

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL,
PESHAWAR.

SERVICE APPEAL No. **660/2024**

Mr. Zia Ullah

.....**APPELLANT**

VERSUS

The Government of Khyber Pakhtunkhwa & others

.....**RESPONDENTS**

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Dated: 11-11-2024

APPELLANT

THROUGH:

NOOR MUHAMMAD KHATTAK
ADVOCATE SUPREME COURT

①

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL,
PESHAWAR

APPEAL NO. 660/2024

ZIA ULLAH
VERSUS

GOVT. OF KP & OTHERS

REJOINDER ON BEHALF OF THE APPELLANT IN RESPONSE
TO THE REPLY OF THE RESPONDENTS

R/SHEWETH:

Preliminary Objections from 1 to 8:

All the preliminary objections raised by the respondents are incorrect, baseless and not within accordance with law & Rules rather the respondents are stopped due to their own conduct to raise any objection at this stage of the appeal.

ON FACTS:

- 1- Incompetent to reply properly.
- 2- Incompetent to reply.
- 3- Incompetent to reply properly.
- 4- Incompetent to reply properly.
- 5- Incompetent to reply properly.
- 6- Incorrect and not replied accordingly, hence denied.
- 7- The respondents are incorrect to the extent that they had issued the inquiry order within accordance with law as provided under E & D Rules, 2011. In addition to this, they are also totally ignorant about the duties of Departmental Representative as mandated under rules "11 (4)", "13", ["14" "4" "d"] & "15" and that is why they did not appoint any one as departmental representative under rule 10 (1) (c) of the ibid Rules, hence violated the aforementioned rule deliberately and intentionally overruled it.
- 8- The respondents are misrepresenting the letter 15-04-2024, issued by the inquiry committee regarding the non-appointment of the departmental representative. The aforementioned letter is crystal clear in its own contents while requesting therein regarding the appointment/nomination order of the Departmental representative from the quarter concerned and therefore cannot be misinterpreted at any cost.
- 9- Incorrect, Vague & Absurd, hence denied. The appeal is **"fully mature"** in light of the Section 4 of Service Tribunal Act and the same has been duly endorsed/admitted by this August Tribunal at the very outset. The very objection of **"premature"** raised by Registrar in light of reported judgment **"2005 SCMR 890"**, its

Khyber Pakhtunkhwa
Service Tribunal

Diary No. 17894

Dated 13-11-24

subsequent reply by appellant and the clarification & acceptance for resubmission of the appeal before this August Tribunal are attached as **R, R1 & R2. (Copies of the objection in light of referred judgment, its reply and subsequent approval of Tribunal, attached asR, R1 & R2).**

10- That, the matter of disciplinary action/proceeding falls under the **Chapter II of the Civil Servant Act, 1973** [**Terms & Conditions**], as envisaged by **Section 16**". That, under **Section 22**" of the aforesaid Act, right of appeal has been provided to a Civil Servant aggrieved by any order passed, in respect of his terms & conditions. This Section in respect of appeal has been further elaborated in a reported judgment rendered in **"2011 SCMR 99"**. The titled appeal before this Tribunal does not lie in the ambit of Section 4 (1) (b) i.e to the extent of fitness or quantum of punishment as mandated of the Service Tribunal Act, 1974; hence the matter under reference is appealable. In other chain of judgments, it has been well elaborated that any orders, being, Malafide, Coram non judice and ultra vires are appealable and Section 4 of Service Tribunal Act, is fully attracted. **(Copies of the referred Sections [16 & 22], Judgment incorporated with Section 22, and the relevant referred chain of Judgments attached as.....R3, R4 & R5).**



11- Incorrect and was not replied accordingly, hence denied. The impugned nomination order dated **"25-04-2024"** (**Annexure "F" of the main appeal**), has been issued in response of an appeal dated **"16-04-2024"** R/W letter dated **"15-04-2024"** of the Inquiry Committee (**Annexures "E" & "C" of the main appeal**) while reflecting the appointment of Departmental Representative by designation, hence is appealable and may be challenged in the **Relevant/ Competent Forum**.

ON GROUNDS:

From A to Q:

All the facts & grounds of main appeal of the appellant are correct and within accordance with law and rules and that of the respondents are incorrect and baseless and having no force of law. Moreover the respondents have not considered the reported judgment of the Apex Court rendered in **"2022 SCMR 439"** R/W Letter of the Establishment Department dated **"14-02-2022"** [**Annexures "G" & "H" of the Main Appeal**] while issuing the impugned nomination order dated **"25-04-2024"**, under the garb of illusive and elusive tem of **"Competent Authority"**, hence the same is not tenable and liable to be set aside.

It is therefore most humbly prayed that on acceptance of this rejoinder the appeal of the appellant may please be accepted as prayed.


APPELLANT
ZIA ULLAH
THROUGH:

NOOR MOHAMMAD KHATTAK
ADVOCATE

2/A

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL,
PESHAWAR.

SERVICE APPEAL No. **660/2024**

Mr. Zia Ullah

.....**APPELLANT**

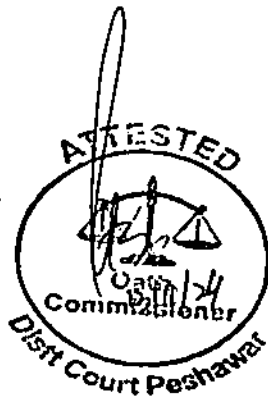
VERSUS

The Government of Khyber Pakhtunkhwa & others

.....**RESPONDENTS**

AFFIDAVIT

I, Zia Ulla, (Appellant), do hereby solemnly affirm that the contents of this **Rejoinder** are true and correct to the best of my knowledge and belief and nothing has been concealed from this Honorable Tribunal.



Zia Ullah
DEPONENT

"R"

(3)

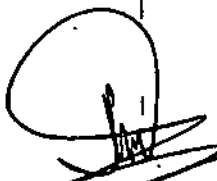
This is an appeal filed by Mr. Ziaullah today on 13.05.2024 against the statement of allegations/enquiry order against which he preferred/made a departmental appeal on 16.04.2024 the period of ninety days is not yet lapsed as per section 4 of the Khyber Pakhtunkhwa Service Tribunal Act 1974 which is premature as laid down in an authority reported as 2005-SCMR-890.

As such the instant appeal is returned in original to the appellant/counsel. The appellant would be at liberty to file fresh appeal after maturity of cause of action and removing the following deficiencies.

- 1- According to sub-rule-4 of rule-6 of Khyber Pakhtunkhwa Service Tribunal rules 1974 respondent no. 5 is un-necessary/improper party, in light of the rules ibid and on the written direction of the Worthy Chairman the above mentioned respondent number be deleted/struck out from the list of respondent.
- ② Copy of impugned enquiry order dated 15.04.2024 mentioned in the heading of appeal is not attached with the appeal be placed on it.
- ③ Memorandum of appeal is not signed by the counsel.

No. 21 /Inst.24/KPST,

DL 13/05/2024


REGISTRAR 13/5/24
SERVICE TRIBUNAL
KHYBER PAKHTUNKHWA
PESHAWAR.

Noor Muhammad Khattak Adv.
High Court Peshawar.

ATTSTED

R

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2005 S C M R 890

[Supreme Court of Pakistan]

Present: Sardar Muhammad Raza Khan and Mian Shakirullah Jan, JJ

MANAGING DIRECTOR, OIL AND GAS DEVELOPMENT COMPANY LTD.---

Appellant

versus

Syed NAJMUL HASSAN NAQVI---Respondent

Civil Appeal No.662 of 2001, decided on 28th February, 2005.

(On appeal from the judgment, dated 23-6-2000 passed by the Federal Service Tribunal, Islamabad in Appeal No.1675(R) of 1999).

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

---S. 4---Civil Procedure Code (V of 1908), S.80 & O.VII, R.11---Premature appeal---Effect---Any suit or cause of action which is premature, does not entail dismissal of that cause but it results into rejection under O.VII, R.11 C.P.C. that does not operate as res judicata---If appeal before Service Tribunal is premature, it should be returned by Registrar so as to be re-submitted after maturity of cause of action.

Abdullah Bhai's case PLD 1964 SC 106; Muhammad Usman's case PLD 1983 SC 436; Syed Aftab Ahmed's case 1999 SCMR 197; Pakistan International Airlines Corporation's case 1999 PLC (C.S.) 1539 and Sui Southern Gas Company Limited's case 2003 PLC (C.S.) 796 ref.

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

---S. 4---Civil Procedure Code (V of 1908), O.VII, R.11---Premature appeal---Filing of appeal before expiry of ninety days---Penalty of compulsory retirement, setting aside of---Civil servant was compulsory retired from service but Service Tribunal allowed appeal and set aside the penalty---Plea raised by the authorities was that civil servant had filed appeal after eighty days from filing of departmental representation, thus the appeal was premature the same merited dismissal by Service Tribunal---Validity---If at the initial stage, by serious omission, the timely return of appeal was avoided and the cause of action was allowed to mature during pendency of appeal and on the fag end of proceedings, the appeal was dismissed on the ground that the initial submission was premature, such volte face if taken by Service Tribunal, could not be endorsed under any canon of justice---Premature matters were not bad but simply premature and must be returned---Failure to return the appeal debarred the Tribunal to subsequently jeopardize rights and bona fide claims of civil servants---Service Tribunal was required to return the appeal at the very first instance, if such course was not adhered to, then the Tribunal subsequently could not damage the civil servant on the grounds of prematurity of appeal when the same had become mature during the pendency allowed by Service Tribunal itself---Service Tribunal had rightly declined to dismiss the appeal on the score of prematurity---Appeal was dismissed.

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

---S. 4---Penalty of compulsory retirement, setting aside of---Discrimination---Departmental inquiry was initiated against eight officers but the respondent civil servant was only condemned who was compulsory retired from service just 4 days prior to his superannuation---Service Tribunal allowed the appeal and set aside the penalty---Validity---No action was

ATTORNEY

taken against other officers under inquiry on the ground that he was to retire after about four months---If such reason could prevail with the authorities with regard to that other officer, it was equally available for the respondent civil servant who was compulsorily retired 4 days before his superannuation---Service Tribunal had rightly concluded that the penalty awarded to respondent civil servant was clearly discriminatory and his retirement was expedited mala fide despite the fact that after 4 days he was to retire on superannuation---Supreme Court declined to interfere with the judgment passed by Service Tribunal as the same was unexceptionable---Appeal was dismissed.

Shah Abdul Rasheed, Advocate Supreme Court with Syed Amjad Ali, Dy. Admn. Officer (O.G.D.C.) for Appellant.

Hafiz S.A. Rehman, Advocate Supreme Court for Respondent.

Date of hearing: 28th February, 2005.

JUDGMENT

SARDAR MUHAMMAD RAZA KHAN, J.--- Oil and Gas Development Company Limited, Islamabad has challenged, after leave of the Court, the judgment, dated 23-6-2000 of learned Federal Service Tribunal whereby, on acceptance of the appeal of Syed Najamul Hassan Naqvi, his compulsory retirement from service was set aside.

2. The respondent joined the company on 23-9-1982 as Deputy Chief Geologist and in due course became a Manager (B-21) when on 12-12-1998 he was served with a charge-sheet levelling the allegations of misconduct. An inquiry was held and ultimately it was found that the charges of misconduct were proved. Accordingly, vide office memorandum dated 13-8-1999 he was made to retire from service compulsorily. His appeal before the Service Tribunal succeeded and hence this appeal.

3. Learned counsel for the appellant challenged the very maintainability of appeal before the Tribunal on the ground that it was premature and was filed without waiting for a period of 90 days after filing of appeal or representation before the higher departmental authority. The learned counsel drew analogy from section 80 of the Civil Procedure Code where no suit against Government could be filed before the expiry of two months next after notice in writing, as contemplated by the section itself. It was vehemently asserted by the learned counsel that any suit brought in contravention of section 80, C.P.C. was bound to be rejected under Order VII, rule 11 of the C.P.C. and could not be entertained by the Court. That identical was the case of appeals to be filed under section 4 of the Service Tribunal Act.

4. We believe that the one in hand is a matter squarely akin to the civil law and that is why the learned counsel also consciously sought protection under the provisions of section 80, C.P.C. Still, we cannot avoid making expression that the condition of prematurity involved under section 80, C.P.C. as well as under section 4 of the Service Tribunals Act is of hyper-technical nature. Legislature having realized this fact has amended the section in the year 1962 by adding proviso to the effect that if a premature suit is instituted without such notice or in contravention of the provision of section 80, C.P.C., the Court shall allow not less than three months to the Government to submit its written statement. The logic behind the issuance of notice under section 80, C.P.C. of providing time to the Government is covered by allowing it three months time after the institution of suit, to file written statement. This carries an idea that the causes of action if premature can be overlooked if those become mature during pendency of the cause. This Court comprising of Mr. Justice A.R. Cornelius,

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Mr. Justice B.Z. Kaikaus and Mr. Justice Hamoodur Rahman in Abdullah Bhai's case PLD 1964 SC 106-113 had categorically observed that it was open for the Court to have decreed the suit which was premature when it was filed but where the cause of action matured during the pendency of the suit.

5. The aforesaid verdict though available in field, in principle, this Court comprising of two Honourable Judges in Muhammad Usman's case PLD 1983 SC 436 did not agree to the hearing of a premature appeal by the Tribunal under section 4 of the Service Tribunals Act. Subsequent development would indicate that this rule was relaxed in Syed Aftab Ahmed's case 1999 SCMR 197 by holding that where no statutory provision or statutory rule providing a right of appeal or representation is available in the relevant laws of the appellant, he is not bound to file the same and then wait for a period of 90 days in order to have resort to the Service Tribunal. Similar view was taken in Pakistan International Airlines Corporation 1999 PLC (C.S.) 1539 that if the provision of appeal or representation is available in the statutory rules of a corporation or statutory body, the employee shall have to file such appeal but where the rules are not statutory, the employees can directly resort to the Service Tribunal. In the instant case, the Oil and Gas Development Company is not possessed of any statutory rules and hence the appeal before the Tribunal could be filed directly either without filing any appeal or representation before the departmental authority or without waiting for a period of 90 days. The latest view of this Court in this behalf is given in the case of Sui Southern Gas Company Limited 2003 PLC (C.S.) 796.

6. With regard to the stringency of the rule involved, we have another view of the matter as well. Any suit or cause which is premature, does not entail the dismissal of that cause but it results into rejection under Order VII, rule 11, C.P.C. that does not operate as res judicata. We are, therefore, of the firm view that if an appeal before a Service Tribunal is premature, it should be returned by the Registrar so as to be re-submitted after the maturity of the cause of action. Quite an anomalous situation would it be that on the one hand and at the initial stage, by serious omission, the timely return of appeal is avoided and the cause of action is allowed to mature during pendency and, on the other hand, at the fag end of proceedings, it is dismissed on the ground that the initial submission was premature. Such volte face if taken by the Tribunal cannot be endorsed under any canon of justice. The fact remains that premature matters are not bad but simply premature and must be returned. Failure to do so debars the Tribunal to subsequently jeopardize the rights and bona fide claims of the appellants. We, therefore, conclude that a premature appeal before the Tribunal requires to be returned at the very first instance. If this course of action is not adhered to, the Tribunal subsequently, cannot damage the appellant on grounds of prematurity of appeal when the same had become mature during the pendency allowed by the Tribunal itself. The Tribunal, in the instant case, has rightly declined to dismiss the appeal on this score and moreover, this objection was not taken before the Tribunal either, by filing any concise statement.

7. Coming to the factual aspect of the case concerning charges of misconduct and the manner those were tackled with by the Tribunal, we would take up the charge concerning Gas Dehydration Plant. In this charge 8 officers were under inquiry and the respondent was held liable being member of the Evaluation Committee. The learned Tribunal has rightly concluded that on the one hand, the respondent was not a member of Evaluation Committee consisting of 5 members namely, Mr. Ain-ud-Din Siddique, Mr. Jaffar Muhammad, Mr. Ghulam Abbas Nakai, Mr. Qamar Saeed Awan and Muhammad Athar. It may be remarked at

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this stage that Mr. Qamar Saeed Awan was exonerated for not being a member of the committee while he was very much the member thereof, whereas, the respondent was condemned though not a member at all. This was an act of discrimination as well.

8. No action was taken against Mr. Qamar Saeed Awan on the ground that he was to retire on 7-1-1999. If such reason could prevail with the authorities qua Mr. Qamar ASaeed Awan, it was equally available for he respondent as well who also was to retire on 17-8-1999. The height of discrimination is that Mr. Qamar Saeed Awan was accordingly exonerated but the respondent was compulsorily retired only 4 days before his superannuation.

9. Concerning the charge about appointment of a consultant, it is rightly observed by the Tribunal that the same appointment of consultant was dropped on 27-4-1995 by the competent authority and the said committee did not take any final decision. There were many officers senior to him in the committee and the final decision never rested with the respondent.

10. Regarding Gas Transport Pipeline the allegation against the respondent was that he facilitated the procurement of a Pipeline at a very high cost, depriving the corporation of the benefits of a fair and transparent competition. Suffice it to say for negation of charge that the decision to adopt the gallop tender was taken at the level of Chairman, the Minister and the Prime Minister. It was implemented through the decision of Chairman O.G.D.C. and the period of 15 days after gallop tender was determined by the Chairman himself.

11. For all the aforesaid reasons, it was rightly concluded that the penalty awarded to the respondent did not commensurate with the so-called misconduct on his part. That he was clearly discriminated and his retirement was expedited malafidely despite the fact that after 4 days he was to retire on superannuation. In the circumstances, the judgment of the Tribunal being unexceptionable is maintained and the appeal is hereby dismissed.

M.H./M-233/S

Appeal dismissed.

ATTORNEY

"R/W"

③

REPLY TO THE REMOVING OF OBJECTIONS / DEFICIENCIES, RAISED IN THE APEAL OF MR. ZIA ULLAH FILED ON 13-05-2024.

As Mr. Zia Ullah (**appellant**) has filed an appeal through learned Counsel Mr. Noor Muhammad Khattak (**ASC**), which was returned to the appellant/Counsel in original on the basis of its premature nature. It is pertinent to mention here that the appellant has filed an appeal before the appellate authority i.e Chief Minister through Principal Secretary vide dated 16-04-2024 (**Annexure "E" of the instant appeal**), regarding the directing Competent Authority to appoint "**departmental representative by designation**", so as to provide a legal

coverage to the unlawful inquiry order dated 15-04-2024 (**Annexure "B" of the instant appeal**), which has been issued in utter violation of rule 10 (1) (c) of Efficiency & Discipline Rules, 2011. The matter under reference has been also communicated by the inquiry committee at the very outset which is evident from the letter dated 15-04-2024. (**Annexure "C" of the instant appeal**).

That in response to the above appeal i.e dated 16-04-2024, the departmental authority i.e Secretary Health (**Incompetent Authority**) instead of the Competent Authority issued an impugned notification vide dated 25-04-2024 (**Annexure "F" of the instant appeal**). in sheer violation of rule 10 (1) (c) of Efficiency & Discipline Rules, 2011, by nominating the "**departmental representative by designation**" to provide legal coverage to the unlawful inquiry order. As an appellate order (cause of action) in the form of impugned notification dated 25-04-2024, has arrived in response to the appeal dated 16-04-2024 R/W letter 15-04-2024 of the inquiry committee and the appellant reserves the legal right under Section "**4**" of Service Tribunal Act, 1974, to file the instant Service appeal.

NOTED

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In addition to above, the deficiencies in the form of deleting respondent No.5, signing of the memorandum of appeal etc, have been already removed please.

Resubmitted for kind perusal and proper order please.

Appellant/Counsel,

 14/05/24
Zia Ullah/ Noor Muhammad Khattak ASC.

Reply is satisfactory be fixed
before court. R
14/5/24.

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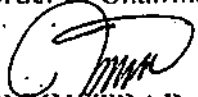
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FORM OF ORDER SHEET

Court of _____

Appeal No. 660/2024

S.No.	Date of order proceedings	Order or other proceedings with signature of judge
1	2	3
1-	14/05/2024	<p>The appeal of Mr. Ziaullah resubmitted today by Mr. Noor Muhammad Khattak Advocate. It is fixed for preliminary hearing before Single Bench at Peshawar on 16.05.2024. Parcha Peshi given to the counsel for the appellant.</p> <p>By the order of Chairman  REGISTRAR</p> <p>TESTED</p>

"R/3"

(11)

ESTA CODE [Establishment Code Khyber Pakhtunkhwa] 11

15. Conduct.---The conduct of a civil servant shall be regulated by rules made, or instructions issued, by Government or a prescribed authority, whether generally or in respect of a specified group or class of civil servants.

16. Disciplinary action.---A civil servant shall be liable to prescribed disciplinary action and penalties in accordance with the prescribed procedure.

17. Pay.---A civil servant appointed to a post ¹[....] shall be entitled, in accordance with the rules, to the pay sanctioned for such post ²[....] :

Provided that, when the appointment is made on a current-charge basis or by way of additional charge, his pay shall be fixed in the prescribed manner:

Provided further that where a civil servant has, under an order which is later set aside, been dismissed or removed from service or reduced in rank, he shall, on the setting aside of such order, be entitled to such arrears of pay as the authority setting aside such order may determine.

18. Leave.---A civil servant shall be allowed leave in accordance with the leave rules applicable to him; provided that the grant of leave will depend on the exigencies of service and be at the discretion of the competent authority.

³[19 Pension and gratuity.---(1) On retirement from service, a civil servant shall be entitled to receive such pension or gratuity as may be prescribed.

(2) In the event of death of a civil servant, whether before or after retirement, his family shall be entitled to receive such pension or gratuity, or both, as may be prescribed.

(3) No pension shall be admissible to a civil servant who is dismissed or removed from service for reasons of discipline, but government may sanction compassionate allowance to such civil servant, not exceeding two-third of the pension or gratuity which would have been admissible to him had he been invalided from service on the date of such dismissal or removal.

(4) If the determination of the amount of Pension or gratuity admissible to a civil servant is delayed beyond one month of the date of his retirement or death, he or his family, as the case may be, shall be paid provisionally such anticipatory pension or gratuity as may be determined by the prescribed authority, according to the length of service of the civil servant which qualifies for pension or gratuity, and any over payment on such provisional payment shall be adjusted against the amount of pension or gratuity finally determined as payable to such civil servant or his family:

Provided that those who are appointed in the prescribed manner to a

1. The word "or grade" omitted by Khyber Pakhtunkhwa Ordinance No. IV of 1985
2. The word "or grade" omitted by Khyber Pakhtunkhwa Ordinance No. IV of 1985
3. Section 19 substituted by KP Act III of 2013 dated 22-01-2013 w.e.f. 30-06-2001.

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12 - ESTA CODE (Establishment Code Khyber Pakhtunkhwa)

service or post on or after the 1st July, 2001 till 23rd July, 2005 on contract basis shall be deemed to have been appointed on regular basis:

Provided further that the amount of Contributory Provident Fund subscribed by the civil servant shall be transferred to his General Provident Fund.

(5). In case any difficulty arises in giving effect to any of the provisions of this section, the Secretary to Government, Establishment Department shall constitute a Committee comprising of the Secretary to Government, Finance Department, Secretary to Government Law Department and Accountant General, Khyber Pakhtunkhwa for removal of the difficulty.]

20. Provident Fund.---(1) Before the expiry of the third month of every financial year, the Accounts Officer or other officer required to maintain provident fund accounts shall furnish to every civil servant subscribing to a provident fund the account of which he is required to maintain a statement under his hand showing the subscriptions to including the interest accruing thereon, if any, and withdrawals or advances from, his provident fund during the preceding financial year.

(2) Where any subscription made by a civil servant to his provident fund has not been shown or credited in the account by the Accounts Officer or other officer required to maintain such account, such subscription shall be credited to the account of the civil servant on the basis of such evidence as may be prescribed.

21. Benevolent Fund and Group Insurance.---All civil servants and their families shall be entitled to the benefits admissible under the West Pakistan Government Employees Welfare Fund Ordinance, 1969 (W.P Ord. I of 1969), or the Khyber Pakhtunkhwa Government Servants Benevolent Fund Ordinance, 1972 (Khyber Pakhtunkhwa Ord. VII of 1972), and the rules made thereunder.

22. Right of Appeal or Representation.---(1) Where a right to prefer an appeal or apply for review in respect of any order relating to the (terms and conditions) of his service is provided to a civil servant under any rules applicable to him, such appeal or application shall, except as may be otherwise prescribed, be made within thirty days of the date of such order.

(2) Where no provision for appeal or review exists under the rules in respect of any order or class of orders, a civil servant aggrieved by any such order may, within thirty days of the communication to him of such order, make a representation against it to the authority next above the authority which made the order:

Provided that no representation shall lie on matters relating to the determination of fitness of a person to hold a particular post or to be promoted to a higher post or grade.

2011 S C M R 99

[Supreme Court of Pakistan]

Present: Mian Shakirullah Jan, Mahmood Akhtar Shahid Siddiqui and Mian Saqib Nisar, JJ

Capt. (Retd.) KHALID ZAMAN---Appellant

Versus

GOVERNMENT OF PAKISTAN through Secretary, Establishment Division and others---Respondents

Civil Appeal No. 1868 of 2007, decided on 6th October, 2010.

(On appeal from the judgment dated 29-6-2007 of the Federal Service Tribunal, Islamabad passed in Appeal No. 168(R)(CS) of 2004).

Civil Servants (Seniority) Rules, 1993---

----R.5---General Clauses Act (X of 1897), S.21---Constitution of Pakistan, Art. 212 (3)---Leave to appeal was granted by Supreme Court to consider; whether service rendered by petitioner in Pakistan Army was not countable towards his service in Postal Group in the light of law laid down by Supreme Court; and whether notwithstanding re-fixation of seniority, promotion once given to petitioner in accordance with his entitlement under law, could be withdrawn in the light of principle of locus poenitentiae.

Hameed Akhtar Niazi v. Secretary Establishment Division, Government of Pakistan and another 1996 SCMR 1185 ref.

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

----S.22---Civil Servants (Seniority) Rules, 1993, R.5---Compulsory Service (Armed Forces) Ordinance (XXXI of 1971), S. 9-A---Seniority---Pervious service of Army---Civil servant was serving in Pakistan Army and from there he joined Civil Service and was inducted in Postal Service Group---Chairman Pakistan Postal Services Management Board counted period of civil servant served in Army and fixed his service accordingly---Federal Government reversed the decision of Chairman, which order was maintained by Service Tribunal---Plea raised by civil servant was that Secretary Communication Division of Government of Pakistan, had no jurisdiction to pass such order---Validity---Pakistan Postal Service Management Board was an attached department of Communication Division of Government of Pakistan, the Secretary was head of that Division and according to provisions of S. 22(2) of Civil Servants Act, 1973, a civil servant aggrieved of any order contemplated, where no appeal or review was provided in law could validly maintain a representation before the authority next higher to that which had passed the order---Irrespective of the grade of Chairman Pakistan Postal Services Management Board and that of Secretary Communication being equal, under the Rules of Business the Secretary being in-charge of concerned division for all intents and purposes was an authority higher than the Chairman and, therefore, competent to entertain and decide representation of respondents, therefore, the objection of appellant could not sustain and was repelled---Supreme Court declined to interfere in the judgment passed by Service Tribunal---Appeal was dismissed.

ATTACHED

Capt. (Retd.) Abdul Qayyum v. Government of Punjab through Chief Secretary and 81 others 2003 PLC (C.S.) 1008; Hameed Akhtar Niazi v. Secretary Establishment Division, Government of Pakistan and another 1996 SCMR 1185; Muhammad Iqbal Khokhar and 3 others v. The Government of The Punjab through the Secretary to Government of the Punjab Lahore and 2 others PLD 1991 SC 35; Capt. (Retd.) Abdul Qayyum, Executive Engineer v. Muhammad Iqbal Khokhar and 4 others PLD 1992 SC 184 and PLD 1997 SC 351 distinguished.

Abdur Rehman Siddique, Advocate Supreme Court and Arshad Ali Ch., Advocate-on-Record for Appellant.

Mazhar Ali Ch., DAG and M.S. Khattak, Advocate-on-Record for Respondents Nos. 1 to 3.

Shoaib Shaheen, Advocate Supreme Court for Respondents Nos.5, 7, 8, 11 to 14, 16, 17, 20, 23, 24, 34 to 36, 38, 40, 42 to 44, 46, 49, 50, 52 to 55, 57, 59, 60 and 64.

Ex parte for Respondents Nos.4, 6, 9, 10, 15, 18, 19, 21, 22, 25, 33, 37 to 39, 41, 45, 47, 48, 51, 56, 58 and 61 to 63.

Date of hearing: 6th October, 2010.

JUDGMENT

MIAN SAQIB NISAR, J.---The appellant was a Captain in Pakistan Army who with the permission of the G.H.Q. appeared in Central Superior Services (CSS) examination and on passing thereof was appointed in the Postal Group of Civil Service, in Grade 17 in the year 1992. He continued to serve in the department and in 2003 approached the Chairman of the Pakistan Postal Services Management Board (PPSMB) requesting that he should be given the benefit qua his seniority for the period he rendered services in Pakistan Army. It seems that his claim was founded upon a decision of this Court reported as Capt.(Retd.) Abdul Qayyum v. Government of Punjab through Chief Secretary and 81 others (2003 PLC (C.S.) 1008). The Chairman through an order dated 24-6-2003 accepted the appellant's request and granted him seniority in the Postal Group by counting his service period in the Army. The private respondents in the matter whose seniority was affected on account of the above, feeling aggrieved of the order filed a representation before Secretary, Ministry of Communication, Government of Pakistan (Respondent No. 2), who accepted the same vide order dated 8-1-2004 and thus set aside the order of the Chairman (PPSMB) dated 24-6-2003. The appellant obviously hurt by this order filed an appeal before the Federal Service Tribunal (FST) which has been dismissed by it though the impugned judgment dated 29-6-2007 hence, a petition for leave to appeal was initiated before this Court, in which leave was granted on 28-11-2007 in the following terms:--

"After hearing the petitioner, we are inclined to grant leave to appeal in this petition to consider the questions firstly, as to whether the service rendered by the petitioner in Pakistan Army was not countable towards his service in the Postal Group in the light of law laid down by this Court in Hameed Akhtar Niazi v. Secretary

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Establishment Division, Government of Pakistan and another (1996 SCMR 1185) and secondly, notwithstanding the re-fixation of the seniority, the promotion once given to the petitioner in accordance with his entitlement under the law, could be withdrawn in the light of principle of locus poentiae".

2. It has been argued by the learned counsel for the appellant that the decision of the FST is underpinned on four main reasons. (i) Case of the appellant is not at par with that of Capt. (R) Abdul Qayyum. (ii) Rather it is akin to the case of Mirza Irshad. (iii) For the Armed Forces inductees Rule 5 of Civil Servants (Seniority) Rules, 1993 is applicable (iv) The Chairman of (PPSMB) was not the competent authority to grant the seniority.

While making submissions on the last of the aforementioned reason (of FST) first, the learned counsel by referring to Section 4 of the Pakistan Postal Services Management Board Ordinance, 2002 read with schedules I and II thereto has argued that for all the functions mentioned therein (the Schedules) it is the Chairman who is the competent authority, and his empowerment includes the settling of the seniority issues of the employees of the postal service, thus the view otherwise set out by the FST in the impugned judgment is rested on misconception and misapplication of the relevant law; he has submitted that rather it is the Secretary Communication who was not vested with any jurisdiction to entertain the so-called appeal or representation of the private respondents against the order of the Chairman (PPSMB) and resultantly his order 8-1-2004 is without jurisdiction and lawful authority is thus void; it is also argued that the appellant has never claimed his seniority on the basis of Compulsorily Service (Armed Forces) Ordinance, 1971 with the effect, that such law has been misapplied to his matter, likewise is the position about the judgment of Irshad Mirza's case which was relied by the FST in dislodging the appellant; the learned counsel categorically and emphatically stated, that the case of the appellant is exclusively and entirely structured on the judgment of this Court rendered Capt. (R) Abdul Qayyum's case, which is aptly and squarely applicable to the matter; explaining that the two cases are akin it is submitted that in an earlier round of litigation which reached the apex Court. Capt. (R) Abdul Qayyum was not found entitled to the relief of counting his service period while he was in the Army on the basis of Ordinance 1971 *ibid* but it is independent thereto, that in the second round the relief which the appellant is asking for, was given to him (Qayyum), therefore, the case of the appellant being strictly at par with the said case, he was entitled to the same relief which was correctly so provided to him by the Chairman (PPSMB). In general, he has argued that the FST has erred in law and also misconceived while differentiating the facts of the two noted cases; Mr. Mazhar Ali Ch. DAG, in response to the above has placed on record his written submission, while Mr. Shoaib Shaheen learned counsel for the private respondents has submitted that an impression throughout has been given by the appellant if he was either an Engineer or a Doctor in the Pakistan Army, whereas this is not true, because he was an ordinary Captain; the appellant was inducted in the Postal service in year 1992 and never raised an issue of his seniority, though he always remained posted and notified of his placement in the seniority, it is only in the year 2003 when he already stood promoted to grade-18 a move was made seek enumeration of the Army service *qua* even when he was in grade-17. And unfortunately it was so retrospectively allowed to him by the Chairman; he has argued that the facts of Capt. (R) Abdul Qayyum's case are peculiar thereto, having no similarity to the instant matter and therefore such

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decision cannot be considered a precedent for the present case; the judgment in the noted case is in personam rather in rem, therefore it has no application to the matter in hand; the appellant was governed by the Appointment/ Promotion Seniority Rules, 1973 under which, it was not permissible for him to jump the seniority queue, by reckoning the Army service as a part of his civil service in the postal department. Replying to the argument of the appellants counsel that the Secretary Communication lacked jurisdiction to pass the order dated 8-1-2004, it is unequivocally submitted that according to section 22 of the Civil Servants Act, 1974 he (the Secretary) being the higher authority a representation against the decision of the Chairman was competent before him for the redressal of the grievance of the respondents who were seriously and adversely effected by a patently, illegal and a mala fide order and thus the jurisdiction has been validly exercised while passing the order dated 8-1-2004.

3. Heard. It may be pertinent to mention here that the learned counsel for the appellants while making his submissions has neither drawn any support from the judgment of this Court (1996 SCMR 1185) mention in the LGO or pressed into service the principle of locus poentiae. When specifically questioned he very candidly and frankly conceded that the case of the appellant is strictly founded upon that of Capt. (Retd.) Abdul Qayyum; and further that the appellant shall have no case to argue if it is otherwise; it is however repeatedly submitted the both the cases are alike; besides the jurisdiction of the Secretary to pass the impugned order has been vehemently attacked. Therefore in view of the above it is expedient to ascertain whether there is any factual or legal similarity about the two cases.

4. The facts of Mr. Qayyum's case are uncomplicated; he joined the Army Corps of Engineering under the Direct Short Service Commission (DSSC) for the project relating to the construction of Karakoram Highway; in the year 1971; GHQ had sought options from the members of the said service for regular commission or release from Army; Mr. Qayyum opted for the later, however, his release was declined due to extraordinary situation in the country emerging on account of 1971 war, but ultimately he was relived in 1975, whereafter he joined as Assistant Engineer in communication and Works Department, Government of Punjab. On the basis of section 9-A of the Compulsory Service (Armed Forces) Ordinance, 1971 he sought the counting of his service period in the army towards the newly acquired job in civil department and thus the determination of his seniority accordingly; the Governor of Punjab while exercising his residual power under section 22 of the Punjab Civil Servant Act 1974 allowed Mr. Qayyum the benefit asked for and his seniority was accordingly augmented; he also got the promotion as an XEN; the employees of the said department who were affected due to the above, challenged the decision before the Punjab Service Tribunal, but only relating to the determination/fixation of the seniority and not about the promotion; the appeal by the Tribunal was however dismissed, which order was assailed before this Court and the appeal was partly allowed vide judgment dated 2-10-1990 reported as Muhammad Iqbal Khokhar and 3 others v. The Government of the Punjab through the Secretary to Government of the Punjab Lahore and 2 others (PLD 1991 SC 35). The relevant portion of the judgment is reproduced as under:-

"The appeal is, therefore, allowed. The judgment of the Service Tribunal is set aside and the service appeal filed by appellant is allowed partly to the extent that the order passed by the Governor conferring seniority on respondent No.2 by giving him

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benefit of service rendered from 21-10-1969 to 26-2-1975 in the Army is declared to be ultra vires section 22 of the Punjab Civil Servants Act and of no legal effect. As regards the rest of the exercise of relaxation of power, the appeal in respect of it is dismissed. The parties are left to bear their own costs."

Accordingly the Secretary Communication gave effect to the above decision by withdrawing the first part of the order, whereby the seniority of Mr. Qayyum was brought up while his promotion was not, touched. It may however be mentioned that Mr. Qayyum had sought the review of the above judgment of this Court and during the pendency thereof, the Secretary Communication and Works Department, revised his seniority as XEN; anyhow the review petition was dismissed vide judgment reported as Capt. (Retd.) Abdul Qayyum, Executive Engineer v. Muhammad Iqbal Khokhar and 4 others (PLD 1992 SC 184).

5. In the above circumstances, Mr. Qayyum commenced a fresh round of litigation as being aggrieved of the order of the Secretary dated 26-6-1991 through which his seniority as XEN was also revised; he filed a representation before the Punjab Government which was not decided within the statutory period, constraining him to unsuccessfully move to the Punjab Service Tribunal (PST) and thereafter assailed the decision before this Court whereupon the leave was granted to him. It may be pertinent to state that by the time section 9-A of the Ordinance 1971 was amended and after the word 'practitioner' the words "other essential persons" had been inserted. Furthermore the omission of the Engineers from the original category of section 9-A of Ordinance 1971 was subjected to challenge before the Federal Shariat Court which delivered the judgment, relevant extract whereof reproduced as under:--

"that the omission of the Engineers who are also compelled to serve the Armed Forces is a violation of the human rights of equality before law and equal protection of law which is proved by the Quran and Sunnah. After the word Medical Officer in section 9A words 'or an Engineer' shall be added."

Pursuant to the judgment of the Federal Shariat Court, further amendment was made in the section in 1984 allowing the benefit of Army service in civilian department to essential persons like Engineers and others (this is specifically mentioned in paragraph No. 13 of the judgment reported as Capt. (Retd.) Abdul Qayyum v. Government of Punjab through Chief Secretary and 81 others (2003 PLC (C.S.) 1008). Thus, considering all these facts, the changes brought about in law, the apex Court in paragraph No. 20 of the noted dictum held as below:--

20 The insertion of the words "other essential services" in section 9A by virtue of 1984 amendment in 1971 Ordinance is nothing but recognition of the principle of fairness that a person who joins a civilian department after release from the Army is entitled to the service benefit. No doubt, the Governor of Punjab had conferred this benefit on the appellant in 1979 before the amendment made in 1984, but the

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powers of the Governor under section 22 of the Punjab Civil Servants Act fully justified the Governor to do so on the basis of principle of equity persons" will have retrospective operation. Although, in Wajahat Hussain's case supra, section 22 of the Punjab Civil Servants Act was involved, yet principle of retrospective operation of the rules and the residual powers of the Governor was recognized. It was argued that judgment in Iqbal Khokhar's case was a judgment as per incuriam and the retrospective applicability of the insertion 'the other essential persons' was not considered, therefore, agreeing with the general observations made in the judgment reported as PLD 1997 SC 351, we are of the view that the appellant is entitled to have his seniority as Assistant Engineer with effect from 21-10-1969 as ordered by the Governor and further implemented by the Department vide Secretary C & W order dated 6-6-1989 by re-fixing his seniority as XEN at serial No.31-A of the seniority list dated 1-1-1988. "(emphasis supplied)

In the context of the peculiar facts of that case and also the ratio thereof, it is manifest from the aforesaid decision that the relief was granted to Mr. Qayyum on account of being part of the compulsory service and the case falling within the purview of the law cited above, as also by applying the rule of justice and fairplay.

And as has been noted that in paragraph No.20 reproduced above, it has been specifically mentioned that judgment in Iqbal Khokhar's case was per incuriam because the mandate and the import of the law "other essential persons" was not considered while deciding that case and therefore the apex Court agreed with the general observations made in case reported PLD 1997 SC 351. But examining the case of the appellants, it is conspicuously noted that the facts are vividly distinguishable, the appellant was only a Captain in the Pakistan Army having no nexus to the nature of the service as contemplated by section 9-A of the Ordinance, 1971 in its original or amended form; he joined the postal service through the competitive examination in the year 1991-92 and never raised any question about his seniority on any account; all of sudden, he sought change of the seniority in 2003 which was allowed to him by the Chairman and that too with retrospective effect because by then he had been promoted in grade-18, whereas seniority was allowed since the time of induction in the postal service; there obviously is no similarity either in the facts or the ratio of the two cases which (similarity) as accordingly conceded by the appellant's counsel is foundational and sine-qua-non to his case; resultantly the appellant could not have been allowed the seniority on any stretch of legal provisions, rules of justice, fairplay and/or equality thus notwithstanding that the Chairman (PPSMB) had the power to determine the seniority of the appellants or not, his order dated 24-6-2003 was patently illegal and unlawful.

6. Now attending to the question raised by the appellant's counsel that the Secretary Communication had no jurisdiction to pass order dated 8-1-2004, the answer is embedded in subsection (2) of section 22 of the Civil Servants Act 1973. It is an admitted legal position that Pakistan Postal Service Management Board is an attached department of the Communication Division of Government of Pakistan, the Secretary is the head of that division and according to the provisions ibid a civil servant aggrieved of any order

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contemplated by the section (22[2]) where no appeal or review is provided in law could validly maintain a representation before the authority next higher to that which had passed the order: irrespective the grade of the Chairman PPSMB and that of the Secretary Communication being equal, even if assumed for the moment to be so, under the rules of business the Secretary being the incharge of the concerned division for all intents and purposes was an authority higher than the Chairman and, therefore, competent to entertain and decide the representation of the private respondents therefore, the objection of the appellant's counsel cannot sustain and is hereby repelled.

7. As this appeal is liable to be dismissed for the foregoing reasons thus we are not inclined to touch upon any other proposition raised by either side. This appeal accordingly has no merits and is hereby dismissed.

M.H./K-17/SC

Appeal dismissed.

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2017 P L C (C.S.) 336

[Lahore High Court]

Before Jawad Hassan, J

MUHAMMAD AZIM KHAN LEGHARI

Versus

FEDERATION OF PAKISTAN and others

Writ Petition No.37557 of 2016, decided on 5th December, 2016.

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

---Rr. 5(1)(ii) & 6---Civil Servants Act (LXXI of 1973), S.25---Constitution of Pakistan, Arts.199 & 212--- Constitutional petition---Maintainability--- Civil service--- Disciplinary proceedings--- Service Tribunal, jurisdiction of---Scope---Employee challenged order of inquiry issued by the Authority---Validity---Authorized officer had discretion to decide whether an inquiry should be conducted through an inquiry officer or inquiry committee---Employee had been asked for his written defence within seven days of receiving charge sheet---Employee, after entering into the proceedings before the inquiry officer, had challenged the same through constitutional jurisdiction of High Court---Service Tribunal having exclusive jurisdiction with regard to the matters relating to the terms and conditions of service of civil servants including disciplinary matters---Jurisdiction of High Court qua interference in the same had been barred---Orders even if mala fide or coram non judge fell within the ambit of Service Tribunal and jurisdiction of Civil Court including High Court was ipso facto ousted---Service Tribunal had been given exclusive jurisdiction for redressal of grievance of employee---Constitutional petition, in the present case, was unwarranted being premature---Adjudication of question of delay in initiating the inquiry proceedings by the department was not within the jurisdiction of High Court---Service Tribunal had the jurisdiction to determine such question---Constitutional petition was dismissed being not maintainable.

Ali Azhar Khan Baloch and others v. Province of Sindh and others 2015 SCMR 456; National Assembly Secretariat v. Manzoor Ahmed and another 2015 SCMR 253; Fazal Ahmad Ranjha and others v. Government of Punjab and others 2016 PLC (C.S.) 1209; Monomohan Roy v. Government of Chandpur Municipality PLD 1958 Dacca 47; Gulistan Textile Mills Ltd. v. Collector (Appeals) Customs Sales Tax and Federal Excise and others 2010 PTD 251; Government of Pakistan and others v. Farheen Rashid 2009 PLC (C.S.) 966; Federal Land Commission v. Rais Habib Ahmad PLD 2011 SC 842 and Mian Aurangzeb Noor v. Rent Controller and another 2012 CLC 1729 ref.

Salim Sadiq v. Government of Punjab and others 2003 PLC (C.S.) 1258 distinguished.

Muzaffar Hussain v. The Superintendent of Police District Sialkot 2002 PLC (C.S.) 442;


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Khalil ur Rehman and others v. Government of Pakistan and others PLD 1981 Kar. 750; Asadullah Rashid v. Haji Muhammad Muneer and others 1998 SCMR 2129; Peer Muhammad v. Government of Balochistan through Chief Secretary and others 2007 SCMR 54; Khalid Mahmood Wattoo v. Government of Punjab and others 1998 SCMR 2280; Muhammad Murtaza and another v. The Deputy Commissioner, Anti-Corruption Establishment, Bahawalpur and others 1997 PLC (C.S.) 214 and Salim Sadiq v. Government of Punjab and others 2003 PLC (C.S.) 1258 rel.

Ch. Muhammad Zafar Iqbal and Ch. Abdus Sattar for Petitioner.

Miss Sadia Malik, Standing Counsel.

ORDER

JAWAD HASSAN, J.--- Through this Petition, the Petitioner, who is presently posted as D.I.G./OSD, Establishment Division, Islamabad, has challenged the Order of Inquiry dated 10.11.2016 issued by the Respondent No.2.

2. Brief facts leading to the filing of the instant petition are that the Respondent No. 2, Inspector General NH and MP, Islamabad, issued the Order of Inquiry No. NH&MP-1(3)/2016/IG/218 dated 10 November, 2016 (the "Order of Inquiry") to the Petitioner while exercising his powers under Rule 5(1)(ii) of the Government Servants Efficiency and Discipline Rules, 1973 (the "Rules"), whereby he appointed Respondent No.3, Deputy Director General, Intelligence Bureau Academy, Islamabad, as the Inquiry Officer to conduct inquiry into the charges leveled against the Petitioner. The detailed Charge Sheet, calling upon the Petitioner to submit written defence, and Statement of Allegations against the Petitioner were also enclosed with the Order of Inquiry. On 20 November, 2016, the Petitioner submitted his detailed reply to the Charge Sheet and Summary of Allegations to the Respondent No.3 for his kind information and consideration.

3. The learned counsel for the Petitioner submitted that the Respondents have initiated proceedings in the grab of an inquiry under the Rules after a period of four and a half years just to jeopardize the career/further promotion of the Petitioner which are biased and on behest of some vested interest whereas the Petitioner was given "very good" ACR by Additional IGP, Special Branch, Punjab for the said period which negates the charges leveled upon the Petitioner.

4. On the last date of hearing, 30 November, 2016, the learned Law Officer in response has raised a preliminary objection qua maintainability of the present petition and submitted that jurisdiction of this Court cannot be invoked in view of bar contained in Article 212 of the Constitution of Pakistan, 1973 (the "Constitution"). The learned Law Officer relied on the judgments reported as Ali Azhar Khan Baloch and others v. Province of Sindh and others, 2015 SCMR 456; National Assembly Secretariat v. Manzoor Ahmed and another, 2015 SCMR 253 and Fazal Ahmad Ranjha and others v. Government of Punjab and others, 2016 PLC (C.S.) 1209.

5. When conferred with bar under Article 212 of the Constitution of Pakistan, 1973 (the "Constitution"), the learned counsel for the Petitioner relied upon Salim Sadiq v. Government of

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2007 S C M R 54

[Supreme Court of Pakistan]

Present: Javed Iqbal and Raja Fayyaz Ahmad, JJ

PEER MUHAMMAD----Petitioner

Versus

GOVERNMENT OF BALOCHISTAN through Chief Secretary and others----Respondents

Civil Petition No.77/Q of 2006, decided on 3rd August, 2006.

(On appeal from the judgment, dated 2-6-2006 of the High Court of Balochistan, Quetta passed in Civil Petition No.310 of 2006).

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

----S. 10---Constitution of Pakistan (1973), Arts.199 & 212---Constitutional jurisdiction of High Court under Art.199 of the Constitution---Scope---Posting and transfers---Terms and conditions of service---Jurisdiction of High Court---Scope---Question of posting of a government servant squarely falls within the jurisdictional domain of competent authority, subject to law and rules made therefor---Question of posting/transfer relates to terms and conditions of a government servant, Service Tribunal, therefore, has the exclusive jurisdiction to dilate upon and decide such matters---Constitutional jurisdiction of High Court cannot be invoked to get such controversies resolved.

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

----S. 10---Constitution of Pakistan (1973), Arts.185(3), 199 & 212---Posting and transfers---Terms and conditions of service---Jurisdiction of High Court---Scope---Plea of mala fide---Petitioner assailed his transfer order before High Court in exercise of constitutional jurisdiction, on the plea of mala fide but High Court held that in view of the bar contained in Art. 212 of the Constitution, petition was not maintainable---Validity---Jurisdiction of all other Courts was ousted because of the provisions contained in Art. 212 of the Constitution---Orders of departmental authorities, even though without jurisdiction or mala fide could be challenged only before Service Tribunal and jurisdiction of Civil Court including High Court was specifically ousted---Plea of mala fide did not confer upon High Court jurisdiction to act in the matter in view of constitutional ouster as contained in Art. 212 of the Constitution---Service Tribunal had full jurisdiction to interfere in such like matters---Supreme Court declined to interfere in the judgment passed by High Court---Leave to appeal was refused.

Piran Ditta v. Noor Muhammad PLD 1966 Kar. 618 ref.

Kh. Abdul Wahid v. Chairman, WAPDA 1986 SCMR 1534 rel.

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(c) Constitution of Pakistan (1973)---

----Art. 184(3)---Leave to appeal---Maintainability---Principles---Leave to appeal is competent only if the case involves a substantial question of law of public importance, which is sine qua non for invocation of jurisdiction as conferred upon Supreme Court under Art. 184 (3) of the Constitution---Where neither any question of public importance is involved nor enforcement of any of the fundamental rights, is sought leave to appeal may not be granted under Art.184(3) of the Constitution.

Director Food v. Rashid Ahmad 1990 SCMR 1446; Muhammad Manzoor Ahmad v. Commissioner, Multan Division 1990 SCMR 560; Sattan v. Rani 1989 SCMR 1677 and Government of Punjab v. Khalid Hussain Gill 1989 SCMR 748 rel.

Syed Ayaz Zahoor, Advocate Supreme Court and M.W.N. Kohli, Advocate-on-Record for Petitioner.

Nemo for Respondents.

Date of hearing: 3rd August, 2006.

JUDGMENT

JAVED IQBAL, J.---This petition for leave to appeal is directed against the judgment, dated 20-6-2006 whereby the civil petition preferred on behalf of petitioner has been dismissed.

2. Heard Syed Ayaz Zahoor, learned Advocate Supreme Court on behalf of petitioner who mainly contended that the learned Division Bench of High Court of Balochistan had erred while holding that the petition was not maintainable in view of the bar contained in Article 212 of the Constitution of Islamic Republic of Pakistan when the relief sought was not related to the terms and conditions of the service and only it was prayed that earlier order passed by High Court of Balochistan in C.P. No.187 of 2006 be got implemented. It is next contended that the posting of Ghulam Rasool (respondent), against the post of Director-General, Agriculture Extension Balochistan has been made in violation of the relevant Agriculture Service Rules and besides that it was mandatory upon the Provincial Government to implement the orders of High Court of Balochistan in letter and spirit.

3. We have carefully examined the contentions as agitated on behalf of petitioner and perused the judgment impugned with care and caution. A careful scrutiny of the record would reveal that the entire controversy revolves around the posting of "Director-General, Agriculture Extension" and the petitioner wants to be posted against it. We are not persuaded to agree with the prime contention of Syed Ayaz Zahoor, learned Advocate Supreme Court on behalf of petitioner that order of learned High Court in Civil Petition No.187 of 2006 was not implemented by the Provincial Government for the simple reason that no categorical direction whatsoever was given qua the posting of petitioner as Director-General, Agriculture Extension but on the contrary the Provincial Government was directed to take action strictly in accordance with law and on merits. It is worth mentioning here at this juncture that Mr. Ghulam Rasool (respondent) who has been posted as Director-General Agriculture Extension is equally qualified and he could have been posted against the vacancy of Director-General, Agriculture Extension. No legal right of the petitioner has been infringed. A desire simpliciter cannot be equated to that of legal right. "A legal right is that right which is recognizable and enforceable at law. A legal right is less abstract than the conception which is represented by the unqualified word "right", because the unqualified word includes both juristic and legal conceptions. The juristic conceptions have their source in and pertain to what is idealistic, or to the world order as a whole, or to the social order in principle. They come out of what Prof. Roscoe Pond has called "culoudcuckootown"; while legal conceptions and legal rights pertain to an actual legal order. These two kinds may sometimes fall far apart because while the former belongs to the science of law, the latter belongs to a particular system of law. Hence jurists may hold different ideas as to them without affecting the law. The two kinds of conceptions meet when the provisions of a particular legal system need to be better understood by breaking them up, like a beam of light, into the waves of thought, by passing them, as it were, through the prism of jurisprudence. The differation that is achieved is both realistic and colourful". (Piran Ditta v. Noor Muhammad PLD 1966 Kar. 618.

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4. Admittedly the petitioner had no legal right to be posted against a particular post hence the question of its infringement does not arise as pressed time and again by the learned Advocate Supreme Court on behalf of petitioner. It is well-settled by now that the question of posting of a Government servant squarely falls within the jurisdictional domain of the Competent Authority subject to law and rules made thereunder. The question of posting/transfer relates to terms and conditions of a Government servant and Service Tribunal would have exclusive jurisdiction to dilate upon and decide such matters and Constitutional jurisdiction cannot be invoked to get such controversies resolved. We have also adverted to the question of mala fides which according to the learned Advocate Supreme Court could have been dilated upon in Constitutional jurisdiction which is not correct because the provisions as contained in Article 212 of the Constitution of Islamic Republic of Pakistan ousts jurisdiction of all other Courts and orders of the departmental authority even though without jurisdiction or mala fide can be challenged only before the Service Tribunal and jurisdiction of Civil Court including High Court is specifically ousted. The plea of mala fide does not confer upon High Court jurisdiction to act in the matter in view of the Constitutional ouster as contained in Article 212 of the Constitution of Islamic Republic of

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Pakistan and learned Service Tribunal has full jurisdiction to interfere in such-like matters. In this regard we are fortified by the dictum laid down in case Kh. Abdul Wahid v. Chairman, WAPDA 1986 SCMR 1534. There is no denying the fact that leave to appeal to Supreme Court is competent only if the case involves a substantial question of law and public importance which is sine qua non for the invocation of jurisdiction as conferred upon this Court under Article 184(3) of the Constitution of Islamic Republic of Pakistan as neither any question of public importance is involved nor enforcement of any of the fundamental rights. There is no cavil with the proposition that "where no question of law of public importance is involved leave to appeal may not be granted". In this regard reference can be made to cases Director Food v. Rashid Ahmad 1990 SCMR 1446; Muhammad Manzoor Ahmad v. Commissioner, Multan Division. 1990 SCMR 560; Sattan v. Rani 1989 SCMR 1677 and Government of Punjab v. Khalid Hussain Gill 1989 SCMR 748.

In sequel to above mentioned discussion the petition being devoid of merit is dismissed and leave refused.

M.H./P-14/SC

Petition dismissed.

ATTSTED

2015 S C M R 253

[Supreme Court of Pakistan]

Present: Anwar Zaheer Jamali, Mian Saqib Nisar and Amir Hani Muslim, JJ

NATIONAL ASSEMBLY SECRETARIAT through Secretary---Appellant

Versus

MANZOOR AHMED and others---Respondents

Civil Appeal No. 1355, C.M.A. No. 4783 of 2014 in C.A. 1355 of 2014, decided on 17th November, 2014.

(On appeal against the judgment dated 21-7-2014, passed by the Islamabad High Court Islamabad, in Writ Petition No.3547 of 2013)

(a) Constitution of Pakistan---

---Arts. 199 & 212(2)---Civil Service---Statutory rules relating to terms and conditions of service, violation of---Bar of jurisdiction of High Court---Civil servant could not have approached the High Court under Art. 199 of the Constitution for redressal of his grievance, which pertained to the terms and conditions of his service in view of the bar created under Art. 212(2) of the Constitution---High Court, therefore, was not competent to adjudicate the issue raised in the constitutional petition---High Court had fallen in error while proceeding on the erroneous assumption that civil servant had raised the issue of violation of the statutory rules, therefore, it was competent to decide the issues---High Court had adopted an incorrect approach by entertaining a constitutional petition of a civil servant on the ground of the statutory violation--Such grievances of a civil servant fell within the domain of the Federal Service Tribunal as mandated by the Constitution.

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

---S. 10---Transfer, temporary nature of---No right of transferee to get absorbed in borrowing department---Transfer under S. 10 of the Civil Servants Act, 1973 was itself of a temporary nature and neither conferred a right on the transferee to get himself absorbed nor the borrowing department, in law, could be compelled to retain the services of such an employee on permanent basis by absorption---No concept of absorption of a civil servant in another department existed either in the Civil Servants Act, 1973 or the Rules framed thereunder---Section 10 of the Civil Servants Act, 1973 empowered the competent authority to order an employee from one post to another, which was never permanent in nature.

Hafiz S. A. Rehman, Senior Advocate Supreme Court for Appellant.

G.M. Chaudhry, Advocate Supreme Court and Syed Rifaqat Hussain, Advocate-on-Record for Respondent No.1.

Nemo for Respondents Nos.2 - 4.

Date of hearing: 17th November, 2014.

JUDGMENT

AMIR HANI MUSLIM, J.---This appeal by leave of the Court is directed against the judgment dated 21-7-2014 of the Islamabad High Court whereby the Writ Petition filed by respondent No.1, was allowed.

2. The facts necessary for decision of these proceedings are that the respondent No.1, was Assistant in BS-14 in the then Ministry of Education and by the 18th Amendment made in the Constitution on 19-4-2010, the Ministry of Education was devolved on the Provinces. On 16-8-2012, Schedule 1 of the Rules of Business was amended and the Ministry of Education was

" R/S "

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ATTORNEY

renamed as "Ministry of Education and Trainings". On 24-5-2013, by an amending Ordinance V of 2013, section 3, of the Civil Servants Act 1973, was amended in the following manner:--

"(3) The Federal Government may transfer a civil servant of a devolved Ministry or Division, working in an Attached Department or Subordinate Office situated in a Province, to the Province concerned, in consequence of the devolution of functions pursuant to the Constitution (Eighteenth Amendment) Act, 2010 (X of 2010) and thereby he shall become the civil servant of the respective Province, on the same terms and conditions of service as were applicable to him before such transfer.

(4) The Federal Government may transfer a civil servant working in a Ministry, Division, Attached Department or Subordinate Office located in the Islamabad Capital Territory to any other Ministry, Division, Attached Department or Subordinate Office, in consequence of the abolition of such Ministry, Division, Attached Department or Subordinate Office pursuant to the Constitution (Eighteenth Amendment) Act, 2010 (X of 2010) and thereby he shall become the civil servant of the respective Ministry, Division, Department or Office to which he is so transferred, on the same terms and conditions of service as were applicable to him before such transfer.

(5) The seniority of the civil servants transferred by virtue of subsections (3) and (4) shall be determined by the concerned Province, Ministry or Division, as the case may be, in accordance with the rules.

(6) The cases of civil servants of a Ministry, Division, Attached Department or Subordinate Office devolved in pursuant to the Constitution (Eighteenth Amendment), Act, 2010 (X of 2010) and working in FATA, Gilgit-Baltistan and AJK shall be dealt with in the manner as may be provided by an Order made by the President in this behalf".

3. The petitioner was working in the Ministry of Education. On 24-3-2008, his Services were requisitioned on deputation to the National Assembly Secretariat. The respondent No.1, on expiry of his term of deputation was repatriated to the Establishment Division as by that time, the Ministry of Education was devolved by virtue of Eighteenth Amendment to the Constitution, and it was not clear that as to which department the employees of the devolved Ministry were to join. The Cabinet Secretariat, therefore, created a Devolution Cell to facilitate the smooth transfer of such employees. In the intervening period, on requisition of the Opposition Leader of the National Assembly, the respondent No.1 was transferred and posted to the National Assembly Secretariat in BS-14. On 3-7-2013, the respondent No.1 was repatriated to the Devolution Cell by the Secretariat of National Assembly, on the ground that his period of deputation was over. The respondent No.1, moved an application to the Hon'ble Wafaqi Mohtasib for release of his pay and other allowances and regularization of his service in the National Assembly Secretariat, which application is claimed to be still pending.

4. The respondent No.1 also assailed the action of the appellant through Writ Petition No.3547 of 2013, before the Islamabad High Court and on 19-9-2013, he succeeded in getting an injunctive order, which was assailed by the appellant through a Civil Petition No.1940 of 2013, before this Court. On 16-12-2013, this Court disposed of the said Petition with the direction to the High Court to decide the case of respondent No.1 expeditiously. On 21-7-2001, the Writ Petition of respondent No.1 was allowed hence this Appeal by leave of the Court filed.

5. It is contended by the learned Counsel for the appellant that the impugned judgment of the learned High Court is without jurisdiction as the respondent No.1 is a Civil Servant and the High Court did not have the jurisdiction to adjudicate upon the issue relating to the terms and conditions of service of the respondent No.1, owing to the bar contained under Article 212(2) of the Constitution. He next contended that the learned High Court proceeded on the erroneous assumption, while entertaining the Petition of respondent No.1, that the issue raised in the Petition pertained to the statutory violation, therefore, the High Court was competent to entertain the Petition of respondent No.1

6. He further contended that respondent No.1 was never an employee of the National Assembly Secretariat and the finding of the learned High Court that the amendment in the Civil Servant Act by the Ordinance No.V of 2013, dated 24-5-2013 [herein after referred to as 'the Ordinance'], allowed him to continue as employee of the National Assembly, was erroneous.

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7. On the other hand, the learned Counsel representing respondent No.1 contends that at the time of promulgation of the Ordinance amending the Civil Servants Act, the respondent No.1 was serving in the National Assembly Secretariat and by virtue of the Ordinance, he became a permanent employee of the National Assembly Secretariat. He supported the impugned judgment.

8. We have heard the learned counsel for the parties and have perused the record. Admittedly, respondent No.1 is a Civil Servant and, therefore, he could not have approached the High Court under Article 199 of the Constitution for redressal of his grievance, which pertained to the terms and conditions of his Service in view of the Bar created under Article 212(2) of the Constitution. The High Court, therefore, was not competent to adjudicate the issue raised in the Writ Petition. The High Court has fallen in error while proceeding on the erroneous assumption that respondent No.1 had raised the issue of violation of the statutory Rules, therefore, it was competent to decide the issues. This was an incorrect approach of the learned High Court to entertain a Constitution Petition of a Civil Servant on the ground of the statutory violation. Such grievances of a Civil Servant fall within the domain of the Federal Service Tribunal as mandated by the Constitution.

9. After the Eighteenth Amendment introduced in the Constitution, the Federal Government amended Schedule 1 of the Rules of Business and renamed the devolved Ministry of Education as "Ministry of Education and Trainings". To facilitate the employees of the devolved Ministry an Ordinance was promulgated by which the Civil Servants Act was amended. The respondent No.1, under the Ordinance was obliged to join the newly created Ministry of Education and Trainings, instead he claimed that since he was serving in the National Assembly Secretariat on appointment by transfer, therefore, he stood absorbed as permanent employee in the said Secretariat. Mere transfer of respondent No.1 from Devolution Cell of the Cabinet Division to the National Assembly Secretariat, could not be construed that his services were transferred and absorbed in the National Assembly Secretariat. Such transfer was temporary in nature and the respondent No.1 will continue his lien with the parent department, created by the Federal Government by the Schedule I of the Rules of Business. The learned High Court has failed to notice that the transfer under section 10 of the Civil Servants Act is itself of a temporary nature and neither confers a right on the transferee to get himself absorbed nor the borrowing department, in law, could be compelled to retain the services of such an employee on permanent basis by absorption. There is no concept of absorption of a Civil Servant in another department either in the Civil Servant Act or the Rules framed thereunder. Section 10 of the Civil Servant Act empowers the Competent Authority to order an employee from one post to another, which is never permanent in nature.

10. We, for the aforesaid reasons, are of the considered view that the High Court, in the first place, did not have the jurisdiction to entertain the Writ Petition of the respondent No.1. Besides the finding recorded by it in the impugned judgment, is not tenable in law being contrary to the scheme of the Civil Servants Act. Simultaneously, we direct the Government/Competent Authority of the newly created Ministry to adjust/accommodate respondent No.1 fixing the inter se seniority with his batch mates and release all salaries and arrears, if any, for the period for which he has not been paid within two weeks from the date of communication of this Judgment and report compliance. This Appeal is allowed in the above terms. These are the reasons of our short order of even date, which is reproduced as under:--

"We have heard the arguments of learned ASCs for both the parties. For the reasons to be recorded later on separately, this appeal is allowed, impugned judgment dated 21-7-2014, is set aside and the Writ Petition No.3547 of 2013 (re: Manzoor Ahmad v. National Assembly Secretariat and others) before the Islamabad High Court is dismissed."

MWA/N-12/SC

Appeal allowed.

ATTESTED

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1998 S C M R 2129

[Supreme Court of Pakistan]

Present: Ajmal Mian, CJ., Nasir Aslam Zahid and Munawar Ahmad Mirza, -JJ

ASADULLAH RASHID ---Petitioner

versus

Haji MUHAMMAD MUNEER and others---Respondents

Civil Petition No. 934-L of 1998, decided on 1st July, 1998.

(On appeal from the judgment dated 15-6-1998 of the Lahore High Court passed in W.P. No. 4957 of 1998).

Constitution of Pakistan (1973)-

----Art. 199---Civil service---Constitutional petition under Art. 199 of the Constitution--- Maintainability---Principles---Constitutional petition under Art. 199 of the Constitution is not maintainable by a civil servant in relation to any matter connected with the terms and conditions of service in respect whereof the Service Tribunal has jurisdiction, in view of Art. 212 of the Constitution of Pakistan---Orders, even if mala fide, ultra vires or coram non iudice, fell within the ambit of Service Tribunal and jurisdiction of Civil Courts including High Court is ipso facto ousted as result of barring provision of Art. 212 of the Constitution---High Court, before taking any decision regarding admission of a Constitutional petition and/or passing order granting interim relief will first decide the question of its jurisdiction in view of Art. 212 of the Constitution and in the light of the judgments of Supreme Court on the point involved.

Zahid Akhtar's case PLD 1995 SC 530; Khalid Mahmood Wattoo v. Government of Punjab Civil Petition for Leave No.727-L of 1998; Imar Bakhsh v. Deputy Commissioner, Layyah 1992 SCMR 365; Muhammad Anis v. Abdu" Haseeb PLD 1994 SC 539; Rukhsana Ijaz v. Secretary Education 1997 SCMR 167; Ayub Anjum v. Government of Punjab 1997 SCMR 169 and Muhammad Sarwar v. Government of Punjab 1990 SCMR 999 ref.

Khalil-ur-Rehman v. Government of Pakistan PLD 1981 Kar. 750 approved.

Hafiz Tariq Nasim, Advocate Supreme Court for Petitioner.

Nemo for Respondent No. 1.

Miss Yasmin Saigal, Additional Advocate-General, Punjab for Respondents Nos. 2, 3 and 4.

Date of hearing: 1st July, 1998,

ORDER

ATTORNEY

NASIR ASLAM ZAHID, J.---Petitioner Asadullah Rashid was working as Assistant Agricultural Engineer (W & D), Vehari, when he was transferred to F & W, Vehari vice respondent No.1 Haji Muhammad Muneer (petitioner in the writ petition before the High Court) on 19-5-1998 on account of exigency of service. The order dated 19-5-1998 was later on cancelled by order dated 30-5-1998 but then this order was withdrawn by order dated 5-6-1998, the result being that the earlier order dated 19-5-1998 was restored. Being aggrieved, respondent No.1 Haji Muhammad Muneer filed Writ Petition No.4957 of 1998. The Lahore High Court admitted the writ petition for regular hearing. Reference was made by the High Court to the case of Zahid Akhtar (PLD 1995 SC 530). It was observed in the admission order that prima facie the impugned order dated 4-6-1998 was a mala fide order having been passed due to political interference. Interim relief was also granted to respondent No.1 by suspending the operation of the impugned order dated 4-6-1998. Petitioner Asadullah Rashid has filed this petition seeking leave against the impugned order dated 15-6-1998 of the High Court. On the last date of hearing i.e.. 25-6-1998 notice of this petition was issued to the respondents and also to the Advocate-General, Punjab, for today. No one has

appeared on behalf of respondent No.1 Haji Muhammad Muneer. However, Miss Yasin Saigal, learned Additional Advocate-General, Punjab, has appeared on notice. We have heard Hafiz Tariq Nasim, learned counsel for the petitioner and the learned Additional Advocate-General and have also referred to the relevant record.

2. Learned counsel for the petitioner contended that the writ petition filed by respondent No. 1 was barred by Article 212 of the Constitution and in that context he has referred to a number of judgments of this Court wherein it has been held that Service Tribunals have exclusive jurisdiction in relation to all matters connected with the terms and conditions of service of the civil servants (subject to some exceptions which are not relevant to the present controversy) and these include matters relating to transfer of a civil servant.

In a recent decision dated 27-5-1998 dismissing Civil Petition for Leave No.727-L of 1998 (Khalid Mahmood Wattoo v. Government of Punjab), this Court observed as follows:

"The consistent view of this Court has been that a writ petition or Constitutional petition under Article 199 of the Constitution is not maintainable by a civil servant in relation to any matter connected with the terms and conditions of service in respect whereof the Service Tribunal has jurisdiction, in view of the provisions contained in Article 212 of the Constitution. Reference can be made to the following judgments:--

- (i) Imam Bakhsh v. Deputy Commissioner Layyah (1992 SCMR 365);
- (ii) Muhammad Anis v. Abdul Haseeb (PLD 1994 SC 539);
- (iii) Rukhsana Ijaz v. Secretary Education (1997 SCMR 167);
- (iv) Ayub Anjum v. Government of Punjab (1997 SCMR 169);
- (v) Muhammad Sarwar v. Government of Punjab (1990 SCMR 999)".

In that decision, Full Bench judgment of the Sindh High Court in the case of Khalil-ur-Rehman v. Government of Pakistan (PLD 1981 Karachi 750) was also approved where it was held that orders, even if mala fide, ultra vires or coram non iudice, fell within the ambit of Service Tribunal and jurisdiction of Civil Court including High Court was ipso facto ousted as a result of barring provisions of Article 212 of -the Constitution. Reference in the decision of this Court dated 27-5-1998 in Civil Petition No.727-L of 1998 was also made to Zahid Akhtar (PLD 1995 SC 530) and it was observed as follows:--

"Against his transfer, the petitioner Zahid Akhtar had filed a writ petition in the Lahore High Court, which was dismissed as not maintainable in view of the bar contained in Article 212. Petitioner filed a petition for leave. In its decision, this Court referred to various principles and also the Government Transfer Policy to be followed, but ultimately the petition for leave was dismissed as not maintainable."

3. Miss Yasmin Saigal, learned Additional Advocate-General, Punjab, supported the case of the petitioner submitting that the High Court should have first decided the question of its jurisdiction before admitting the writ petition and/or granting interim relief.

4. As a result, Civil Petition No.934-L of 1998 is converted into appeal and the same is allowed, order dated 15-6-1998 of the Lahore High Court passed in Writ Petition No.4957 of 1998 is set aside and the matter is remanded to the High Court for fresh decision after hearing the parties. Before taking any decision regarding admission of the writ petition an or passing orders granting interim relief, the High Court will first decide the question of its jurisdiction in view of the provisions of Article 212 of the Constitution and in the light of the judgments of this Court on the point involved.

There shall be no order as to costs.

M.B.A./A-106/S

ATTACHED

Order accordingly.

RS

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2002 P L C (C.S.) 442

[Lahore high Court]

Before Ch. Ijaz Ahmad, Syed Jamshed Ali and Ijaz Ahmad Chaudhary, JJ

MUZAFFAR HUSSAIN

versus

THE SUPERINTENDENT OF POLICE, DISTRICT SIALKOT

Writ Petitions Nos. 10758, 11611, 11610, 10638 11614, 10630, 12848, 10756, 10637, 10752, 11628, 11613, 11615, 10821, 10816, 10819, 10817, 13458, 10624, 13457, 10828, 10823, 13459, 13456, 10837, 11774, 11776, 11773, 10829, 10825, 10820, 10818, 13455, 10822, 11627, 10755, 10620, 10631, 10757, 11617, 11616, 11622, 11619, 11620, 11621, 10632, 11623, 11625, 11626, 13818, 10750, 10629, 10636, 11545, 11544, 11543, 11795, 13453, 11793, 11794, 11586, 11582, 10576, 10824, 13905, 10520, 11792, 12364, 10623, 11618, 10754, 10749, 10619, 10621, 11624, 10751, 10622, 10760, 10753, 11542, 11612, 11056, 10432, 10433, 11775, 10836, 10563, 10839, 10562, 10682, 10565, 10840, 10768, 10838, 13556, 13558, 11085, 1102, 11083, 11080, 13833, 11705, 11703, 11698, 11717, 13251, 12470, 12501, 12132, 12121, 11735, 11783, 12790, 13392, 13381, 13389, 13390, 13387, 13386, 13382, 13384, 13385, 13388, 13383, 13391, 12715, 12824, 12822, 12825, 12823, 13915, 13914, 13917, 13389, 13400, 13460, 13656, 11557, 13420, 13394, 12615, 13396, 13682, 11449, 11821, 13413, 13395, 14304 of 2001, decided on 15th August, 2001.

(a) Bias---

---Concept---Opinion expressed by a Judge in a particular case does not constitute bias---Views formed by a particular Judge in a particular case depend upon circumstances of each case and the assistance rendered by the counsel.

Ghulam Rasool and others v. Crown PLD 1951 FC 62 and Islamic Republic of Pakistan v. Abdul Wali Khan PLD 1976 SC 57 distinguished.

Ms. Benazir Bhutto v. The President of Pakistan and another 1992 SCMR 140 and Black's Law Dictionary, 6th Edn. ref.

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

---Arts. 212(1)(a) & 199---Constitutional petition---Maintainability---Matter relating to terms and conditions of service---Disciplinary action against civil servant---Bar contained in Art.212 of the Constitution---Applicability---Such action is part of terms and conditions of service of civil servant as envisaged in Art.212(1)(a) of the Constitution--Where issue raised in the Constitutional petition is germane to terms and conditions of service of petitioner, any grievance with regard thereto attracts the ouster clause of Art. 212 of the Constitution.

(c) Constitution of Pakistan (1973)---

---Arts. 199 & 212---Constitutional petition---Civil service---Matter relating to terms and conditions of service---Interim order, assailing of---Jurisdiction of High Court when final order cannot be interfered by High Court, interference in an interim order will manifestly frustrate the object of law-- Even if no final order has been passed, High Court does not have jurisdiction under Art. 199 of the Constitution which is subject to the other provisions of the Constitution---Provisions of Art.212 of the Constitution have the effect of curtailing jurisdiction of High Court under Art. 199 of the Constitution in respect of a matter to which the jurisdiction of the Tribunal extends.

Federation of Pakistan v. Sh. Abdul Aziz 1998 SCMR 91; Muhammad Azhar v. General Manager Operation PLD 1990 Lah. 352; Turaj Ahmad Khan v. D.I.-G. Police, Multan, PLD 1982 Lab. 464; Ahsan Saleem v. I.G. Police, 1988 PLC -(C.S.) 193 and Dr. Ali Sana Shakir Bokhari v. Sabah Mohy-ud-Din 2000 PSC 103 distinguished.

Abdul Wahab Khan v. Government of the Punjab and others PLD 1989 SC 508; Abdul Bari v. Government of Pakistan and 2 others PLD 1981 Kar. 290 and Abdul Rahim v. Government of Pakistan and others 1993 PLC (C.S.) 1364 ref.

(d) Interpretation of statutes---

--- While interpreting provisions of a statute no such construction should be placed which may run counter to the object of the law or to render a provision of statute redundant.

(e) Constitution of Pakistan (1973)---

Arts. 247 & 270-A---Bar of jurisdiction of Courts---Scope---Ouster contemplated in Arts.247 & 270-A of the Constitution is total without providing any remedy to an aggrieved person.

(f) Constitution of Pakistan (1973)---

---Arts. 225 & 199---Constitutional petition---Bar of jurisdiction of High Court---Election dispute---Invocation of jurisdiction of High Court---Ouster of jurisdiction under Art.225 of the Constitution is implied which has been given effect to by the superior Courts---Where a person is disenfranchised and is, therefore, not in a position to challenge election through election petition such person can competently invoke the Constitutional jurisdiction of High Court.

Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan PLD 1998 SC 1263 ref.

(g) Constitution of Pakistan (1973)---

. ---Arts. 184(3) & 199---Fundamental Rights, enforcement of---Jurisdiction of Supreme Court---Scope---Constraint of Art. 199 of the Constitution is not applicable in case of exercise of jurisdiction by the Supreme Court under Art. 184 of the Constitution for enforcement of Fundamental Rights.

Abdul Bari v. Government of Pakistan and 2 others PLD 1981 Kar. 2,90 and M: Yamin Qureshi v. Islamic Republic of Pakistan and another PLD 1980 SC 22 ref.

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

---S. 4---Constitution of Pakistan (1973), Art.212---Service Tribunal, jurisdiction of---Departmental Authority---Distinction---For the purposes of jurisdiction of Service Tribunal, distinction has to be drawn between an Authority who is not Departmental Authority and the Authority who is not, competent Departmental Authority---Where order was passed by incompetent Departmental Authority, such order was appealable before the Tribunal.

Government of the Punjab and others v. Saleem Hussain Gardezi 1985 SCMR 443 and Muhammad Aslam Bajwa v. Federation of Pakistan PLD 1974 Lah. 545 ref.

(i) Constitution of Pakistan (1973)---

---Art. 260(2)---Act of Provincial Assembly---Scope---Ordinance is included in the definition of an "Act of the Provincial Assembly" under the provisions of the Constitution.

(j) Constitution of Pakistan (1973)---

---Art. 128---Provisional Constitution Order (I of 1999), Preamble---Punjab Removal from Service (Special Powers) Ordinance (IV of 2000), S. 2-- Promulgation of Ordinance by Governor ---Vires of Punjab Removal from Service (Special Powers) Ordinance, 2000---Vires of law could only be challenged on the ground of legislative incompetence or violation of any provision of the Constitution---High Court in view of various provisions of Provisional Constitution Order, 1999 was unable to find either the legislative incompetency of the Governor or violation of any provision of the Constitution because with the promulgation of Provisional Constitution Order No.1 of 199, and various orders issued by the Chief Executive the provisions of the Constitution would be deemed to have been altered as even the power to amend the

~~NOTED~~

Constitution by the Chief Executive had been recognised by the Supreme Court---Governor, in accordance with the provisions of Provisional Constitution Order No. 1 of 1999, was bound to act in accordance with the instructions of the Chief Executive, therefore, the promulgation of the Punjab Removal from Service (Special Powers) Ordinance (IV of 2000) by the Governor was not in violation of Art. 128 of the Constitution.

(k) Punjab Removal from Service (Special Powers) Ordinance (IV of 2000)---

---Preamble---Vires of Punjab Removal from Service (Special Powers) Ordinance, 2000 challenged on the ground that since the Punjab Civil Servants (Efficiency and Discipline) Rules, 1975, were already in existence there was no justification for promulgation of the Ordinance
---Validity--- Legislative Authority was not precluded from promulgating any legislative measure even in the occupied field---In any case, the Punjab Removal from Service (Special Powers) Ordinance, 2000, had brought within its fold the employees of the Corporations of the Punjab Government which otherwise provided a justification for the said Ordinance.

Khan Asfandiyar Wali v. Federation of Pakistan PLD 2001 SC 607 and Federation of Pakistan and others v. Muhammad Nawaz Khokhar and others PLD 2000 SC 26 ref.

(1) Vires of Legislation---

--- Vires of legislative measure is not open to the scrutiny of the superior Courts on the alleged ground of mala fides because legislative measures are presumed to be bona fide.

Fauji Foundation and another v. Shamim-ur-Rehman PLD 1983 SC 457 ref.

(m) Constitution of Pakistan (1973)---

---Art. 212---Service Tribunals Act (LXX of 1973), S.4---Vires of legislation---Jurisdiction of Service Tribunal---Scope---Examination of vires of a law under which action is taken against a civil servant is within the competence of the Service Tribunal---Validity of action against civil servant is required to be determined in the light of the relevant facts and the law applicable thereto---Where the Tribunal finds that the law under which action is taken against a civil servant is not validly made, the action taken thereunder can be struck down.

Pir Sabir Shah v. Shad Muhammad Khan and others PLD 1995 SC 66; Fazal Ellahi Ijaz's case PLD 1977 Lah. 549; Iqan Ahmad Khurram v. Government of Pakistan and others PLD 1980 SC 153; Muhammad Asif v. 'Secretary to the Government of Punjab 1990 PLC (C.S.) 257 and J.B. Chopra and others v. Union of India AIR 1987 SC 357 ref.

(n) Punjab Removal from Service (Special Powers) Ordinance (IV of 2000)---

---S. 10---Punjab Civil Servants Act (IX of 1974), S.4---Constitution of Pakistan (1973), Art. 212---Employees of a Corporation---Provisions of Art.212 of the Constitution---Applicability---Where, by virtue of S.10 of Punjab Removal from Service (Special Powers) Ordinance, 2000, right of appeal has been provided to employees of Corporations of the Punjab Government against, any final order passed under the provisions of the Ordinance, in such cases as well the bar of jurisdiction as contained in Art.212 of the Constitution is applicable as the jurisdiction of the Punjab Service Tribunal stands enlarged and extends to the grievance of the servants of the Corporations of the Punjab Government---Employees of Corporations were deemed to be civil servants for the purpose of Punjab Service Tribunals Act., 1974, and therefore, no separate declaration either in the Civil Servants Act. 1973 or in the Punjab Service Tribunals Act, 1974, was required to be made.

(o) Punjab Removal from Service (Special Polders) Ordinance (IV of 2000)---

---Ss. 2 & 9---Constitution of Pakistan (1973), Art.190 --- Constitutional petition--- Maintainability---Employees of Corporation---Master and servant relationship-- -Provisions of Punjab Removal from Service (Special Powers) Ordinance, 2000---Effect---In case of the employees of Corporations (WASA, FDA or Social Security Institute etc.), their services were not governed by any statutory rules and in case any action was taken against them, they could not invoke the Constitutional jurisdiction because their services were governed by the rule of master

and servant---Remedy provided under the provisions of Punjab Removal from Service (Special Powers) Ordinance, 2000, was in the nature of an inroad on the principle of master and servant.

(p) Constitution of Pakistan (1973)---

---Arts. 175, 202, 203 & 212---Service Tribunal not a parallel judicial system---Service Tribunals are constituted under Art.212 of the Constitution---To condemn a system as a parallel judicial system it should be one which is not backed by Arts. 175, 202, 203 or 212 of the Constitution-- As appeals against the judgments of the Service Tribunal lie before the Supreme Court under Art.212(3) of the Constitution, the Service. Tribunals are not beyond the judicial system contemplated by the Constitution so as to constitute a. parallel judicial system.

PLD 1998 SC 1455; Khan Asfandiyar Wali v. Federation of Pakistan PLD 2001 SC 607; Maharram Ali v. Sh. Liaqat Hussain knd others v. Federation of Pakistan PLD 1999 SC 504 and Jamaat-I-Islami Pakistan v. Federation of Pakistan PLD 2000 SC 111 ref.

(q) Punjab Service Tribunals Act (IX of 1974)---

---S.3(3)---Chairman of Service Tribunal---Qualification---Sitting Judge of High Court---Eligibility threshold, according to the provisions of S.3(3) of the Punjab Service Tribunals Act, 1974, is that the Chairman should be a person who is qualified to be a Judge of the High Court---In absence of any specific prohibition, sitting Judge of High Court is not, therefore, excluded from the provision of S.3(3) of the Punjab Removal from Service (Special Powers) Ordinance, 2000.

(r) Punjab Service Tribunals Act (IX of 1974)---

---S.3(3)---Punjab Service Tribunals---(Qualification of Members) Rules, 1978, R.2---Appointment of Members of Service Tribunals-- Consultation with Chief Justice of High Court---Such appointment as is contemplated by S.3(3) of the Punjab Service Tribunals Act, 1974, and the Punjab Service Tribunals (Qualification of Members) Rules, 1978, a Member of the tribunal is to be a person who is not below the status of the Secretary of the Provincial Government with at least 18 years' sere ice in Grade-17 aid above---Service Tribunal is constituted by law framed under Art.212 of the Constitution and it cannot be inferred from Art.212 of the Constitution or the Punjab Service Tribunals Act, 1974 that the Members of the Tribunal should be appointed in consultation with the Chief Justice of High Court or they should belong to the judicial service.

(s) Punjab Service Tribunals Act (IX of 74)---

ATTS

---S.3(3)---Constitution of Pakistan 11973;. Art.212 ---Vires of S.3(3) of Punjab Service Tribunals Act. 1974---Punjab Service Tribunals Act, 1974 is neither contrary Art.212 of the Constitution nor is in excess of legislative competence of he Provincial Legislature.

(t) Punjab Service Tribunals Act (IX of 1974)---

---Ss. 3 & 3-A---Disposal of cases by Service Tribunal---Administration of justice---Guidelines to Provincial Government---High Court observed that if one Member who belonged to the executive constituted a Tribunal, it was likely that some cases in which the orders of the Governor or senior officers were attacked, the member might not be able to act fairly, justly and independently, thereby eroding the concept of fair administration of justice-- Object of S.3-A of the Punjab Service Tribunals Act, 1974, was to enable the Tribunal to dispose of large number of cases because if every case was required to be heard by the Tribunal as contemplated by S.3 of the Punjab Service Tribunals Act, 1974, the disposal of cases before the Tribunal might be retarded---High Court being conscious of the fact that the composition of the Tribunal to hear a particular case should be such as to inspire public confidence and ensure that the stream of justice flowed unpolluted advised that the situation where the order before the Tribunal was passed by Governor or by any senior officers could be remedied by the Chairman of the Tribunal by directing distribution of work of the Tribunal in such a manner that such cases were to be heard by Tribunal comprising, inter alia, the Chairman and that the Tribunal should also have equal number of judicial members from amongst the persons qualified to be Judge of High Court and to be appointed after meaningful consultation with the Chief Justice of High Court and every

Bench should i.e. headed by at least one judicial member so as to eliminate any misgiving or apprehension of aggrieved persons as regards the independent working of the Tribunal---High Court clarified that the advice was not to be construed as a direction of High Court to legislate but to improve the quality of justice by the Tribunal, the same Was required to be done.

(u) Punjab Removal from Service (Special Powers) Ordinance (IV of 2000)---

---Ss.2 & 9---Constitution of Pakistan (1973), Arts.199' & 212-- Constitutional petition---Maintainability---Service matter---Employees of corporations---Show-cause notices were issued to the petitioners under the provisions of Punjab Removal from Service (Special Powers) Ordinance, 2000---Such notices were assailed before High Court in exercise of Constitutional jurisdiction---Validity---Where on account of bar of Art.212 of the Constitution the Constitutional petition was not maintainable, it was not necessary to examine the question as to the maintainability of Constitutional petition against a show-cause notice or the other grounds of attack---Petition was dismissed in circumstances.

Nazir Ahmad v. Pakistan and 11 others PLD 1970 SC 453; Alamgir v. Divisional Forest Officer, Multan and others 1993 . SCMR 603; Sh. Mudasar Ahmad v. Government of Pakistan and others 1991 PLC (C.S.) 1047; Government of the Punjab and another v. S. Tassudaq Hussain Bokhari PLD 1986 SC 162; Muhammad Ashraf and others v. The State 1995 SCMR 626; Muhammad Akbar v. S.S.P., Peshawar and others 1995 PLC (C.S.) 349; Pakistan and others v. Public at Large PLD 1987 SC 304; SYed Zafar Ali Shah and others v. General Pervaiz Musharaf and others PLD 2000 SC 869; Administrator, District Council, Larkana v. Gulab Khan and 5 others 2001 SCMR 1320; Secretary to Government of N.-W.F.P. v. Sadullah Khan 1996 SCMR 413; A.D.B.P. v. Muhammad Anwar Bajwa and others 1994 SCMR 852; Muhammad Afzal Khan v. Karachi Development Authority and 6 others PLD 1984 Kar. 114; Edulji Dinshaw Limited v. Income Tax Officer PLD 1990 SC 399; Ataullah Mehr v. Punjab ' Government 1983 CLC 2903; Messrs East & West Steamship Company v. Pakistan and others PLD 1958 SC 41; Subedar Major Gul Zaman v. The Settlement. Commissioner, Lahore PLD 1976 Lah. 1454; I.A. Sherwani's case 1991 SCMR 1041; The State v. Zia-ur-Rehman and others PLD, 1973 SC 49; Federation of Pakistan and another v Malik Ghulam Mustafa Khar PLD 1989 SC 26; Malik Ghulam Mustafa Khar v. Pakistan and others PLD 1988 Lah. 49; Nabi Bakhsh and another v. The State and others PLD 1991 Pesh. 10; Mian Muhammad Nawaz Sharif v. President of Pakistan and others PLD 1992 SC 473; Aftab Shahban Mirani v. President of Pakistan and others 1998 SCMR 1863; Messrs Chenab Cement Product (.Private) Ltd. v. Banking Tribunal, Lahore and others PLD 1996 Lah. 672; Government of Sindh v. Sharaf Faridi and others PLD 1994 SC 105; Al-Jehad Trust v. Federation of Pakistan and others PLD 1996 SC 324; S.P. Sampath Kumar v. Union of India and others AIR 1987 SC 386; Syed Aftab Ahmad v. K.E.S.C. and others 1999 SCMR 197; Nabi Bakhsh Khoso v. Branch Manager, National Bank of Pakistan 2001 SCMR 1017; A.R. Niazi, Advocate v. Pakistan and others PLD 1968 SC 119; Virasat Ullah v. Bashir Ahmad & another 1969 SCMR 154; Nazir Ahmad Sheikh v. Government of Sindh and another 1998 PLC (C.S.) 607; Khalil-ur-Rehman and others v. Government of Pakistan and others PLD 1981 Kar. 750; Shaheen Akhtar v. Government of Punjab and others 1998 PLC (C.S.) 70; Tahira Fazeelat and others v. Province of Punjab and others 1998 PLC (C.S.) 268; Muhammad Ashraf Chaudhry v. Chairman, CBR 2001 PLC (C.S.) 781; Inspector- General of Police v. Mushtaq Ahmad Warraich and others PLD 1985 SC 159; Haji Ghulam Mustafa v. Secretary, Agriculture Department, Punjab 1973 PLC 308; Mian Muhammad Abdullah v. The Road Transport Corporation, Lahore PLD 1964 Lah. 743; Major Muhammad Nawaz v. Pakistan PLD 1970 Lah. 811; PLD 2001 SC 568; Jamaat-I-Islami Pakistan v. Federation of Pakistan PLD 2000 SC 111; PLD 2001 SC 607; Khalid Mahmood Wattoo v. Government of the Punjab and others 1998 SCMR 2280; Syed Mazhar Hussain Bukhari v. Secretary, Government of Punjab and others 1998 SCMR 1948; Asadullah Rashid v. Haji Muhammad Muncer and others 1998 SCMR 2129; National Bank of Pakistan v. Malik Manzoor Ahmad 1995 CLC 267; Habib Bank Limited and others v. Syed Zia-ul- Hassan Kazmi 1998 SCMR 60 and Waseem Sajjad v. Federation of Pakistan through Secretary PLD 2001 SC 2-33 ref.

Maqbool Elahi Malik, A.-G. (Punjab) and Shan Gull with Fauzi Zafar, A.A. -G. for Respondent.

Dates of hearing: 19th, 23rd to 26th, 30th and 31st July, 2001.

ATTESTED

JUDGMENT

CH. IJAZ AHMAD, J.---We propose to dispose of the following writ petitions by this judgment:

(1) 10758/2001, (2) 11611/2001, (3) 11610/2001, (4) 10638/2001, (5) 11614/2001, (6) 10630/2001, (7) 12848/2001, (8) 10756/2001, (9) 10637/2001, (10) 10752/2001, (11) 11628/2001, (12) 11613/2001, (13) 11615/2(101), (14) 10821/2001, (15) 10816/2001, (16) 10819/2001, (17) 10817/2001, (18) 13458/2001, (19) 10624/2001, (20) 13457/2001, (21) 10828/2001, (22) 10823/2001, (23) 13459/2001, (24) 13456/2001, (25) 10837/2001, (26) 11774/2001, (27) 11776/2001, (28) 11773/2001, (29) 10829/2001, (30) 10825/2001, (31) 10820/2001, (32) 10818/2001, (33) 13455/2001, (34) 10822/2001, (35) 11627/2001, (36) 10755/2001, (37) 10620/2001, (38) 10631/2001, (39) 10757/2001, (40) 11617/2001, (41) 11616/2001, (42) 11622/2001, (43) 11619/2001, (44) 11620/2001, (45) 11621/2001, (46) 10632/2001, (47) 11623/2001, (48) 11625/2001, (49) 11626/2001, (50) 13818/2001, (51) 10750/2001, (52) 10629/2001, (53) 10636/2001, (54) 11545/2001, (55) 11544/2001, (56) 11543/2001, (57) 11795/2001, (58) 13453/2001, (59) 11793/2001, (60) 11794/2001, (61) 11586/2001, (62) 11582/2001, (63) 10576/2001, (64) 10824/2001, (65) 13905/2001, (66) 10520/2001, (67) 11792/2001, (68) 12364/2001, (69) 10623/2001, (70) 11618/2001, (71) 10754/2001, (72) 10749/2001, (73) 10619/2001, (74) 10621/2001, (75) 11624/2001, (76) 10751/2001, (77) 10622/2001, (78) 10760/2001, (79) 10753/2001, (80) 11542/2001, (81) 11612/2001, (82) 11056/2001, (83) 10432/2001, (84) 10433/2001, (85) 11775/2001, (86) 10836/2001, (87) 10563/2001, (88) 10839/2001, (89) 10562/2001, (90) 10682/2001, (91) 10565/2001, (92) 10840/2001, (93) 10768/2001, (94) 10838/2001, (95) 13556/2001, (96) 13558/2001, (97) 11085/2001, (98) 11082 /2001, (99) 11083/2001, (100) 11080/2001, (101) 13833/2001, (102) 11705/2001, (103) 11703/2001, (104) 11698/2001, (105) 11717/2001, (106) 13251/2001, (107) 12470/2001, (108) 12594/2001, (109) 12132/2001, (110) 12121/2001, (111) 11735/2001, (112) 11783/2001, (113) 12790/2001, (114) 13392/2001, (115) 13381/2001, (116) 13389/2001, (117) 13390/2001, (118) 13387/2001, (119) 13386/2001, (120) 13382/2001, (121) 13384/2001, (122) 13385/2001, (123) 13388/2001, (124) 13383/2001, (125) 13391/2001, (126) 12715/2001, (127) 12824/2001, (128) 12822/2001, (129) 12825/2001, (130) 12823/2001, (131) 13915/2001, (132) 13914/2001, (133) 13917/2001, (134) 13389/2001, (135) 13400/2001, (136) 13460/2001, (137) 13656/2001, (138) 11557/2001, (139) 13420/2001, (140) 12449/2001, (141) 13397/2001, (142) 13199/2001, (143) 13756/2001, (144) 13394/2001, (145) 12615/2001, (146) 13396/2001, (147) 13682/2001, (148) 11449/2001, (149) 11821/2001, (150) 13413/2001, (151) 13395/2001, (152) 14304/2001.

(i) Writ Petitions at Serial Nos. 1 to 113 are by the police officials.

(ii) In cases at Serial Nos. 95, 96 and 113 a regular enquiry under the

Punjab Police (Efficiency and Discipline) Rules, 1975, has been initiated. In all other cases except in the petition at Serial No. 58, show-cause notice has been issued for major penalty after dispensing with the inquiry.

(iii) In writ petition at Serial No. 58 proceedings have been initiated under the Punjab Removal from Service (Special Powers) Ordinance (Punjab Ordinance No. IV of 2000).

(iv) Petitions at Serial Nos. 114 to 126 are by the employees working in the office of the Accountant-General, Punjab to whom show-cause notices for premature retirement have been issued under the Removal from Service (Special Powers) Ordinance (Ordinance No. XVII of 2000).

(v) Petitions at Serial Nos. 127 to 133, 135 to 138, 140, 112, 143, 144, 147 are by the employees of the Provincial Government to whom show-cause notices have been issued under Ordinance No. IV of 2000.

(vi) Petition at serial No. 134 is by an employee of the Irrigation Department against the order of his suspension.

(vii) In writ petitions at Serial.Nos.139, 141, 145, 146, the employees of the Punjab Government have been put to notice for premature retirement under section 12 of the Punjab Civil Servants Act, 1974.

(viii) Writ petitions at. Serial Nos. 148 and 149 are by the employees of the WASA of the FDA while writ petition at Serial No. 150 is by an employee of the Punjab Social Security Institute. In these three cases, show-cause notices have been issued to them under section 3(Q) of Ordinance, IV of 2000.

(ix) Writ petitions at Serial Nos:151 and 152 are by employees of the Pakistan Railway to whom show-cause notices under Ordinance XVII of 2000 have been issued.

3. Detailed submissions were made before us by the following learned counsel:

1. Mr. Farooq Beddar, Advocate,
2. Dr. A. Basit, Advocate,
3. Rana Ijaz Ahmad Khan, Advocate,
4. Mr. Asad Ullah Siddiqui, Advocate,
5. Hafiz Tariq Nasim, Advocate,
6. Mr. Parvaiz Inayat Malik, Advocate,
7. Mr. Ikram Zahid, Advocate,
8. Mr. Nasir Ahmad Qureshi, Advocate,
9. Mr. M.D. Tahir, Advocate,
10. Syed Iftikhar Ahmad Shah, Advocate,
11. Mr. Ishrat Ali Javed, Advocate,
12. Mr. M. Yasin Bhatti, Advocate,
13. Hafiz Khalil Ahmad, Advocate,
14. Mr. S. M. Masud, Advocate,
15. Malk Noor Muhammad Awan, Advocate,
16. Mr. Saleem Saigol, Advocate,
17. Mr. Inayallah Cheema, Advocate,
18. Mr. Asif Mehmood Cheema, Advocate,
19. Sheikh Muhammad Siddique, Advocate,
20. Mr. Mimawar Ahmad Javed, Advocate,

4. Mr. Farooq Baddar, Advocate, appearing for some of the petitioners,, objected to the inclusion of one of us (Ijaz Ahmad Chaudhary, J.) on the Bench on the ground that similar matters i.e. Writ Petition No.10924 of 2001 and others were placed before him who decided these matters on 18-6-2001 dismissing all the writ petitions on the grounds that not only bar of jurisdiction under Article 212 of the Constitution was attracted but also that a writ petition was not maintainable against a show-cause notice. Having expressed his views, he is disqualified to sit on the Bench. Reliance was placed on the case of Ghulam Rasool and others v. Crown (PLD 1951 FC 62) and Islamic Republic of Pakistan v. Abdul Wali Khan (PLD 1976 SC 57).

ACTED

RS
37
P L D 1981 Karachi 750

Before Zaffar Hussain Mirza, Nalmuddin, Muhammad Zahoorul

Haq, Saeeduzzaman Siddiqui and Z. C. Yalliani, JJ

KALILUR REHMAN AND OTHERS-Petitioners

VERSUS

GOVERNMENT OF PAKISTAN AND OTHERS-Respondents

Constitutional Petition No. 1578 of 1980, decided on 23rd February, 1981.

(a) Constitution of Pakistan (1973)--

Arts. 212 & 199 read with Service Tribunals Act (LXX of 1973), S. 4 and Civil Servants Act (LXXI of 1973), S. 13(ii)-Retirement under S. 13(ii) of Act LXX of 1973 and appeal under S. 4 of Act LXXI of 1973-Jurisdiction of High. Court in such matter, *held*, ousted.-[Civil services].

Jurisdiction of High Court is ousted in regard to all such matters which fall within ambit of authority of Tribunal to adjudicate even though the Tribunal is conferred with jurisdiction limited to some of matters relating to terms and conditions of service. Words "in respect of any matter to which the jurisdiction of such administrative Court or Tribunal extends" provide for degree of ouster of jurisdiction of Courts in direct proportion to scope of jurisdiction of Tribunal. Once it is shown that an appeal is competent before Service Tribunal, the matter will lie outside the pale of the jurisdiction of the High Court.

Link

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

S. 13(ii) and Service Tribunals Act (LXX of 1973), S. 4(b) Competent authority taking decision with regard to fitness or other wise of an incumbent to hold a particular post-Such decision by itself does not infringe any of terms and conditions of his service as long as none of his other service rights affected-Appointment and promotion.-[Civil services].

Fitness or otherwise of a person to be appointed or to hold a particular post or to be promoted to a higher post is a matter which in the very nature of things is not liable to be regulated by any rules or regulations, but depends upon the judgment and opinion of the competent authority required to determine the same. Often such opinion is dependent upon imponderables not capable of objective examination or- review by another authority. Such opinion may be based on a variety of considerations. It was, therefore, rational for the law-maker to clarify that no appeal -shall lie against a decision of such nature. It is not difficult to see why no right of appeal has been provided against a decision determining the question of fitness or otherwise of a person to be appointed to a particular post or to be promoted to a higher post or grade. In Pakistan it is well settled that no person has a vested right to an initial appointment to a particular post or to be promoted to a higher post. These matters lie within the domain of prerogative right of the Government to select persons found suitable to their satisfaction for appointment or promotion. It is the absolute discretion of the competent authority in the Government whether to appoint or to promote to higher post any person because once the appointment or promotion is made, the incumbent may acquire vested: service rights vis-a-vis Government. The fitness of a person to "hold" a post has been bracketed with appointment or promotion. No person in Government service has ordinarily been recognized to have a right to hold a "particular" post. The word "particular" is very significantly used in this clause limits the scope of the clause so far as the decision relevant to the fitness or otherwise of a person to hold a post is concerned. Section 10 of the Civil Servants Act stipulates as one of the conditions of service of a civil servant that he shall be liable to serve anywhere or outside Pakistan, in any post under the Federal Government, or any Provincial Government or Local Authority, or a

if the competent authority takes a decision with regard to fitness or otherwise of an incumbent to hold a particular post, such decision by itself does not infringe any of the terms and conditions of his service, as long as none of his other service rights is affected. An unjustified or male *fide* or colourable order of retirement under section 13(ii) of Civil Servant Act, 1973 would obviously involve the infringement of the right of a civil servant to continue to serve until the sixtieth year of his age. It cannot, therefore, be a mere matter of his fitness to hold a particular post. A decision as to "fitness of a person to hold a particular post" cannot be equated with a decision to "retire a person from service in public interest".

[Link 1](#)
[Link 2](#)

(c) Interpretation of statutes-

Proviso to a section-Proviso to be strictly construed-Remedial provision of an enactment-To be construed so as to advance remedy and suppress mischief intended to be suppressed by provision.

[Link](#)

Muttaqi Hussain Rizvi v. Province of Sind P L D 1978 Kar. 703 ref. (d) Service Tribunals Act (LXX of 1973)-

--- S. 4 and Civil Servants -Act (LXXI of 1973), S. 13(ii) read with Constitution of Pakistan (1973), Arts. 199 & 212-Compulsory retirement-Order of retirement in public interest in respect of a civil servant after completing 25 years' service qualifying for pension and other retirement benefits being appealable under S. 4 of Service Tribunals Act, jurisdiction of High Court, *held*, stands ousted by virtue of bar contained in Art. 212 of Constitution-High Court has no inherent power to judicially review action of executive, Legislature, Courts or Tribunals but exercises such jurisdiction in field of judicial review as expressly conferred upon it by Art. 199.-[Jurisdiction-Civil services].

[Link 1](#)
[Link 2](#)
[Link 3](#)

Sher Muhammad v. Director-General of Pakistan Telegraph & Telephones Department P L D 1979 Kar. 1 ; Iqan Ahmed Khurrun v. Government of Pakistan P L D 1979 Kar. 610 ; 117an Ahmed IKhurrun v. Government of Pakistan P L D 1980 S C 153 ; Muhammad Hashim Khan v. Province of Baluchistan P L D 1976 Quetta 59 ; Fazal Elahi Ijaz and others v. Government of Punjab and others 1981 S C. M R 433 ; Mujeebullah Hajazi v. Director General, Telephone &c Telegraph Department P L D 1980 Quetta 51 ; Afzal Hussain Syed v. Government of Punjab P L D 1980 iLah. 697 ; Amanul Mulk-v. N.-W. F. P. P L D 1981 Pesb. 11 ; State v. Zia-ur-Rehman P L D 1973 S C 49 ; Muhammad Aslam Bajwa v. Federation of Pakistan P L D 1974 Lab. 545 and M. Yameen Qureshi v. Islamic Republic of Pakistan PLD1980SC22ref.

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

S. 4, Civil Servants Act (LXXI of 1973), S.13(ii) and Constitution of Pakistan (1973), Art. 212-Compulsory retirement-High Court Not competent to examine validity of an order which falls within jurisdiction of Tribunal-Orders male *fide*, *ultra vires* or *coram non judice*-Within ambit of Service Tribunal and jurisdiction of civil Courts including High Court ipso facto ousted as a result of barring provision of Art. 212.-[Jurisdiction-Civil sarvices].

[Link 1](#)
[Link 2](#)
[Link 3](#)

Afzal Hussain Syed v. Government of Punjab P L D 1980 Lah. 697 and Fedcration of Pakistan v. Saeed Ahmed Khan and others P L D 1974 S C 151 ref.

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

-- S. 13(ii) and Service Tribunals Act (LXXI of 1973), S. 4(1) read with Art. 212-Appeal against final order-Contended that inasmuch as jurisdiction of Service Tribunal confined to entertain appeals from "final" orders made by departmental authorities, jurisdiction in respect of other orders continues to remain intact so far, as High Court concerned-Held, impugned order although not final so far as departmental authority passing it concerned, yet in nature of a step towards final order that may eventually be passed--Such interlocutory order having eventually to merge in final order and capable of being brought before Service Tribunal in an appeal from final order, held, outside jurisdiction of High Court.-[Appeal (civil)-Jurisdiction].

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

S. 4(1), proviso (a)-Proviso (a) to S. 4(1)-Cannot be considered to restrict exclusiveness of jurisdiction of Tribunal in relation to matters committed to its jurisdiction exclusively.-[Jurisdiction].

Link**(h) Service Tribunals Act (LXX of 1973)-**

S. 4(1) read with Constitution of Pakistan (1973), Art. 212 - Jurisdiction of Tribunal-Subject-matter pertaining to any terms and conditions of service of civil servants once placed within jurisdiction of Tribunal, ouster of jurisdiction of other civil Courts, *held*, absolute in respect of such terms and conditions-Certain preliminary steps having to be taken by way of procedure for invoking jurisdiction of Tribunal-During time such steps taken civil Courts cannot be said to have jurisdiction.-[Jurisdiction].

Link**(i) Service Tribunals Act (LXX of 1973)-**

S. 4 read with Constitution of Pakistan (1973), Art. 212-Fact of Tribunal having no express authority to implement its decisions . Does not mean Tribunal being not of exclusive jurisdiction-Tribunal presently constituted empowered to give redress to aggrieved civil servants against any orders passed to their detriment in relation to their terms and conditions of service.-[Jurisdiction].

Link

Sind Employees' Social Security v. Adamjee Cotton Mills Ltd. P L D 1975
S C 32 ref.

(i) Interpretation of statutes--

Construction to be made of all parts of a Statute together and not of one part only by itself.

Link

Maxwell on Interpretation of Statutes, 12th Edn., p. 58 ref.

NOTED

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

Ss. 22 & 13(ii) and Service Tribunals Act (LXX of 1973), S. 4(1), proviso (a)--Expression "departmental authority" occurring in proviso-Relates to "an authority next above authority which passed order"-Scheme of Civil Servants Act discussed.-[Civil services , Interpretation of statutes].

Reading section 22 of the Civil Servants Act, 1973 with proviso (a) to section 4 of the Service Tribunals Act, it will be clear that the expression 'departmental authority' occurring in the said proviso relates to- "an authority next above the authority which made the order". This is the key to the interpretation of the expression in question. Clearly the scheme of the Civil Servants Act which is a sister enactment to the Service Tribunals Act shows that in the hierarchy of the departmental authorities an order passed by any officer can be challenged before the next

senior officer in the Department in absence of specific rules to the contrary. Therefore, the expression "departmental authority" can mean an authority or officer senior in rank to the civil servant in respect of whom an order is passed. Even if a literal construction of the wording employed in the Explanation is adopted, the expression "departmental authority" would mean - any. authority, other than a Tribunal, which is competent to make an order in respect of, "any of the terms and conditions of civil servants". In other words, an order passed by a particular authority incompetently would still be appealable if that authority is otherwise competent to pass an order in respect of any of the terms and conditions generally of the civil servants. There are diverse terms and conditions of civil servants as laid down by the Civil Servants Act and the Rules. Therefore, even this interpretation would include almost invariably all the senior officers of the Department.

Link

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

S. 13(ii) and Service Tribunals Act (LXX of 1973), S. 4 read with Constitution of Pakistan (1973), Arts. 199 & 212-Competency of authority passing order of retirement-Such question if belonging to hierarchy of officers of Department concerned, *held*, will be subject to decision and jurisdiction. of Service Tribunal-Even otherwise if a Court not having jurisdiction wrongly exercises such jurisdiction, an appeal lies from that decision in same manner as an appeal lies from a decision with jurisdiction-- Service Tribunal on same principle, will have jurisdiction to entertain, appeals in cases 'in which appeal lies from an order of a subordinate departmental authority competently passing such order and also where such departmental authority incompetently passes such an order-Jurisdiction of Court in respect of such orders stands ousted.-[Jurisdiction-Civil services-Appeal (civil)].

Link

Muhammad Ashfaq v. State P L D 1973 S C 368 ref.

(m) Service Tribunals Act (LXX of 1973)-.

S, 3 and Constitution of Pakistan (1973), *Art.* 212-Civil servant aggrieved by an order in writing and not by a mere oral threat of a departmental authority-Such order if final, matter falls within jurisdiction of Service Tribunal and covered by ouster clause contained in Art. 212 of Constitution and exclusiveness of jurisdiction of Tribunal not affected.-[Jurisdiction].

Link

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

S. 4. and Civil Servants . Act (LXXI of 1973), S. 13(ii) *read* with Constitution of Pakistan (1973), Arts. 199 & 212-Retirement Tribunal, *held*, has jurisdiction to decide all questions of law and fact as may be raised by any appellant to challenge order of retirement. [Jurisdiction-Civil services].

Link

Farzand Ali v. Province of West Pakistan P L D 1970 S C 98 ; A I R 1971 SC40; AIR 1972 SC 2185 and AIR 1980 SC 1894ref.

ATTORNEY

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

-- S. 4 read with Constitution of Pakistan (1973), Art. 199-Contention that no finality attaches to an otherwise final order passed by 4 departmental authority until lapse of 90 days as required in proviso (a)a of S. 4(1) and therefore recourse can be had to Art. 199 of Constitution during such period-Contention, *held*, not tenable-Once subject matter falls within ambit of Tribunal irrespective of procedural provisions as to when such matter can be brought before Tribunal, ouster of jurisdiction of other Courts including High Court absolute [Jurisdictionle

Link

(p) Constitution of Pakistan (1973)

Art. 199 and Laws (Continuance in Force) Order [C. M. L. A. 1 of 1977], para. 2(3) - Question whether in cases of violation of Fundamental Rights, jurisdiction of High Court would be 'available in view of mandate contained in clear terms in cl. (2) of Art: 199 of Constitution-Examination of question, *held*, not possible in face of binding decision of Supreme Court in P L D 1977 S C 657 upholding validity of para. 2(3) of C. M. L. A.'s Order 1 of 1977 as a consequence of which enforcement of fundamental rights stand suspended.-[Jurisdiction-Fundamental rights].

Link

Begum Nusrat Bhutto v. Chief of Army Staff etc. P L D 1977 S C 657 ref. Khalid M. Ishaque, Nasim Farooqui, Wajihuddin Ahmed, Raja Haq Nawaz and Raja Qureshi for Petitioners.

Deputy Attorney-General and Miss Rashida Masud for Respondents. Advocate-General, Muhammad Ali Sayeed and Mansoor Ali Khan Amicus curiae.

JUDGMENT

ZAFFAR HUSSAIN MIRZA, J.-The following questions were referred to the Full Bench by a Division Bench comprising of the learned Chief Justice and Justice Ajmal Mian :-

- (i) Whether the petitions are barred by Article 212 of the Constitution ?
- (ii) Whether the competent authority can retire a civil servant at any time after his completing 25 years service or alternatively the said power to retire a civil servant can be exercised at or about the time when the civil servant is due to complete 25 years of service "
- (iii) Whether the power to retire under section 13(ii) of the Civil Servants Act (1973) is absolute or is regulated by rules ?

2. These questions have arisen out of several petitions under Article 199 of the Constitution filed by civil servants who have been retired by orders passed in purported exercise of power conferred upon the competent authority in each case under section 13(ii) of the Civil Servants Act, 1973, which reads as under :-

"Retirement from Service.-A civil servant shall retire from service-

- (i) in the case of a person holding the post of Additional Secretary to the Federal Government as any equivalent or higher post, on such date as the competent authority may, in the public interest, direct ;
- (ii) in any other case, on such date after he has completed twenty-five years of service qualifying for pension or other retirement benefits as the competent authority may. in the public interest, direct ; or
- (iii) where no direction is given under clause (i) or, as the case may be. under clause (ii), on the completion of the sixtieth year of his age.

Explanation.-In this section. "competent authority" means the appointing authority or a person duly authorised by the appointing authority in that behalf, not being the person lower in rank than the civil servant concerned."

3. On the petitioners' side we have heard Messrs Khalid Ishaque, Nasim Farooqui, Wajihuddin Ahmed, Raja Haq Nawaz and Raja Qureshi. For the respondents the learned Deputy Attorney-General and Miss Rashida Masud addressed arguments. The learned Advocate-General, Mr. Muhammad Ali Sayeed and Mr. Mansoor Ali Khan have also addressed us as amicus curiae. The argument on the petitioners' side was opened by Mr. Khalid Ishaque. It was suggested on behalf of the petitioners that the first question as framed by the Referring Bench may be recast as in its present form it will be difficult to answer the question, for, many other petitions have not been admitted to regular hearing and according to the counsel for the petitioners the petitions cannot be finally disposed of without taking into consideration all the grounds urged in the respective petitions specially in absence of the material upon consideration

of which the competent authority passed the impugned orders. After hearing the counsel for the parties we unanimously felt that the intention behind the referring order did not seem to be to refer all the petitions for final disposal to the Full Bench, but specified questions of law formulated by the Bench were referred for the opinion of the Full Bench. Accordingly we have refrained the first question so as to read as under

"(1) Whether petitions under Article 199 of the Constitution seeking to challenge orders of retirement under section 13(ii) of the Civil Servants Act, 1973, are barred under Article 212 of the Constitution?"

4. We will first take up the aforesaid question as refrained above. At this stage it will be convenient to reproduce the provisions of Article 212 of the Constitution which read as under

"212.-(1) Notwithstanding anything hereinbefore contained, the appropriate Legislature may by Act provide for the establishment of one or more Administrative Courts or Tribunals to exercise exclusive jurisdiction in respect of-

- (a) matters relating to the terms and conditions of persons who are or have been in the service of Pakistan, including disciplinary matters ;
- (b) matters relating to claims arising from tortious acts of Government, or any person in the service of Pakistan, or of any local or other authority empowered by law to levy any tax or cess and any servant of such authority acting in the discharge of his duties as such servant ; or
- (c) matters relating to the acquisition, administration and disposal of any property which is deemed to be enemy property under any law.

(2) Notwithstanding anything hereinbefore contained, where any Administrative Court or Tribunal is established under clause (1), no other Court shall grant an injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of such Administrative Court or Tribunal extends and all proceedings in respect of any such matter which may be pending before such other Court immediately before the establishment of the Administrative Court or Tribunal, other than an appeal pending before the Supreme Court, shall abate on such establishment

Provided that the provisions of this clause shall not apply to an Administrative Court or Tribunal established under an Act of a Provincial Assembly unless, at the request of that Assembly made in the form of a resolution, Parliament by law extend the provisions to such a Court or Tribunal.

(3) An appeal to the Supreme Court from a judgment, decree, order or sentence of an Administrative Court or Tribunal shall lie only if the Supreme Court, being satisfied that the case involves a substantial question of law of public importance, grants leave to appeal."

Tote Parliament provided for the establishment of Administrative Tribunal, to be called the Service Tribunal by the Service Tribunals Act, 1973, to exercise exclusive jurisdiction in respect of matters relating to terms and conditions of service of civil servants and for matters connected therewith or ancillary thereto. It is, therefore, contended on behalf of the respondents that this Court has no jurisdiction to entertain any proceedings in respect of the impugned orders as an appeal is competent before the Service Tribunal against an order passed for retirement of a civil servant under section 13(ii) of the Civil Servants Act before the Tribunal. The relevant section dealing with the jurisdiction of the Service Tribunals is section 4 of the Service Tribunals Act, 1973 which reads as under :-

"4. Appeals to Tribunals.-(1) Any civil servant aggrieved by any final 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

Provided that

ATTACHED