

JUDGMENT SHEET
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

Writ Petition No.6917/2023

Hafiz Riaz Ahmad etc. Vs. Province of Punjab etc.

Date of hearing	06-02-2023
Petitioners by	Mr. Hassan Iqbal Warraich, Advocate.
Respondents No.1 & 2 by	Malik Sarood Ahmed, Additional Advocate General, Punjab.
Respondents No.3 by	M/s Hafiz Tariq Naseem and Jalil-ur-Rehman, Advocates.

ABID AZIZ SHEIKH, J. In this Constitutional Petition, the petitioners have challenged the order dated 25.01.2023 (**impugned order**) passed by respondent No.2, whereby petitioners' posting against the post of '*Executive Engineer*' (**XEN**) on their Own Pay and Scale (**OPS**) was set-aside.

2. Relevant facts are that petitioners were appointed as '*Sub-Engineer*' in Housing Urban Development and Public Health Engineering Department of Government of Punjab (**Department**), subsequently, they were promoted to the rank of Sub Divisional Officer (**SDO**) (BS-17) on regular position. The petitioners No.1 & 2 were transferred and posted as XEN against OPS vide orders dated 02.12.2022 & 31.10.2022, respectively. The respondent No.3 alongwith other SDOs in the Department filed Writ Petition No.78612/2022 challenging the said posting of the petitioners mainly on the ground that under

the Punjab Health Engineering Department Service Rules, 1975 (**Rules**), only an engineer duly registered with Pakistan Engineering Council (**PEC**) can be appointed against the post of XEN, therefore, petitioners' appointment is hit by relevant Rules and the law laid down by the Hon'ble Supreme Court in "MAULA BUX SHAIKH and others Vs. CHIEF MINISTER SINDH and others" (**2018 SCMR 2098**). This Court, vide order dated 12.12.2022, without touching merits referred the matter to respondent No.2 to treat it as an application on behalf of the said SDOs and decide the same after hearing all concerned. The respondent No.2, after hearing all concerned, vide impugned order held that under the Rules no officer / person can perform professional engineering work, who does not possess accredited engineering qualification from the accredited engineering institution and his name is not registered as a registered engineer or professional engineer with PEC under the Pakistan Engineering Council Act, 1976 (**PEC Act**). Consequently, the appointment orders of the petitioners (who are B.Tech (Hons.) degree or Diploma degree holders) working as XEN on OPS, were withdrawn / cancelled. The petitioners being aggrieved have filed this Constitutional Petition.

3. Learned counsel for respondent No.3 appeared at the limine stage and raised preliminary objections to the maintainability of this petition on the ground that admittedly the

petitioners are Civil Servants and the impugned order for cancellation of their posting and transfer orders/appointment orders relates to the terms and conditions of their service, therefore, this Constitutional Petition is not maintainable.

4. Learned counsel for the petitioners, on the other hand, submits that petitioners were appointed against OPS and therefore, such order does not fall within the terms and conditions of their service, defined under Chapter-II of the Punjab Civil Servants Act, 1974 (**Act**). He placed reliance on “REGIONAL COMMISSIONER INCOME TAX, NORTHERN REGION, ISLAMABAD and another Vs. SYED MUNAWAR ALI and others” (**2016 SCMR 859**). He further submits that not only the impugned order has been passed in pursuance to this Court’s direction but respondent No.2 has also misconstrued the law settled by the Hon’ble Supreme Court in *Maula Bux* case *supra*, therefore, this Constitutional Petition is the only remedy available with the petitioners.

5. I have heard the learned counsel for the parties on threshold question of maintainability of this Constitutional Petition. There is no dispute that the petitioners are Civil Servants and performing their duties as such with the Department. The moot legal question of maintainability is that *whether this Court has jurisdiction in the instant matter or whether petitioners' appointment orders on OPS basis will fall*

within the terms and conditions of their service for invoking the jurisdiction of Punjab Service Tribunal (PST). In this context, perusal of the orders dated 02.12.2022 and 31.10.2022 shows that the petitioners were “transferred” and “posted” as XEN (OPS). These orders, on face of it, are transfer and posting orders of the petitioners and mere fact that petitioners were “transferred” and “posted” against OPS will not change the nature or status of their posting and transfer orders and exclude it from the terms and conditions of the service of the petitioners, including Section 9, Chapter-II of the Act where posting and transfer is one of the terms and conditions of service.

6. No specific provision in law or rules referred to, which prescribes or permits appointment on OPS basis. However, the Hon’ble Supreme Court in “PROVINCE OF SINDH and others Vs. GHULAM FAREED and others” (**2014 SCMR 1189**) while dealing with OPS posting not only discouraged such practice but also noted that in exigencies the Government makes such appointments as a stop gap arrangement. The relevant part of the Hon’ble Supreme Court’s judgment is reproduced hereunder:-

“11. We have inquired from the learned Additional Advocate-General to show us any provision of law and or rule under which a Civil Servant can be appointed on higher grade/post on OPS basis. He concedes that

there is no specific provision in the law or rule which permits appointment on OPS basis. He, however, submitted that in exigencies the Government makes such appointments as a stop gap arrangement. We have examined the provisions of Sindh Civil Servants Act and the Rules framed thereunder. We do not find any provision which could authorize the Government or Competent Authority to appointment any officer on higher grade on "Own Pay And Scale Basis". Appointment of the nature that, too of a junior officer causes heart burning of the senior officers within the cadre and or department. This practice of appointment on OPS basis to a higher grade has always been discouraged by this Court, as it does not have any sanction of law, besides it impinges the self-respect and dignity of the Civil Servants who are forced to work under their rapidly and unduly appointed fellow officers junior to them. Discretion of the nature if allowed to be vested in the Competent Authority will offend valuable rights of the meritorious Civil Servants besides blocks promotions of the deserving officers."

The same view was also followed by the Hon'ble Supreme Court in "KHAN MUHAMMAD Vs. CHIEF SECRETARY, GOVERNMENT OF BALOCHISTAN QUETTA and others" (2018 SCMR 1411), where is held as under:-

"The impugned notification stipulates that the petitioner and respondent No.3 were posted/transferred in their "own pay and scale". In the case of Province of Sindh v. Ghulam Fareed (above) it was held, that posting/transferring a civil servant on his own pay and scale (OPS) is not legally

permissible.”

7. It is also relevant to note that the judgment of Hon’ble Supreme Court in “PROVINCE OF SINDH and others Vs. GHULAM FAREED and others” *supra* was against the judgment passed by PST and in said judgment, the Hon’ble Supreme Court did not hold that PST has no jurisdiction in matters regarding appointment and transfer against OPS. Similarly, in respect of transfer against OPS, the service appeals were adjudicated by learned PST and matters went up to Hon’ble Supreme Court in judgments reported as “Sh. AMAR MAFTOON Vs. GOVERNMENT OF THE PUNJAB through Secretary Education and another” (1992 SCMR 1869), “CHIEF SECRETARY, GOVERNMENT OF N.W.F.P. and others Vs. Syed ZAFARMAND ALI” (2005 SCMR 1212) and “Mst. SAJIDA JAVED Vs. DIRECTOR OF SECONDARY EDUCATION, LAHORE DIVISION and others” (2007 PLC (C.S.) 364) and in none of these judgments, the Hon’ble Supreme Court held that in matter of appointments/transfers against OPS the jurisdiction of Service Tribunal is excluded.

8. From the above discussion, there is no manner of doubt that transfer / appointment orders dated 02.12.2022 and 31.10.2022 of the petitioners despite being OPS are for all intent and purpose are transfer and posting orders and therefore, fall within the terms and conditions of their service, prescribed

under Chapter-II of the Act. The judgment of the Hon'ble Supreme Court, reported as "REGIONAL COMMISSIONER INCOME TAX, NORTHERN REGION, ISLAMABAD and another Vs. SYED MUNAWAR ALI and others" (**2016 SCMR 859**) and relied upon by the petitioners, is not applicable to the instant case. In the said judgment, the Hon'ble Supreme Court held that up-gradation is different from promotion and being granted through policy is not covered in the terms and conditions of the service of Civil Servants. However, in the present case there is no specific policy notified by the Government for OPS rather it is only followed as stop gap arrangement in the transfer and posting matters, hence, cannot be equated with up-gradation.

9. The Hon'ble Supreme Court in various judgments repeatedly held that in respect of transfer and posting matters, the exclusive jurisdiction is of the PST and jurisdiction of this Court is barred under Article 212 of the Constitution of Islamic Republic of Pakistan, 1973 (**Constitution**). In this regard, reliance is placed on "Miss RUKHSANA IJAZ Vs. SECRETARY, EDUCATION, PUNJAB and others" (**1997 SCMR 167**), where it was held as under:-

"2. We have heard the learned counsel for the parties. Both the petitioner and respondent No. 1 are admittedly civil servants. Dispute between them relates to their transfer/posting which is a matter

relatable to the terms and conditions of their service. Disputes about these matters fall within the exclusive jurisdiction of the Service Tribunal and the jurisdiction of the High Court is excluded in such matters by virtue of the express provisions of Article 212(2) of the Constitution. It appears that the learned Judge in the High Court has not duly attended to this aspect of the matter before issuing the stay order. In the circumstances, we convert this petition into an appeal and allow it. The impugned stay order is set aside and it is directed that the High Court should first decide the question of its jurisdiction before passing any stay order.”

In “ASADULLAH RASHID Vs. Haji MUHAMMAD MUNEER and others” (**1998 SCMR 2129**), the Hon’ble Supreme Court held as under:-

“In that decision, Full Bench judgment of the Sindh High Court in the case of Khalilur-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 judice, 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. ”

The same view was also expressed by Hon’ble August Court in

“FEDERATION OF PAKISTAN through Secretary Establishment, Islamabad Vs. M. Y. LABIB-UR-REHMAN and others” (**2021 SCMR 1554**) in following terms:-

“The High Court without indulging into the question of maintainability passed the order in cyclostyle fashion while assuming the jurisdiction which is not vested in it. This Court in the recent judgment dated 21.05.2021 titled as Khalilullah Kakar v, PPO Balocitistan passed in Civil Appeal No.909/2020 etc has candidly held that Article 212 of the Constitution specifically places an embargo on all other courts except the Service Tribunal to assume jurisdiction. It is now established that any relating to terms and conditions of service is within the domain of administrative courts and tribunals established under Article 212 and even if the element of mala fides, ultra vires or coram non judice is pressed into, the same can be entertained and decided by the said courts in its jurisdiction. There is no denial to this fact that the bare reading of the said Article is of significant importance especially with reference to its exclusive jurisdiction to entertain matters relating to terms and conditions of service. Hence, in all eventualities any petition relating to terms and conditions of service is to be dealt with by administrative courts and tribunals specifically established for its adjudication in pursuance of Article 212 of the Constitution. As a general principle, the

framers of the Constitution while inserting the said provision have ousted the jurisdiction of other courts including the High Court under Article 199 of the Constitution.”

10. There is no cavil that PST has no jurisdiction on the question of “fitness”, however, the question of eligibility is different from the question of fitness. The eligibility primarily relates to the terms and conditions of service and their applicability to the Civil Servants concerned, and therefore, the PST has jurisdiction on the question of eligibility, whereas the question of fitness is a subjective evaluation on the basis of objective criteria, where substitution for an opinion of the competent authority is not possible by that of a Tribunal, therefore, the Tribunal has no jurisdiction on the question of fitness. This general rule has been enumerated by the August Supreme Court in “MUHAMMAD ANIS and others Vs. ABDUL HASEEB and others” (**PLD 1994 Supreme Court 539**). In the present case, perusal of the impugned order shows that petitioners’ transfer/posting orders were cancelled on the ground that they, being B.Tech (Hons.)/Diploma degree holders and not accredited engineers registered with PEC, were not eligible for the post of XEN (OPS) in view of the Rules and Section 27 of the PEC Act. There is no question of fitness rather only the question of eligibility is involved in this petition, therefore, notwithstanding the fact that representation was

decided in pursuance to direction of this Court, even on this score this Constitutional Petition is not maintainable. In this regard, reliance is placed on "CHIEF SECRETARY, GOVERNMENT OF PUNJAB, LAHORE and others Vs. Ms. SHAMIM USMAN" (2021 SCMR 1390).

11. In view of the above discussion, the petitioners could not cross the threshold question of maintainability of this Writ Petition, therefore, without touching its merits lest it may prejudice case of any of the parties, the instant petition is **dismissed** being not maintainable.

(ABID AZIZ SHEIKH)
JUDGE

Approved For Reporting

JUDGE

Arsalan