

KHYBER PAKHTUNKHWA SERVICE TRIBUNAL, PESHAWAR

BEFORE: **KALIM ARSHAD KHAN ... CHAIRMAN**
RASHIDA BANO ... MEMBER (Judicial)

Application No.295/2024

In

Service Appeal No.1299/2019

Date of presentation of Application.....18.04.2024

Date of Hearing.....19.09.2024

Date of Decision.....19.09.2024

1. **The Chief Secretary**, Government of Khyber Pakhtunkhwa, Peshawar.
2. **Principal Secretary to Chief Minister**, Khyber Pakhtunkhwa, Peshawar.
3. **Secretary Population Welfare Department** Government of Khyber Pakhtunkhwa, Peshawar.
4. **The Director General**, Population Welfare Department, Government of Khyber Pakhtunkhwa, Peshawar.....(*Applicants*)

Versus

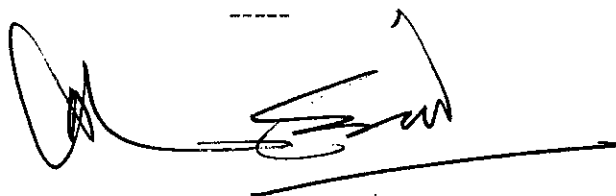
1. **Dr. Lal Zari**, D/O Professor Muhibullah R/O Section N-1, House No.4, Street No.1, Hayatabad Peshawar. At present working under Directorate General Health Service Khyber Pakhtunkhwa, Peshawar.....(*Respondent*)

Present:

Mr. Naseer Ud Din Shah, Assistant Advocate General...For the Applicants
Mr. Noor Muhammad Khattak, Advocate.....For the respondent

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**APPLICATION UNDER SECTION 12(2) OF THE CODE
OF THE CIVIL PROCEDURE, 1908 FOR SETTING
ASIDE THE JUDGMENT IN SERVICE APPEAL
NO.1299/2019 DATED 14.04.2023, OBTAINED
THROUGH FRAUD AND MIS-REPRESENTATION**



JUDGMENT

KALIM ARSHAD KHAN CHAIRMAN: This is an application moved under section 12(2) of the Code of Civil Procedure, 1908 against the judgment dated 14.04.2023 passed by this Tribunal.

2. The application is mainly on the grounds that the appellant (respondent herein) was the employee of the Population Welfare Department and was serving in the Health Department while the latter one was not implicated in the service appeal; that the appellant could not claim any promotion from the Population Welfare Department as the promotions were given to her by the Health Department; that Judgment was obtained through fraudulent means and misrepresentation.

3. We have heard the learned AAG for the applicants and learned counsel for the respondent.

4. It is at the very outset observed that the application is shown to have been signed by four persons. Petitioner No.1 has not signed the petition, rather someone else has done the same. Besides, there is no name under the signature of the petitioner No.2, i.e. Principal Secretary to the Chief Minister Khyber Pakhtunkhwa. The affidavit is signed by the Secretary Population Welfare Department, wherein he has also skipped his name. True that the mentioned defects were curable at a later stage by filing proper authorization or putting signature



and names of the persons/applicants signing the petition but the same could not have been cured till writing of this judgment.

5. The appellant was initially dismissed from service which dismissal was assailed by her in Service Appeal No.976/2015 and this Tribunal vide its judgment dated 31.08.2018 directed for her reinstatement and initiation of denovo inquiry. Compliance of the judgment, the petitioners conducted de-novo inquiry, wherein she was awarded major penalty of reduction to lower scale for one year and was held junior to the officers promoted during that (one year) period. That order was challenged by the appellant before the Tribunal in Service Appeal No.1299/2019, with the following prayer:

"On acceptance of this appeal the impugned orders dated 25.06.2019 and 06.09.2019 may very kindly be set aside and the appellant may be restored on her original post i.e. Deputy Director (BPS-18) with all back benefits including seniority. That the respondents may further please be directed to grant back benefits to the appellant for the intervening period i.e. w.e.f the date of dismissal (21.05.2015) till the date of reinstatement (25.06.2019).

6. This Tribunal vide judgment dated 14.04.2023, accepted the appeal in the following manner:



"In view of the above, appeal was accepted by this Tribunal and impugned order was set aside. Respondents were directed to conduct de-novo inquiry against the appellant strictly in accordance with law. The de-novo inquiry report is available on file which shows that charge sheet alongwith statement of allegations were never served upon appellant. As per Rule-10 (I) (b) of Khyber Pakhtunkhwa Government Servants (Efficiency & Discipline) Rules, 2011, if the competent authority decides that it is necessary to hold an inquiry against the accused under Rule-5, it shall pass an order of inquiry in writing which shall include the grounds for proceeding, clearly specifying the charges alongwith apportionment of responsibility.

7. *In the instant case, upon the direction of this Tribunal for de-novo inquiry, charge sheet alongwith statement of allegations was not served upon the appellant as per law. It will not be out of place to mention here that framing of charge and its communication alongwith statement of allegations is not mere a formality but it is a mandatory pre-requisite which is to be followed.*

Despite directions by this Tribunal, Secretary



Social Sector being head of the Department, was not examined in the presence of appellant in order to provide her a proper opportunity of cross-examination. Statement of members of the Purchase Committee/Technical Committee were also not recorded in the presence of appellant. The appellant had leveled certain allegations against Mr. Fakhar Alam, Store Keeper and Mr. Muhammad Kamran but their statements were not recorded despite directions and again the de-novo inquiry is silent on this issue. Secretary Social Sector (FATA) was responsible for certain lapses but again he was not associated with the inquiry proceedings and the appellant was made scapegoat to save the skin of others. De-novo inquiry was not conducted in accordance with Khyber Pakhtunkhwa Government Servants (Efficiency & Discipline) Rules, 2011 as neither the statements of all concerned were recorded in the presence of the appellant nor she was given any opportunity of cross-examination. Nothing was brought before this Bench in order to show any action against Secretary, Storekeeper and other officials of AGPRs and Rule-11(4) of Khyber Pakhtunkhwa



Government Servants (Efficiency & Discipline)

Rules, 2011 was violated as their statements were not recorded in the presence of accused appellant.

It is also on record that show cause notice was also not served upon the appellant. The report of de-novo inquiry is also silent in this regard and that's why no reply was submitted by the appellant.

Inquiry report was also not provided. As per Rule-

14(4)(c) of Khyber Pakhtunkhwa Government

Servants (Efficiency & Discipline) Rules, 2011, the

competent authority shall provide a copy of the

inquiry report to the accused but in the instant case,

inquiry report was provided on the previous date of

hearing to the appellant. Admittedly she was

condemned unheard as no chance of personal

hearing was afforded to her. It has been held by the

Supreme Court of Pakistan that where the civil

servant was not afforded a chance of personal

hearing before passing of termination order, such

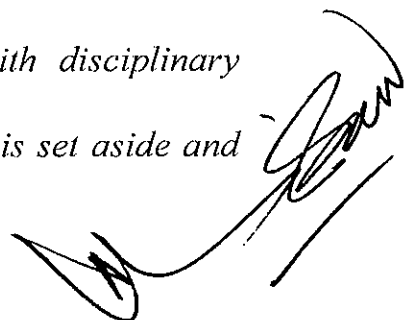
order would be void ab-initio. Reliance is placed on

2003 PLC (C.S) 365.

8. For what has gone above, the impugned

order of imposition of penalty with disciplinary

proceedings wherefrom it resulted, is set aside and



appeal is accepted as prayed for. Parties are left to bear their own costs. File be consigned to the record room."

7. We have been informed that the Applicants have also filed CPLA against the same judgment of the Tribunal, in the Supreme Court of Pakistan, which is stated to be still pending.

8. We may reproduce section 12(2) of the Code of Civil Procedure, 1908 as under:

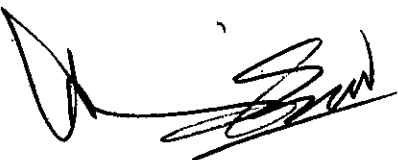
"12. Bar to further suit.

(1).....

(2) Where a person challenges the validity of a judgment, decree or order on the plea of fraud, misrepresentation or want of jurisdiction, he shall seek his remedy by making an application to the Court which passed the final judgment, decree or order and not by a separate suit."

9. The provisions of the above subsection mandate that plea of fraud and misrepresentation are pre-conditions and have to be specifically described by the party, alleging these, in detail in the application under S. 12(2) CPC. But when we see the application that does not contain any element of fraud, misrepresentation or jurisdictional error.

10. Strange enough to observe that the petitioners, while completely ignoring the facts that if more than one remedies are available to a person then only one could be availed, has filed of this application under section 12(2) CPC challenging the



validity of judgment dated 14.04.2023. The petitioners have also lost sight of the fact that a CPLA had also been filed in the Supreme Court of Pakistan against the same Judgment of the Tribunal. The petitioners seem to have misguided and mislead the provincial government by asking it to resort to unnecessary and frivolous multifarious litigation by availing all the available remedies for no fruitful purpose thereby wasting the time, public money and delaying the implementation of the judgment. Filing of objection petition and this application, both, aim at thwarting the implementation of the judgment of the Tribunal, especially, when the judgment already challenged in the Supreme Court of Pakistan in CPLA. It is reiterated that the judgment debtor has only two options with him. That is either to implement the judgment in its true spirit or to have the judgment suspended from the Supreme Court, as the Applicants/judgment debtors have already filed CPLA.

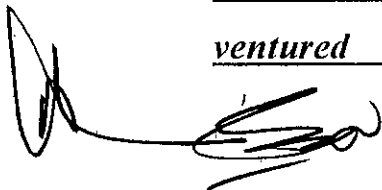
11. Reliance is placed on the judgment of the Supreme Court of Pakistan reported as 2021 SCMR 1617 titled "*JS Bank Limited, Karachi and others versus Province of Punjab through Secretary Food, Lahore and others*" wherein the Supreme Court has held as under:

"As we have noted supra in the light of "Trading Corporation of Pakistan v. Devan Sugar Mills Limited and others" (PLD 2018 SC 828), it was petitioners' responsibility to be clear in their mind



as regards to what remedy was available to them under the law. Relevant portion from Para No. 11 of the said judgment is reproduced:-

"In this view of the matter, the impugned judgment of the learned bench of the High Court cannot be sustained. **Fair trial, does not envisage recourse to successive remedies one after another against one and the same impugned order on substantially same set of facts and pleadings seeking substantially similar relief, as it would be against the doctrine of election, as expounded above. A tenant confronted with ex-parte order striking out its defence resulting in his ejection order, quite a few remedies may be available against such order; namely Appeal under section 24 of the Cantonments Act, 1963, Application under Order IX, Rule 13 C.P.C., Application under section 12(2), C.P.C., application under Order XXI, Rules 99 to 103, C.P.C. and not the least application under section 47, C.P.C. all such remedies arm the tenant/judgment debtor to effectively resist ex-parte ejection order passed against it.** In instant case as noted above respondent-tenant, chose not to file appeal under section 24 of the Act, 1963 against the ejection order dated 17.5.2011 but had chosen to invoke provisions of section 12(2), C.P.C. on 07.12.2011, which application was dismissed on merits by the executing Court on 7.8.20 12 and maintained by High Court on 19.8.2016. **The Appellant after almost five years from date of ejection order, ventured to invoke Section 47, C.P.C. on**



substantially same facts and grounds. Even if it is assumed that grounds as available under section 47, C.P.C. to question executability, discharge or satisfaction of ejection order passed as a consequence for non-compliance of tentative order, set down different parameter to resist and defend execution of eviction order, then too, all such grounds were very much available when first application under section 12(2), C.P.C. was initially made."

Even if more than one remedies are available to the petitioners against the impugned order, they have to choose one remedy, at a time all the available remedies cannot be pressed by the petitioners in the light of the judgment of this Court noted supra. In case in hand situation is different; one remedy was available to the petitioners, if it is their stance that ICA was competent and that has wrongly been dismissed then their petition to challenge the order of learned Division Bench was to be filed only and if they admit that the ICA was not competent then they were having a right to challenge the order of learned Single Judge dismissing their writ petitions. Invoking the jurisdiction of this Court against the order of learned Single Judge directly through a petition for leave to appeal and simultaneously challenging the order of the learned Division Bench by filing leave to appeal petition are self-contradictory.

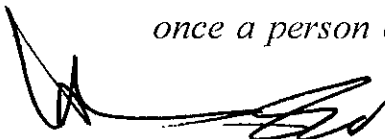
We could have considered applications/ grounds for the condonation of delay in these



petitions, keeping in view the complexity of the matter in the light of judgment of this Court reported as "Khushi Muhammad through L.Rs. and others v. Mst. Fazal Bibi and others" (PLD 2016 SC 872). However, as petitioners have chosen to avail both remedies i.e. direct petitions before this Court against the judgment of the learned Single Judge as well as they have challenged the order of learned Single Judge through ICAs. Now praying that the judgment of the learned Division Bench is not maintainable and ICAs were competent and that order be set aside. The ground taken for condonation of delay is not acceptable under the law, therefore, we are not inclined to condone delay in filing the petitions and, the same are dismissed. As C.Ms for condonation of delay stand dismissed, therefore, C.P.L.As. Nos. 1049 of 2019, 1355 of 2019, 1450 of 2019, 1683 of 2019, 1188-L of 2019 and 1243-L of 2019 also stand dismissed for being barred by time."

12. Wisdom is also derived from the judgment of Lahore High Court reported as 2022 CLC 1397 titled "Messrs Fact Finders (PVT.) LTD. and others versus CNBC Pakistan and others", wherein the Lahore High Court found as under:

"8. The scheme of law is further clarified in the decision of this Court in learned Division Bench reported as "Dr. Faiza Asghar v. Nighat Nasir Sheikh and others" (PLD 2017 Lahore 884) that once a person opts, for a remedy under the general



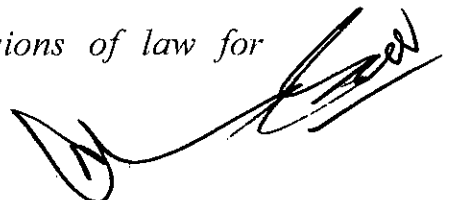
law then the remedy under Defamation Ordinance is completely barred and vice versa."

13. We may also seek guidance from the judgment of the Peshawar High Court reported as 2016 YLR 1901 titled "Ghulam Sarwar versus Muhammad Javed and others", wherein it was held as under:

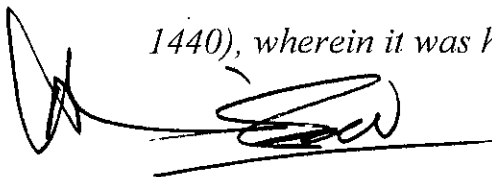
"8. In the circumstances, when the same objections raised in the earlier objection petition under Section 47, C.P.C. were held not sustainable, there was no justification to entertain and proceed with application under Section 12(2), C.P.C. containing the same allegation, and not fulfilling the essential requirement of disclosing fraud and misrepresentation in the impugned decree. Therefore, orders of both the Courts below proceed on wrong premise, and ought to be set aside. This will, hopefully, put an end to the ordeal of the petitioner who is being denied fruits of decree in his favour long ago."

14. We may also rely on the judgment of the Peshawar High Court reported as PLD 2018 Peshawar 154 titled "Government of N.W.F.P. through Secretary Works and Services Department Peshawar and another Versus Messrs CEMCON (Private) Ltd. through Managing Director" wherein, the Peshawar High Court held as under:

"Perusal of the record reveals that on 11.6.2005, the petitioner moved an application under section 151 C.P.C. read with other enabling provisions of law for



setting aside the ex parte judgment and decree dated 16.12.2003, passed by the learned Senior Civil Judge, Peshawar, which was dismissed on merits on 19.6.2007, whereafter, on 6.5.2008, the petitioner moved an application under section 12(2) C.P.C. with similar prayer alleging that it was obtained by playing fraud. No doubt, where a suit has been decreed ex parte, various remedies are available to the aggrieved person. Firstly, an application under Order IX, Rule 13, C.P.C. secondly a review application under section 114 read with Order XLVII, C.P.C., thirdly, the appeal under section.96 C.P.C. and lastly a proceedings to set aside the decree on the ground that it was obtained by fraud, misrepresentation and want of jurisdiction, etc under section 12(2), C.P.C.. Here, the petitioner has exhausted the remedy by filing an application an application under Order IX, Rule 13 C.P.C. read with other enabling provisions provided under the law, therefore, on the same ground he cannot be permitted to re-agitate the same issue by means of a fresh petition under section 12(2), C.P.C., as the provision of section 12(2), C.P.C. are not intended to be a duplication of the proceedings provided for Order IX, Rule 13, C.P.C. In this behalf, reference may be made on the case reported as Ghulam Sarwar v. Muhammad Hassain and others (1987 SCMR 1440), wherein it was held as:--



---S.12(2) & O.IX R.13---Constitution of Pakistan (1973), Art.185(3)---Ex parte decree, setting aside of---Petitioner having failed in proceedings for setting aside ex parte decree, moved application under S.12(2), C.P.C., with similar prayer claiming that decree was fraudulently obtained---Dismissal of application challenged---Supreme Court affirmed impugned order holding that provision of S.12(2), C.P.C. were not intended to be a duplication of proceedings provided for in O.IX, R.13, C.P.C. and refused leave to appeal.

In this respect, reliance can also be placed on the case reported as Mrs.Amna Bibi through General Attorney v. Nasrullah and others (2000 SCMR-296), wherein it was held that the petitioner having exhausted remedy by filing an application under Order IX, Rule 13 C.P.C. which could not be permitted to re-agitate the same issue by means of fresh petition under section 12(2) C.P.C."

15. For what has been discussed above we find no merits in this application and would dismiss it with costs. Consign.

16. Pronounced in open Court at Peshawar and given under our hands and the seal of the Tribunal on this 19th day of September, 2024.



KALIM ARSHAD KHAN

Chairman



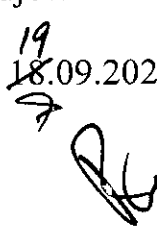
RASHIDA BANO

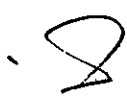
Member (Judicial)

16th Sep. 2024

1. Mr. Muhammad Jan, District Attorney alongwith Mr. Ahmadyar Khan, Assistant Director for the petitioners present. Learned counsel for the respondents present.

2. Former made a request for adjournment in order to prepare the brief. Adjourned by way of last chance. To come up for arguments on ¹⁹18.09.2024 before D.B. P.P given to the parties.


(Rashida Bano)
Member (J)


(Kalim Arshad Khan)
Chairman

Mutazem Shah

Petition No.295/2024 in S.A #.1299/2019


ORDER

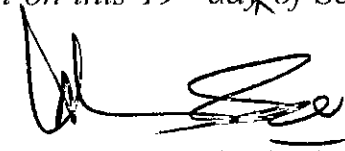
19th Sep. 2024

1. Mr. Nascir Ud Din Shah, Assistant Advocate General for the petitioners present. Mr. Noor Muhammad Khattak, Advocate for the respondent present. Heard.

2. Vide our detailed judgment of today placed on file, we find no merits in this application and would dismiss it with costs. Consign.

3. *Pronounced in open Court at Peshawar and given under our hands and the seal of the Tribunal on this 19th day of September, 2024.*


(Rashida Bano)
Member (J)


(Kalim Arshad Khan)
Chairman

Mutazem Shah