

HCJDA-38

JUDGMENT SHEET

IN THE LAHORE HIGH COURT

RAWALPINDI BENCH

RAWALPINDI

JUDICIAL DEPARTMENT

I. C. A. No. 53 of 2021

Abdus Salam

versus

Assistant Commissioner, Murree & 5 others

JUDGMENT

<i>Date of hearing</i>	23-02-2023
<i>Appellant(s) by:</i>	<i>Sardar Abdul Raziq Khan, Advocate.</i>
<i>Respondent(s) by:</i>	<i>Qazi Muhammad Nauman Sarwar, Assistant Advocate General.</i>

SULTAN TANVIR AHMAD, J:—Through present Intra Court Appeal, filed under section 3 of the Law Reforms Ordinance, 1972, the appellant has assailed the order dated 16.12.2020, passed by learned Judge-in-Chambers, in constitution petition No. 550 of 2017, whereby, the petition of the appellant has been dismissed on the basis of preliminary objection of maintainability of the petition in view of bar under Article 212 of the Constitution of the Islamic Republic of Pakistan, 1973 (the ‘**Constitution**’).

2. Facts, necessary for the decision of the present

case, are that appellant was appointed in Revenue Department on 01.05.1976 and upon attaining age of superannuation he was retired from his service on 15.01.2008. In writ petition No. 550 of 2017 the appellant assailed order dated 22.11.2016 passed by respondent No.1, who exercised his powers under Punjab Civil Service (Pension Rules 1963) to withdraw the pension of the appellant. This order was challenged by invoking the constitutional jurisdiction of this Court, under Article 199 of the *Constitution* through petition No. 550 of 2017, which was dismissed being not maintainable. Aggrieved from the same, present Intra Court Appeal has been filed.

3. Sardar Abdul Raziq Khan, learned counsel for the appellant, has submitted that after retirement the appellant ceased to be a ‘civil servant’, therefore, the bar of Article 212 of the *Constitution* does not apply to the case; that impugned order is patently illegal and violates section 21 of the PEEDA Act, 2006; that the appellant or for that matter any citizen cannot be deprived of salary or pension by merely holding that the matter pertains to ‘terms and conditions’, as these rights are fundamental rights of the citizens. It is further submitted by the learned counsel for the appellant that the learned Judge-in-Chambers has failed to correctly interpret Article 212 of the *Constitution* as well as section 2(b) and section 4 of the Punjab Service Tribunal Act, 1974 (the ‘**Tribunal Act**’); that the impugned order has been passed without appropriately appreciating the definition of ‘civil servant’ as contained in section 2(b) of the Punjab Civil Servant Act, 1974 (the ‘**Civil Servant Act**’); that the entitlement and right of pension is conferred upon the appellant under section 18 of *Civil Servant Act*, thus, it was inevitable to

interpret the element of maintainability of the constitution petition in the light of definition of ‘civil servant’ provided in the *Civil Servant Act* instead of the *Tribunal Act*, which is a fatal mistake requiring interference in this appeal. The learned counsel, during the course of arguments, has relied upon cases titled “Mst. Islam Bibi versus Government of Pakistan through Secretary State and Frontier Regions Division, Islamabad and 3 others” (**2022 PLC (C.S.) 1196**), “Mst. Chandni Asad versus Federation of Pakistan and others” (**2020 PLC (C.S) 96**), “Sher Zaman Ex-Assistant Excise and Taxation Officer (B-16) versus Board of Revenue Balochistan (Excise and Taxation Branch) through Member Board of Revenue-II/Secretary Excise and another” (**2020 PLC (C.S) 969**), “Syed Raza Mehdi Baqari versus Province of Punjab through Secretary LG & CD Department and 2 others” (**2016 PLC (C.S) 1046**), “Abdul Wali versus WAPDA through its Chairman and others” (**2004 SCMR 678**), “Ehsan-ul-Haque versus Executive Engineer, Ahmadpur Canal Division Ahmadpur East and 2 others” (**2011 PLC (C.S.) 1523**), “Muhammad Younis versus Abbas Raza and 6 others” (**2005 PLC (C.S.) 833**), “Abdul Aziz Virk versus Special Secretary, Education (Schools), Government of the Punjab, Lahore and 7 others” (**2001 PLC (C.S.) 661**), “Khalid Imran Khan Barki versus Government of Punjab and others” (**2021 PLC (C.S.) 426**), and “Jamshaid Khan versus Divisional Forest Officer and others” (**K.L.R. 2013 Civil Cases 68**).

4. Conversely, Qazi Muhammad Nauman Sarwar, learned Assistant Advocate General, has fervently opposed the appeal and he has submitted that the learned Judge-in-Chambers has correctly interpreted Article 212

of the *Constitution* and the relevant provisions of the concerned statutes. Learned Law Officer has relied upon case titled "Javed Iqbal versus Government of the Punjab through Secretary Forestry, Wildlife and Fisheries, Punjab Lahore and 5 others" (**PLJ 2021 Lahore 647**) to defend the order passed by the learned Judge-in-Chambers. He has further submitted that the pivotal question required determination is the maintainability of a petition under Article 199 of the *Constitution* and not the right of pension, if any, which can be agitated by the appellant before the appropriate forum.

5. We have heard the arguments of the learned counsel of the parties and the documents available on the file have been perused with their able assistance.

6. The question of law put-forth before us is that as to whether a person who admittedly remained member of civil service of the Province or held any civil post in connection with the affairs of the Province but upon attaining age of superannuation has retired from service, is able to maintain his petition under Article 199 of the *Constitution* or not, in the view of bar of Article 212 of the *Constitution*?

7. We deem it appropriate to first examine Article 212 of the *Constitution* and relevant provisions of the law, which are as follows:-

Article 212 of the Constitution.

(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, [Majlis-e-Shoora (Parliament)] by law extends the provisions to such a Court or Tribunal.

(3) xxx

(Emphasis Supplied)

The definition of ‘civil servant’ is contained in section 2(b) of the *Tribunal Act* and forum of appeal is provided in section 3 and 4, which reads as follows: -

2. Definitions.--

In this Act, unless there is anything repugnant in the subject or context, --

(a) xxx

(b) "civil servant" means a person **who is or who has been** a member of a civil service of the Province or **holds or has held a civil post** in connection with the affairs of the Province but does not include--

(i) a person who is or who has been on deputation to the Province from the Federation or any other Province or authority;

(ii) a person who is or has been employed on contract, or on work-charged basis, or who is or has been paid from contingencies; or

(iii) a person who is or has been a 'worker' or 'workman' as defined in the Factories Act, 1934 (XXV of 1934) or the Workmen's Compensation Act, 1923 (VIII of 1923);

3. Tribunals.--

(1) xxx

(2) *The tribunal shall have exclusive jurisdiction in respect of matters relating to the terms and conditions of service of civil servant, including disciplinary matters.*

(3) xxx

4. Appeal 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 latter prefer an appeal to the Tribunal --

Provided that--

- (a) where an appeal, review or representation to a departmental authority is provided under the Punjab Civil Servants Act, 1974, or any rules against any such order no appeal shall lie to a Tribunal unless the aggrieved civil servant has preferred an appeal or application for review or representation to such departmental authority and a period of ninety days has elapsed from the date on which such appeal, application or representation was so preferred;
 - (b) no appeal shall lie to a Tribunal against an order or decision of a departmental authority determining the fitness or otherwise of a person to be appointed to, or hold a particular post or to be promoted to a higher grade; and
 - (c) no appeal shall lie to a Tribunal against an order or decision of a departmental authority made at any time before the 1st July, 1969.
- (2) xxx

(Emphasis Supplied)

8. Sardar Abdul Raziq Khan, learned counsel for the appellant has relied upon the definition of 'civil servant' in the *Civil Servant Act* to convince this Court that the learned Judge-in-Chambers has adopted incorrect approach. Section 2(b) of *Civil Servant Act* is as follows:-

2. Definitions---

- (1) In this Act, unless there is anything repugnant in the subject or context,--
 - (a) xxx
 - (b) "civil servant" means a person who is member of a civil service of the

Province or who holds a civil post in connection with the affairs of the Province, but does not include--

- (i) *a person who is on deputation to the province from the Federation or any other Province or Authority;*
- (ii) *a person who is employed on contract, or on work-charged basis, or who is paid from contingencies; or*
- (iii) *a person who is a 'worker' or 'workman' as defined in the Factories Act, 1934 (XXV of 1934) or the Workmen's Compensation Act, 1923 (VIII of 1923);*

9. Clause 1(a) of Article 212 of the *Constitution* provides that administrative courts or tribunals have exclusive jurisdiction when *matters are relating to terms and conditions* of persons who are or have been in service. The *Constitution* makers have chosen to oust the jurisdiction of all the courts but the tribunal with respect to all the matters relating to terms and conditions of servants who are or have been in service. The question involved in the constitutional petition pertains to pension which clearly relates to those terms and conditions subject to which the appellant joined the service and then he served the respective department. Section 2(b) read with sections 3 and 4 of *Tribunal Act* further clarifies this position that the jurisdiction of Punjab Service Tribunal extends when the matter is in respect of any of the terms and conditions of service of a person, who is or has been a member of civil service of the Province or *holds or has held* a civil post. There is no ambiguity in sub-section (b) of section 2 of the *Tribunal Act* that 'civil servants' for the

given purposes include those who holds as well as the persons who have held the post in connection with affairs of the Province. The intention of legislature, to cover the person who held such post subject to condition that the question emanates out rights or obligations that relates to the terms and conditions, is very clear from the plain reading of wording of section 2(b) of the *Tribunal Act*.

10. Articles 212 (1) and 212 (2) of the *Constitution* are non-obstante clauses, which starts with ‘notwithstanding anything hereinbefore contained’ having prevailing effect over articles contained before the said article. Article 212(2) commands that no other court shall grant injunction, make any order or entertain any proceedings in respect of the matter if falls within the jurisdiction of such Administrative Court or Tribunal. Reference in this regard can be made to cases titled “I.A. Sharwani and others versus Government of Pakistan through Secretary, Finance Division, Islamabad and others” (**1991 SCMR 1041**), “Qazi M. Asif Jah Bahadur versus Government of the Punjab through Education Secretary, Lahore and 3 others” (**2004 PLC (C.S.) 292**), “Dr. Ghazanfarullah and 2 others versus Secretary Health, Government of the Punjab, Lahore and 6 others” (**2010 PLC (C.S.) 51**) and “Muhammad Aslam Bajwa versus Federation of Pakistan” (**PLD 1974 Lahore 545**). We would like to reproduce a relevant extract of Qazi Muhammad Asif Jan case (*supra*), which reads as follows:-

“We have considered the contentions of the learned counsel but are unable to subscribe the same inasmuch as in view of non-obstante operation of Article 212 the

bar of jurisdiction gets attracted. In Muhammad Aslam Bajwa v. Federation of Pakistan (PLD 1974 Lahore 545) it was observed that the exclusionary provisions of Article 212 of the Constitution were applicable “notwithstanding anything hereinbefore contained” which takes within its ambit the preceding provisions of the Constitution.”

11. Sardar Abdul Raziq Khan, learned counsel for the appellant, has relied upon section 2(b) of the *Civil Servant Act* and he stated that said section as well as rules framed thereunder do not recognize retired servant as ‘civil servant’ and matter in hand pertains to pension, which accrued in his favour and then taken away when he ceased to be a civil servant. He has contended that this conflict is required to be resolved in favour of the appellant.

12. The *Civil Servant Act* Chapter II deals with the terms and conditions of ‘civil servant’. Chapter II of the *Civil Servant Act* starts with section 3 which provides that “the terms and conditions of service of a civil servant shall be as provided in this Act and rules”. The appellant’s claim arises out of pension rights, which are provided in section 18 that falls in same Chapter (i.e. Chapter-II). The legislature, by including pension in the Chapter where the terms and conditions are provided and categorizing pension as one of terms of service of a civil servant, has left no uncertainty that though pension starts with the retirement but forms part of those terms and conditions to which the civil servant has joined the service. Section 22-B of the *Civil Servant Act*, whereby restriction is imposed upon the Courts to issue orders in respect of proceedings under the *Civil Servant Act* or an order made thereunder,

starts with *save as provided by the act or Service Tribunal Act*. This also leads to clear inference that the matters of terms and conditions mentioned in the *Civil Servant Act* are intended, by the legislature, to be heard by the forum provided in *Service Tribunal Act*. The grievances of the appellant and the matter in hand are squarely covered by the terms and conditions, thus, falls within the jurisdiction of service tribunal. This Court, therefore, does not have jurisdiction under article 199 of the *Constitution*. We are further fortified in our view by principle settled by the Honourable Supreme Court of Pakistan in case titled “Chief Secretary, Government of Punjab, Lahore and others versus Ms. Shamim Usman” (**2021 SCMR 1390**), whereby, following has been observed:-

“We cannot lose sight of the fact that non-obstante clauses of Articles 212(1) and (2) begin with “notwithstanding anything hereinbefore contained,” thus overriding, inter alia, the constitutional jurisdiction of the High Court under Article 199, which is already “subject to the Constitution.” Article 212(1)(a) provides that a Tribunal established under the law will enjoy exclusive jurisdiction in the matters relating to terms and conditions of persons who are or have been in the service of Pakistan, including disciplinary matters. The term “terms and conditions” is clearly spelt out in Chapter II of the Punjab Civil Servants Act, 1974 and the rules thereunder. Article 212(2) in unambiguous terms states that no other Court can grant injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of such Administrative Court or Tribunal extends. Scope of jurisdiction and powers of the Tribunal are provided in sections 4 and 5 of the Act. The High Court, therefore, has no jurisdiction to

entertain any proceedings in respect of terms and conditions of service of a civil servant which can be adjudicated upon by the Tribunal under the Act... ”

(Underlining is added)

13. Certain judgments have been relied by the learned counsel for the appellant, however, we have noticed that facts involved in most of those cases are distinguishable. In our view the learned Judge-in-Chambers in paragraph No. 7 of the assailed judgment has also correctly distinguished the case law relied by the learned counsel of the appellant. As far as reliance of Sardar Abdul Raziq Khan on case titled “Mst. Islam Bibi (supra)” is concerned, it is observed that a learned Division Bench of the Honourable Peshawar High Court exercised the constitutional jurisdiction in the matter relating to pension and / or gratuity but the petition was instituted by legal heirs of the civil servant after his death. Learned Division Bench of Peshawar High Court relied upon case titled “Muhammad Nawaz, Special Secretary, Cabinet Division, through his Legal Heirs versus Ministry of Finance, Government of Pakistan, through its Secretary, Islamabad” (**1991 SCMR 1192**) to reach the conclusion that family members or legal heirs of deceased servant cannot be termed as civil servant, however, it is categorically held that “it is also undeniable fact that pension and gratuity falls within the ambit of terms and conditions of a civil servant” thus, no benefit from the said judgment can be derived to support the contention of learned counsel of the appellant. As a matter of fact, careful reading of the said judgment reveals that same goes against the interest of the appellant.

14. The question before us is of jurisdiction of this Court, which is of course different from the question that if the respondent-department has correctly withheld the pension of appellant. The latter aspect of the matter can always be considered, in such cases, by the learned forum having jurisdiction to adjudicate upon matters. Needless to observe that the question of delay, on account of pursuing remedy before this Court, can also be seen by the learned competent forum for which guidelines are available in number of judgments of the Honourable Supreme Court.

15. In the wake of above discussion, we are of the view that learned Judge-in-Chambers has correctly appreciated the law on the subject, therefore, the same is upheld. Consequently, the present Intra Court Appeal, having no substance is **dismissed**. No order as to costs.

(**SADAQAT ALI KHAN**) (**SULTAN TANVIR AHMAD**)
JUDGE **JUDGE**

APPROVED FOR REPORTING

JUDGE

JUDGE