

JUDGMENT SHEET
LAHORE HIGH COURT,
RAWALPINDI BENCH, RAWALPINDI
JUDICIAL DEPARTMENT

Writ Petition No.3320 of 2022

Muhammad Bashir **V/S** *Federation of Pakistan and
NESPAK etc*

J U D G M E N T

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| Date of hearing | 28.09.2023 |
| Petitioner(s) by | Mr. Moazzam Sajjad Kiani, Advocate. |
| Respondent(s) by | Mr. Saad Rasool, ASC with Shan S. Ghumman, Advocate with Muhammad Ashfaq Basharat, Manager Legal and Corporate Affairs, NESPAK. Malik Amjad Ali, Additional Advocate General with Mr. Abid Aziz Rajori, Assistant Advocate General. Malik Muhammad Siddique Awan, Additional Attorney General alongwith M/s Arshad Mahmood Malik and Tahir Raheel Awan, Assistant Attorney Generals. |

JAWAD HASSAN, J. The Petitioner has invoked the constitutional jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 (the “*Constitution*”) and sought direction to the Respondents to implement the order dated 17.12.2021 of Supreme Court of Pakistan passed in C.P.No.491/2012 by reinstating him into service from the date of his termination i.e. 21.12.1998. Through this judgment, this Court will discuss in detail the “Functional Test” regarding the maintainability of writ petition in service matters against the National Engineering Services Pakistan Limited (“*NESPAK*”).

A. BRIEF BACKGROUND

2. Facts of the case, as per petition, are that the Petitioner was appointed as Driver in the Respondents department vide service contract dated 26.09.1992 initially for a period of one year however, his

services were regularized vide appointment letter dated 23.08.1995 enabling the Respondents to terminate it in terms of clause 2. The Respondents, on completion of project, terminated the Petitioner's service vide letter dated 21.12.1998. It is Petitioner's version that in terms of order dated 17.12.2021, he fulfills the criteria for reinstatement but the Respondents are adamant to reinstate him despite the fact that they have given the same benefit to similarly placed persons namely Ejaz Ali and Muhammad Azam.

B. PETITIONER'S ARGUMENTS.

3. Learned counsel for the Petitioner Mr. Moazzam Sajjad Kiani *inter-alia* contended that the Petitioner is entitled for the relief granted to other similar employees in terms of order dated 17.12.2021 passed by the Supreme Court of Pakistan whereby the services of terminated employees, between 01.11.1996 to 12.10.1999, were ordered to be reinstated; that the Respondents have not implemented the aforesaid order despite filing representation by him.

C. RESPONDENTS ARGUMENTS.

4. On the other hand, counsel for the Respondents Mr. Saad Rasool, ASC filed report and parawise comments and objected to maintainability of the petition on the ground that "NESPAK" is a private limited company and its service Regulations are non-statutory in nature and as such the relationship between the employer and the employee would be considered as 'master and servant'. He stated that services of the Petitioner were required only for a period of one year as per contract dated 26.09.1992; though his services were regularized vide letter dated 23.08.1995 but clause-2 of the appointment letter empowered the "NESPAK" to terminate his services. He next stated that the Petitioner filed an appeal against his termination before Single Bench of National Industrial Relation Commission, NIRC which was dismissed on 04.05.1999 and afterwards the Petitioner moved application for release of his fund/gratuity and same was duly released on 26.03.2001. Mr. Saad Rasool, ASC pointed out that the Petitioner himself attached a certificate dated 16.06.2008 (Page 39 of the petition) according to which the "NESPAK" is an autonomous organization,

fully owned by Government of Pakistan, working under the administrative control of the Ministry of Water and Power and its hundred percent shares are held by the Federal Government (Ministry of Water and Power). It is managed by a Board of Directors whose Chairman is the Secretary, Ministry of Water and Power, Government of Pakistan, and all other Directors are appointed/nominated by the Government of Pakistan, Ministry of Water and Power. He strenuously argued that the Petitioner does not fall within the definition of sacked employees under the Sacked Employees (Re-instatement) Act, 2010 therefore, he is not entitled for the relief claimed for.

5. Arguments heard. Record perused.

D. MAINTAINABILITY OF WRIT PETITION

6. At the very outset, learned counsel for the Petitioner was confronted with the issue of maintainability of writ petition and he was asked to first cross this hurdle. In response thereto, learned counsel for the Petitioner stated that “*NESPAK*” is working under the administrative control of Ministry of Water & Power, Government of Pakistan which is a statutory body therefore, writ is maintainable as per Article 199(5) of the “*Constitution*”.

7. On the other hand, Mr. Saad Rasool, ASC stated that “*NESPAK*” is an autonomous organization, fully owned by Government of Pakistan and working under the administrative control of the Ministry of Water and Power and its hundred percent shares are held by the Federal Government (Ministry of Water and Power). Moreover, it is stated that the NESPAK is managed by a Board of Directors whose Chairman is the Secretary, Ministry of Water and Power, Government of Pakistan, and all other Directors are appointed/nominated by the Government of Pakistan, Ministry of Water and Power therefore, being non-statutory, writ is not maintainable.

8. There is no cavil to the proposition that “*NESPAK*” is a private limited company incorporated under the provisions of the Companies Act, 1913 (now Companies Act, 2017) and terms and conditions of its employment are governed by National Engineering Services Pakistan (Pvt.) Limited Employees Service Rules (the “*NESPAK Service*

Rules”) , which were framed by the Board of Directors of “**NESPAK**” in pursuance of powers conferred by the Memorandum and Articles of Association, in the meeting held on 02.08.1974. Before examining the Rules being statutory or non-statutory, the Court has to see the status of “**NESPAK**” and apply ‘Functional Test’, discussed below.

i. Status of NESPAK

9. The object and purpose of “**NESPAK**” as argued by Mr. Saad Rasool, ASC above, has been discussed in “MUHAMMAD TAHIR NAWAZ CHEEMA and others versus FEDERATION OF PAKISTAN and others” (2023 PLC (C.S.) 662) wherein the Court has held that “Admittedly, **NESPAK** was established by the Government of Pakistan in 1973 as a private limited company under the Companies Act, 1913. The objective was to create a pool of talented engineers and attain self-reliance in engineering consultancy and replace foreign consultants.1 At present it has a paid-up capital of Rs.5,000,000/- divided into 500,000 ordinary shares of Rs.10/- each. Out of these the Ministry of Energy (Power Division), Government of Pakistan, holds 499,993 shares while one share each is held by the Secretary, Ministry of Energy (Power Division), the Additional Chief Secretary, Ministry of Finance, the representatives of the Governments of Balochistan, KPK, Punjab and Sindh and the Managing Director/President, **NESPAK**. The company’s Board of Directors is also appointed by the Prime Minister. Importantly, it performs various functions which are essentially those of the State and, through the exercise of public power, creates public employments”.

ii. Functional Tests to determine Rules of NESPAK Statutory or non-statutory.

10. The nub of the matter is whether service rules of public sector companies or corporations are statutory or non-statutory. Undoubtedly, the statutory corporations and public sector companies are made under the companies law which is in this case the Companies Act, 1913 (now Companies Act, 2017). The Supreme Court of Pakistan has declared in various pronouncements such companies like Pakistan Steel Mills Corporations (PTCL), Sui Northern Gas Pipelines Limited (SNGPL),

Oil and Gas Development Corporation Limited (OGDCL), Pakistan Television Corporation Limited (PTVCL), Pakistan International Airlines Corporation Limited (PIACL) and other public sector companies in Pakistan out of which only OGDCL has been declared as statutory, whereas SNGPL, PTVCL, PIACL have been declared as non-statutory. The issue whether these are rules made in the Statute or by the Act or by the Board, has been discussed in various judgments which will be discussed in later part of this judgment. However, there are various contradictory views of this Court in declaring Rules of certain bodies, authorities, boards, educational institutions, organizations as statutory or non-statutory in terms of their Service Rules or Regulations but the Functional Test, to determine whether rules are statutory or non-statutory, has been developed by this Court in the case of “MUNDA ELEVEN CRICKET CLUB versus FEDERATION OF PAKISTAN and 4 others” (PLD 2017 Lahore 802) by ruling out the maintainability of writ petition in service matters. The relevant portion reads as under:

“24. Importantly, under Section 3 of the Ordinance, the Government has powers to make boards for the control of sports in Pakistan for the purpose of promoting and developing uniform standards of competition in sports in Pakistan comparable to the standards prevailing internationally and regulating and controlling sports in Pakistan on a national basis. The „sports“ has been defined in Section 2(i) of the Ordinance, and recognizes cricket as a sport. Therefore, the issuance of the PCB Constitution, under which PCB has been established, has the backing of law”.

*25. The case law submitted by the learned counsel of the Respondent, Muhammad Zaman supra, also ruled that **the test of whether rules/regulations were statutory or otherwise was not solely whether their framing required the approval of the Government** or not, rather it was the nature and efficacy of such rules/regulations. The Court had to see whether the rules/regulations dealt with instructions for internal control or management, in which case they would be non-statutory, or they were broader than and were complementary to the parent statute in matters of crucial importance, in which event they would be statutory.*

Underlining for emphases

11. The Functional Test in determining the maintainability of writ petition under Article 199(5) of the “*Constitution*” was also discussed by this Court in “AOWN ABBAS BHATTI versus FORMAN CHRISTIAN COLLEGE and 2 others” (PLD 2018 Lahore 435) elaborating the ‘functional test’, ‘the application of test’ and ‘administrative control test’ and this view was followed by larger Bench of this Court in “DR. KHALID ZAMIR RASIB versus PROVINCE OF THE PUNJAB through Secretary Higher Education Department, Lahore and 4 others” (2021 PLC (C.S.) 994) by holding that “*after analyzing the reasons by two learned Benches of this Court we endorse the viewpoint taken in the case of Aown Abbas Bhatti (supra) as it clinches the issue in its true perspective*”. Furthermore, the Rules of the “*NESPAK*” are non-statutory as held by this Court in the case of “UMER ATTA-UR-REHMAN KHAN versus MINISTRY OF ENERGY through Secretary/Chairman, NESPAK and 4 others” (2021 PLC (C.S.) 1126) wherein it has been observed that “*admittedly, NESPAK is a private limited Company and its Rules namely Employees (Efficiency & Discipline) Rules, 1974 (Rules) are framed by the Board of Directors of the company under the power conferred on them through Articles of Association of NESPAK. Neither these rules are framed by the Federal Government or approval of the Federal Government nor these rules are made under any statute, therefore, said rules cannot be termed as statutory rules*”.

12. It is observed in view of the above said judgments and the status of “*NESPAK*” by applying the “*Functional Test*” that the “*NESPAK Service Rules*” are neither issued under any Statute nor with approval of the Federal Government or to be published in official Gazette hence the same cannot be treated as statutory rules. It is settled law that where the Rules or Regulations are not required to be made with the approval of the Federal Government, they cannot be termed as statutory in nature. The perusal of “*NESPAK Service Rules*” shows that same are

not framed under any Statute but were made by the Board of Directors of the company/NESPAK in exercise of the powers conferred on it by the Article of Association of the Company. Therefore, these Rules are merely regulations, instructions and directions for internal use and management of the Company, hence principle of 'Master and Servant' will be squarely applicable to the employees of the company/NESPAK”.

13. In view of above, the principles elaborating the ‘Functional Test’ by this Court in “AOWN ABBAS BHATTI case and “MUNDA ELEVEN CRICKET CLUB case and law laid down in aforementioned judgments, it is quite clear that writ is not maintainable against the Respondents-NESPAK.

iii. Jurisprudence of Supreme Court of Pakistan on Statutory and Non-Statutory.

14. The Supreme Court of Pakistan in “EXECUTIVE COUNCIL, ALLAMA IQBAL OPEN UNIVERSITY, ISLAMABAD through Chairman and another Versus M. TUFAIL HASHMI” (2010 SCMR 1484) has observed that though employees, who are discharging functions in connection with the affairs of Federation, can approach the High Court under Article 199 of the Constitution but subject to the condition if their services are protected under the statutory rules. In “MUHAMMAD ZAMAN and others versus GOVERNMENT OF PAKISTAN and others” (2017 SCMR 571) the Supreme Court of Pakistan has held that since the regulations in question, passed under the amended law, concerned the pension and gratuity matters of employees of SBP are basically instructions for the internal control or management of SBP and are therefore non-statutory. In “PAKISTAN TELECOMMUNICATION CO. LTD. through Chairman Versus IQBAL NASIR and others” (PLD 2011 SC 132), it has been held that “Employees of Pakistan Telecommunication Corporation Limited were governed by principle of "Master and servant" and in absence of statutory rules, constitutional petitions filed by employees were not maintainable”. In Pakistan Defence Officer’s case (2013 SCMR 1707) the Hon’ble Supreme Court of Pakistan has held as under:

“Where conditions of service of employees of a statutory body are not regulated by Rules/Regulations framed under the Statute but only Rules or Instructions issued for its internal use, any violation thereof cannot normally be enforced through writ jurisdiction and they would be governed by the principle of 'Master and Servant'.”

15. Similarly, the issue of maintainability of writ under Article 199 of the Constitution has been discussed in detail by the Supreme Court in “PAKISTAN INTERNATIONAL AIRLINE CORPORATION and others Versus TANWEER-UR-REHMAN and others” (PLD 2010 Supreme Court 676) and has held as follows

“25. Thus, in view of discussion made hereinabove, we are persuaded to hold that although the appellant-Corporation is performing functions in connection with the affairs of the Federation but since the services of the respondent-employees are governed by the contract executed between both the parties, as is evident from the facts narrated hereinabove, and not by the statutory rules framed under section 30 of the Act, 1956 with the prior approval of the Federal Government, therefore, they will be governed by the principle of Master and Servant.”

16. In “ABDUL WAHAB and others Versus HBL and others” (2013 SCMR 1383), the Supreme Court has held that where a service grievance was agitated by a person/employee who was not governed by statutory rules of service, constitutional petition is not be maintainable. The Division Bench of this Court in “PAKISTAN INTERNATIONAL AIRLINE and others Versus NOREEN NAZ BUTT” (2017 PLC (C.S.) 923) has held that *“the Appellant Pakistan International Airline has no statutory rules and the relationship between the Respondent and the Appellants is that of master and servant. It is an established principle that in such like cases the Constitutional petition is not maintainable”*.

17. Similar view was upheld by Supreme Court in its judgment reported as “PAKISTAN AIRLINE PILOTS ASSOCIATION and others Versus PAKISTAN INTERNATIONAL AIRLINE and another” (2019 SCMR 278) with the following observation:

“As the terms and conditions of employment in PIAC are admittedly not governed by any statutory provision and the employees are amenable to the Rule of "Master and Servant", Article 199 of the Constitution of Pakistan 1973 cannot be invoked. Reliance is placed on PIA Corporation v. Syed Suleman Alam Rizvi (1996 SCMR 1185), Pakistan International Airline Corporation and others v. Tanweer-ur-Rehman and others (PLD 2010 SC 676) and Abdul Wahab and others v. HBL and others (2013 SCMR 1383).”

18. Even otherwise, the Petitioner does not fall within the ambit of ‘sacked employees’ in terms of Section 2(f) of the Sacked Employees (Re-instatement) Act, 2010 which clearly defines that a person who was appointed as a regular or *ad hoc* employee or on contract basis or otherwise in service of employer, during the period from 1st day of November, 1993 to the 30th day of November, 1996 (both days inclusive) and was dismissed, removed, terminated from service or whose contract period was expired or who has given forced golden hand shake during the period from 1st day of November, 1996 to 12th day of October, 1999 (both days inclusive). In the case in hand, the Petitioner’s date of appointment is 26.09.1992 whereas the above said Section prescribes the period to be come under the above said definition from 01.11.1993 to 30.11.1996. Furthermore, the principle of ‘Master and Servant’ is applicable to the case in hand as the rules of “NESPAC” were not framed under any Statute rather these were made by the Board of Directors of the “NESPAC” in exercise of powers conferred on it by Articles of Association of the Company and such rules are merely regulations, instructions and directions for internal use and management of the company. It is also observed that

the order dated 28.07.2022 is indicative of the fact that the Petitioner was provided fair opportunity of hearing but he remained fail to prove his case through cogent and confidence expiring evidence and that too, it was not challenged by him before any forum.

E. CONCLUSION

19. In view of law laid down by the Supreme Court of Pakistan, the learned counsel for the Petitioner has failed to cross the hurdle/objection taken by the learned counsel for the Respondents qua maintainability of this petition. Consequently, this petition is dismissed being not maintainable. However, the Petitioner is at liberty to challenge the impugned order before the competent forum, if so advised.

**(JAWAD HASSAN)
JUDGE**

Approved for Reporting

JUDGE