

JUDGMENT SHEET
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

Writ Petition No.26698/2023

Mazhar Hussain Asif Vs. Province of Punjab etc.

| | |
|-------------------------|---|
| Date of hearing | 04-05-2023 |
| Petitioner by | M/s Ch. Ishtiaq Ahmad Khan, Mr. Waqar A. Sheikh, Mian Bilal Bashir, Imtiaz Ahmad Lona, Hafiz Syed Fahad Iftikhar, Tassawar Sohail Bhalli, Adnan Ahmed Ch. Zarish Fatima, Ch. Umar Latif and Rana Abu Hurairah, Advocates. |
| Respondents No.1 & 2 by | Mr. Omer Farooq Khan, Assistant Advocate-General, Punjab. |
| Respondents No.3 & 4 by | Barrister Haris Azmat, Barrister Maryam Hayat, Barrister Hamza Amjad and Barrister Meer Muqsit, Advocates and Mr. Waseem Bhaddar, Senior Legal Advisor-LDA. |
| Respondent No.5 by | Mr. Imran Arif Ranjha, Legal Advisor and Hafiz Adeel Ashraf, Law Officer ECP. |
| Respondent No.6 by | M/s Asad Manzoor Butt, Prince Naseem Raza, Afzaal Hussain Hashmi and Hafiz Muhammad Nouman Zafar Advocates. |

ABID AZIZ SHEIKH, J. Through this Constitutional Petition, the petitioner has challenged two impugned transfer orders bearing Endorsement Nos.LDA/ADMN/S-I/242 & 243 dated 27.03.2023 (**impugned transfer orders**) issued by respondent No.4 on behalf of Director General (**DG**), Lahore Development Authority (**LDA**), whereby the petitioner (who

was working as Chief Engineer-II, Urban Development (**UD**) Wing, LDA and holding additional charge of the post of Chief Engineer, Traffic Engineering & Transport Planning Agency (TEPA), LDA) (hereinafter referred to as **Chief Engineer TEPA**) has been transferred and posted as Chief Engineer, TEPA, LDA and through the second impugned transfer order, respondent No.6, already working as Chief Engineer-I, UD Wing, LDA, (hereinafter referred to as **Chief Engineer-I**) has been given the additional charge of the post of Chief Engineer-II, UD Wing LDA (hereinafter referred to as **Chief Engineer-II**). The petitioner has also challenged the order dated 07.04.2023 (**impugned order**) passed by respondent No.2, whereby his representation has been dismissed.

2. Relevant facts are that the LDA, under the chairmanship of Chief Minister, Punjab held its meeting on 17.08.2021 and decided to upgrade the existing post of Additional Chief Engineer in UD Wing, LDA from BS-19 to BS-20 and re-designate the same as Chief Engineer-II (BS-20), similarly, the existing post of Chief Engineer in UD Wing of the LDA was decided to re-designate as Chief Engineer-I (BS-20). Subsequently, vide order dated 04.10.2021, the respondent No.6 was posted as Chief Engineer-I and the petitioner was posted as Chief Engineer-II and the workload was distributed

accordingly. Through the impugned transfer orders, the petitioner has been transferred as Chief Engineer TEPA and respondent No.6 has been given additional charge of the post of Chief Engineer-II, respectively. The petitioner being aggrieved filed Writ Petition No.21132/2023, which was disposed of by this Court on 31.03.2023 with direction to respondent No.2 to decide the representation/appeal of the petitioner under Regulation 23(2) of the Lahore Development Authority (Appointment & Conditions of Service) Regulations, 1978 (**Regulations**), however, the said representation of the petitioner has been dismissed through the impugned order dated 07.04.2023, hence, this Constitutional Petition.

3. Learned counsel for the petitioner submits that the petitioner is Grade-19 officer, however, he was posted against the post of Chief Engineer-II, which is a post of Grade-20, therefore, under Schedule “A” read with Regulation 3 of the Regulations, the jurisdiction to transfer the petitioner is with the Chief Minister (who is the Chairman of LDA) and not with the DG, LDA. He further submits that under Section 8(2)(b) read with Section 10 of the Lahore Development Authority Act, 1975 (**Act**), the Authority issued “Delegation of Powers Circular” (hereinafter referred to as **Circular**), whereby certain powers are delegated to DG, LDA and under Clause 19 thereof,

the powers of DG, LDA to make transfers are confined up to Grade-19 and not against the post of Grade-20. He submits that Clause 12 of the Circular under the head (“Powers of the Authority/The Chairman”), the remaining powers are with the Chairman, and therefore the impugned transfer order in respect of the petitioner is not valid. He submits that even otherwise, the dual charge of the post of Chief Engineer-I and Chief Engineer-II could not be given to respondent No.6 being in clear violation of the Authority’s decision dated 17.08.2021. He adds that under Section 8(2)(b) of the Act, the DG, LDA is bound by the decision of the Authority. Finally, submits that the impugned transfer orders have been passed during the ban imposed by the Election Commission of Pakistan (**ECP**), vide Notification dated 15th March, 2023 (**Notification**) and despite the letter dated 19.04.2023, issued by District Election Commissioner-I, Lahore, the impugned transfer orders have not been recalled. He placed reliance on the order dated 22.02.2023, passed by learned Full Bench of this Court in Writ Petition No.6125 of 2023, and “GOVERNMENT OF BALOCHISTAN through Secretary Services and General Administration Department and others Vs. ABDUL RAUF and others” (**PLD 2021 Supreme Court 313**). On the question of maintainability of this petition, he submits that the Regulations,

being approved by the Martial Law Administrator, Punjab on 30.04.1978 and validated by the Article 270A of the Constitution of the Islamic Republic of Pakistan, 1973 (**Constitution**), have the force of statutory regulations, hence, this Constitutional Petition is maintainable.

4. On the other hand, learned counsel for the respondents-LDA submits that the Regulations being non-statutory, this Writ Petition is not maintainable. He submits that the petitioner being Grade-19 officer, the jurisdiction for his transfer vests with the DG, LDA under Regulation 11(3) of the Regulations. He submits that even the earlier transfer order dated 04.10.2021 of the petitioner was passed by the DG, LDA and not by the Chairman. He submits that dual charge given to respondent No.6 by the competent Authority is also in accordance with the relevant Rules and Regulations. He submits that though there was ban imposed by the ECP through the Notification on the transfer and posting but the said ban is not applicable to the LDA. He adds that this ground is not specifically raised in writ petition and in any case, the LDA filed application to the ECP on 28.04.2023 for *ex-post facto* approval of the transfers in question, which is likely to be granted, therefore, Writ Petition is not maintainable. He further submits that it is the Authority, who can determine that whether the services of any staff

member of LDA is required, therefore, the Writ Petition is not maintainable in respect of the transfer matters. He placed reliance on “KHYBER MEDICAL UNIVERSITY and others Vs. AIMAL KHAN and others” (**PLD 2022 Supreme Court 92**) and “MUHAMMAD SAJJAD Vs. FEDERATION OF PAKISTAN and others” (**2023 PLC (C.S.) 292**). Learned counsel for the respondent No.6 supported the above arguments and submits that respondent No.6 is Grade-19 officer and performing his duties diligently and for this reason, he has been lawfully assigned dual charge of the post of Chief Engineer-II through the second impugned transfer order.

5. Learned counsel for the respondent-ECP, however, submits that the impugned transfer orders have been made without approval of the ECP, which are not sustainable.

6. Arguments heard. Record perused. Before touching merits of the case, I would like to decide the question of maintainability of this petition on the legal question i.e. whether the LDA Regulations are statutory or non-statutory. One of the tests to determine that whether the Rules or Regulations under any enactment are statutory or otherwise, laid down by the hon’ble Supreme Court from time to time, is that when the Rules or Regulations are framed or approved by the

Government then the same have force of law and are statutory in nature, however, where the Rules or Regulations are made by the Authority or concerned department for internal control or management without approval of the Government, the same are non-statutory and does not have statutory force behind it. In this context, reliance is placed on “ZARAI TARAQIATI BANK LIMITED and others Vs. SAID REHMAN and others” (2013 SCMR 642), “PROVINCE OF PUNJAB through Collector Sialkot and others Vs. RANA ZILADAR KHAN” (2013 SCMR 219), “KAMRAN KHAN Vs. WAPDA etc.” (2014 PLC (C.S.) 332 Lahore) and “MUHAMMAD FAHAD MALIK Vs. PAKISTAN MEDICAL AND DENTAL COUNCIL and others” (PLD 2018 Lahore 75).

7. The Regulations in-question when examined in the light of the law settled in afore-noted judgments, no doubt the same have been framed under Section 45 of the Act by the Authority and no approval of the Government is required under said provision, however, the perusal of LDA Regulations shows that vide letter dated 30.04.1978 by government of Punjab (Local Government Social Welfare and Rural Development Department), the same were approved by the Martial Law Administrator, Punjab (MLA) on 16.04.1978. Under Article 270A(1) of the Constitution, all Proclamations, President's

orders, Ordinances, Martial Law Regulations, Martial Law Orders and all other laws made between 05.07.1977 and the date when Article 270A of the Constitution came into force, were affirmed, adopted and declared to have been validly made by the competent authority. Further, under Article 270A(2) & (3) of the Constitution, all orders made, proceedings taken and act done by any authority or any person which was made, taken or done between 05.07.1977 and the date on which Article 270A of the Constitution came into force (30.01.1985), in exercise of powers derived from Proclamation, President's Orders, Ordinance, Martial Law Regulations, Martial Law Orders, enactments Notifications, Rules, Orders or Byelaws be deemed to be and always to have been validly made, taken or done and remain in force unless altered, repealed or amended by the competent authority. The hon'ble Supreme Court of Pakistan in "Miss BENAZIR BHUTTO Vs. FEDERATION OF PAKISTAN and another" (**PLD 1988 Supreme Court 416**), while interpreting the Article 270A of the Constitution, held as under:-

"Having regard to the meanings which the words "affirm", "adopt" and "declare" convey, it is manifest that the legislature owned the legal instruments and legal measures made between the specified dates as if enacted by itself so as to give validity and competency to those legal instruments and measures. The

principle of ratification was here adopted and such validity and competency was proclaimed. This principle belongs to the realm of the law of agency: “In the law of principal and agent, the adoption and confirmation by one person with knowledge of all material facts, of an act or contract performed or entered into in his behalf by another who at the time assumed without authority to act as his agent. Essence of “ratification” by principal of act of agent is manifestation of mental determination by principal to affirm the act, and this may be manifested by written word ...” (See Black’s Law Dictionary, Fifth Edition, p.1135). In this respect there was a departure from the protection earlier given by the two constitutional provisions, namely Article 281(1) of the Interim Constitution and Article 269(1) of the 1973 Constitution.”

Though the LDA Regulations framed under Section 45 of the Act were neither required nor approved by the Government, however, these Regulations were approved by the MLA on 16.04.1978, who was exercising the powers of the Provincial Government for all intent and purposes under Proclamations, including the Martial Law Regulations and Martial Law Orders, which were subsequently validated under Article 270A of the Constitution, therefore, the approval of MLA has the same status as approval of the Government. The necessary corollary and conclusion of the above discussion is that LDA Regulations are statutory in nature and it will be a fallacy to hold it otherwise. The impugned transfer orders are also challenged

being violative of the decision of the Authority dated 17.08.2021, ECP order dated 15.03.2023 and the provisions of the Act, therefore, this petition is maintainable on this score as well. In view of above discussion, the preliminary objection on the maintainability of this petition is overruled.

8. On merits, under regulation 11(3) of the Regulations, the DG, LDA may transfer any employee from the Authority to any of its Agencies and *vice versa* against equivalent posts. The petitioner is admittedly an employee of the LDA and has been transferred as Chief Engineer in TEPA, which is one of the Agencies of the Authority. The perusal of the earlier posting order dated 04.10.2021 of the petitioner shows that the same was also issued with the approval of the DG, LDA, therefore, it cannot be said that DG, LDA has no jurisdiction to pass the impugned transfer orders under the Regulations. The argument of the petitioner that authority to pass transfer orders under Schedule “A” of the Regulations and Clause 12 & 19 of the Circular is with the Chairman, LDA, is misconceived. The perusal of Schedule “A” issued under Regulation 3 of the Regulations shows that the Chairman is the Appointing Authority for Grade-20 officers, whereas the petitioner and respondent No.6 are admittedly Grade-19 officers, in respect of whom the Appointing/Competent Authority is the DG, LDA

under the said Schedule “A”. Similarly, Clause 19 of the Circular (under the head “Powers of DG”) power to transfer posts in Grade 17, 18 & 19 vests with the DG, LDA. Mere fact that posts of Chief Engineers I & II were upgraded to BS-20 will not exclude the jurisdiction of DG, LDA in respect of the petitioner and respondent No.6, who are admittedly Grade-19 officers. Therefore, the argument that DG, LDA had no jurisdiction to transfer the petitioner has no force.

9. Notwithstanding the above legal position, I found substance in the argument of the petitioner that the impugned transfer orders have been passed in violation of the Notification dated 15.03.2023 by the ECP, whereby ban was imposed on transfers and postings in the Punjab Province where schedule for General Election to the Provincial Assembly was issued on 08th March, 2023 till the publication of the names of the returned candidates in the official Gazette. The argument of the respondents-LDA that this ground has not been raised in the petition or the ECP’s Notification is not applicable to LDA, is baseless. Perusal of Para 2(ii) of this Writ Petition shows that not only this legal question has been specifically raised in the petition but the copy of ECP’s Notification dated 15.03.2023 is also appended with the petition as ‘Annexure-B’. Regarding applicability, the perusal of the ECP’s Notification manifests

that same was issued under Article 218(3) of the Constitution read with Section 230(2)(f) of the Elections Act, 2017 (**Elections Act**) and was made applicable not only to the Government but also to the Authorities. The LDA admittedly being an Authority under the Act, the ECP's Notification is also applicable to the LDA. This legal position is also supported by the fact that District Election Commissioner-I, Lahore specifically wrote a letter dated 19.04.2023 to DG, LDA to withdraw the impugned transfer orders being in violation of the direction of ECP. Further, the respondents-LDA itself, vide letter dated 28.04.2023, sought *ex-post fact* approval for the transfer of the petitioner under the letter dated 15.03.2023 and it is nowhere claimed in the said letter that ECP's Notification is not applicable to LDA. In view of above discussion, the impugned transfer orders, in respect of the petitioner and respondent No.6, being violative of ECP's Notification dated 15.03.2023, are not sustainable.

10. The petitioner has also challenged the impugned transfer order dated 27.03.2023, whereby additional charge of the post of Chief Engineer-II was given to respondent No.6 being in violation of the direction of the Authority dated 17.08.2021. I have carefully examined this argument. The perusal of the Minutes of meeting of the Authority dated 17.08.2021 shows

that the Authority decided to upgrade the existing post of Additional Chief Engineer in UD Wing, LDA from BS-19 to BS-20 and re-designation of the same as Chief Engineer-II (BS-20) LDA, similarly, it was decided to re-designate the existing post of Chief Engineer in UD Wing of the LDA as Chief Engineer-I (BS-20), LDA and specific direction was also issued to DG, LDA to distribute the workload amongst the Chief Engineer-I and Chief Engineer-II as may, from time to time, be deemed appropriate by him and may take all consequential actions reasonable necessary thereon. The aforesaid decision of the Authority is binding on DG, LDA under Section 8(2)(b) of the Act, therefore, the DG, LDA was required to distribute the workload amongst the Chief Engineer-I and Chief Engineer-II and could not give additional charge of the post of Chief Engineer-II to respondent No.6, who was already working as Chief Engineer-I. The said charge of Chief Engineer-II was required to be assigned to some other eligible officer to distribute the workload between the two posts as per the direction of the Authority.

11. There is no cavil with the settled proposition of law that transfer and posting is the domain of the department for exigencies of the service, however, where the transfer orders are in clear violation of the orders passed by the ECP or

Authority itself, then the same are not sustainable. The case law relied upon by the learned counsel for the respondents-LDA is distinguishable and not applicable to the facts and circumstances of this case.

12. In view of the above discussion, this Writ Petition is **allowed** and the impugned transfer orders of even date i.e. 27.03.2023 in respect of the petitioner and respondent No.6, alongwith the impugned order dated 07.04.2023 are set-aside being passed without lawful authority and of no legal effect.

(ABID AZIZ SHEIKH)
JUDGE

Approved For Reporting

JUDGE

Arsalan