner Shchzad Sharif strenuously argued that implementation of repeated orders of the Prime Minister regarding appointment of their client against the disputed poet of Naib Tehsildar B-14 was binding obligation of official respondents. It will be appropriate here that the relevant extract of the Azad Jammu and Kashmir Revenue Patwari, Qanoongo, Naib Tehsildar and

ATTESTED

to
Ad.

25-Jul-23, 12:30 PM

76



Tehsildar Rules 1991, may be reproduced which speaks as under:-

S.#	Name of Department	Functional Un	Name of the post with grade	Appointing Authority	appointment by initial Minimum qualification.
2	8	do	Naib Tehsildar BPS-14	Commissioner	Graduate from a recognized University

ATTESTED

to be true
[Signature]

77

6

--	--	--	--	--	--

A bare reading of the aforesaid extract makes abundantly clear that appointing authority of the post in dispute is Commissioner. Therefore, all the orders of the Prime Minister Azad Govt. of the State of Jammu and Kashmir and approval of summary for appointment of petitioner Shahzad Sharif are illegal. It is by now well settled principle of law that an illegal order of the Chief Executive cannot be enforced through writ jurisdiction. The point supra came under consideration before the apex Court in case titled Major Muhammad Aftab Ahmed v. Azad Jammu and Kashmir Government [1992 SCR 3071. At page 312 of the report it was held as follows:-

"iii. Even if it is assumed for the sake of arguments that the Prime Minister had made the order for the appointment of the appellant to the post of Superintendent of Police still it cannot be given effect to or enforced by way of issuing writ directing the respondent to issue the order of his appointment to the said Post as it is a settled law that the writ jurisdiction cannot be exercised to direct a person to give effect to an unlawful order of any authority even though he is competent authority to pass such an order in a lawful manner. Since, as said earlier, the appointment of the appellant could not be made to the post of superintended of Police under the rules the orders of the Prime Minister claimed by the appellant to be the orders of his appointment to the said post being violative of the relevant rules were unlawful and consequently were not enforceable by the High Court in its writ jurisdiction which is discretionary in nature and its exercise is always refused where the ends of justice and facts of the case do not justify and call for to do so."

13. The contention of Sardar Abdul Sammie Khan Advocate, the learned counsel for petitioner Shehzad Sharif that previously Ansar Ali petitioner filed writ petition No.919/2011 which was disposed off by this Court vide order dated

ATTESTED
to be true copy
of the original

78

17.05.2012, hence, his writ petition merits dismissal is not tenable for the reason that through the aforesaid order even necessary observation for consideration of the aforesaid petitioner was passed which has yet not been acted upon, hence, the above order again strengthen the case of Ansar Ali that 12% quota was violated by respondents.

14. However, before parting it is liable to be observed here that previous practice and notification dated 15.01.2011, whereby initial recruitment pertaining to the posts of Naib Tehsildars B-14 regarding 6.50% quota of children of officers and employees of Revenue Department liable to be made through Board of Revenue are contrary to the Azad Jammu and Kashmir Patwari, Qanoongo, Naib Tehsildar and Tehsildar Service Rules, 1991. The aforesaid notification has been issued without any statutory backing. It is settled principle of law that in case of inconsistency between notification and statutory rules, the rules shall be prevailed. An identical point was arisen before the apex Court in case titled Muhammad Ejaz Khan and 12 others v. Mushtaq Ahmed Khan and 10 others [2010 SCR 201]. At page 205 of the report it was held as follows:--

".... The Senior Member Board of Revenue was not competent to issue such policy which override the provisions of rules. It may be observed that a policy or notification cannot override the statutory rules framed by the Government under the statute. Instructions and policies cannot amend the statutory rules."

A similar point came under consideration before the apex Court of Pakistan in case titled Muhammad Nadeem Arif and others v. Inspector General of Police, Punjab, Lahore and others [2010 PLC (C.S) 924] wherein at page 931 of the report it was held as follows:-

".... The department consistently followed those instructions of the Inspector General of Police which were issued without approval of the Provincial Government. The instructions as well as departmental practice are illegal and violative of the directions or instructions on departmental practice conflicting with the parent statute or rule cannot remain operative and must be ignored even though they have been followed long, have been found to be convenient and have worked fairly in practice. No one is obliged to obey such directions/instructions/departmental practice. The role of the directions/instructions is to supplement, never to contradict or conflict with rules. A direction/instruction cannot abridge, or run counter to, statutory provisions. If there is any conflict between the rules and the directions/instructions/ departmental practice, the rules prevails. Instruction or departmental practice cannot amend or supersede the rules."

Therefore, in view of above the official respondents shall make appointments in future against 6.50% quota through Public Service Commission. The instant observation will, however, not affect appointments which have already been made on the basis of Government notification dated 15.01.2011.

15. The crux of above discussion is that writ petition No.1426/2011 is accepted

ATTESTED

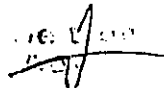
79

and official respondents Nos.3 to 5 are directed to place the case of petitioner Ansar Ali before the appropriate selection authority for consideration to be promoted against the post of Naib Tehsildar B-14 within two months from the receipt of the instant order. However, writ petition No.690/2012 is baseless, hence, the same is dismissed. An attested copy of the instant judgment shall be transmitted to Senior Member Board of Revenue and Commissioners of Divisions for compliance. The costs shall follow the eventuality.



SA/61/HC(AJ&K)

ATTESTED

to the effect


2018 P L C (C.S.) 657

[Supreme Court of Pakistan]

Present: Mian Saqib Nisar, C.J., Sardar Tariq Masood and Faisal Arab, JJ

MUHAMMAD RAFIULLAH and others

Versus

ZARAI TARAQIATI BANK LIMITED (ZTBL) through President, Islamabad and another

Civil Petitions Nos. 3078 to 3130, 3163 to 3180, 3184 to 3203, 3244 to 3258, 3263, 3285 and 3286 of 2016 and Civil Misc. Applications Nos. 6624 to 6626 of 2016 and 5569 of 2017, decided on 22nd November, 2017.

(Against the judgment dated 29.06.2016 of the Islamabad High Court, Islamabad, passed in I.C.As. Nos. 29, 30, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 170 of 2014, 994, 998 of 2013 and 181 of 2018)

(a) Civil service---

---Terms and conditions of service, alteration in--- Terms and conditions of service could not be unilaterally altered by the employer to the disadvantage of the employees.

(b) Civil service---

---Service benefits---Where an employee voluntarily accepted and received benefits under some arrangement with the employer out of his own free will then he could not turn around and seek benefits that were ordinarily applicable to other employees.


Zarai Taraqati Bank Limited v. Said Rehman and others 2013 SCMR 642 ref.

(c) Agricultural Development Bank Employees Pension and Gratuity Regulations, 1981---

---Preamble---Zarai Taraqati Bank Limited (Staff Regulations), 2005, Preamble---Constitution of Pakistan, Art. 25---Plea of discrimination---Reasonable classification between two sets of employees---Employees of Agricultural Development Bank of Pakistan received their pensionary benefits computed on basis of pension factor of 2.33%---Before Agricultural Development Bank of Pakistan was converted into Zarai Taraqati Bank Limited, the bank issued a circular which reduced the pension factor to 1.15%---Said circular was applicable to those employees who opted for the Golden Handshake Scheme or were covered under the Zarai Taraqati Bank Limited (Staff Regulations), 2005 ("first set of employees")---Employees of the Bank, who had neither opted under the Golden Handshake Scheme nor under Zarai Taraqati Bank Limited (Staff Regulations), 2005 ("second set of employees"), upon their retirement were also given pensionary benefits on the basis of the revised pension factor of 1.15%, however on the orders of the High Court their pension factor was restored to 2.33%---First set of employees contended that their pension factor should also be restored to 2.33% as their terms and conditions of service could not be changed by the Bank unilaterally, and that they were being discriminated against in reference to the second set of employees; held, that the first set of employees received all benefits including pensionary benefits as provided in the scheme under which they exercised their option---Said employees on account of their own voluntary act considered the most beneficial option, which disentitled them from claiming pensionary benefits under Agricultural Development Bank Employees Pension and Gratuity Regulations, 1981---Said employees could be categorized distinctly from the second set of employees who had not opted either under the Golden Handshake Scheme of 2002 or under Zarai Taraqati Bank Limited (Staff Regulations), 2005---Plea of discrimination was, therefore, not available to the first set of employees being of distinct class---Petition for leave to appeal was dismissed accordingly.

National Bank of Pakistan v. Nasim Arif Abbasi 2011 SCMR 446 and State Bank of Pakistan v. Imtiaz Ali Khan 2012 SCMR 280 ref.

ATTESTED



25-Jul-23, 11:03 AM

Abdur Rehman Khan, Advocate Supreme Court for Petitioners (in C.Ps. Nos. 3078, 3079, 3083, 3085 to 3091, 3093 and 3123 to 3130 of 2016).

Muhammad Ikram Chaudhry, Senior Advocate Supreme Court for Petitioners (in C.Ps. Nos. 3094 to 3121 of 2016).

Abdul Rahim Bhatti, Advocate Supreme Court for Petitioners (in C.Ps. Nos. 3092, 3080 to 3082, 3084, 3122, 3163 to 3180, 3184 to 3190 of 2016).

Muhammad Shoaib Shaheen, Advocate Supreme Court for Petitioners (in C.Ps. Nos. 3191 to 3203, 3244 to 3258, 3263, 3285 and 3286 of 2016).

Muhammad Ikram Chaudhry, Senior Advocate Supreme Court for Applicants (in C.M.As. Nos. 6624 to 6626 of 2016).

Ch. Imtiaz Ahmed, Advocate Supreme Court for Applicants (in C.M.A. No. 5569 of 2017).

Muhammad Shoaib Shaheen, Advocate Supreme Court for Respondents (in C.Ps. Nos. 3078 to 3130, 3163 to 3180, 3184 to 3190 of 2016).

Date of hearing: 22nd November, 2017.

JUDGMENT

FAISAL ARAB, J.—In the year 2002, the Government of Pakistan decided to reorganize Agricultural Development Bank of Pakistan, a state run enterprise and convert it into a public limited company. The first step that was taken by the respondent bank towards its reorganization was the revision of pay scales of all its employees. This was done under Circular Nos. PD/33/2001 and PD/34/2001 dated 05.12.2001 whereby new pay scales were introduced increasing the salaries of the bank employees substantially. While revising the pay scales, it was made clear that the pension and retirement benefits shall be decided after actual study. The next step that was to be taken was revising the pensionary and retirement benefits. A decision in this regard was taken by the Board of Directors, which is reflected in Circular No. PD/26/2002 dated 10.08.2002. The pension that was earlier being calculated on the basis of the factor of 2.33% payable in terms of the Agricultural Development Bank Employees Pension and Gratuity Regulations, 1981, after revision of the pay scales was brought down to factor of 1.15%. This decision of the Board was duly circulated.

2. After revising the pay scales and pensionary benefits as stated above, the next step towards reorganization was launching of the voluntary Golden Handshake Scheme on 19.08.2002 for all its regular employees offering pension, gratuity, compensation, leave encashment, general provident fund, benevolent fund, medical facilities and other benefits in terms thereof. As regards the pensionary benefits, which are the subject matter of the controversy in these proceedings, it was made clear in the Scheme that the same shall be calculated on the basis of the Circular No. PD/26/2002 dated 10.08.2002 which provided calculation on the basis of the revised pension factor of 1.15%. Being well aware that the new pension factor stated in the scheme would be on the basis of pension factor 1.15%, many employees opted for the Golden Handshake and left their jobs. Subsequently, on 04.10.2002, the President of Pakistan Promulgated Agricultural Development Bank of Pakistan (Re-organization and Conversion) Ordinance, 2002 whereby the Agricultural Development Bank of Pakistan was converted into a public limited company and was named as Zarai Taraqiati Bank Limited and duly registered under the Companies Ordinance, 1984. Then in 2005 another set of employees, who voluntarily left their jobs after availing benefits under Zarai Taraqiati Bank Limited (Staff Regulations) 2005, their pensionary benefits too were computed on the basis of pension factor of 1.15%.

3. The employees of the respondent bank, who had neither opted under the Golden Handshake Scheme of 2002 nor under Zarai Taraqiati Bank Limited (Staff Regulations), 2005, upon their retirement were also given pensionary benefits under the Circular No. PD/26/2002 dated 10.08.2002 i.e. on the basis of the revised pension factor of 1.15%. They protested by taking the stand that their terms and conditions cannot be revised unilaterally to their disadvantage and claimed pension to be computed on the basis of pension factor of 2.33% payable under the Agricultural Development Bank Employees Pension and Gratuity Regulations, 1981 which

82



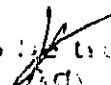
were applicable when they joined service. Upon such challenge, the two sets of employees who had earlier opted severance of their employment under the Golden Handshake Scheme of 2002 as well as under Zarai Taraqati Bank Limited (Staff Regulations) 2005 also joined in to seek the same relief. When denied, they challenged the same in constitutional jurisdiction before the Islamabad High Court taking the plea that the reduction of pension factor from 2.33% to 1.15% amounts to adversely affecting their terms and conditions of service and hence be declared without lawful authority and of no legal effect. The learned Single Judge allowed the writ petitions vide judgment dated 16.05.2013 granting relief to all employees including those who opted under Golden Handshake Scheme of 2002 and Zarai Taraqati Bank Limited (Staff Regulations), 2005. Being aggrieved by such decision, the respondent bank filed Intra Court Appeals before the Division Bench of the Islamabad High Court, which were allowed to the extent that except for those employees who opted under any of the two schemes stated above the rest were held to be entitled for computing their pension on the basis of factor 2.33%. It was held as follows:-

15. We, therefore, hold that the employees who had accepted the terms and conditions of Voluntary Golden Handshake Scheme offered vide Circular dated 19.8.2002 and had accepted the payments are not entitled to claim the benefits under the Regulations of 1981. To their extent the terms and conditions stipulated in Circular dated 19.8.2002 and in the other related documents have attained finality and thus have become past and closed transactions. As far as the employees who had voluntarily accepted the option given for adopting the Regulations of 2005 are concerned they are also at par with those who had accepted the terms and conditions and had availed the benefits under the Voluntary Golden Handshake Scheme. The option having been exercised voluntarily and out of free will has a contractual status and, therefore, is not covered under section 6 of the Ordinance of 2002 or section 13 of the Act of 1974. However, whether or not an employee had accepted the offer made by the appellant Bank vide Circular dated 30.12.2005 to adopt the Regulations of 2005 voluntarily and out of free will or it was a fait accompli raises disputed questions of fact which could not have been decided in exercise of powers vested in this Court under Article 199 of the Constitution. Nevertheless it shall be open for the respondents or other employees to approach the competent authority of the appellant Bank if it is their case that they had not adopted the Regulations of 2005 voluntarily or that it was a fait accompli. The competent authority in each case shall afford an opportunity of hearing and thereafter pass a speaking order. In case of voluntary acceptance and adoption of the Regulations of 2005 the employee shall not be entitled to claim any benefit under the Regulations of 1981.

4. As in the Intra Court Appeals, relief was not granted to those retired employees who neither opted under the Golden Handshake Scheme of 2002 nor under Zarai Taraqati Bank Limited (Staff Regulations), 2005, they preferred these petitions seeking leave to appeal.

5. Learned counsel for the petitioners contended that in terms of proviso to section 39(2) of the Agricultural Development Bank Ordinance, 1961, no regulation relating to matters stated in clauses 'e' and 'f' shall take effect until it has been approved by the Federal Government. He stated that as the Voluntary Golden

ATTESTED

to  true copy

83



Handshake Scheme does not have the backing of Federal Government's approval, it is not enforceable in law. He next contended that while the relief of pensionary benefit in terms of pension factor 2.33% has been granted to other employees of the respondent Bank in the impugned judgment, denial of such relief to the present petitioners is discriminatory and their pensionary benefits also ought to have been calculated on the basis of factor of 2.33% instead of 1.15%. Learned counsel for the respondents, on the other hand, has defended the impugned judgment.

6. It is a well settled principle of law that the terms and conditions of service cannot be unilaterally altered by the employer to the disadvantage of the employees. Such protection is also recognized under section 6 of the Agricultural Development Bank of Pakistan (Reorganization and Conversion) Ordinance, 2002 and section 13 of the Banks (Nationalization) Act of 1974. However, where an employee voluntarily accepts and receives benefits under some arrangement with the employer out of his own free will then he cannot turn around and seek benefits that were ordinarily applicable to other employees. This principle has been recognized by this Court in the case of Zarai Taraqiati Bank Limited v. Said Rehman and others (2013 SCMR 642). In paragraph 14 it was held as follows:-

14. Notwithstanding the legal status of the impugned Circular we concluded that the employees who were protected under section 6 of the Ordinance of 2002 i.e. who were in service prior to conversion of the appellant Bank into an incorporated company and thus were governed under the Regulations of 1981 would not be affected in any manner whatsoever nor the Circular dated 10.8.2002 shall have any relevance to their extent. However, the case of the employees who had voluntarily and out of free will accepted and adopted the Regulations of 2005 or the offer of Golden Handshake Scheme vide Circular dated 19.8.2002 and pursuant thereto had accepted and received the benefits and payments thereunder are not entitled to claim protection either under section 6 of the Ordinance of 2002 nor under section 13 of the Act of 1974. Both the said statutory provisions are a clog or restraint on the employer not to alter or change the terms and conditions to the disadvantage of an employee. The protection under section 6 of the Ordinance of 2002 or section 13 of the Act of 1974 by no stretch of imagination can be extended to such employees who consciously, out of their free will and voluntarily accept or adopt altered or changed terms and conditions of service. If this was not the case then a person tendering his resignation out of free will could also turn around later and seek protection under section 6 of the Ordinance of 2002. When an employee accepts an offer voluntarily and the same is acted upon then he or she is estopped from resiling from the commitment later. The legislative intent behind section 6 of the Ordinance of 2002 or section 13 of the Act of 1974 is to ensure that the terms and conditions of the transferred employees remain protected and they are not alleged or varied to their disadvantage unilaterally and without their consent. Consent, conscious decision or acting out of free will would obviously not attract the protection contemplated under section 6 of the Ordinance of 2002 or section 13 of the Act of 1974.

(Underlined to lay emphasis).

7. In the present case the petitioners in all the connected petitions belong to such categories of ex-employees of respondent No.1 who left their jobs long ago after

ATTESTED

[Signature]
to be true
Advocate

25-Jul-23, 11:03 AM

84



opting either under the Golden Handshake Scheme of 2002 or under Zarai Taraqati Bank Limited (Staff Regulations), 2005 and received all benefits including pensionary benefits as provided in the scheme under which they exercised their option. The petitioners on account of their own voluntary act considered the most beneficial option, which disentitled themselves from claiming pensionary benefits under Agricultural Development Bank Employees Pension and Gratuity Regulations, 1981. They can be categorized distinctly from the employees who had not opted either under the Golden Handshake Scheme of 2002 or under Zarai Taraqati Bank Limited (Staff Regulations), 2005. The plea of discrimination was, therefore, not available to the petitioners being of distinct class, the Division Bench of the High Court rightly declined them the relief. Judgments of this Court rendered in the cases of National Bank of Pakistan v. Nasim Arif Abbasi (2011 SCMR 446) and State Bank of Pakistan v. Imtaiz Ali Khan (2012 SCMR 280), which have upheld similar kind of classification can be referred with considerable advantage. In paragraph 13 of the National Bank of Pakistan supra case, it is held that "a reasonable classification in terms of the law laid down by this Court in I. A. Sharwani v. Government of Pakistan (1991 SCMR 1041) did exist between the two categories of employees, i.e. those who had exercised the option and those who had not exercised the option. As such, the learned counsel for the respondents failed to point out discrimination prohibited under Article 25 of the Constitution." Hence, the question of discrimination does not arise.

8. Insofar as the restriction that no regulation relating to matters stated in clauses 'e' and 'f' shall take effect until it has been approved by the Federal Government contained in proviso to section 39(2) of the Agricultural Development Bank Ordinance, 1961 is concerned, it suffices to say that the Voluntary Golden Handshake Scheme has been recognized in various judicial pronouncements and the same was not challenged by any of the petitioners at the time of opting benefit thereunder. Hence, the same cannot be gone into at this stage of the proceedings.

9. The above are the detailed reasons of our short order dated 22.11.2017 whereby we dismissed all these connected petitions.

C.M.As. NOS. 6624 TO 6626 OF 2016 AND 5569 OF 2017

10. As we have dismissed the main petitions, these C.M.As. for impleadment as party have become infructuous and are accordingly dismissed.

MWA/M-4/SC
dismissed.

Petitions

ATTESTED

10
C.A.

85

VAKALATNAMA
BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL,
PESHAWAR.

Appeal No /2024

S.M Asaad Halimi

(APPELLANT)
(PLAINTIFF)
(PETITIONER)

VERSUS

Health Deptt

(RESPONDENT)
(DEFENDANT)

I/we S.M. Asaad Halimi

Do hereby appoint and constitute **Noor Mohammad Khattak Advocate Supreme Court** to appear, plead, act, compromise, withdraw or refer to arbitration for me/us as my/our Counsel/Advocate in the above noted matter, without any liability for his default and with the authority to engage/appoint any other Advocate Counsel on my/our cost. I/we authorize the said Advocate to deposit, withdraw and receive on my/our behalf all sums and amounts payable or deposited on my/our account in the above noted matter.

Dated. / /202


CLIENT

ACCEPTED

**NOOR MOHAMMAD KHATTAK
ADVOCATE SUPREME COURT**


WALEED ADNAN


UMAR FAROOQ MOHMAND

&


**MAHMOOD JAN
ADVOCATES**

OFFICE:

Flat No. (TF) 291-292 3rd Floor,
Deans Trade Centre, Peshawar Cantt.
(0311-9314232)