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BEFORE THE HONOURABLE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL PESHAWAR

Service Appeal No. 905/2023

Qari Umar Nabi S/O Muhammad Zaman R/O Village Kund Khwar Tehsil Takht Bhai District Mardan ..... Appellant

VERSUS

Government of Khyber Pakhtunkhwa through Secretary Education and others ..... Respondents

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Dated. 03/05/2024

Appellant

Through

Amjad Ali (Mardan)
Advocate
Supreme Court of Pakistan

03-05-2024

one copy handed over to AG staff.

BEFORE THE HONOURABLE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL PESHAWAR

(1)

Service Appeal No. 905/2023

Qari Umar Nabi S/O Muhammad Zaman R/O Village Kund Khwar Tehsil Takht Bhai District Mardan ..... Appellant

VERSUS

Government of Khyber Pakhtunkhwa through Secretary Education and others ..... Respondents

REPLICATION ON BEHALF OF APPELLANT

Respectfully Sheweth:-

PRELIMINARY OBJECTIONS:

1-7. That Paras No 1 to 7 of the preliminary objections of reply/comments are incorrect, misconceived. Denied. Appellant has been condemned unheard and no regular inquiry has been conducted.

8-12. That Paras No 8 to 12 of the preliminary objections of the reply/comments are incorrect, misconceived. Denied. The respondents are not considering the acquittal order dated 24.06.2013 passed by the Honorable Peshawar High Court Peshawar wherein appellant has been acquitted from the allegation of fake documents and the August Peshawar High Court further held that they waived off the back benefits till the judgment of the Peshawar High Court dated 24.06.2013, so they will not be entitled for back benefits, meaning thereby they shall be reinstated. The Department is further directed that they shall not pay any such benefit. The Honorable High Court further held that their job for 14 months was quite satisfactory and there was no complaint from the students and they performed their duties like well versed teachers. The copy of the judgment of the Honorable High Court was sent to the appointing/competent authority of the appellant which was not appealed against in the apex court and thus became final and past and closed transaction and thereafter the Departmental and Service Tribunal proceedings are totally incorrect and misconceived as the judgment of the Honorable High Court is binding upon all the Departments including the Service Tribunal as per Article 201 of the Constitution of Pakistan 1973 which principle is held in judgment reported in 1999 SCMR 988 **(Copy of the judgment reported in 1999 SCMR 988 is attached as Annexure R-1)**. So all the subsequent proceedings after the final judgment of the Honorable Peshawar High Court Peshawar on the issue of fake documents, merit list, competency of the teacher has been opined and determined by the Honorable Peshawar High Court Peshawar, so the entire proceedings after judgment dated 24.06.2013 of the Honorable Peshawar High Court Peshawar are incorrect, misconceived and appellant is deemed to be in service w.e.f 1st appointment order dated 29.09.2007, however, as the appellant himself waived off his back benefits from 31.12.2008 till judgment of the Honorable Peshawar High Court dated 24.06.2013 which can

be treated as leave of the kind due for the purpose of regularity of service as the break can't be attributed to the appellant. It is a very sorry state of inquiry that the inquiry in question is the 3rd inquiry but again in haphazard manner, without even reading the relevant law which was applicable to the issue in hand which has arisen in 2007 was the NWFP Removal from Service Ordinance 2000 and the instant de-novo inquiry report under the KP E&D Rules 2011 is totally misconceived, incorrect, void ab initio and has to scrumble to the ground being in gross violation of the RSO 2000.

Besides, the members of the Inquiry Committee for the 3rd time has merely on the basis of surmises and conjectures and making pick and choose from the earlier inquiry reports which were specifically set aside by the Tribunal as well as disbelieved by the Honorable Peshawar High Court Peshawar and even the superstructure in the shape of dismissal of the appellant was set aside and the finding of the Honorable Peshawar High Court Peshawar, including the provision of NWFP RSO 2000 and KP E&D Rules 2011with respect to association of the appellant with the inquiry proceedings, recording of statements of witnesses in front of the appellant and the opportunity of cross examination were malafidely ignored, in order to reach to their finding against the aforementioned Courts as well as the relevant rules on the subject, thus both the members of the Inquiry Committee were highly biased and a biased person can't become an inquiry officer or judge as the same is in gross violation of the third maxim of natural justice i.e Nemo Debit Esse Judex Impropria Causa (No man can be a judge in his own cause) and the 1st element in this maxim is the material bias, so the members of the inquiry committee doesn't hold the test of the aforementioned maxim of natural justice which is deemed to be enshrined in every statute whether specifically provided or not as per PLD 1964 SC.

The Inquiry Committee failed to verify even the documents from the concerned quarter and relied upon the earlier inquiry reports whereas neither appellant is confronted with the academic record nor any fresh verification was sought from the concerned Universities nor the detailed statement of the appellant was considered and that statement was totally brushed aside without giving any plausible reasoning or explanation for the same and proceeded in a capricious and arbitrary manner.

The bias of the inquiry officer is visible from day one as he writes in his report that he approached the DEO to reinstate the appellant only for the purpose of inquiry which speaks of his biased mind from very inception of the inquiry.

The appellant has been made a scapegoat as none of the dealing hands and officers responsible for the same has been proceeded against and appellant has been singled out which is clear discrimination falling under Article 25 and 27 of the Constitution of Pakistan 1973. The Departmental Selection Committee as well as the Scrutiny Committee as well as the appellate committee members as well as the concerned Assistant District Education Officers & District Education Officer Mardan were neither made an accused in the case nor witnesses nor accused in the Anti Corruption case and as per 1996 SCMR 413, 2009 SCMR 663, 2014 PLC (C.S) 1007. In such type of cases the employee cannot be dismissed when action is not taken against the dealing hands. **(Copies of the judgments reported in 1996 SCMR 413, 2009**

SCMR 663, 2014 PLC (C.S) 1007 are attached as Annexure R-2, R-3 and R-4 respectively)

The competent authority was required under rule 10 of the KP E&D Rules 2011 as well as the RSO 2000 to issue a charge sheet and statement of allegation specifically describing the charges under hi seal and signature which is a glaring illegality and can't be cured again and again. No show cause notice has been issued to the appellant so as the competent authority could show the appellant that what are the findings of the inquiry officer/committee on guilt of the accused, so that he should make a justifiable reply to the same. The order passed by the appellate authority dated 09.05.2023 (available on page 66 of the reply) is during the pendency of the instant service appeal and is hit by doctrine of lis pendens as well as against rule 19(2) of the KP E&D Rules 2011 wherein appellate authority became functous officio as it failed to decided the departmental appeal within 60 days as per rule 17 of the KP E&D Rules 2011. Rule 19(2) is reproduced as under:

> **"(2) If a decision on a departmental appeal or review petition, as the case may be, filed under rule 17 is not communicated within period of sixty days of filing thereof, the affected Government servant may file an appeal in the Khyber Pakhtunkhwa Province Service Tribunal within a period of 4 [ninety] days of the expiry of the aforesaid period, whereafter, the authority with whom the departmental appeal or review petition is pending, shall not take any further action."**

The inquiry Committee failed to scrutinize the merit list available on page 64 of the reply as the recruitment policy framed by the Provincial Government under the enabling provisions of KP (Appointment, Promotion and Transfer) Rules 1989 duly available in the Esta Code **(Copy of the recruitment policy is attached as Annexure R-5)** wherein there are 08 marks for interview which has not been given to the appellant, 10 marks for experience has not been given to the appellant, the basic eligibility qualification for Qari Teacher was Matric along with certificate with Qirat Sanad and the two step higher qualification carries 08 marks which is admitted by the inquiry Committee as holds the qualification of FA and BA (two stages higher). In the presence of the uniform policy for recruitment framed by the Provincial Government under the aforementioned rules of KP Government, resort to any other criteria is wholly illegal, void, arbitrary and of no legal effect, so the merit list based on the percentage of marks for SSC, F.A, B.A and M.A is totally incorrect. As per the recruitment policy mentioned above, when the eligibility criteria is SSC (Matric), 70 marks are to be allocated for 1st Division in Matric and appellant is entitled for 70 marks as he has admittedly obtained 544 out of 850 marks which is 1st Division and placed in Grade B as its percentage comes to 64% which is more than 60%., so the score of the appellant has been wrongly calculated and the marks/percentage given to the candidate for professional qualification i.e Qirat Sanad is not provided in the recruitment policy as the same is merely criteria for eligibility. The correct calculation is as under as per the Provincial Uniform recruitment policy: **(Copy of the experience certificate is attached as Annexure R-6)**

S.No	Qualification of appellant	Marks as per Provincial recruitment policy

(4)

1	Minimum Qualification (Matric with 1st Division)	70
2	Three stage (F.A and B.A along with Hifz Ul Quran) higher qualification	10
3	Three years experience	10
4	Interview	8
Total		**98**

Whereas the Department in Para 12 of their comments/reply affirms on counter affidavit that the 15th candidate who was the last one has scored 59.89 marks, therefore score of the appellant being 96 is on much higher merit than the selected/appointed candidates.

This Honorable Tribunal vide judgment dated 04.10.2022 directed the Department to conclude the inquiry within sixty days from the date of order dated 04.10.2022 which is announced at open Court in Peshawar, however, the inquiry committee as well as the Department blatantly disregarded the said direction and the inquiry committee has given its report much beyond the stated sixty days i.e on 10.12.2022 and removal on 16.12.2022 which too is beyond the target and is nullity in the eye of law as per reported precedents/judgments of the Honorable Supreme Court reported in 2009 SCMR 129, 2010 PLC (C.S) 608, 2007 PLC (C.S) 959 **(Copies of the judgments reported in 2009 SCMR 129, 2010 PLC (C.S) 608, 2007 PLC (C.S) 959 is attached as Annexure R-7, R-8, R-9 respectively)**

ON FACTS:

Para 1-18 That Paras No.1 to 18 of the service appeal are correct and that of comments/reply are incorrect, misconceived and denied specifically. Moreover, explained in detail above.

ON GROUNDS:

A-W That all the grounds from A to W of the service appeal are correct and that of the comments are incorrect. Denied specifically. Appellant is jobless and entitled to back benefits.

It is therefore humbly prayed that on acceptance of this service appeal, appellate order dated 09.05.2023 passed by Assistant Director (Estab-1) and office order dated 16.12.2022 passed by respondent no 4 (District Education Officer (Male) Mardan) may please be set aside and appellant may please be reinstated in service with all back benefits.

Dated. 03/07/2024

Appellant

Through

Amjad Ali (Mardan)
Advocate
Supreme Court of Pakistan

BEFORE THE HONOURABLE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL PESHAWAR

(5)

Service Appeal No. 905/2023

Qari Umar Nabi S/O Muhammad Zaman R/O Village Kund Khwar Tehsil Takht Bhai District Mardan ..... Appellant

VERSUS

Government of Khyber Pakhtunkhwa through Secretary Education and others ..... Respondents

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AFFIDAVIT

I, **Qari Umar Nabi S/O Muhammad Zaman R/O Village Kund Khwar Tehsil Takht Bhai District Mardan (appellant)** do hereby solemnly affirm and declare that the contents of the **accompanying rejoinder** are true and correct to the best of my knowledge and belief and nothing has been concealed from this Honorable Court.

Deponent

Aqeel Ahmad Advocate Oath Commissioner No. 1511 Date 21/5/24 District Courts Mardan

Jma R-1

(6)

1999SCMR988

[Supreme Court of Pakistan]

Present: Nasir Aslam Zahid, Mamoon Kazi and Wajihuddin Ahmed, JJ

Syed ALI, GUL SHAH---Appellant

versus

GOVERNMENT OF SINDH through Chief Secretary, Karachi and 2 others---Respondents

Attested
Amjad Ali Advocate
Supreme Court

Civil Appeal No.823 of 1994, decided on 20th November, 1998. .

(On appeal from the judgment of Sindh Service Tribunal at Karachi, dated 28-2-1994 passed in Appeal No.31 of 1993).

(a) Sindh Civil Servants Act (XIV of 1973)---

----S.' 2(1)(b)---Sindh Service Tribunals Act (XV of 1973), Ss. 2(aa) & 3-E---Constitution of Pakistan (1973), Art.212(3)---"Civil servant "---Leave to appeal was granted by Supreme Court to examine as to whether or not, petitioner was a civil servant and the Service Tribunal could grant him the relief prayed for.

(b) Constitution of Pakistan (1973)---

----Arts. 189 & 20.1---Service Tribunals Act (LXX of 1973), S. 3---Binding effect of decisions of Supreme Court and the High Courts, respectively---Nature and extent---Service Tribunal dissenting from the High Court's opinion which had attained finality---Supreme Court disapproved such cause. for, Service, Tribunal though not a Court subordinate to the High Court yet same was a judicial forum directly impacted by the High Court's determination and was bound by the opinion of High Court.

Articles 189 and 201 of the Constitution, 1973 confer binding effect on decisions of the Supreme Court and the High Courts, respectively, to the extent any such Court decides a question of law or its decision is- based upon of enunciates a principle of law. Relevant to the decision of the Supreme Court the binding effect extends to "all other Courts in Pakistan", whereas relative to a High Court the same effect is achieved as regards "all Courts subordinate" to the High Court concerned.

In so far as the Supreme Court is concerned, an added effect is provided to its pronouncements by Article 190 of the Constitution.

The binding nature of the pronouncements of the superior Courts is Constitutionally limited to the Courts functioning in Pakistan and to the extent visualized by Articles 189 and 201 respectively. The reason is not far to seek namely, that for the concerned Courts it is impermissible to travel beyond or cut across the enunciations of law recorded by the relevant High Court or, where applicable, Supreme Court. This, however, does not imply that the pronouncements of the superior Courts are not entitled to the highest respect if and when such are referred to or relied upon by authorities, whether executive, quasi-judicial or judicial, though not covered by the Constitutional provisions above-referred. It has, therefore, evolved that when a precedent of one High Court is cited even before another High Court, the same has considerable pursuasive force. There is yet another aspect too, which is of still greater significance Such arises in cases where the decision of a superior Court is directly addressed to or has a bearing upon the proceedings before another forum Within these connotations fell the judgment of the High Court. in relation to the Service Tribunal. Even if the Service Tribunal had reservations about the binding nature of the High

Court order, as a result whereof the appellant had approached the Tribunal, it should have been only too proper for the Tribunal to have accepted the conclusion of the High Court and proceeded to decide the matter accordingly, the error in the High Court decision, if any, coming to be rectified in Supreme Court if and when the matter was brought there. Supreme Court, therefore, disapproved the Service Tribunal having in effect dissented from the High Court opinion, which having attained finality bound the Tribunal not because it was a "Court" subordinate to the High Court but because it was a judicial forum directly impacted by the High Court determination.

(c) Sindh Civil Servants Act (XIV of 1973)--

----S. 2(1)(b)-,-Sindh Service Tribunals Act (XV of 1973), Ss. 2(aa) & 3-E--"Civil servant"---Definition---Employee of a corporation---Person having joined the Local Council's Service not in the ordinary course but as a civil servant, was a civil servant.

Muhammad Ali Hakro v. Government of Sindh C.P,L.A. No. 154-K of 1998 ref.

Fazl-e-Ghani Khan, Advocatpreme Court for Appellant.
M. Saleem, Additional Advocate-General for Respondents .

Date of hearing: 20th November, 1998.

JUDGMENT

WAJIHUDDIN AHMED, J.---The facts of the case, as recorded by the Sindh Service Tribunal, are as tinder:--

The case of the appellant, Mr. Ali Gul Shah, which is undoubtedly a case of great hardship, has been described in the memo. of appeal as follows. The appellant joined Government service in 1971 as Sub-Engineer in the Irrigation and Power Department. Three years later in July, 1974, he was appointed as Assistant Engineer (BPS-16) in the Peoples Works Programme. Then came the Martial Law which replaced the Democratic Regime. Following the promulgation of M.L.O.-55 like many other cases, the appellant's appointment was also referred for scrutiny by the relevant Select Committee. After his clearance by the said Committee, his appointment stood regularised vide the Minutes of the Committee's meeting held on 11-7-1978. The appellant continued to work in the capacity of Assistant Engineer (BPS-17) until he was found surplus and on 17th January, 1979, he was referred to the Administrator, Hyderabad Municipal Corporation for absorption in Local Council Service (Engineering Branch). In his letter, dated 28th May, 1979, addressed to the Administrator, Hyderabad Municipal Corporation, the Secretary, Local Government Department listed the conditions on which some surplus Engineers of P.W.P. were to be absorbed in the Local Council Service. The Administrator was further required by the letter to obtain the appellant's consent for the said conditions so that the case of his appointment in the Local Council Service was finalized. Although the appellant vehemently protested against the arbitrary decision with regard to his absorption in the Local Councils Service, yet left with no option he reluctantly accepted the terms and conditions for his appointment in the said service, and consequently he was absorbed in the said service. However, he kept on making representations to various authorities until he was intimated by the letter, dated 19th February, 1992 of the Secretary, Local Government Department that his request for the benefit of the past pay drawn by him in the defunct Rural Development Programme Department was considered and rejected. Dissatisfied with the said order, he filed Constitution Petition No.D-269 of 1992 in High Court but the same was dismissed in limine vide the judgment of High Court, dated 28-11-1992. Since the appellant was declared as Civil Servant by the said judgment he preferred departmental appeal on 9-1-1993 to the Chief Secretary, from the order, dated 19th February, 1992 hereinabove. As the said appeal remained un-decided for the statutory period of 90 days he approached this Tribunal in the present appeal filed on 12-4-1993.

The Tribunal, which the appellant approached in the circumstances detailed above, recorded the undernoted observations:--

"After careful perusal of the above documentary proof, no doubt was left in our minds that the appellant who started his service career with Government service, was forced by circumstances to reluctantly accept the appointment of Assistant Engineer in Local Councils service, after he was rendered surplus in the Government Department. Of course the poor man had no choice in the matter. We have all the sympathy with the appellant because we are appalled at his helplessness which in our opinion has been unduly exploited. From the terms and conditions offered to him for his new appointment the condition at Serial No. 1 was so oppressive that it robbed him of not only past service of nearly eight years but also of the salary and other emoluments he had earned during the said period of his service. This was obviously done contrary to basic principles and the longstanding practice in vogue. In such cases of the change in service, at least the last emoluments of the persons involved in the change of service are invariably protected. If any precedent is needed in support of this view, we would like to refer to the revolutionary change reflected by the nationalization of private schools and colleges. In that case the last emoluments of the teachers coming from private schools and colleges were given due protection. To alleviate the sufferings of the appellant and save him from further litigation, authorities concerned would be well-advised to show their good will even at this belated stage and redress his grievance at least with regard to his pay, even though the appellant may not, be in a position to bring legal pressure on them particularly when he had himself accepted all the conditions of service including the oppressive one referred to above.

Following the appellant's absorption in Local Council (now known as Sindh Councils Unified Grades Service), as discussed above, his is connection with Government service stood completely severed. His own admission in last line of para. 4 of the memo of appeal is that the date of his absorption in Local Council Service was 23rd January, 1979. From that date onward he has obviously been performing his function, and doing his duties in connection with the Local Council concerned. In return he has been drawing his pay etc. from the said council's funds. As such he has ceased to be a civil servant from the said date. As for his appointment, reference may be made to Sindh Councils Unified Grades Service Rules, 1982 (hereinafter referred as the said Rules). As provided in clause (c) of sub-rule (1) of rule 4 of the said rules the Minister in charge is the appointing authority for posts in BPS-17 Thus, the Government functionary continues to be appointing authority of the appellant who is admittedly working as Assistant Engineer (BPS-17). Moreover, from the above date of the appellant's absorption in Local Councils Service he was governed by the Sindh Local Government Ordinance 1979, and the rules framed thereunder. But as provided in section 3 of the Sindh Civil Servants Act, 1973, the terms and conditions of service of a civil servant-shall be as contained in the said Act and the rules framed thereunder. Had the appellant continued to be in service of Government after his absorption in Local Council Service, he would have been considered to be on deputation to the Local Council concerned. In that case the question of treating him as fresh entrant in service and curtailing his pay back to the minimum of the scale (BPS-17) would not have arisen at all. However, the appellant's learned counsel relied upon the judgment of High Court delivered in the Constitution Petition filed by the appellant, wherein the appellant was declared as civil servant and Service Tribunal having exclusive jurisdiction to entertain appeal with regard to the appellant's grievance. In this connection we put a question to the learned counsel if the judgment of the High Court was binding on the Service Tribunal. His reply to the above question was in the negative Since we are of the view that the appellant is not a civil servant, this Tribunal has no jurisdiction to interfere in his case. "

Premised on the foregoing observations, the Tribunal, while rejecting he plea of limitation still, found the service appeal to be non-maintainable against the Tribunal's order, thus, passed on 28-2-1994, the appellant preferred leave petition. Per leave granting order, dated 28-8-1994, leave was granted in following terms:-

Attested
Amjad Ali Advocate
Supreme Court

"The High Court of Sindh dismissed the Constitution Petition of the Petitioner for want of jurisdiction on the ground that he is a civil servant and can get the relief only from the Service Tribunal. After the dismissal of his Constitution Petition, the petitioner approached the Sindh Service Tribunal. The Sindh Service Tribunal also dismissed the appeal of the petitioner on the ground of lack of jurisdiction for the reason that he was not a civil servant.

(2) Leave to appeal is granted to examine as to whether or not the petitioner is a civil servant and the Service Tribunal could grant him the relief prayed for. "

We would now take up the order of the Sindh High Court, dated 28-11-1992, passed by a Division Bench of that Court, in Constitutional Petition No.D-267 of 1992 (Hyderabad Circuit), whereby the appellant was opined to be a civil servant and his remedy, such as that' may have been, to lie exclusively within the jurisdiction of the Sindh Service Tribunal, constituted pursuant to Article 212 of the Constitution. The Division Bench of the High Court, comprising of Mukhtar Ahmed Junejo and Nazim Hussain Siddiqui, JJ., had therein determined the legal position as follows:----------

"'Civil Servant", as per clause (b) of subsection (1) of section 2 of Sindh Civil Servants Act means a person who is member of civil service of the province or holds civil post in connection with the affairs of the province. Deputationists to the Provincial Government and employees on contract basis or on work charged basis are excluded from the definition of civil servant as also an employee paid from contingencies. In the present case, the petitioner was appointed by the Government of Sindh, was regularized by Government of Sindh and was directed to be absorbed in service against a post of Assistant Engineer. Such direction was given by the Government of Sindh in Services and General Administration Department to the Local Government Board, Government of Sindh. Although the service of the petitioner was placed at the disposal of Hyderabad Municipal Corporation, but he continued to be employee of the Government of Sindh and for this reason alone the petitioner was communicated the terms and conditions of his employment by the Secretary Local Bodies etc. Government of Sindh. At no stage of his service the petitioner was appointed by any Municipal Committee or by any Municipal Corporation because he was an employee of the Government of Sindh. In this situation the petitioner is a civil servant as defined by section 2(1)(b) of Sindh Civil Servants Act. Consequently, it is held that the petitioner could seek his remedy before Sindh Service Tribunal butt not before this Court "

Now, as seen, because it was conceded before the Tribunal, when the Tribunal was approached, that the High Court order did not bind the Tribunal, the latter proceeded to return a contrary finding. It is Articles 189 and 201 of the Constitution, which confer binding effect on decisions of the Supreme Court and the High Courts, respectively, to the extent any such Court decides a question of law or its decision is based upon or enunciates a principle of law. Relevant to the decision of the Supreme Court the binding effect extends to 'all other Courts in Pakistan', whereas relative to a High Court the same effect is achieved as regards "all Courts subordinate" to the High Court concerned. These two Articles of the Constitution run thus:--

"189. Decisions of Supreme Court binding on other Courts.---Any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other Courts in Pakistan."

"201. Decisions of Hi h Court "din on subordinate Courts. ---Subject to Article 189, any decision of a High Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all Courts subordinate to it."

Attested
Amjad Ali Advocate
Supreme Court

In so far as the Supreme Court is concerned, an added effect is provided to its pronouncements by Article 190 of the Constitution, which is reproduced below:--

"190. Action to aid of Supreme Court.---All executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court, "

It will at once be seen that the binding nature of the pronouncements of the superior Courts is constitutionally limited to the Courts functioning in Pakistan and to the extent visualized by Articles 189 and 201 respectively. The reason is not far to seek namely, that for the concerned Courts it is impermissible to travel beyond or cut across the enunciations of law recorded by the relevant High Court or, where applicable, this Court. This, however, does not imply that the pronouncements of the superior Courts are not entitled to the highest respect if and when such are referred to or relied upon by authorities, whether executive, quail judicial or judicial, though not covered by the Constitutional provisions above-referred. It has, therefore, evolved that when a precedent of one High Court is cited even before another High Court, the same -has considerable pursuasive force. There is yet another aspect too, which is of still greater significance. Such arises in cases where the decision of a superior out is directly addressed to` or has a bearing upot the proceedings before mother forum. Within these connotations fell the judgment of the High Court m elation to the Sindh Service Tribunal. It seems to us that even if the Service tribunal had reservations about the binding nature of the High Court order, as a result whereof the appellant had approached the Tribunal; it should have been my too proper for the Tribunal to have accepted the conclusion of the High Court and proceeded to decide the matter accordingly, the error in the High Court decision, if any, coming to be rectified in this Court if and when the utter was brought here. We, therefore, do not approve the Sindh Service Tribunal having, in effect, dissented from the High Court opinion, which having attained finality bound the Tribunal not because it was a "Court" subordinate to the High Court but because it was a judicial forum directly impacted by the High Court determination.

Taking up the main controversy now, there may have been some weight in the High Court observation namely, that the appellant had joined the Local Councils service not in the ordinary course but as a civil servant. He had, thus, been a civil servant. The point of time when the appellant ceased to be a civil servant, if at all, it too blurred to be identified at a particular point of time. In any case, for the purposes of this appeal, during the intervening period, an amendment has come to occupy the field and that is reflected in the Sindh Service Tribunals (Amendment) Act, XXXI of 1994. Such enactment promulgated on 16-1-1995 and made effective forthwith has resulted in the insertion of clause 2(aa) in the Sindh Service Tribunals Act, 1973, which runs thus:--

"(aa)'Corporation' means a Corporation or Institution set up or established by a Provincial enactment. "

The reproduced definition clause is followed by the insertion of section 3-E in the same Act and is to the following effect:--

"3-E. Employees of a Corporation be deemed civil servant.--Notwithstanding anything contained in any law, service of Corporation is hereby declared to be the service of the Province and every person holding a post in the Corporation, not being a persons who is on deputation to the Corporation shall, for the purposes of this Act, be deemed to be a civil servant. "

Without going into further" details, in Muhammad Ali Hakro v. Government of Sindh C.P.L.A. No.154-K of 1998, decided on 18-11-1998, a Division Bench of this Court has concluded that Sindh Councils Unified Grades Service is covered by the above insertions and persons occupying similar positions as the appellant would now be deemed to be civil servants. The insertions, being procedural, would be retrospective.

(11)

In the circumstances, and the appellant having been found to be a civil servant, this appeal is allowed and the case is remanded back to the Sindh Service Tribunal for determination on merits and according to law. Parties, however, shall bear their own costs.

M.B.A./A-149/S

Appeal allowed.

Attested
Amjad Ali Advocate
Supreme Court

"Khula` form of dissolution is invoked in cases where it is proved objectively that parties cannot reside within the limits imposed by Almighty God."

I am not sure what the learned District Judge precisely meant when he used the words `prove objectively'. It was on record that the contesting respondent was making persistent allegations that the petitioner was assaulting her. It is also not disputed that the petitioner had made a complaint to the Senior Superintendent of Police that the petitioner had beaten her and that under the orders of a Magistrate she was sent to the Darul Aman by way of protection from the petitioner. In the circumstances, when the contesting respondent stated that she had developed hatred towards the petitioner her assertion could not be rejected summarily; it may also be mentioned that the relationship between the husband and wife is of a very intimate nature. It may also be too embarrassing for either of them to disclose to the Court what has transpired between them in the privacy of their home. That being so, there can hardly be any standard for assessing the substance in the wife's assertion that she has developed hatred for her husband. Apparently, the learned District Judge was oblivious of the view taken by his own Court in a number of cases on the right of a woman to seek dissolution of marriage on the ground of Khula`. Some of these have been reported as Rashida Bibi v. Bashir Ahmad PLD 1983 Lah. 549; Ghulam Zohra v. Faiz. Rasool (NLR 1984 (Civil) Lahore 308) and Shahida Khan v. Abdul Rahim Khan PLD 1984 Lah. 365.

4. Leave is refused.

A.A./A-1358/S Leave refused.

1996 S C M R 413

Attested
Amjad Ali Advocate
Supreme Court

[Supreme Court of Pakistan]

Present: Raja Afrasiab Khan, Mukhtar Ahmad Junejo and Muhammad Bashir Khan Jehangiri, JJ

SECRETARY TO GOVERNMENT OF N.-W.F.P. ZAKAT/SOCIAL WELFARE DEPARTMENT, PESHAWAR
and another---Petitoners

versus

SADULLAH KHAN---Respondent

Civil Petition for Special Leave to Appeal No. 103-P of 1995, decided on 13th November, 1995.

(On appeal from the order of the N.-W.F.P. Service Tribunal, Peshawar dated 16-2-1995 passed in Appeal No.368 of 1994).

(13)

North-West Frontier Province Civil Servants (Appointment, Promotion and Transfer) Rules, 1975---

----R. 10 (2)---Constitution of Pakistan (1973), Art. 212(3)---Termination of services on ground that appointment of civil servant was irregular---Service Tribunal ordered reinstatement of civil servant---Validity---Department's plea was not that civil servant lacked qualifications for the post in question---Department having itself appointed civil servant on temporary basis in violation of rules could not be allowed to take benefit of its lapses in order to terminate services of civil servant merely because it had itself committed irregularity in violating procedure governing such appointment---Service Tribunal having re-instated civil servant could not be deemed to have committed any illegality or irregularity---Leave to appeal was refused in circumstances. [p. 415] A

Saifur Rehman Kiyani, A.G., N.-W.F.P. with Haji A.Q. Mazhar, Advocate-on-Record for Petitioners.

Nemo for Respondent.

Date of hearing: 13th November, 1995.

ORDER

MUHAMMAD BASHIR KHAN JEHANGIRI, J.---This Petition for Special Leave to Appeal is directed against the order dated 16-2-1995 passed by the N.-W.F.P. Service Tribunal, Peshawar.

2. Saduallah Khan, respondent, was appointed on 19-5-1994 as Saleman by petitioner No.2 in the office of the Superintendent, Institute for Blind, Swabi. He assumed the charge on 1-6-1994. His services were, however, terminated with effect from 16-8-1994 on the ground that his appointment was irregular. After rejection of the respondent's departmental appeal/representation he filed appeal before the N.-W.F.P. Service Tribunal. The gravamen of the respondent was that he was appointed by petitioner No. 2 who was competent authority; that no irregularity had been committed in his appointment, that he possessed the requisite qualification for the post; that the respondent could not be punished for any act or omission of the petitioners; that he had been condemned unheard and; that some favourites were being appointed against the post and thus the respondent was the victim of nepotism.

3. According to the stand of the petitioners, the services of the respondent were terminated on the ground that, besides being irregular, his appointment was violative of sub-rule(2) of Rule 10 of the N.-W.F.P. Civil Servants (Appointment, Promotion and Transfer) Rules, 1989 and Services and General Administration Department Circular Letter dated 11-2-1987.

4. The learned Tribunal, while conceding that the procedure laid down in rule 10(2) supra regulating the appointment of Saleman had not been adhered to,

yet the appointment of the respondent was made by the competent authority. The Tribunal further maintained that there was no dearth of the precedents of the Tribunal wherein the incumbents were not held to suffer merely due to the conscious or unconscious procedural lapses attributable to the competent authorities. The learned Tribunal then took notice of the case of Mst. Razia Sultana of Dir who was appointed as N.C.I. in BPS-8 on "irregular basis" like the respondent and her services were terminated alongwith the respondent but she was re-instated vide Zakat and Social Welfare Department Order No.SO (SW) -3/93 dated 24-8-1994 and reached the conclusion that even irregular appointments, according to the practice of the petitioners, themselves, were regularized in cases exactly similar to that of the respondent. In this context, the learned Tribunal aptly observed:--

> "If the irregular appointment of Razia Sultana could be rectified and she could be reappointed/reinstated, the learned counsel for the appellant contends that why the appellant should not be reinstated for the same reason.
>
> The appointment of the appellant is definitely temporary as given in Annexure-A on the file but the reason for termination of the services of the appellant is not that the services of the appellant were temporary but is that his appointment was irregular which the Tribunal has already held not to be the fault of the appellant but that of competent authority who appointed him in violation of the appointment rules."

In this view of the matter the learned Tribunal was persuaded to accept the appeal and to direct the reinstatement of the respondent from the date of termination of his services.

5. Mr. Saifur Rehman Kiyani, learned Advocate-General, had reiterated before us the contention that appointment of the respondent being purely temporary and having been found to be irregular could be terminated at any time and without assigning any reason by giving 15 days' notice. In this context, he invoked the provisions of rule 10(2) ibid and Circular Letter of the S&GAD dated 11-2-1987.

6. It is disturbing to note that in this case petitioner No.2 had himself been guilty of making irregular appointment on what has been described "purely temporary basis". The petitioners have now turned around and terminated his services due to irregularity and violation of rule 10(2) ibid. The premise, to say the least, is utterly untenable. The case of the petitioners was not that the respondent lacked requisite qualification. The petitioners themselves appointed him on temporary basis in violation of the rules for reasons best known to them. Now they cannot be allowed to take benefit of their lapses in order to terminate the services of the respondent merely

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because they have themselves committed irregularity in violating the procedure governing the appointment. In the peculiar circumstances of the case, the learned Tribunal is not shown to have committed any illegality or irregularity in re-instating the respondent.

7. Resultantly, this petition is dismissed and the leave is refused.

A.A./S-1019/S Petition dismissed.

1996 S C M R 416

[Supreme Court of Pakistan]

Present: Saiduzzaman Siddiqui and Fazal Ilahi Khan, JJ

HABIB-UD-DIN---Appellant

versus

Mst. HAMIDA BANO and another---Respondents

Civil Appeal No. 235 of 1994, decided on 12th December, 1995.

(On appeal from the judgment dated 16-5-1993 of the Lahore High Court, Rawalpindi Bench, Rawalpindi in Civil Revision No.9/D of 1990).

(a) Constitution of Pakistan (1973)---

----Art. 185 (3)---High Court had decided revision petition upon assumption that Trial Court's judgment was based on consent of parties and therefore, did not decide matter in controversy on merits---Leave to appeal was granted after perusal of statements of parties recorded in appeal wherefrom it transpired that plaintiff never consented to passing of decree in terms stated rather it was prayed that appeal be decided on merits. [p. 419] A

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(b) Specific Relief Act (I of 1877)---

----S. 56 (i)---Constitution of Pakistan (1973) Art. 185---Defendant digging land adjoining the wall of the house of plaintiff thereby exposing such wall to endanger lives of plaintiff's family and to cause damage to his property---Apprehension was to the effect that wall in question could collapse at any moment and cause irreparable loss---Court was thus, duty bound to have ordered remedial measures to be taken to avoid such continuous apprehension and danger within meaning of S. 56 (i), Specific Relief Act, 1877---Appellate Court and High Court acted illogically to refuse relief prayed for by plaintiff, which had been granted by Trial Court, merely on the undertaking given by defendant to wait for the day when wall in question, would collapse and actual injury was sustained, whereafter loss could be made good in suit for liquidated damages---Material on record indicated that plaintiff was successful in proving that he was entitled to relief prayed for in plaint---Judgment of High Court and Appellate

Ans-R/3 (16)

7. In the above perspective, we have examined the impugned judgment and feel that under the circumstances, the learned High Court did not commit any legal infirmity. No misreading or non-reading of the record of the case has been pointed out. We are not persuaded to upset the well reasoned judgment, which is hereby maintained.

8. In view of the above, the present petition, being devoid of any force, stands dismissed and leave to appeal is refused.

M.B.A./A-20/SC Petition dismissed.

2009 S C M R 663

[Supreme Court of Pakistan]

Present: Ijaz-ul-Hassan Khan and Muhammad Qaim Jan Khan, JJ

DISTRICT COORDINATION OFFICER, DISTRICT DIR LOWER and others---Petitioners

versus

ROZI KHAN and others---Respondents

Civil Petitions Nos.660-P, 661-P and 662-P of 2006, decided on 6th February, 2009.

(On appeal from the judgment, dated 17-6-2006 of the N.-W.F.P. Service Tribunal, Peshawar passed in Appeals Nos.490, 491 and 492 of 2005).

Constitution of Pakistan (1973)---

----Art. 212(3)---Termination/withdrawal of appointment of civil servant---Civil servants, in the present case, were qualified and their appointments were made by the competent authority after observance of due process of law---No proper inquiry, such as issuing of charge-sheet/statement of allegations, show-cause notice, had been issued to the civil servants while terminating/withdrawing their services---Judgment of the Service Tribunal was based on valid and sound reasons and was entirely in consonance with the settled law---Neither there was misreading, nor misconstruction of facts and law was found in the said judgment of Service Tribunal---Any irregularity, whatsoever, if committed by the appointing department itself, the appointee could not be harmed, damaged or condemned subsequently when it occurred to the department that it had itself committed some irregularities qua any appointment---Petition for leave to appeal by the department was dismissed by the Supreme Court, in circumstances.

[pp. 665, 666] A & B

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Collector of Customs and Central Excise, Peshawar and 2 others v. Abdul Waheed and 7 others 2004 SCMR 303 **fol.**

Ghulam Rasool and others v. Government of Balochistan and others 2002 PLC (C.S.) 47; Federation of Pakistan through Secretary, Establishment Division, Islamabad and another v. Gohar Riaz 2004 SCMR 1662 and Abdul Salim v. Government of N.-W.F.P through Secretary, Department of Education Secondary, N.-W.F.P, 2007 PLC (C.S.) 179 **ref.**

Tasleem Hussain, Advocate Supreme Court for Petitioners.

Ijaz Anwar, Advocate Supreme Court for Respondents.

Date of hearing: 6th February, 2009.

JUDGMENT

IJAZ-UL-HASSAN KHAN, J.---These petitions for leave to appeal, proceed against common judgment dated 17-6-2006 passed by the N.-W.F.P Service Tribunal, Peshawar, whereby Appeals Nos.490, 491 and 492 of 2005 filed by respondents Rozi Khan, Saeedullah and Muhammad Idrees, Arabic Teachers were accepted, order dated 30-7-2004 was restored and the impugned order dated 31-1-2005 of termination/withdrawal of respondents, was set aside.

2. Facts of the case need not be reiterated as the same have been mentioned in detail in the impugned judgment as well as in the memo of petitions.

3. We have heard at length. Mr. Tasleem Hussain, Advocate, appearing on behalf of petitioners-Department and Mr. Ijaz Anwar, Advocate representing the respondents. We have also perused the material on record as well as the impugned judgment minutely.

4. Learned counsel for the petitioner-Department mainly contended that appointment of the respondents was withdrawn for valid reasons as "Sanads" of the respondents issued by the "Deni-Madrasa" were not found valid as the "Madrasa" has not been registered/recognized by the Higher Education Commission. He also added that the Institution/ Madrasa which issued the "Sanad" is not affiliated to Model Dini Madaris Board as required under the Federal Government promulgated Ordinance No.XL of 2001.

5. On the other side, learned counsel for the respondents vehemently controverted the above contentions and argued that respondents were appointed as regular employees after completion of

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legal formalities and approval of the competent authority and that respondents assumed the charge and received three months salaries and as such petitioner-department had no justifiable reason to withdraw their order of appointment. To substantiate the contentions, reliance was placed on Ghulam Rasool and others v. Government of Balochistan and others 2002 PLC (C.S.) 47, Federation of Pakistan through Secretary, Establishment Division, Islamabad and another v. Gohar Riaz, 2004 SCMR 1662 and Abdul Salim v. Government of N.-W.F.P. through Secretary, Department of Education Secondary, N.-W.F.P. 2007 PLC (C.S.) 179.

6. Record reveals that respondents were initially appointed as "Qaris" (BS-7) vide order dated 29-4-1999 after proper selection. Subsequently, as a result of advertisement appearing in the newspaper, the respondents applied for the post of Arabic Teacher (BS-9) and they were appointed as such vide order dated 30-7-2004. The respondents took the charge on 31-7-2004 and received the salary. Vide order dated 31-7-2005, the appointment order issued on 30-7-2004, was withdrawn. The respondents preferred departmental appeals which remained un-responded. Feeling aggrieved, the respondents, approached the N.-W.F.P Service Tribunal, Peshawar, by way of filing appeals, which were accepted as stated and mentioned above.

7. The respondents were qualified and their appointments were made by the competent authority after observance of due process of law. No proper inquiry such as issuing of charge sheet/statement of allegations, show-cause notice has been issued to the respondents. The impugned judgment is based on valid and sound reasons and is entirely in consonance with the law laid down by this Court. Neither there is misreading or non-reading of material evidence, nor misconstruction of facts and law. Needless to emphasize that or any irregularity whatsoever, if committed by the department itself, the appointee cannot be harmed, damaged or condemned subsequently when it occurs to the department that it had itself committed some irregularities qua any appointment. This Court has held in Collector of Customs and Central Excise, Peshawar and 2 others v. Abdul Waheed and 7 others 2004 SCMR 303 that for the irregularities committed by the department itself qua appointment of a candidate, the appointees cannot be condemned subsequently. It was observed:---

> "Obviously the appointments so made, were made by the Competent Authority and in case prescribed procedure was not followed by concerned authority, the appointees/respondents could be blamed for what was to be performed and done by the Competent Authority before having verified the qualification and suitability and observance of the due process before issuing the appointment orders."

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8. Having considered the matter from all angles in the light of material on file, we find that learned Tribunal in the impugned judgment has discussed all aspects of the matter in a proper manner and has assigned cogent and sound reasoning in the impugned judgment before arriving at the conclusion. Neither any misreading or non- reading of the evidence on record could be pointed out in the impugned judgment, justifying interference by this Court. Even otherwise no substantial question of law of public importance is involved.

9. Pursuant to above, finding no substance in these petitions, we dismiss the same and decline to grant leave.

M.B.A./D-6/SC Petitions dismissed.

2009 S C M R 666

[Supreme Court of Pakistan]

Present: M. Javed Buttar and Zia Perwez, JJ

CIVIL AVIATION AUTHORITY, QUAID-E-AZAM, INTERNATIONAL AIRPORT, KARACHI----Petitioner

versus

JAPAK INTERNATIONAL (PVT.) LIMITED, LAHORE----Respondent

Civil Petition No.1392 of 2008, decided on 20th January, 2009.

(On appeal from the judgment, dated 6-8-2008 of the High Court of Sindh, Karachi in H.C.A. No.56 of 2005).

(a) Civil Procedure Code (V of 1908)---

----O. VIII, Rr.6, 7 & 9---Written statement and set-off---After filing of written statement without claiming any set-off, the party is barred from raising such a defence which is not claimed in the written statement---Claim for set-off can be presented at a subsequent stage only after leave of the court under O.VIII, R.9, C.P.C. is allowed. [p. 670] A

(b) Civil Procedure Code (V of 1908)---

----O. VIII, Rr.6, 7 & 9---Provisions of O.VIII, Rr.6, 7 & 9 permit a defendant to raise in his defence what is called a legal set-off---Essential conditions of legal set-off enumerated.

Following are the essential conditions of legal set-off:---

(i) The suit must be one for the recovery of money.

deemed admitted. We agree with the argument of the learned counsel that the limitation starts from the date of communication of order. The respondents failed to substantiate that the order was duly communicated to the appellant, therefore, we can safely hold that the Service Tribunal was not justified to dismiss the appeal on the ground of limitation. Ann R/4 (20)

Resultantly, this appeal is accepted, while setting aside the order passed by the Service Tribunal dated 10-5-2012 and declaring that the order dated 12-1-2011 has been issued without lawful authority and is void *ab initio*.

HBT/57/SC(AJ&K) Appeal accepted.

2014 P L C (C.S.) 1007

[Peshawar High Court]

Before Rooh-ul-Amin Khan and Syed Afsar Shah, JJ

NOOR ZEB KHAN and 2 others

versus

GOVERNMENT OF KHYBER PAKHTUNKHWA through Secretary Food and Agriculture Department and 3 others

Writ Petition No.206-B of 2013, decided on 26th February, 2014.

Constitution of Pakistan---

---Art. 199---Constitutional petition---Civil service---Appointment---Termination of service---Petitioners were appointed by competent authority on the recommendations of Departmental Selection Committee---Petitioners started performing their duties---Services of the petitioners were terminated on the ground that some irregularities were committed by the department during process of appointment---Validity---In case of any procedural violation, the Authority could not be allowed to take benefit of its lapses in order to terminate services of petitioners/appointees merely because it had itself committed irregularity in violating procedure governing such appointment---Services of the petitioners/appointees had wrongly been terminated on the ground of some irregularities committed by department/respondents during process of the appointment for which the respondents could not punish the petitioners---Impugned termination order was set aside, petitioners/appointees were re-instated into service---Constitutional petition was allowed. [pp. 1011, 1013] A & B

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Secretary to Government of N.-W.F.P. Zakat/Social Welfare Department Peshawar v. Sadullah Khan 1996 SCMR 8413; Collector of Customs and Central Excise Peshawar and 2 others v. Abdul Waheed and 7 others 2004 SCMR 303; Federation of Pakistan through Secretary Establishment Division, Islamabad and another v. Gohar Riaz 2004 SCMR 1662; Muhammad Akhtar Sherani and others v. Punjab Text Book Board and others 2004 SCMR 1077; Managing Director SSGC Ltd. v. Ghulam Abbas PLD 2003 SC 724 and Ghazanfar Abbas and 2 others v. District Education Officer (Colleges) Sialkot and 2 others 2011 PLC (C.S.) 331 rel.

M. Shah Nawaz Khan Sikandri and Anwar-ul-Haq, Inamullah Khan Kakki for Petitioner.

Saifur Rehman, A.A.-G. for Respondents.

Date of hearing: 26th February, 2014.

JUDGMENT

ROOH-UL-AMIN KHAN, J.--- Through the instant constitutional petition under Article 199 of the Constitution, 1973, petitioners seek issuance of the following writ :---

> "Directing the respondents to re-instate the petitioners in service as Naib Qasid and Chowkidars with full back benefits by setting-aside the impugned Office Order No.314 dated 20-6-2013, whereby their appointments/recruitments have been cancelled."

2. Petitioners alleged that after recommendations of Departmental Selection Committee, they were appointed as Niab Qasid and Chowkidars, respectively in BPS-I, vide appointments orders dated 3-5-2013, in the respondents depa tment/Assistant Director Food Bannu Division Bannu, on contract b' is, whereafter, they submitted their arrival reports, but all of a sudden, vide impugned order dated 20-6-2013, their appointments were cancelled by respondents without any rhyme and reason, which act of the respondents is unlawful, without lawful authority and against the principles of natural justice, hence, ineffective upon their rights.

3. Respondent No.2 filed Para-wise comments, wherein the appointments of the petitioners against the questioned posts have not been denied, however, it was asserted that the Departmental Selection Committee, constituted for appointments of the petitioners was not properly constituted as was lacking representative from Administrative Department, therefore, appointments of petitioners being ab initio void were cancelled.

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4. Arguments heard and documents available on file perused.

5. It appears from Office Orders/appointments Letters bearing Nos.223-28/DFC, 230-235/DFC and 237-42/DFC dated 30-5-2013, that petitioners Noor Zeb Khan, Zubair Khan and Raham Niaz, being nominees of Employment Exchange Commission, had been appointed as Niab Qasid and Chowkidars, respectively, on the recommendations of Departmental Selection Committee. They after medical examination, submitted their arrival reports. Consequently, their service books were structured. However, in the meantime, vide Office Order No.314/ADF/Misc.1 dated 20-6-2013, the Assistant Director Food Bannu Division Bannu, cancelled their appointments. Relevant portion of the above referred Office Order is reproduced as below:---

> "Consequent upon the directions of worthy Secretary Food on the face of letter No.PDA/LG and RDD) 4/51/2013 dated 21-5-2013 and conveyed the same vide Food Directorate Peshawar No.4889-93/ET-APT-89-2013 dated 31-5-2013, received on 19-6-2013, with wording/observations reproduced as below:---
>
> "The CS has conveyed the orders of the CM designate that all sorts of recruitments in the deptt:/Office be put on hold for the time being."
>
> As the appointments/recruitments, have been made on 30-5-2013, on the recommendation of selection committee. While the directions received later on. As such keeping in view of the direction of Chief Minister, the appointment/ recruitments of the candidates as per detail given below are hereby cancelled with immediate effect". (The underline is ours for emphasis).

6. The above quoted office order was defended by the respondents before this Court through filing their Para-wise comments in the following words:---

> "Though the appointment orders of petitioners namely Messrs Noor Zeb Khan son of Khurshid Khan, Zubair Khan son of Shamsher Khan and Raham Niaz son of Balqiaz Khan, as Naib Qasid and Chowkidars (BS-01) were issued vide Office Order No.223-38/DFC dated 30-5-2013, No.230-35/DFC dated 30-5-2013 and No.237-42/DFC dated 30-5-2013, respectively, but without the recommendation of appropriate Committee. As evident from Notification of Government of Khyber Pakhtunkhwa Food Department vide issued No.SOF (Food Deptt.) 1-35/552 dated 2-10-2012, the Selection Committee

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must have a representative of the Administrative Department but in the Selection in hand this codal formalities has not been fulfilled. As such the criteria laid down for the purpose, embodied flaw, and thereby any such action undertaken in such circumstances become void ab initio in the eyes of law.

It is further stated that according to Rules/Procedure vacant posts position of Class-IV in District/Divisional Offices in initial quota is reported to the Provincial Head Quarter (Food Directorate) for provision of NOC from Provincial Surplus Pool due to closing of District Surplus Pool. And after obtaining NOC, the Manager Employment Exchange in District Office is to be asked to provide list of suitable candidates for filling the subject vacant posts. On submission of the list by the Manager Employment Exchange a letter is issued to the candidates for test/interview as per laid down procedure".

7. Perusal of the above quoted cancellation order dated 20-6-2013, would divulge that it has been passed on the directives of Chief Minister through Chief Secretary, conveyed to the Appointing Authority by the Administrative Secretary of the Department. The order further reveals that the Chief Secretary of the Province has conveyed order of the Chief Executive/Chief Minister to all the Administrative Secretaries for holding in abeyance all the appointments/recruitments orders for the time being. But the appointing authority instead of complying with the directives of the Chief Secretary, straightaway, cancelled the appointments orders with immediate effect.

8. At the time of filing comments, the respondents taking somersault, introduced a new plea of defence, which runs totally contrary to the impugned order dated 20-6-2013. The relevant Paragraph of the comments, reproduced above, would indicate that appointment orders of the petitioners were rescinded by the appointing authority, as at the time of appointment, the Departmental Selection Committee had not properly been constituted. The reason advanced by the respondents in comments, for cancellation of appointments orders is unwarranted, flimsy and against the law, for the reason that Departmental Selection Committee had properly been constituted under the rules. Part-III of North-West Frontier Province (Now Khyber Pakhtunkhwa) Civil Servants (Appointment, Promotion and Transfer) Rules, 1989, provides mechanism for appointment of civil servant against a civil post. According to second proviso of Rule 10(2), appointment in BPS-I to IV shall be made on the recommendations of Departmental Selection Committee through District Employment Exchange Commission. In the instant case, undisputedly, petitioners are the recommendees/nominees

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petitioners themselves appointed him on temporary basis in violation of the rules for reasons best known to them. Now they cannot be allowed to take benefit of their lapses in order to terminate the services of the respondent merely, because they had themselves committed irregularity in violating the procedure governing the appointment. In the peculiar circumstances of the case, the learned Tribunal is not shown to have committed any illegality or irregularity in re-instating the respondent."

A similarly controversy arose in case titled, "*Collector of Customs and Central Excise Peshawar and 2 others v. Abdul Waheed and 7 others* (2004 SCMR 303) and the apex Court while resolving the same hold the following:---

"Plea raised by the authorities was that the appointments of civil servants were made without observing prescribed procedure for appointment and they were no more required being ad hoc appointees. validity. Appointments of civil servants were made by competent authority. If prescribed procedure was not followed by the concerned authority, the civil servant could not be blamed for what was to be performed and done by the competent authority."

Similar view has been reiterated by the apex Court in case titled, "*Federation of Pakistan through Secretary Establishment Division, Islamabad and another v. Gohar Riaz*" (2004 SCMR 1662), which is reproduced as under:---

"Contention of employer department that initial appointment of civil servant was made in violation of rules by asserting politica pressure was without any substance as department had not bee able to establish on record that the employee lacked requisi qualification and was not appointed by the competent authority Employee could not be punished for any act or omission of th department. Department could not be allowed to take benefit its lapses in order to terminate the service of employee merel because department had itself committed irregularity by violati the procedure governing the appointment."

In case titled, "*Muhammad Akhtar Sherani and others v. Punj Text Book Board and others* (2004 SCMR 1077), the apex Court ho that petty employees like Chowkidar, Naib Qasid and Junior Clerks et could not be penalized for wrongdoing of the appointing authorit Reliance may also be placed on case titled, "*Managing Director SSG Ltd. v. Ghulam Abbas*" (PLD 2003 SC 724).

Attested

In case titled, "*Ghazanfar Abbas and 2 others v. District Educatio*

the Employment Exchange Commission. The respondents have also not denied that the petitioners are the recommendees of Departmental Selection Committee, but the only stance taken by them is that the Departmental Selection Committee constituted for appointment, was lacking the representation of Administrative Department. In this respect, minutes of the meeting are worth perusal, which reveals that one of the representatives of Food Department from Head Office, Peshawar was a member of the said Committee and he has duly signed the minutes and recommendations of the aforesaid Committee.

9. - We have further observed that as per minutes of the meeting, the Departmental Selection Committee, constituted for the appointments/ recruitments of the petitioners, was comprising of Mr. Iftikhar Hussain Qureshi Assistant Director Food, Food Directorate Peshawar (Member), Mr. Din Muhammad Gul District Food Controller, Bannu (Member) and Mr. Afsar Zaman Head Clerk DFC Office Bannu (Member). The appointing authority i.e. Mr. Muhammad Jehangir Khan Assistant Director Food. Bannu Division, Bannu; has presided the meeting as a Chairman, while the other three have acted as members of the Departmental Selection Committee. Learned A.A.-G failed to show any deficiency in constitution of the Departmental Selection Committee, thus, the plea taken in parawise comments, is not convincing and against the record. It is not the plea of the respondents department that the petitioners lacked qualification for the posts in question. The Departmental Selection Committee has duly recommended them for their recruitments. Thus, the respondents-department has appointed the petitioners on temporary basis in accordance with procedure and rules. The alleged violation of procedure and rules is after-thought and merely a pretext. Time and again it has been ruled by the apex Court that in case of any procedural violation, the authority cannot be allowed to take benefit of its lapses in order to terminate service of the petitioners merely because it has itself committed irregularity in violating procedure governing such appointment. A like situation arose before the apex Court in case titled, "*Secretary to Government of N.-W.F.P. Zakat/Social Welfare Department Peshawar v. Sadullah Khan*" (1996 SCMR 8413) and the Hon'ble Supreme Court in concluding paragraph observed the following:---

> "It is disturbing to note that in this case petitioner No.2 had himself been guilty of making irregular appointment on what has been described "purely temporary basis". The petitioners have now turned around and terminated his services due to irregularity and violation of rule 10(2) ibid. The premise, to say that least, is utterly untenable. The case of the petitioners was not that the respondent lacked requisite qualification. The

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Officer (Colleges) Sialkot and 2 others 2011 PLC (C.S.) 331, while dealing identical controversy by the worthy Lahore High Court observed under:---

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> "Petitioners were appointed by competent authority on the recommendations of Departmental Selection Committee after performing all formalities. Petitioners started performing their duties and accordingly the department had been paying the monthly salaries and other benefits to the petitioners. Service of the petitioners were terminated simply on the ground that some irregularities were committed by the department during process of appointment of the petitioners. Ground on basis of which the petitioner' services were terminated, was misconceived, because the department could not punish the petitioner for the lapses caused by it; and appointing authority was responsible to face the consequences of its lapses. If appointment of an employee was made illegal same could not be cancelled and instead of taking action against the employee; action must have been taken against the appointing authority for committing a misconduct by making illegal appointments. Petitioners, who otherwise were eligible, could not be penalized for the act of department. Constitutional petition was allowed."

10. Besides, the procedural wrong committed by the respondents department is not detrimental to the rights of any other private individual. Moreso, the impugned order vide which the appointments of the petitioners have been cancelled clearly manifest that it was not for cancellation of the appointments, rather recruitments in the respondents department/Office was directed to be put on hold for the time being, on the direction of Chief Minister. Thus, there was no occasion for the respondents to rescind the appointments orders of the petitioners.

11. For what has been discussed above and deriving wisdom from the judgments of the apex Court on the subject, we are of the firm view that the services of the petitioners have wrongly been terminated on the ground of some irregularities committed by the department/respondents during process of the appointment for which the respondents/department cannot punish the petitioners. Resultantly, we admit and allow the instant writ petition, set aside the impugned order dated 20-6-2013 and issue a writ to the respondents department to re-instate the petitioners on their service from the date of their appointments, however, the petitioners shall not be entitled to any arrears and back-benefits for the period of their service, which shall be treated as leave without pay.

B

JK/111/P

Petition accepted.

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Amjad Ali Advocate
Supreme Court

Add R-5

27

[59]Recruitment Policy for the Provincial services.

(a) Recruitment to posts in BPS-16 and above as well as the posts of Assistant Sub-Inspectors of Police, Naib Tehsildars, Zilladars and Sub-Engineers will continue to be made through the NWFP Public Service Commission. However, the Commission may make efforts to finalize the recruitment within six months of the receipt of the requisition duly completed from the Administrative Department.

(b) Recruitment to posts in the various Government Departments as indicated below will also henceforth be made by the NWFP Public Service Commission:-

(i) **All Departments including Board of Revenue, NWFP-**

(1) Senior Scale Stenographer(B-15)
(2) Data Processing Supervisor(B-14)
(3) Junior Scale Stenographer(B-12)
(4) Assistant (B-11)[60]
(5) Draftsman(B-11)

(ii) **Board of Revenue-**

(1) Sub-Registrar(B-14)
(2) Excise and Taxation Inspector(B-11)

(iii) **Home & Tribal Affairs Department -**

(a) Police Department;

(1) Prosecuting Sub-Inspector (B-14)

(b) Inspectorate of Prisons:
(1) Assistant Jail Superintendent (B-11)

(c) Reclamation and Probation Department;

(1) Parole/Probation Officer(B-11)

(iv) Industries, Commerce, Mineral Development, Labour and Transport Department-

(a) Directorate of Industries:

(1) Assistant Industrial Development Officer/ Assistant Price Stabilization Officer(B-11)
(2) Royalty Inspector(B-11)
(3) Surveyor(B-11)

(b) Directorate of Manpower and Training:

(1) Instructor T.T.C(B-14)

[59] Issued vide .S&GAD letter No.SOR.I (S&GAD)1-117/91(C), dated 12.10.1993.
[60] The post of Assistant has now been placed in BS-14 universally

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Supreme Court

(v) Cooperative Societies:

(1) Inspector(B-11)

(vi) Communication and Works Department-

(1) Assistant Architectural Draftsman(B-14)

(2) Senior Draftsman(B-13)

(vii) Public Health Engineering Department-

(1) Motivation Officer(B-15)

(2) Assistant Motivation Officer(B-14)

(3) Lady Health Educator (B-12)

(viii) Electric Inspectorate:-

(1) Sub-Inspector(B-11)

(ix) Food Department-

(1) Assistant Food Controller(B-8)
(2) Food Grain Inspector(B-6)

(x) Directorate of Archives and Libraries-

(1) Preservation Assistant (B-11)
(2) Cataloguer / Classifier (B-11)

(c) Initial recruitment to posts in BPS-15 and below other than the posts in the purview of the Public Service Commission, in all the departments shall continue to be made in accordance with Rule 10,11 and 12 (Part-III) of the NWFP Civil Servants (Appointment, Promotion and Transfer) Rules,1989, the criteria as laid down in S&GAD letter No.SORI(S&GAD)4-1/75,dated 11.2.1987 and the zonal allocation formula contained in S&GAD Notification NO.SOS.III(S&GAD)3-39/70, dated 2.10.1973 as amended from time to time.

(d) No ad hoc appointment against any post in any pay scale shall be made.

N.B: [ad hoc appointment is now allowed under the NWFP Public Service Commission Ordinance 1978 and the NWFP (Appointment, Promotion & Transfer) Rules 1989 for a period of one year]

(e) [61][.....]

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61. Sub para-e and other entries under it relating to age relaxation were superseded by the NWFP Initial Appointment to Civil Posts (Relaxation of upper Age Limit) Rules, 2008.

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Supreme Court

(f) The Regional/Zonal quota if not filled will be carried forward till suitable candidates are available from the Region/Zone concerned. No "Substitute" recruitment shall be made. Existing backlog, if any, in respect of any zone will not be carried forward and the Commission shall take a fresh start in respect of all posts under its purview. However, this condition will not be applicable in respect of posts which have already been advertised by the NWFP Public Service Commission.

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[62]In case female candidates with prescribed qualification do not become available in Zone-I after advertising at least three times, such vacancy/ vacancies shall be advertised fourth time for Merit Quota.

(g) The vacancies in all the Departments shall be advertised in leading newspapers on [63](Sunday).The advertisement in electronic media should be to the extent of drawing attention of all concerned to the relevant newspapers in which the vacancies are advertised.

(h) Initial Recruitment to all the vacant posts shall be made on regular known periodic intervals in February and August each year after proper advertisement through electronic and national/regional media. After advertisement, a minimum period of 30 days should be allowed for receipt of applications. [64][ ]

(i) (Deleted).

[65](j) i) 2% quota for disabled persons already fixed shall stand and should be enforced strictly.

ii) 10% quota has also been fixed for female candidates in all the Provincial services which are filled up through initial recruitment in addition to their participation in the open merit. However, it shall not be applicable to cadres exclusively reserved for females. The vacancies reserved for women for which qualified women candidates are not available shall be carried forward and filled by women.

iii) The above orders shall also apply to initial appointments in all autonomous/semi-autonomous bodies/ corporations etc which are administratively controlled by the Provincial Government.

iv) The Commission shall revise the Requisition Form for all such posts for specifying the women's quota in the available vacancies and the Administrative Department shall intimate the quota for the women in the Requisition Form accordingly.

v) The above reservation shall not apply to:-

- *the percentage of vacancies reserved for recruitment on the basis of merit;*
- *Short term vacancies likely to last for less than six months; and*
- *Isolated posts in which vacancies occur only occasionally;*

---

62 Entry added at the end of sub-para (f) vide No SOR-I(S&GAD)1-117/91 (C), 23-05-2000.

63 The words "Friday" substituted in para(g) by Notification No. SOR-I(S&GAD)1-117/91 (C), 22-11-97

64 Last sentence of sub-para (h) i.e. "A waiting list of eligible candidates shall be maintained for a period of six months" was deleted vide circular No. SOR-VI (E&AD)1-10/05 (IV), dated 31-12-2008.
Sub-Para-J substituted vide circular No. SOR-VI (E&AD)1-10/05 (IV), dated 25-07-2007.

65 The one percent substituted by Notification No.SOR.I(S&GAD)4-1/80, Vol.III dated 19.2.1999

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Amjad Ali Advocate
Supreme Court

[66](JJ) 0.5 per cent quota has been fixed for candidates belonging to minorities in all the Provincial services which are filled in through initial recruitment in addition to their participation in the open merit. However, this reservation shall not apply to:-

- *the percentage of vacancies reserved for recruitment on the basis of merit;*
- *Short term vacancies likely to last for less than [67][six months]; and*
- *Isolated posts in which vacancies occur only occasionally."*

(k) For initial appointment to posts in BPS-17 and below in the Autonomous Bodies/Corporations, the zonal allocation formula applicable for Provincial Services may be adopted. The method of recruitment shall also conform to sub-para (c) above.

(l) The Provincial Government have already agreed that recruitment to the post of PTC in Education Department in various districts shall be made on constituency-wise basis. For this purpose, the existing districts have been divided into various zones. Each zone shall correspond to the area of constituency of the Provincial Assembly. However, recruitment to the posts shall, in each case, be 60% on merit in open competition on district basis and 40% on constituency basis.

[68]The competent authority has decided that henceforth all the Government Departments/Offices shall ensure that requisitions are sent to the NWFP Public Service Commission complete in all respects and should reflect not only all the existing vacant posts but also posts likely to become vacant during the next eighteen months on account of retirement etc falling to the initial recruitment quota under the rules.

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66 Sub- Para-JJ added vide circular No. SOR-VI (E&AD)1-10/(Min)05 (IV), dated 18-11-2008.

67 Period of six months replaced with "one year" in the NWFP (Appointment, Promotion & Transfer) Rules 1989 vide Notification No. SOR-VI(E&AD)1-3/2008, dated 6th January, 2009.

68 Instructions issued vide circular letter No. SOR-VI (E&AD)1-10/08 (X), dated 07-10-2008.

Attested
Amjad Ali Advocate
Supreme Court

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CONSTITUTION OF PSB,DPC & DSC

NOTIFICATION
Peshawar, dated the 22nd August,1991.

No.SORI(S&GAD)4-1/75(Vol.I):- In pursuance of the provisions contained in clause(d) and (g) of rule 2 of the North-West Frontier Province Civil Servants (Appointment, Promotion & Transfer) Rules,1989, read with rule 7(1) thereof and in supersession of this Department's Notification No.SOS-III (S&GAD)1-206/74-III, dated 16.5.1975, and No.SORI(S&GAD) 4-1/75, dated 18.9.1989, issued in this behalf, the Governor of North-West Frontier Province is pleased to constitute the Provincial Selection Board and the Departmental Promotion Committees for making selection to various posts as under:-

A- PROVINCIAL SELECTION BOARD

1. The Provincial Selection Board shall consist of the following:-

(1)	Chief Secretary, NWFP	... Chairman
(2)	Additional Chief Secretary, NWFP	... Member
(3)	Senior Member, Board of Revenue, NWFP	... Member
(4)	Administrative Secretary concerned	... Member
(5)	Secretary Services & General Administration Department.	... Member/ Secretary

2. [73]The Board shall make recommendations for appointment by promotion or transfer to all posts in Basic Pay Scale-18 and above and shall also assess fitness/suitability of officers for move-over to BPS-20 and make its recommendations.

B- DEPARTMENTAL PROMOTION COMMITTEES

1. For each Department, there shall be a Departmental Promotion Committee consisting of the following:-

(1)	Secretary of the Department concerned	...	Chairman
[74](2)	Additional Secretary, S&GAD.	...	Member
[74](3)	Additional Secretary, Finance Department	...	Member
(4)	Head of Attached Department concerned	...	Member
[74](5)	Deputy Secretary of the Department concerned.	...	Secretary

[73] Para 2 under A substituted by Notification No.SORI(S&GAD)4-1/75(Vol.II), dated 27.9.97.

[74] Substituted vide S&GAD Notification No.SORI(S&GAD)4-1/75(Vol.I), dated 5.12.1991.

Attested
Amjad Ali Advocate
Supreme Court

2. [75]The Departmental Promotion Committee shall make recommendations for appointment by promotion or transfer to posts in BPS-16 and BPS-17 and shall also assess fitness/ suitability of officers for move over from BPS-15 to BPS-16, or BPS-16 to BPS-17 or BPS-17 to BPS-18,or BPS-18 to BPS 19 as the case may be, and make its recommendations. 32

3. In all cases, whether pertaining to promotion, transfer or move over, the Department concerned shall strictly adhere to the guidelines/policy instructions issued by the S&GAD from time to time.

4. No meeting of the Departmental Promotion Committee shall be held without representative of the S&GAD.

NOTIFICATION
Peshawar, dated the 17th June,1989.

No.SORI(S&GAD)4-1/75:- In pursuance of the provisions in rule 5 of the North-West Frontier Province Civil Servants (Appointment, Promotion & Transfer) Rules,1989, the Services and General Administration Department is pleased to lay down the constitution of the Departmental Promotion Committee and the Departmental Selection Committee for the purpose of making selection for promotion, transfer and initial appointment to the posts in BPS-15 and below in the Attached Departments/Offices as under:-

(1)	Appointing Authority	...	Chairman
(2)	An officer to be nominated by the Administrative Department concerned.	...	Member
(3)	An Officer to be nominated by Appointing Authority.	...	Member

[75] Para 2 under B substituted by Notification No.SORI(S&GAD)4-1/75(Vol.II), dated 27.9.97

Attested
Amjad Ali Advocate
Supreme Court

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Constitution of Departmental Selection Committees for posts in BPS-15 and below

Reference this Department's circular letter No.SORI(S&GAD) 4-1/75 (Vol.I), dated 4th March,1992 as amended vide this department letter of even number dated 12th October,1992, it was inter alia provided that candidates qualifying the written test for posts in BPS-11 to 15 be interviewed by a broadbased panel of Selection Committees of five/six members headed by the Ministries concerned.

2. It has been decided by the Provincial Government to withdraw the above orders with immediate effect to the extent that henceforth the Departmental Selection Committees, as constituted vide Notification No.SOS.III(S&GAD)1-206/74-1, dated 16.5.1975, and No.SORI(S&GAD)4-1/75, dated 17.6.1989,for posts in BPS-15 and below, shall stand revived as per details given below:-

I. Posts in the NWFP Civil Secretariat

(1)	Secretary, S&GAD	...	Chairman
(2)	Deputy Secretary, S&GAD	...	Member
(3)	Deputy Secretary(Opinion) Law Department.	...	Member
(4)	Section Officer concerned in S&GAD.	...	Secretary

II. Attached Departments/Offices in NWFP

(1)	Appointing Authority.	...	Chairman
(2)	An officer to be nominated by the Administrative Department concerned.	...	Member
(3)	An officer to be nominated by the Appointing Authority.	...	Member

3. It is requested to bring these instructions to the notice of all concerned for strict compliance.

(Authority:-SORI(S&GAD)4-1/75(Vol.II), dated 13th June,1993)

Attested
Amjad Ali Advocate
Supreme Court

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PROCEDURE FOR SELECTION FOR PROMOTION/INITIAL RECRUITMENT

I am directed to say that under rule 7 of the NWFP Civil Servants (Appointment, Promotion & Transfer) Rules,1989 appointment by promotion to posts in BPS-2 to BPS-16 shall be made on the recommendations of the appropriate Departmental Promotion Committee. Similarly, under rule 11 of the rules ibid, initial appointments to posts in BPS-1 to 15 shall be made on the recommendation of the Departmental Selection Committee after the vacancies have been advertised in newspapers. However, no criteria for selection has so far been prescribed.

2. In order to ensure a fair degree of selection, minimize the chances of discretion and favouritism, the Provincial Government have laid down the following criteria for selection for promotion vis-a-vis initial recruitment to the posts which are filled by the department concerned:-

(I) **Criteria for Selection for Promotion:-**Promotion to any post in a grade below Grade-16 shall not be subject to any test. The suitability of candidates shall be determined on the basis of service record i.e seniority-cum-fitness.

(II) **Criteria of Selection for initial recruitment:-**

(i) **For post in Grades 1 to 4-** No special criteria has been laid down and the committee concerned shall adopt its own method and procedure for selection.

(ii) **For posts in Grade-5 and above in all departments-** -In addition to the total marks allocated for a written competitive examination, if any held, the total marks will be 100 as per distribution given below:-

(a)	Prescribed qualification	...70
(b)	Higher qualification	...12
(c)	Experience	...10
(d)	Interview	...08

3. Para 2 above indicates only the general distribution of the marks. To enable the Administrative Departments to develop criteria of comparative grading of candidates within the above overall framework, S&GAD has done a model exercise(attached as Annexure) for guidance of all concerned.

4. I am accordingly directed to request you to kindly ensure that the aforesaid criteria for selection for promotion vis-a-vis initial recruitment to posts is adhered to strictly in filling the vacant posts in future.

Attested
Amjad Ali Advocate
Supreme Court

[76]ANNEXURE

35

COMPARATIVE GRADING OF QUALIFICATION

A. Minimum Prescribed Qualification.

I	For Non-Professional Posts	First	Second	Third	Total Mark 70
(i)	Matric	70	53	42	
(ii)	Matric	35	26	21	
	FA/F.Sc	35	27	21	
(iii)	Matric	23	17	14	
	FA/F.Sc	23	17	14	
	B.A/B.Sc	24	18	14	
(iv)	Matric	17	13	10	
	F.A/F.Sc	17	13	10	
	B.A/B.Sc	17	13	11	
	M.A/M.Sc	19	14	11	
2.	For Professional Posts.				
(i)	For four examination				
	Ist Professional.	17	13	10	
	2nd Professional	17	13	10	
	3rd Professional	17	13	10	
	Final	19	14	12	
(ii)	For three examination				
	Ist Professional.	23	17	14	
	2nd Professional	23	17	14	
	Final	24	19	14	
(iii)	For two examination				
	Ist Professional	35	26	21	
	Final	35	27	21	

B. Higher Qualification 12
(Next above the qualification prescribed under the rules).

one stage above	06
two stage above	08
three stage above	12

C. Experience 10

Experience of one year	04
Experience of two years	07
Experience of three years and above	10

D. Interview 08

Total marks... 100

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[76] Annexure revised vide letter No.SORI(S&GAD)4-1/75(Vol.III) dated.26.5.2000

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Amjad Ali Advocate
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Explanations:

(a) Where qualification prescribed in the rules is Matric, comparative grading of candidates shall be done as shown at (A) (i) above. Where typing is prescribed in the rules as a part of qualification after Matric, all persons possessing the prescribed speed shall be considered as equal.

(b) Where the prescribed qualification is F.A, grading shall be done as indicated at (A) (ii) of Annexure. To illustrate; if the candidate is a 2nd Division in Matric and Ist Division in F.A., he shall get 26 plus 35 marks out of the total of 70 reserved for prescribed qualification.

(c) Where prescribed qualification is Graduation, the comparative grading shall be done (A) (iii) of Annexure above. If a candidate is 3rd Division in Matric, 2nd Division in F.A/F.Sc and Ist Division in B.A/B.Sc, he shall get 14,17, 24 marks i.e 55 marks out of 70.

(d) If the minimum qualification is M.A (which is very rare as the selection criteria pertain to posts in Grade 1 to 15 only) the grading shall be done as indicated at (A) (iv) above.

(e) The above grading can be applicable only where academic qualifications are from Matric onwards. In cases where technical qualifications (like Diploma or Certificate) are also prescribed after these basic qualifications, in such cases 70 marks for comparative grading shall be distributed as below:-

(1)	Total Marks	...	70
(2)	Basic qualification like Matric, F.A/B.A as may be provided in the rules.	...	50
(3)	Additional Technical qualifications	...	20

The method for further distribution of 20 marks shall be laid down by the Departments themselves on the analogy of the principles indicated above. 50 marks shall be distributed for the basic qualifications by necessary modification in the formula indicated at (A) of Annexure above. To illustrate, if the basic qualification is Matric, 50 marks shall be distributed as below:-

1st Division	2nd Division	3rd Division
50	38	30

It will be noticed that the same proportion as obtaining between the marks reserved for First, Second and Third Division at (A) above has been maintained in the distribution of 50 marks as shown above.

(f) Out of the 12 marks reserved for higher qualifications the actual marks to be given to a candidate are shown at (B) of Annexure. If the candidate possesses the qualification one stage above i.e. for example he is intermediate and qualification in the rules is Matric he shall get 6 marks; if he is a graduate and minimum qualifications is Matric he shall get 8 marks and so on.

(g) Marks for experience shall be for experience in the line at the scale shown at (C) of Annexure. Persons with more than 3 years experience shall also get the maximum i.e. 12 marks.

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Amjad Ali Advocate
Supreme Court

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[77](h) The equation of grades versus division is as follows:-

Grade A & B	=	1st Division
Grade C & D	=	2nd Division
Grade E	=	3rd Division

Note:- Below 45% marks obtained in Grade-D will be considered as 3rd Division.

(i) In case where no division/grade is given in the respective Certificate, it is worked out on the basis of secured marks of candidates as follows:-

(a) 60% and above marks	...	1st Division
(b) 45% - 59% marks	...	2nd Division
(c) Below 45% marks	...	3rd Division

(j) If not specifically provided otherwise in the relevant Service Rules "experience" will mean in the line and only that experience is considered which has been acquired after the acquisition of minimum qualifications prescribed for the post.

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Amjad Ali Advocate
Supreme Court

[77] Substituted vide letter No.SORI(S&GAD)4-1/75, Dated 22.7.98.

Hira Public School Harichand

Affiliated with BISE Peshawer

Ann-R/6

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HIRA PUBLIC HIGH SCHOOL HARI CHAND

EXPERIENCE CERTIFICATE

It is Certified that Mr / Miss. Umar Nabi S/D of Muhammad Zaman has been teaching here in this institution as Teacher Since 03/05/2004 Up to 15/05/2007.

He / She is very responsible and hardworking Teacher.

He / She shows good moral character.

Principal
Hira Public School Harichand

Attested
Amjad Ali Advocate
Supreme Court

Ann R/7

(39)

petitioner. The respondent, Mst. Surriya Bibi has successfully proved that her husband himself filed application for allotment of the plot, mortgaged the plot with a financial institution and obtained loan for raising construction over the same and also sent money from Kuwait to his elder brother who was his general attorney also, their possession over the ground floor of the house and produced relevant documents of their ownership and title. The petitioners had failed to discharge onus of proof on issues regarding defendant being "Benami" owner of the suit property. The trial Court, Appellate Court and High Court in revision found the evidence of the defendants-respondents more weighty, plausible and convincing after perusal of the same in "juxtaposition" to the evidence of plaintiffs-petitioners. The findings of all the three Courts on question of fact did not suffer from any illegality, infirmity, misreading or non-reading of evidence. In such-like cases, this Court is always reluctant to interfere with the judgments of the lower Courts. In this context, reference can be made to the case of Khalid Mehmood v. Abida Perveen 2003 SCMR 18.

12. For the foregoing reasons, we do not find any substance in these petitions which are dismissed and leave to appeal refused.

Leave to appeal refused.

M.B.A./M-80/SC

2009 S C M R 129

[Supreme Court of Pakistan]

Present: Muhammad Moosa Khan Leghari,
Syed Zawwar Hussain Jaffery and Sheikh Hakim Ali, JJ

ZARAI TARAQIATI BANK LTD., ISLAMABAD
and another----Petitioners

versus

AFTAB AHMED KOLACHI and another----Respondents

Attested
Amjad Ali Advocate
Supreme Court

Civil Petition No.1024 of 2008, decided on 27th August, 2008.

(On Appeal from the judgment and order of the High Court of Sindh, Bench at Larkana, dated 22-5-2008 passed in Constitution Petition No.22 of 2008).

Civil service---

---Dismissal from service---Back-benefits---Service Tribunal, on appeal, reinstated the employee and allowed the employers to conduct a fresh enquiry and left the question of back-benefits dependant upon the result

of fresh enquiry proceedings---Service Tribunal further directed that in case of failure of the employers to initiate and conclude the de novo proceedings within a period of four months the employee shall be entitled to all the back benefits---Employee, however, could get the relief of his reinstatement only by resorting to the constitutional petition before High Court---High Court had not barred the employers/Bank from conducting the enquiry but had passed directions for completing the enquiry expeditiously preferably within the period of three months and direction to the employee to cooperate in holding the enquiry--Employers/Bank, however could not initiate enquiry proceedings within the period of four months stipulated by the Service Tribunal, as a consequence thereof, they had been directed to make payment of back benefits to the employee---Effect---Held, such directions of the High Court were neither perverse nor fallacious, rather absolutely just and proper as the employers could not be permitted to seek premium for the acts of apathy, stoicism and impassivity, displayed by them---No case for grant of leave to appeal to Supreme Court was, thus made out---Petition for leave to appeal was dismissed--Constitution of Pakistan (1973), Art.185(3). [p. 133] A

Haider Hussain, Advocate Supreme Court for Petitioners.

Nemo for Respondents.

Date of hearing: 27th August, 2008.

JUDGMENT

MUHAMMAD MOOSA KHAN LEGHARI, J.--- This petition for leave to appeal, is directed against the judgment, dated 22-5-2008 delivered by learned Division Bench High Court of Sindh, at Larkana by which the constitutional petition filed by respondent No.1 against the petitioners was partially allowed.

2. Precisely the facts of the case are, that the respondent was dismissed from service on 28-9-2002 on the charges of reckless lending by sanctioning loans of Rs.4.737 million. On appeal the Federal Service Tribunal by its judgment, dated 24-6-2006 set aside the order of respondent's dismissal and directed his reinstatement mainly on the ground that the enquiry conducted against the respondent was defective. The Federal Service Tribunal, however, allowed the petitioners to conduct a fresh enquiry and left the question of back-benefit dependent upon the result of fresh enquiry proceedings. However, the Tribunal directed that in case of failure of the petitioner to initiate and conclude the de novo proceedings within a period of four months the respondent shall be entitled to all the back-benefits.

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Amjad Ali Advocate
Supreme Court

(41)

3. Consequently the respondent/employee appears to have reported for duty but he was refused to be taken on duty. Resultantly the employee approached the Sindh High Court through Civil Petition No.D-290 of 2006, for a direction to the petitioner bank to implement the judgment of the Federal service Tribunal. However, during the pendency of the petition, petitioner/bank reinstated the respondent/employee in service on 19-12-2007, which resulted into withdrawal of the said petition. The bank after reinstatement seems to have served a fresh charge-sheet upon the respondent which gave a cause of grievance to the respondent/employee to move the High Court of Sindh Bench at Larkana seeking the quashment of enquiry proceedings pleading the action to be illegal, void and violative of the judgment of the Federal Service Tribunal on the ground that the enquiry was neither initiated nor completed within the stipulated period of four months.

4. Through the impugned judgment, High Court of Sindh, Larkana Bench allowed the petitioner/bank to hold an enquiry but directed them to pay the amount of back-benefits to the respondent/employee for their failure to hold the enquiry within the timeframe given by the Federal Service Tribunal, hence this petition for leave to appeal.

5. We have heard Mr. Haider Hussain, Advocate Supreme Court for the petitioner at great length. He has contended that the enquiry could not be initiated against the respondent within the time frame fixed by the Federal Service Tribunal as he could not be reinstated in service under the bona fide impression that all the pending proceedings and the order passed by the Federal Service Tribunal stood abated consequent upon the pronouncement of judgment in Mubeen-us-Salam and others v. Federation of Pakistan PLD 2006 SC 602. He further contended that after abatement of case of the respondent he did not approach the appropriate forum within the period of 90 days as held in the case of Mobeen-us-Salam (supra). Learned Advocate Supreme Court vehemently argued that the High Court has committed an error of law by depriving the petitioner/bank from conducting an enquiry against the petitioner in the acts of serious misconduct, which has occasioned in serious miscarriage of justice.

6. We have anxiously considered the arguments advanced before us and have consciously perused the material made available on the record.

7. It is an admitted position that the order of dismissal of the respondent/employee was set aside by the Federal Service Tribunal as no proper and valid enquiry was conducted in his case. Indeed looking to the gravity of acts of misconduct alleged against the respondent/

Attested
Amjad Ali Advocate
Supreme Court

employee, the Federal Service Tribunal allowed the petitioner/bank to hold an enquiry. However, the Federal Service Tribunal fixed a time frame of four months for initiating and concluding the proceedings and the payment of back-benefits, was made dependent on the outcome of the enquiry proceedings. The judgment of the Federal Service Tribunal which was delivered on 24-6-2006, was never assailed by the petitioner/bank thus, the same attained finality. In spite of the fact that the respondent/employee reported for duty on 30-6-2006 but was not allowed by petitioner/bank to resume. Eventually the respondent/employee has to invoke the constitutional jurisdiction of High Court of Sindh to get the judgment of Federal Service Tribunal implemented, and to seek the relief of reinstatement. The action of the petitioner/bank of not complying with the order of the Tribunal under the garb of the verdict of this Court in Mubeen-us-Islam case, apparently reveals serious lack of the elements of bona fide. In fact nothing has been made available on the record to demonstrate resolution on the part of petitioner/bank to display bona fides. The conduct of the petitioner/bank could be easily gauged from the fact that the respondent/employee could get the relief of his reinstatement only by resorting to the constitutional jurisdiction of High Court of Sindh. It will be seen that in order to tackle such indifferent and adamant conduct demonstrated on the part of petitioner/bank, this Court in the case of Muhammad Idrees v. Agricultural Development Bank of Pakistan and others PLD 2007 SC 681, had to issue inter alia the following direction:---

"(2) As a result of the above said findings, the following directions were rendered:---

(a) The cases which have been decided finally by this Court in exercise of jurisdiction under Article 212 (3) of the Constitution shall not be opened and if any Review Petition, Misc. Application or Contempt Application, filed against the judgment is pending, it shall be heard independently and shall not be affected by the ratio of this judgment.

(b) The proceedings instituted either by an employee or by an employer, pending before this Court, against the judgment of the Service Tribunal, not covered by category (a) before this Court or the Service Tribunal shall stand abated, leaving the parties to avail remedy prevailing prior to promulgation of section 2-A of the STA, 1973.

(c) The cases or proceedings which are not protected or covered by this judgment shall be deemed to have abated and the aggrieved person may approach the competent forums for redressal of their grievances within a period of 90 days and the bar of limitation

Attested
Amjad Ali Advocate
Supreme Court

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provided by the respective laws, shall not operate against them till the expiry of stipulated period.

(d) The cases in which the order of Service Tribunal has been implemented shall remain intact for a period of 90 days or till the filing of appropriate proceedings, whichever is earlier.

(e) The Service Tribunal shall decide pending cases under section 2-A of the STA, 1973 in view of the above observations. However, if any of the cases is covered by clause 'c' (ibid), a period of 90 days shall be allowed to aggrieved party to approach the competent forum for the redressal of its grievance."

8. On examination of the judgment of the High Court it clearly transpires that the High Court has not debarred the petitioner/bank from conducting the enquiry but has passed directions for completing the enquiry expeditiously preferably within the period of three months with a further direction to the respondent/employee to cooperate in holding the enquiry. However, since the petitioner/bank could not initiate the enquiry proceedings within the period of four months stipulated by the Federal Service Tribunal in its judgment, as a consequence thereof, they have been directed to make payment of back-benefits to the respondent.

9. The above direction of the High Court is neither perverse nor fallacious, rather absolutely just and proper as the petitioners cannot be permitted to seek premium for the acts of apathy, stoicism and impassivity, displayed by them, no case for grant of leave is, thus, made out.

10. As a consequence of above discussion, the petition is dismissed and leave refused.

M.B.A./Z-9/SC Petition dismissed.

2009 S C M R 133

[Supreme Court of Pakistan]

Present: Tassaduq Hussain Jillani, Muhammad Akhtar Shabbir and Syed Sakhi Hussain Bokhari JJ

FAISAL HUSSAIN BUTT----Petitioner

versus

THE STATE and another----Respondents

Civil Petition No.940-L of 2008, decided on 11th November, 2008.

Attested
Supreme Court

Anx-R/8

2010 P L C (C.S.) 608

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[Supreme Court of Pakistan]

Present: Javed Iqbal and Anwar Zaheer Jamali, JJ

NATIONAL BANK OF PAKISTAN and others

Versus

SHAMOON KHAN and others

Civil Petition No.1557-L of 2001, decided on 29th March, 2010.

(On appeal from judgment, dated 28-2-2001 passed by the Federal Service Tribunal, Lahore in Appeal No.533/L of 1998).

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

----S. 4---Limitation Act (IX of 1908), S.5---Appeal---Condonation of delay---Jurisdiction---Sufficiency of cause for condonation of delay being question of fact is within the exclusive jurisdiction of Service Tribunal---Once discretion is exercised regarding question of limitation by Service Tribunal, it is not usually interfered with by Supreme Court:

Ali Hasan Rizvi v. Islamic Republic of Pakistan 1986 SCMR 1086; Hussain Bibi v. Mubarak Hussain 1976 SCMR 262; Yousaf Hussain Siddiqui v. Additional Settlement and Rehabilitation Commissioner; Peshawar and 5 others 1976 SCMR 268; WAPDA v. Abdur Rashid Dar 1990 SCMR 1513; Sher Bahadur v. Government of N.W.F.P. 1990 SCMR 1519 and Zahida v. Deputy Director 1990 SCMR 1504 rel.

(b) Constitution of Pakistan (1973)---

----Arts. 185(3) & 212(3)---Petition for leave to appeal---Maintainability---Petition for leave to appeal is only competent where case involves substantial question of law of public importance---Where no question of law of public importance is involved leave to appeal may not be granted.

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Muhammad Iqbal v. Secretary to Government of Punjab 1986 SCMR 1; Karamat Hussain v. Province of the Punjab 1982 SCMR 897; Razia Sultana v. Government of Punjab 1981 SCMR 715; M. Yamin Qureshi v. Islamic Republic of Pakistan PLD 1980 SC 22; Irtiqa Rasool Hashmi v. Water and Power Development Authority and another 1980 SCMR 722; Dilbar Hussain v. Province of Punjab 1980 SCMR 148; Yousaf Hussain Siddiqi v. Additional Settlement and Rehabilitation Commissioner 1976 SCMR 268; Muhammad Azhar v. Service Tribunal; Islamabad 1976 SCMR 262; M.A. Majid v. Government of Pakistan 1976 SCMR 311; (Director Food v. Rashid Ahmad 1990 SCMR 1446; Muhammad Manzoor Ahmad v. Commissioner Multan Division 1990 SCMR 560; Government of Punjab v. Khalid Hussain Gill 1989 SCMR 748; Abdul Razaq v. Province of Punjab 1980 SCMR 876 and Muhammad Yaqub Sheikh v. Government of the Punjab 1987 SCMR 1354 rel.

(c) Service Tribunals Act (LXX of 1973)---

----S. 4---Constitution of Pakistan (1973), Art.212(3)---Reinstatement---De novo inquiry---Service Tribunal reinstated employee in service with option to bank employer to initiate de novo inquiry---Validity---Inquiry was not got conducted against employee in accordance with relevant provisions of law and it was found in flagrant violation of the principles enunciated in cases already decided by Supreme Court---Service Tribunal had given fair opportunity to bank to initiate inquiry proceedings de novo within a period of three months but nothing could be done for the reasons best known to it---Judgment passed by Service Tribunal was free from any illegality or infirmity and did not call for interference---Leave to appeal was refused.

Shakeel Ahmad v. Commandant 502 Central Workshop E.M.E. 1998 SCMR 1970; Basharat Ali v. Director; Excise and Taxation 1997 SCMR 1543; Land Reforms Commission; Punjab Lahore and another v. Mst. Azra Parveen and 2 others 1995 SCMR 890 and Jan Muhammad v. General Manager, Karachi 1993 SCMR 1440 rel.

Muhammad Qamar-uz-Zaman, Advocate Supreme Court for Petitioner.

Ch. Muhammad Khalid Farooq, Advocate Supreme Court for Respondents.

Date of hearing: 29th March, 2010.

JUDGMENT

JAVED IQBAL, J.--- This petition for leave to appeal is directed under Article 212(2) of the Constitution of Islamic Republic of Pakistan, 1973 against the judgment dated 28-2-2001 passed

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by learned Federal Service Tribunal, Lahore whereby the appeal preferred on behalf of respondents has been accepted.

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2. The facts of the case have been mentioned elaborately in the judgment impugned and the petition in hand hence reproduction whereof would be of no use.

3. It is mainly contended by the learned Advocate Supreme Court on behalf of petitioner/Bank that the appeal of respondent should have not been accepted as it was badly barred by time which escaped the notice of the learned Federal Service Tribunal causing serious prejudice against the petitioners. It is next contended that appeal should have been dismissed on the sole ground of limitation which could not be examined by the learned Service Tribunal in its true perspective resulting in serious miscarriage of justice. It is also pointed out that after initiation of disciplinary action a full-fledged inquiry was conducted and the charges levelled against the respondent No.1 were substantiated by adducing cogent and concrete evidence and hence the question of fresh inquiry as directed by Service Tribunal is without any lawful justification.

4. We have carefully examined the contentions as agitated on behalf of the petitioner in the light of relevant provisions of law and record of the case. We have minutely perused the judgment impugned. After having gone through the entire record we are of the view that all the points including question of limitation have been dilated upon and decided in a comprehensive manner in the judgment impugned and relevant portion whereof is reproduced hereinbelow for ready reference:---

"(5) Arguments heard and the record perused. Although the respondent-Bank has stressed that the inquiry was held and consequent action taken strictly in accordance with law but no document has been placed to substantiate and to rebut the allegations and contentions of the appellant to the effect that the inquiry was held strictly in accordance with law. The appellant has however placed two documents and two inquiry reports dated 19-5-1981 and 1-11-1981 indicating only some procedural lapses but there is no suggestion for punishment at all. The relevant paras of the inquiry report dated 19-5-1981 is reproduced:-

"From the perusal of what has been stated above it is said beyond doubt that the Branch Manager, Cashier Incharge and Mr. Shamoon Khan, Assistant are irresponsible, carefree and negligent in the performance of their duties which can place the bank in awkward position at any stage.

However, it is gathered from the conversation and cross question that there was some dispute of Rs.2000 of the depositor with Mr. Shamoon Khan, Assistant of the branch (who had good relations with each other) which was later on settled with the intervention of the respectables of the Town.

The complainant has already given in writing duly witnessed by the Chairman of the Town that the issue stands settled. He has again given me the enclosed statement wherein he has stated

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that he lodged the complaint by mistake and now after checking the record he has come to th conclusion that the complaint lodged by him was wrong and therefore may not be filed."

The observation of the Inquiry Officer in the second inquiry report dated 1-11-1981 regarding the appellant is also reproduced for better appreciation of the case:

"Mr. Shamoon Khan, Senior Assistant was in need of funds so he tendered some ornaments to the Branch Cashier for the purpose. He stated his occupation as Zamindar instead of "Bank Service". Thus he tried to conceal his identity. He might be knowing that if he will declare his occupation as "Bank's service" the loan will not be granted to him without the permission of the competent authority. Thus he availed loan at public rates."

From the perusal of the documents only placed by the appellant it appears that quantum of punishment is of the highest degree of removing the appellant from service. The respondents failed to substantiate their contention by placing any document but on the other side the appellant has been able to make out a case that the inquiry was not held in accordance with law as submitted by him above. Keeping in view the above discussion we hold that imposition of penalty on the basis of defective inquiry was not justified. The appeal is hereby accepted, the impugned order dated 23-1-82 is hereby set aside and the appellant is reinstated in service. This order will be without prejudice to the discretion of the respondent to initiate inquiry proceedings de novo within a period of three months and the question of back-benefits shall depend upon the result of de novo inquiry".

5. A careful perusal of the operative portion of the judgment impugned as reproduced hereinabove would indicate that the question of limitation has been dilated upon and decided. It is well established by now that sufficiency of cause of condonation of delay being question of fact is within the exclusive jurisdiction of Tribunal. Ali Hasan Rizvi v. Islamic Republic of Pakistan 1986 SCMR 1086, Hussain Bibi v. Mubarak Hussain 1976 SCMR 262, Yousaf Hussain Siddiqui v. Additional Settlement and Rehabilitation Commissioner, Peshawar and 5 others 1976 SCMR 268. Even otherwise once the discretion is exercised qua the question of limitation by the learned Service Tribunal it is not usually interfered with by this Court. In this regard reference can be made to cases titled WAPDA v. Abdur Rashid Dar 1990 SCMR 1513, Sher Bahadur v. Government of N.-W.F.P. 1990 SCMR 1519, Zahida v. Deputy Director 1990 SCMR 1504.

6. It may not be out of place to mention here that leave to appeal to this Court is only competent where a case involves a substantial question of law and public importance. Muhammad Iqbal v. Secretary to Government of Punjab 1986 SCMR 1, Karamat Hussain v. Province of the Punjab 1982 SCMR 897, Razia Sultana v. Government of Punjab 1981 SCMR 715, M. Yamin Qureshi v. Islamic Republic of Pakistan PLD 1980 SC 22, Irtiqa Rasool Hashmi v. Water and Power Development Authority and another 1980 SCMR 722, Dilbar Hussain v. Province of Punjab 1980 SCMR 148, Yousaf Hussain Siddiqi v. Additional Settlement and Rehabilitation Commissioner 1976 SCMR 268, Muhammad Azhar v. Service Tribunal, Islamabad 1976 SCMR 262, M.A. Majid v. Government of Pakistan 1976 SCMR 311.where no question of law of public importance is involved leave to appeal may not be granted. Director Food v. Rashid Ahmad 1990 SCMR 1446, Muhammad Manzoor Ahmad v. Commissioner Multan Division 1990 SCMR 560, Government of Punjab v. Khalid Hussain Gill 1989 SCMR 748, Abdul Razaq v. Province of Punjab 1980 SCMR 876, Muhammad Yaqub Sheikh v. Government of the Punjab 1987 SCMR 1354. The

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learned Advocate Supreme Court was asked pointedly that what is the question of law of public importance, but no satisfactory answer could be given. Let we mention here at this juncture that inquiry was not got conducted in accordance with relevant provisions of law and moreso it was found in flagrant violation of the principles enunciated in cases titled Shakeel Ahmad v. Commandant 502 Central Workshop E.M.E. 1998 SCMR 1970, Basharat Ali v. Director, Excise and Taxation 1997 SCMR 1543, Land Reforms Commission, Punjab, Lahore and another v. Mst. Azra Parveen and 2 others 1995 SCMR 890, Jan Muhammad v. General Manager, Karachi 1993 SCMR 1440. The Service Tribunal has given a fair opportunity to the petitioner to initiate inquiry proceedings de novo within a period of three months but nothing could be done for the reasons best known to it.

7. The upshot of the above discussion is that the judgment impugned being free from any illegality or infirmity does not call for interference. The petition being meritless is dismissed and leave refused.

M.H./N-7/SC

Petition dismissed.

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three months. This appeal is accordingly allowed with no order as to costs. (49)

H.B.T./S-143/SC Appeal accepted.

2007 P L C (C.S.) 959

[Federal Service Tribunal]

Before Justice (Retired) Amanullah Abbasi, Chairman and Muhammad Iqbal Khan, Member

ZAHOORUDDIN SHEIKH

versus

PAKISTAN ATOMIC ENERGY COMMISSION through Chairman, Islamabad

Miscellaneous Petitions Nos.308, 386, 404 and 572 of 2003 in Appeal No.101(K)CE of 2001, decided on 22nd January, 2004.

(a) Government Servants (Efficiency and Discipline) Rules, 1973---

----Rr. 4(1)(b)(iii), 5 & 6---Service Tribunals Act (LXX of 1973), Ss. 4 & 5---Removal from service---Reinstatement in service---Powers of Service Tribunal to implement its order---Appeal--Order of removal from service passed against appellant was set aside by Service Tribunal directing appellant to be reinstated in service with the condition that Authority would hold de novo inquiry proceedings within a period of six months from the date of judgment of Service Tribunal and that in case inquiry was not conducted and completed within six months, appellant would be entitled to all back-benefits provided appellant would file affidavit to the effect that he did not work for gain anywhere during period of his removal from service--Judgment of Service Tribunal was upheld by Supreme Court---As soon as Supreme Court declined to interfere with judgment of Service Tribunal, it became obligatory for the Authority to implement judgment of Service Tribunal and de novo disciplinary proceedings should have been held against appellant according to direction of Service Tribunal in its judgment, but same had not been done by the Authority---Authority had contended that six months period for commencement and completion of de novo inquiry proceedings against appellant would start from the judgment of Supreme Court as judgment of Service Tribunal stood merged in the judgment of Supreme Court---Contention of Authority was repelled because doctrine of merger was not applicable in the present case as Supreme Court had not changed directions contained in the judgment of Service Tribunal and

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did not give any direction contrary to those contained in judgment of Service Tribunal---Non-implementation of judgment of Service Tribunal within stipulated period of six months had flouted the directions as prescribed therein---Charge-sheet, show-cause notice and removal order issued after expiry of said prescribed period of six months, were void, non-existent and of no legal value---Setting aside order of removal from service passed against appellant, Authority was directed to ensure implementation of order within specified period. [pp. 960, 961, 962, 965, 966, 967, 969, 970, 973, 974] A, B, C, D, E, F, G, I, J, M, N & O

PLD 1992 SC 549; PLD 1958 SC 104; 1999 SCMR 819=1999 PLC (C.S.) 409; PLD 1958 SC 104; 1989 PLC (C.S.) 398; PLD 1996 SC (AJ&K) 29 and 1997 PLC (C.S.) 929 **ref.**

(b) Service Tribunals Act (LXX of 1973)---

----Ss. 4 & 5---Judgment of Service Tribunal---Implementation of---Spirit underlying S.4 of Service Tribunals Act, 1974 was that a civil servant whose terms and conditions had been adversely affected by an original or appellate order, could approach Service Tribunal for redressal of his grievance subject to the conditions as laid down therein---Once a judgment was issued in favour of a civil servant, his terms and conditions as infringed by an order of the Authority stood addressed to the extent as ordained in judgment concerned---If the judgment was not implemented and petition for leave to appeal was either not filed or was declined by Supreme Court against judgment of Service Tribunal, no escape route was before the Department, except to implement the judgment in letter and spirit---In the event of department not complying with the directions contained in a judgment, after having exhausted legal remedies available, department would have no other alternative except to implement the judgment in the interest of supremacy of the rule of law. [pp. 969, 973] H & K

(c) Civil Procedure Code (V of 1908)---

----S. 151---Inherent powers of Court---Inherent power of civil Court to do right and undo wrong were preserved and kept by S. 151, C.P.C.---Where a law conferred jurisdiction, it also would grant powers of doing all such acts as were legitimate and were necessary for its execution. [p. 973] L

M. Shoaib Shaheen for Appellant.

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Raja Muhammad Asghar Khan for Respondent.

ORDER

MUHAMMAD IQBAL KHAN (MEMBER).--- The appellant/petitioner Mr. Zahooruddin Sheikh, Ex-Senior Engineer, CTC, Pakistan

Atomic Energy Commission vide various Miscellaneous Petitions Nos.308 of 2003, dated 26-3-2003, 386 of 2003 dated 19-4-2003, 404 of 2003 dated 25-4-2003 and 572 of 2003 dated 30-5-2003 has prayed that (i) the Tribunal judgment 16-7-2002 be implemented with consequential back-benefits, (ii) sought interim injunction by suspending the operation of the charge-sheet, dated 11-4-2003, (iii) restraining the respondents from initiating disciplinary proceedings after the expiry of the period prescribed in the Tribunal judgment, dated 16-7-2002 and (iv) show-cause notice dated 6-5-2003 and order of removal from service dated 20-5-2003 be declared void, illegal and unlawful.

2. We have scrutinized all these petitions. A consolidated order is contained in the succeeding paras.

3. It would be appropriate to recapitulate the evolutionary stages in this case to understand its whole perspective. At the outset we may refer to the Federal Service Tribunal's judgment, dated 16-7-2002 (hereinafter referred as Tribunal judgment) whereby the impugned order, dated 4-1-2001 was set aside and the appellant was directed to be reinstated in service with the condition that the department was required to hold de novo inquiry proceedings within a period of six months from the date of Tribunal judgment. The operative part of the Tribunal judgment reads as under:--

> "(7) As a result of the consent of the parties, the impugned order, dated 4-1-2001 is hereby set aside and the appellant is directed to be reinstated in service on the same position from which he was removed from service. The respondents are required to hold fresh inquiry within a period of six months of this judgment on the same charges after giving proper chance to the appellant, till then the respondents are required to get the civil suit as well as criminal case adjourned sine die. Question of back-benefits will depend upon the result of the inquiry. In case the inquiry is not conducted and completed within six months, the appellant would be entitled to all back-benefits provided he files affidavit to the effect that he did not work for gain anywhere during the said period."

4. The respondent-Department i.e. Pakistan Atomic Energy Commission sought leave to appeal against the Tribunal judgment from the Honourable Supreme Court of Pakistan. Their Civil Petition for Leave to Appeal No.1495 of 2002 was rejected by the apex Court which was pleased to order as under, vide their judgment dated 21-11-2002:--

> "We have considered the contentions raised by the learned counsel for the petitioner and have gone through the entire

material placed on record. We are not persuaded to interfere with the impugned remand order which has been passed with full consent of both the parties. Even otherwise, no question of law of general public importance as contemplated within the purview of Article 212(3) of the Constitution of the Islamic Republic of Pakistan is involved in the case in hand warranting interference by this Court."

5. It will be observed from the above that as soon as the Honourable Supreme Court of Pakistan declined to interfere with the impugned Tribunal judgment, the judgment became legally competent and lawful and it became obligatory for the respondent-Department to implement the directions as contained in para.7 of the Tribunal judgment as reproduced above in letter and spirit. It meant that in accordance with the directions contained in the Tribunal judgment, the respondents were required to reinitiate disciplinary proceedings against the appellant based on the same charges within a period of six months from the date of judgment. The respondents were thus, under obligation to commence and complete fresh disciplinary proceedings against the appellant within a period of six months i.e. by 15-1-2003 positively in order to meet the directions and requirements of the judgment referred to above. The respondents did not initiate the inquiry proceedings within the time frame as stipulated in the Tribunal judgment. As the deadline for initiation and completion of the disciplinary proceedings by the respondent-Department expired, the appellant vide his Miscellaneous Petition No.308 of 2003 dated 26-3-2003 requested the Tribunal for implementation of the Tribunal judgment and payment of back-benefits. Accordingly, the respondent-Department was served notice with a copy of the miscellaneous petition for parawise comments to be supplied on 7-5-2003, vide Court order dated 26-4-2003. The appellant vide Miscellaneous Petitions Nos.386 of 2003 dated 16-4-2003 and 404 of 2003 dated 25-4-2003 challenged the competence of the department to issue him a charge-sheet dated 11-4-2003 in violation of the directions contained in the Tribunal judgment and requested for interim injunction for restraining the respondent to initiate disciplinary proceedings against him with the issuance of the charge-sheet dated 11-4-2003 till the final disposal of the miscellaneous petition for implementation of the Tribunal judgment. The miscellaneous petition dated 16-4-2003 was heard on 19-4-2003 and notice was issued to the respondent along with a copy of the miscellaneous petition for hearing on 7-5-2003. The Tribunal heard the case on 7-5-2003 and passed the following order:--

"Heard the learned counsel for the appellant and the departmental representative of the respondent-Department. The representative of the respondent-Department seeks time as their Advocate is not available today. Allowed. The question whether

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the respondents can now issue charge-sheet to the appellant to initiate fresh inquiry proceedings against the appellant after refusal of their leave to appeal against the Tribunal judgment, dated 16-7-2002 by the apex Court on 21-11-2002, will also be examined on the next date of hearing. In the meantime, the respondents are restrained from issuing any adverse orders against the appellant till the next date of hearing."

6. The respondent issued show-cause notice to the appellant on 6-5-2003 and eventually removed him from service vide order, dated 20-5-2003. The appellant again vide his Miscellaneous Petition No.572 of 2003 prayed that his order of removal from service dated 20-5-2003 may be declared illegal and unlawful and the operation of the same be suspended till the final disposal of the petition. The miscellaneous petition was accordingly heard on 30-5-2003 and the Court order dated 31-5-2003 as detailed below was issued:--

"The Tribunal vide Court order, dated 7-5-2003 had specifically restrained the respondents from issuing adverse orders against the appellant till the next date of hearing of the appeal. Despite this clear cut and unambiguous orders, the respondent-Department issued show-cause notice dated 6-5-2003 followed by Removal from Service Order, dated 20-5-2003 to the appellant. The learned counsel for the appellant declared at the bar that the Court order referred to above was served upon the respondents in time long before the date of issuance of the show-cause notice, dated 6-5-2003 and Removal from Service Order of 20-5-2003 and also provided postal receipt dated 14-5-2003 in support of dispatch of Court order to respondents. The departmental representative also acknowledged having received the Court order (ibid). We feel that the respondents have committed gross violation of the Tribunal's directive by issuing the show-cause notice dated 6-5-2003 and removal order dated 20-5-2003. In case they had any reservation about the implementability of the Court order dated 7-5-2003 they could explain their point of view at the next date of hearing. In view of the unilateral action taken by the respondents without any justification, the execution of the order of Removal No.Estt-4(3005)/96 dated 20-5-2003 is stayed till next date of hearing. Notice to the concerned parties with copy of Miscellaneous Petition No.572 of 2003 to the learned counsel for the respondents for comments along with today's Court order for compliance/report by next date of hearing on 17-6-2003. In the meantime the respondents are also restrained from dispossessing the appellant from official accommodation under his occupation till the next date of hearing."

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7. It will be observed from the above Court order, the execution of the removal order dated 20-5-2003 was suspended till next date of hearing of the petition and the respondent-Department was also directed to provide comments on the Miscellaneous Petition No.572 of 2003 also at that time. The case was heard on 7-1-2003 and both the parties argued in support of their respective positions.

8. The respondent-Department have furnished their comments on Miscellaneous Petitions Nos.308, 386, 404 and 572, which are summarized as under:--

(i) The Tribunal judgment dated 16-7-2002 merged into the Supreme Court judgment dated 21-11-2002 and as such the date for initiation and completion of the disciplinary proceedings became reckonable from the date of the judgment of the Supreme Court i.e. 21-11-2002 and not from the Tribunal judgment of 16-7-2002 in terms of PLD 1992 SC 549. The Tribunal judgment became subservient to the order of the Supreme Court dated 21-11-2002.

(ii) The appellant vide his Miscellaneous petition No.404 of 2003 sought interim injunction restraining the respondent to hold de novo proceedings for suspension of the charge-sheet/statement of allegations issued to the appellant. On the date of hearing of the miscellaneous petition on 7-5-2003, the PAEC Counsel was busy before the Honourable Supreme Court of Pakistan and the departmental representative had no alternative except to refer to PLD 1992 SC 549 in the light of which the Tribunal judgment stood merged in to the Honourable Court judgment of 21-11-2002. The departmental representative also submitted a copy of the judgment of the Honourable Supreme Court reported in 1999 SCMR 819=1999 PLC (C.S.) 409 and also argued that the disciplinary proceedings against the petitioner from the date of the judgment of the apex Court were fully competent.

(iii) The Court order dated 7-5-2003 was received by the respondents on 21-5-2003 when the respondents had already issued the removal from service order of the appellant on 20-5-2003.

(iv) The Tribunal without issuing any notice to the respondents heard the Miscellaneous Petition No.572 of 2003 on 30-5-2003 and arbitrarily stayed execution of the removal from service order of the appellant and also restrained the respondents from dispossessing the appellant from his official accommodation although there was no appeal before the Tribunal.

(v) The Tribunal has no powers to implement its judgment under the

law and thus, the Tribunal order restraining the respondents from holding de novo enquiry is violative of the judgment of the Supreme Court which held the field in place of Tribunal's judgment. Even the entertainment of application for implementation of Tribunal judgment involves violation of judgment of the Honourable Supreme Court of Pakistan.

(vi) The respondents also referred to case-law reported in PLD 1958 SC 104.

9. After having carefully perused the points raised in the above mentioned miscellaneous petitions filed by the learned counsel for the appellant and comments thereon by the respondent-Department, the crucial issue to be adjudicated by the Tribunal in the light of relevant laws is whether the Tribunal is competent to order implementation of its judgments. At the outset it would be relevant to examine the points raised by the respondents in their comments on the miscellaneous petitions as summarized above:---

(i) The respondents hold the view that six months period for commencement and completion of the disciplinary proceedings against the appellant would start from the date of judgment of the Honourable Supreme Court of Pakistan dated 21-11-2002 and that after the judgment of the apex Court the Tribunal judgment stood merged in the judgment of the Honourable Supreme Court of Pakistan as per case-law PLD 1992 SC 549. Accordingly, the counsel insisted that the six months period reckonable for initiation and completion of the inquiry proceedings would start with effect from the date of judgment of the apex Court on 21-11-2002 and would expire on 21-5-2003. Let us now peruse the case-law reported in PLD 1992 SC 549, which has been relied upon by the learned counsel for the respondent-Department in support of their contention. The relevant portion of the case-law quoted above is reproduced below:--

"(6) Section 66-A authorises IAC to examine and initiate action if the order passed by the ITO is erroneous insofar as it is prejudicial to the revenue. The IAC did not have the jurisdiction or power to initiate same action in respect of the orders passed by the Appellate Authorities or the Tribunal. However, as observed above such power has now been vested in IAC from the year 1991. The controversy is whether after the appellate authority has passed the order does the order of the ITO merge in it and IAC cannot reopen it under section 66-A. In Corpus Juris Secundum, Volume 57, at page 1067 words "Merge" and "Merger" have been defined as follows:--

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"The verb "to merge" has been defined as meaning to sink or disappear in something else, to be lost to view or absorbed into something else, to become absorbed or extinguished, to be combined or be swallowed up.

"Merger" is defined generally as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased, an absorption or swallowing up so as to involve a loss of identity and individuality."

It is well-settled principle that on appeal the original order merges in the appellate order. The Commissioner of Income-tax v. Farookh Chemical Industries, 1992 SCMR 523 it was observed that the order of the ITO upon appeal merged in the order of the Income Tax Appellate Tribunal. Here the assessment order made by ITO was reopened under section 65 and a revised assessment was framed which has been set aside by the Tribunal. Thus, the order of the ITO has merged in the order of the Tribunal which holds the field."

In our view the case-law relied upon by the learned counsel for the respondent-Department strengthens and reinforces the case of the appellant. The case-law has enunciated and rightly so that when the original assessment order has been changed by the appellate order, the original order stood merged with the appellate order. The doctrine of merger as propounded in PLD 1992 SC 549 is not applicable in the present case as the apex Court has not changed any directions contained in the Tribunal judgment. Had the Honourable Supreme Court of Pakistan given any other directions contrary to what was directed in the Tribunal judgment and then to that extent the directions of the Honourable Supreme Court of Pakistan would have prevailed over those of the Tribunal judgment. We, therefore, strongly feel that since the Honourable Supreme Court of Pakistan did not give any directions contrary to the those contained in para.7 of the Tribunal judgment, the directions of the Tribunal were final and required implementation whole hog by the respondent-Department. Since the department initiated disciplinary proceedings against the appellant with the issuance of charge-sheet on 11-4-2003, they flouted the directions of the Tribunal to initiate and complete the proceedings within a period of six months, which expired on 15-1-2003 after the issuance of the judgment of the Tribunal on 16-7-2002. The respondents still had one month and 24 days to initiate and complete the de novo enquiry after the apex Court verdict of 21-11-2002. The apex Court decided the case well before the target date of 15-1-2002.

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(ii) The position at (sic) above is also not sustainable. The departmental representative, who invariably represents PAEC in all disciplinary cases before the Tribunal and who is reasonably well-informed about developments in each case, did not inform the Tribunal that show-cause notice was already issued to the appellant on 6-5-2003. The departmental representative intentionally suppressed the truth from the Tribunal. Had he informed the Tribunal the complexion of the Court order of 7-5-2003 perhaps could have been different. The case-law referred by the respondents as reported in 1999 SCMR 819=1999 PLC (C.S.) 409 is also not applicable in this case. The Tribunal judgment as upheld by the apex Court without any different directions as contained in the former and had attained finality after the expiry of six months on 15-1-2003 and hence issuance of show-cause notice to the appellant on 6-5-2003 was an order coram non judice enjoying no legal entity and thus, the removal order dated 20-5-2003 based on it had also no legal significance. The respondent's reliance on the case-law that the appeal against show-cause notice is not maintainable is not convincing as our view is that continuation of disciplinary proceedings against the appellant after the expiry date of 15-1-2003 was illegal and that the show-cause notice and before that the issuance of charge-sheet were measures having no force of law.

(iii) The respondents have again misinterpreted the law. The Court order of 7-5-2003 was against an order which was corum non judice based on wrong perception that the Tribunal judgment had merged with the Supreme Court judgment and as such disciplinary proceedings against the appellant could commence within a period of six months from the date of order of the Supreme Court i.e. 21-11-2002. The departmental representative did not inform the Tribunal about the issuance of the show-cause notice dated 6-5-2003 on 7-5-2003 although as mentioned in (ii) above, we feel that he knew that such order had already been passed by the department. Since he did not inform the Tribunal about issuance of the show-cause notice on 6-5-2003, we find some truth in the allegations of the appellant that issuance of the show-cause notice on 6-5-2003 was an afterthought to pre-empt the effectiveness/consequences of the Court order of 7-5-2003. Similarly, there was no justification for the issuance of the removal from service order on 20-5-2003, especially when vide Court order of 7-5-2003, the respondents were restrained from issuing any adverse orders against the appellant against the next date of hearing. Hence again the respondents have taken shelter under the alibi of receiving the Court order

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of 7-5-2003 on 21-5-2003 i.e. the day after the impugned order of removal was issued on 20-5-2003. The departmental representative must have informed the respondents about the arguments on the miscellaneous petition on 7-5-2003 and reaction of the Tribunal thereon. Moreover, the learned counsel for the appellant produced postal receipt dated 14-5-2003 showing dispatch of the Court order, dated 7-5-2003 to the respondents. The departmental representative also accepted the receipt of the Court order, although he did not indicate the date of receipt of the order. We do not believe that it has taken 7 days for the Court order to reach from the post office to PAEC Office while both being located in Islamabad. The point raised (iii) above is, therefore, not convincing and lacks jurisdiction.

(iv) The issue at (sic) above is not relevant. The Tribunal was considering the question of its jurisdiction to ensure implementation of its judgments. The original appeal of the appellant No.101(K)(CE) of 2001 against his removal from service was still pending implementation as directed by Tribunal judgment dated 16-7-2002 and upheld by Honourable Supreme Court judgment dated 21-11-2002. Hence we heard the assortment of miscellaneous petitions filed by the appellant in continuation of his appeal referred to above. The appellant remained aggrieved and his terms and conditions still remained adversely affected by non-implementation of the Tribunal judgment.

(v) The case-law PLD 1958 SC 104 referred by the Department is not applicable in the present case. In fact it supports the case of the appellant. The relevant portion of the case-law is reproduced below:---

"Where the legislature clothes an order with finality, it always assumes that the order which it declares to be final is within the powers of the authority making it, and no party can plead as final an order made in excess of the powers of the authority making it, in the eye of the law such order being void and non-existent. And if on the basis of a void order subsequent orders have been passed either by the same authority or by other authorities, the whole series of such orders, together with the superstructure of rights and obligations built upon them, must, unless some statute or principle of law recognizing as legal the changed position of the parties is in operation, fall to the ground because such orders have as little legal foundation as the void order on which they are founded. On this view the orders made by the Rehabilitation Board and the Central Government

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refusing to eject the respondents which were based on that part of the Deputy Custodian's order which was in excess of his jurisdiction were void and not final within the meaning of section 13-B of the Rehabilitation Ordinance, and it was the Rehabilitation Commissioner's order directing ejectment of the respondents that became final in law."

The non-implementation of the Tribunal judgment within the stipulated period of six months flouted the directions as prescribed therein. Hence the charge-sheet, show-cause notice and the removal order issued after the expiry of the prescribed period of six months are void and non-existent and they have no legal value as enunciated in the case-law reproduced above. The case-law in our view does not strengthen the department's cause, it provides justification to the case of the appellant.

10. Let us now examine section 4 of the Service Tribunals Act, 1973, stipulates as under:---

"4. Appeals to Tribunals.--- (1) Any civil servant aggrieved by any order whether original or appellate, made by a departmental authority in respect of any of the terms and conditions of his service may, within thirty days of the communication of such order to him or within six months of the establishment of the appropriate Tribunal, whichever is later, prefer an appeal to the Tribunal."

The spirit underlying section 4 is that a civil servant whose terms and conditions have been adversely affected by an original or appellate order may approach the Tribunal for redressal of his grievance subject to the conditions as laid down therein. Once a judgment is issued in favour of a civil servant, his terms and conditions as infringed by an order of the authority in question stand addressed to the extent as ordained in the judgment concerned. There is, therefore, no denying the fact that if the judgment is not implemented and leave to appeal is either not filed or declined, there is no escape route for the department but to implement the judgment in letter and spirit. In the event of the department not complying with the directions contained in a particular judgment after having exhausted the legal remedies available, the department has no other alternative except to implement the judgment in the interest of the supremacy of the rule of law.

11. It would be appropriate to examine the key ingrediance of Tribunal judgment dated 16-7-2002 and Honourable Supreme Court of Pakistan judgment, dated 21-11-2002.

Attested
Amjad Ali Advocate
Supreme Court

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12. The main components of the Tribunal's judgment, dated 16-7-2002 are contained in para.7 thereof as reproduced in para.2 of this order. The Tribunal had set aside the removal order of the appellant dated 4-1-2001 and reinstated him in service on the same position which he held before his removal. The respondents were required to initiate fresh inquiry proceedings against the appellant within a period of six months from the date of the order. The respondents were also directed to get the civil suit as well as criminal case, adjourned sine die. The appellant was to become entitled to back-benefits, if the inquiry was not conducted and completed within six months. These are the unambiguous directions contained in the Tribunal judgment. The Honourable Supreme Court upheld the Tribunal judgment in its entirety vide its judgment dated 21-11-2002 and reproduced in para.3 above. The apex Court dismissed the petition filed by the respondent-Department against the Tribunal judgment without any overriding directions. Resultantly, the Tribunal judgment became fully operational and remained intact and required to be implemented by the respondent-Department in its entirety.

13. What happened after the issuance of the Honourable Supreme Court judgment dated 21-11-2002? As per directions of the Tribunal judgment, the respondent-Department was required to initiate and complete the inquiry proceedings within a period of six months i.e. by 15-1-2003. The department did not take any action on the directions contained in the Tribunal judgment until 11-4-2003 much after their petition against the impugned Tribunal judgment was dismissed by the apex Court on 21-11-2002 when they issued charge-sheet to the appellant. Our considered view is that the respondent-Department failed to comply with the directions as contained in the above referred judgments of the Tribunal and the Supreme Court of Pakistan. They should have immediately initiated action against the appellant when their petition was turned down by the apex Court on 21-11-2002 and should have completed the disciplinary proceedings by the target date of 15-1-2003 to meet the legal requirements of the Tribunal judgment. The department's failure to do so holds them culpable and responsible for violating one of the key and crucial directions contained in the Tribunal judgment.

14. It would not be out of place to refer to section 5 of the Service Tribunals Act, 1973, which reads as under:--

"5. Powers of Tribunals.--- (1) A Tribunal may, on appeal confirm, set aside, vary or modify the order appealed against.

(2) A Tribunal shall, for the purpose of deciding any appeal, be deemed to be a Civil Court and shall have the same powers as

are vested in such Court under the Code of Civil Procedure, 1908 (Act V of 1908), including the powers of---

(a) enforcing the attendance of any person and examining him on oath;

(b) compelling the production of documents; and

(c) issuing commission for the examination of witnesses and documents."

15. To reinforce the spirit underlining the section referred to above, it would be pertinent to refer to the case-law reported in 1989 PLC (C.S.) 398, the relevant portion of which is read as under:--

"From these provisions it is abundantly clear that the Tribunal shall be deemed to be a Civil Court for the purpose of deciding an appeal and shall have the same powers as are vested in such Court under the Code of Civil Procedure, 1908. Certain powers have specifically been mentioned, but they do not derogate anything from the generality of the provisions immediately preceding in the enacting part of subsections; which are clearly suggestive of the fact that the Tribunal's powers for deciding an appeal are commensurate with the Civil Court's powers for decision of matters before it. The proceedings on application for execution or implementation of the Tribunal's orders are undoubtedly one of the steps in the proceedings of the main appeal. Therefore, what follows is that the Tribunal has got the same powers as are vested in the Civil Court under the Code of Civil Procedure, not only for the purpose of deciding an appeal, but also for the consequential purpose of deciding the petition for implementation of its orders.

(8) It is extremely difficult to believe that the Legislature while conferring overwhelming, vast and exclusive powers of deciding an appeal, did not intend to bestow the powers of implementation of the orders passed by it in final disposal of that appeal. Any other interpretation of these provisions would lead us to a ridiculous result. We are not prepared to believe that the Legislature avoided the conferment of power of execution of orders, thereby rendering the entire proceedings in an appeal under section 4 of the Act only an exercise in futility. If the Tribunal do not have the powers to get its order executed, all proceedings before it will be nothing more than wastage of time, and the Legislature could, by no means, be taken to have intended any such result. We are thus, constrained to hold that the powers conferred by section 5(2) of the Act on the Tribunal, inter alia, include the orders of execution and implementation of its order."

Attested
Amjad Ali Advocate
Supreme Court

16. Similarly the position regarding implementation of the judgment of the Tribunal has been made very clearly in PLD 1996 SC (AJ&K) 29. The relevant portion is as under:--

"(e) Jurisdiction---

---Where jurisdiction was conferred on Court or Tribunal to pass an order, power to have that order implemented was implicit in that jurisdiction."

The same views are echoed by Justice (R) Fazal Karim in his book "Access to Justice in Pakistan" under Chapter 29 - Execution of Decrees, which is reproduced below verbatim:--

"Preliminary

As long ago as 1872 the Privy Council observed that "the difficulties of a litigant in India begin when he has obtained a decree. This observation is as true today as it was in 1872. The origin of the difficulties lies in what has been described as the 'natural desire' of the judgment-debtor to avoid the decree or what may be described as lack of law-abiding motives to obey Court decrees. The Privy Council's observation contains both a challenge and a warning. It is a challenge because the task of executing a decree is a daunting task and requires firmness and the will to see that the laws are obeyed. In performing this function, the Court is enforcing the Constitution, Article 5(2) "Obedience to the Constitution and law is the inviolable obligation of every citizen." It is a warning because when a decree has been passed, the stage for the use of the coercive power of the State has arrived and failure of the Court to effectively use that power is failure of the State to enforce its laws and the judgments and decrees of its Courts and that is obviously a very strong thing. A decree is the result of a hard-fought forensic battle, invariably, extending over a period of years and without the decree-holder being able to realise the fruits of the decree, it is no more than a piece of paper: "It is a matter of common knowledge that too many obstacles are put by the judgment-debtor to the execution of the decree taking advantage of the provisions of section 47, Order XXI, rules 58 to 63 and Order XXI, rules 97 to 103, C.P.C. The Court must, therefore, try to alleviate the miseries of a decree-holder by at least discouraging objection petitions for which there is no provision in the Code of Civil Procedure". There is, in these matters, no scope for the exercise of any inherent power.... "where the Legislature has made specific provisions to meet a particular contingency it is not need or proper to entertain a cause under the inherent powers of the Court. The consideration

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of any hardship to the objector in case of his dispossession is of no importance. There are certain hardships which cannot be avoided in judicial proceedings. The hardships of the decree-holder to which the Privy Council referred as far back as 1872 is one of those difficulties...."

17. It would also be appropriate to refer to case-law reported in 1997 PLC (C.S.) 929, which is as under:--

"It is settled principle of law that if law expressly requires a thing to be done in a particular manner it ought to be done in that manner or not at all. In express provisions of law, therefore, excluded any other mode of doing the act which is not specifically provided."

The department had no other choice except to implement the Tribunal judgment in the manner as prescribed therein. K

18. Apart from the above case-laws, we may also refer to section 151 of Civil Procedure Code which should be read in conjunction with section 5 of the Service Tribunals Act, 1973, as reproduced above. The section 151 of Civil Procedure Code is as under:--

"151. Saving of inherent powers of Court.--- Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

The interpretation of the above section would mean that the inherent power of the Civil Court to do right and undo wrong are preserved and kept intact by section 151. It would mean that where a law confers jurisdiction, it also grants powers of doing all such acts as are of legitimate and are necessary for its execution. Thus, in our view the Tribunal has powers to execute its own judgments as this power flows from the jurisdiction itself. L

19. Despite clear-cut orders and case-laws available in the field, there is a confusion whether the Tribunal can implement its judgments or not. As elsewhere discussed in this order, we feel that judgments announced in favour of the civil servants, if not implemented as per directions contained therein, the terms and conditions of service of such civil servants remain in limbo and redressal is not provided to such civil servants even after having obtained favourable verdicts on their appeals. We strongly feel that this cannot be the intention of the framers of the law. The laws apart from other factors are made to balance societal interests apart from ensuring supremacy of the rule of law, which are not served if the Tribunal fails to implement its judgment. The departments some time drag their feet and thus, prolong the agony and frustration of the appellants by not implementing such judgments in the prescribed M

Attested
Amjad Ali Advocate
Supreme Court

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manner. Our view is that the Service Tribunal has the power to implement its own judgments as powers of execution flows from jurisdiction and the requisite powers are inherent from four corners of the case-laws, section 5 of the Service Tribunals Act, 1973 and relevant provision of the Code of Civil Procedure, 1908 and opinion of the legal experts on this key issue.

20. In view of what has been critically evaluated above, we find no justification for issuance of the order, dated 20-5-2003, which is coram non judice and flouts the directions contained in the Tribunal judgment dated 16-7-2002 and apex Court judgment dated 21-11-2002. Accordingly, the impugned order dated 20-5-2003 which has no legal entity and grossly violates directions contained in the Tribunal judgment which has retained finality does not hold the field and the appellant stands reinstated as already ordered by the respondent-Department vide order dated 22-1-2003 with back-benefits. To avoid any confusion in the implementation of the Tribunal judgment, the removal from service order of the appellant dated 20-5-2003 is set aside being of no legal value and significance. The respondent-Department is also directed to ensure implementation of this order within a period of three months and put up compliance report addressed to the Registrar of this Tribunal by 22nd April, 2004. The respondents are also directed to pursue the civil and criminal proceedings case filed against the appellant in the relevant Court of law and take action on its verdict/findings as and when available.

20. The above order collectively disposes of the Miscellaneous Petitions Nos.308 of 2003, 386 of 2003, 404 of 2003 and 572 of 2003.

21. Parties be informed.

H.B.T./32/FST Appeals allowed accordingly.

2007 P L C (C.S.) 974

[Punjab Service Tribunal]

Before Muhammad Afzal, Member-I

MUHAMMAD YASEEN, EX-EXCISE AND TAXATION INSPECTOR

versus

DIRECTOR-GENERAL, EXCISE AND TAXATION, PUNJAB and another

Appeal No.2511 of 2005, decided on 15th August, 2006.