

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

Mr. Justice Gulzar Ahmed
Mr. Justice Dost Muhammad Khan
Mr. Justice Tariq Parvez

Civil Petition No2167 of 2014

(On appeal from the judgment dated 22.09.2014
passed by the Peshawar High Court, Mingora
Bench (Dar-ul-Qaza), Swat in CR No.141-P/2014)

Khan Toti and others

....Petitioners

Versus

Govt. of NWFP thr. Secretary Finance and others

For the petitioners:	Syed Safdar Hussain, ASC
For Govt. of KPK:	Mr. Waqar Ahmed Khan, Addl. A.G. KPK
For the Federation:	Syed Nayyab Hassan Gardezi, ASC
	Standing Counsel for Attorney General
Date of hearing:	16.03.2016

JUDGEMENT

Dost Muhammad Khan, J.— Petitioner Khan Toti along with 17 others and proforma respondents No.8 and 9 have questioned the legality, propriety and legitimacy of the judgment of learned Single Judge of the Peshawar High Court, Mingora Bench, Swat in C.R. No.1141-P/07. Leave to appeal is sought against the impugned judgment dated 22.09.2014 by the petitioners on various grounds.

We have heard Syed Safdar Hussain, learned ASC for the petitioners, Mr. Waqar Ahmed Khan, learned Addl.A.G. KPK and Syed Nayyab Hussain Gardezi, learned ASC, Standing Counsel for the

Federation and have carefully gone through the record as well as the law, rules and regulations, applicable to the subject matter.

2. The epitome of the controversy relates to the issuance of notification by respondents No.1 to 4, officials of Government of NWFP (KPK) dated 22.7.1987 to extend financial and other benefits of service to all the employees/civil servants in BPS-5, 6, 7 and 9. The employees of BPS-5 were given @33% Selection Grade in BPS-7 and employees of BPS-6 were allowed Selection Grade in BPS-7 and 33% posts were placed in Selection Grade BPS-9. Similarly, the notification thus issued, has extended further benefit of two advance increments to those employees who had passed FA examination while to those who had got Bachelor Degree were allowed three advance increments.

3. The Executive/Administrative authorities, not well conversant with the judicial branch of the District Judiciary, could not clarify the nomenclatures of the Readers, Moharars, Examiners and other alike, who in fact are Senior or Junior Clerks in the above grades. However, through a letter dated 27.07.1989, issued by the Finance Department, the petitioners and proforma respondents were extended the benefits, therefore, that controversy, although was put at rest but still agitated by the respondent government.

4. The learned ASC for the official respondents raised preliminary objection that the Civil Court was having no jurisdiction to entertain the subject matter as the petitioners and proforma respondents, being civil servants and the matter relates to the terms & conditions of their service thus, the impugned judgment of the Peshawar High Court is not open to any exception.

On the other hand, learned ASC for the petitioners vehemently contended that it is a classic case of discrimination, which is squarely

prohibited by Article 25 of the Constitution and that, once such amount was paid to the petitioners and proforma respondents in light of the clarification of the Finance Department's letter dated 27.07.1989 then, the official respondents were stopped to make a retrace or to turn volta-face and that, after separation of Judiciary from the Executive, right from the lower tier, the petitioners and proforma respondents were servants of the Province but keeping in view the scheme of the Constitution and the law on the subject after complete separation of Judiciary from the Executive limb of the State, the petitioners could not be termed in strict legal sense as civil servants in the affairs of the Provinces to make them amenable to the jurisdiction of the Provincial Services Tribunal. The learned Judge in the High Court committed legal and jurisdictional error, accepting such objection of the official respondents who were petitioners before the High Court because of the above legal and constitutional position, the learned ASC further added.

5. In view of the Objectives Resolution, which is now integral part of the Constitution by way of Article 2A thereof and the command contained in Sub-Article (3) of Article 175 of the Constitution clearly providing without any exception that the Judiciary shall be separated progressively from the Executive within a period of three years from the commencing day. However the same was extended to five years by the Constitution (Fifth Amendment) Act, 1976 and then to 14 years through 'Presidential Order'.

6. Although no successive government made any effort to comply with the commanding language of the above Article, completely separating or securing the independence of Judiciary at all levels and tiers, however, it was in **Sharaf Faridi's** case when the

Sindh High Court gave an authoritative judgment which was then challenged by the Government of Sindh and others through Chief Secretary before the Supreme Court of Pakistan. A larger Bench of five Hon'ble Judges, including the then Hon'ble Chief Justice while dealing with the issue of separation of judiciary at all tiers and to secure its independence in all spheres including financial independence, after the Federal Government and all the four Provincial Governments conceded to the constitutional requirements, gave authoritative judgment in the case of **Govt. of Sindh vs. Sharaf Faridi** (PLD 1994 SC 105) by laying down exhaustive and comprehensive guidelines to that effect. The Court also elaborated on Law Reforms Ordinance 1972 (XII of 1972) provided for the securing of complete separation of judiciary from the Executive.

7. Necessary directions were issued to all the Governments to amend the Civil Servants Acts of the Provinces and the Federal one and the Appointment, Promotion/Transfer Rules and also E&D Rules framed thereunder to establish the authority of the Chief Justices of the High Courts and that of the Supreme Court of Pakistan with regard to the subordinate Judiciary of the High Courts and its para legal staff and also of the High Courts Ministerial Establishment to draw a clear demarcation line between the Executive and the Judiciary. The latter one was to fall within the exclusive domain of the Supreme Court and the High Courts. All those directions were given effect in due course.

8. The Governors of the Provinces, particularly of NWFP (KPK) delegated all their powers to the Chief Justices of the High Courts to deal with the Judicial officers subordinate to the High Courts and the paralegal staff with further powers to further delegate their powers to any other authority within the High Courts or the District Judiciary.

9. For the redressal of grievance in the matter of Terms & Conditions of Service, Subordinate Judiciary Service Tribunal Act was enacted with the object that the Provincial Service Tribunal was ceased to exercise any jurisdiction with regard to the terms & conditions of the Judges of the Courts subordinate to the respective High Courts.

10. On the other hand, the Finance Division of the Federal Government and the Finance Departments of all the Provincial Governments delegated extensive powers under the Financial Rules to the Chief Justice of Pakistan and Chief Justices of the High Courts as a competent authority to deal with all financial matters including the powers to create or abolish any post, upgrade or down grade or increase the number of posts in the establishment of the Supreme Court, High Courts and District Judiciary with the only exception that the expenditure is to be met within the budget, separately allocated to the Supreme Court and the Four High Courts. Keeping in view the above constitutional and legal position the Judiciary stood separated for all purposes and intents from the Executive.

11. If the paralegal staff of the District Judiciary is construed to be a civil servant, amenable to the jurisdiction of the Provincial Service Tribunal, which is ordinarily presided over by a District & Sessions Judge, nominated by the Chief Justices of the respective High Court on the request of the provincial governments while rest of all the members belong to the executive limb of the State in the Provinces then, a serious inexplicable situation may be emerged because certain posts of the paralegal staff of the District Judiciary has now been upgraded to BPS-17 and above to take action for breach of discipline or to impose punishment, the Chief Justice of the High Court alone is the competent authority while in other cases the District & Sessions

Judges for the employees from grade 1 to 15 are the competent authorities and appeal against their decisions shall lie to the Chief Justice thus, the Chief Justice or to say the High Court and the District & Sessions Judges would be arrayed as respondents in appeal before the Provincial Service Tribunal, rendering them answerable to such Tribunals and to defend themselves before the different benches of the Service Tribunal headed by members from the Executive Authority, except the Chairman who too is subordinate to the Chief Justice and his nominee.

12. Even otherwise under Article 175(3) of the Constitution the Chapter is prefaced with the nomenclature ***“the Judicator”***. The scheme of the Constitution and the law on the subject clearly envisages that the Judiciary is the one and a single ladder where different rungs are working therein right from the District Judiciary, its ministerial staff or menial staff, the High Court establishment staff and the Supreme Court Establishment Staff. Therefore, throwing back the ministerial or menial staff of the District Judiciary at the mercy of the Provincial Service Tribunal, holding them civil servants would amount to reverse all the efforts made so far in securing independence and separation of the judiciary from the executive and the landmark judgment in ***Sharaf Faridi*** case would become of no judicial efficacy rather would be rendered ineffective.

13. Even in the British era, rules were framed by the Judicial Commissioner U/s 27(3) of the ***North-West Frontier Province (KPK) Courts Regulation, 1 of 1931*** for the subordinate services attached to the civil courts (District Judiciary) other than the Judicial commissioner's Court. In clause (ix), although the ***NWFP Civil Services (Punishment and appeal) Rules, 1943*** were made

applicable where against inflicting a penalty on any member of paralegal staff by the subordinate Judge under clause (1) of Rules (IX-A) appeal shall lie to the senior subordinate Judge and in the case of order passed by the senior subordinate Judge under Rule A, the appeal shall lie to the District Judge. However, any penalty imposed by the District Judge in original jurisdiction under clauses (b) & (c) of rule 8, the appeal was to lie to the Judicial Commissioner and further appeal under rule 10 of the Punishment and Appeal Rules had to lie before the Governor of the Province.

14. We have extensively studied the Civil Servants Appointment, Promotion and Transfer Rules of 1975 and the NWFP Civil Servants Appointment, Promotion and Transfer Rules 1981 but could not find any provision specifically or by necessary implication repealing the rules of 1937, framed by the Judicial Commissioner with the approval of the Governor of the NWFP.

15. Leaving aside that aspect of the matter for a moment, a similar proposition came up before this Court in the case of **I.A. Sharwani and others v. Government of Pakistan through Secretary Finance Division, Islamabad and others** (1991 SCMR 1041). The larger Bench of five Hon'ble Judges made exhaustive scrutiny of Article 212 of the Constitution and Ss. 4 & 3 of the **Service Tribunals Act, (LXX) of 1973**. In this case the controversy was with respect to granting of pensionary benefits to a class of retired employees of Executive Branch, who had retired within a particular period while the same was denied to another class of employees similarly placed, who had retired in another period. The then learned Attorney General raised preliminary objection that the Constitution Petitions before the High Court and then before this Court under Article

212 thereof were clearly barred and the same were liable to be dismissed on that ground alone. The Hon'ble Larger Bench after construing the provisions of Article 212 of the Constitution and S. 4 of the Federal Service Tribunal Act, 1973 held that right of appeal is only accrued to a civil servant, if he is aggrieved by any final order, whether original or appellate, made by the departmental authority in respect of any of the terms & conditions of the services where the Service Tribunal has the jurisdiction to the exclusion of other courts under sub-section (1) thereof. It was further held that it must follow that the Service Tribunal does not have jurisdiction to adjudicate upon a particular type of grievance, thus, the jurisdiction of the Court remained intact. It was further pointed out that the Tribunal was having jurisdiction against the final order whether original or appellate passed by the departmental authority relating to the terms & conditions of the service. This Court further held that the question, therefore, arises whether the notification containing the provisions for payment of enhanced pension to one class of retired employees which had been denied to the petitioners, can be treated as a final order, original or appellate, passed by the departmental authority in respect of any term & condition of service. Reliance was placed by the then Attorney General on the cases of **M.A. Yamin Qureshi vs. Islamic Republic of Pakistan and others** (PLD 1980 SC 22)(ii) **Iqan Ahmed Khurram vs. Govt. of Pakistan and others** (PLD 1980 SC 153), (iii) **The Controller, Central Excise and Land Customs and others vs. Aslam Ali Shah** (PLD 1985 SC 82) (iv) **The Superintendent of Police, Headquarters Lahore and two others vs. Muhammad Latif** (PLD 1988 SC 387) and (v) **Abdul Wahab Kan vs. Govt. of the Punjab and 3 others** (PLD 1989 SC 508).

The view taken therein was also not dissented from, rather followed however it was further held that the petitioners' case is solely founded on the ground of discriminatory treatment in violation of Article 25 of the Constitution and not because of breach of any provision of Civil Servants Act or the rules framed thereunder. It was further held that the question involved is of public importance as it effects all the present and future pensioners and, therefore, falls within the compass of clause (3) of Article 184 of the Constitution however, it was clarified that a civil servant cannot by-pass the jurisdiction of the Service Tribunal by adding a ground of violation of the fundamental rights. The Service Tribunal will have jurisdiction in a case which is founded on the terms & conditions of the service even it involves the question of violation of the fundamental rights. The contention of the learned Attorney General, who then was, repelled and it was further held in para-12 of the judgment at page 1064, which reads as follows:

"The plain language of Article 184(3) shows that it is open-ended. The Article does not say as to who shall have the right to move the Supreme Court nor does it say by what proceedings the Supreme Court may be so`" moved or whether it is confined to the enforcement of the Fundamental Rights of an individual which are infringed or extends to the enforcement of the rights of a group or a class of persons whose rights are violated. In this context the question arises whether apart from the non-incorporation of sub-Article 1(a) and 1(c) of Article 199, the rigid notion of an "aggrieved person" is implicit in Article 184(3) as because of the traditional litigation which, of course, is of an adversary character where there is a lis between the two contending parties, one claiming relief against the other resisting the claim. This rule of standing is an essential outgrowth of Anglo-Saxon jurisprudence in which only the person wronged can initiate proceedings of a judicial nature for redress against the wrong-doer. However, in contrast to it, this procedure

is not followed in the civil law system in vogue in some countries. The rationale of this procedure is to limit it to the parties concerned and to make the rule of law selective to give protection to the affluent or to serve in aid for maintaining the status quo of the vested interests. This is destructive of the rule of law which is so worded in Article 4 of the Constitution as to give protection to all citizens. The inquiry into law and life cannot, be confined to the narrow limits of the rule of law in the context of constitutionalism which makes a greater demand on judicial functions. Therefore, while construing Article 184(3), the interpretative approach should not be ceremonious observance of the rules or usages of interpretation, but regard should be had to the object and the purpose for which this Article is enacted, that is, this interpretative approach must receive inspiration from the triad of provisions which saturate and invigorate the entire Constitution, namely, the Objectives Resolution (Article 2-A), the Fundamental Rights and the Directive Principles of State policy so as to achieve democracy, tolerance, equality and social justice according to Islam."

In para 13 of the judgment it was further held that *even otherwise, the above proceedings are in the nature of public interest litigation and, therefore, in order to advance the cause of justice and public good, the power conferred on this Court under clause (3) of Article 184 of the Constitution is to be exercised liberally unfettered with technicalities. In this regard, reference may be made to the case of **D.S. Nakara and others v. Union of India (A.I.R. 1983 SC 130)**, on which Mr. Samdani has heavily relied upon in support of his case on merits and in which inter alia the following observations have been made which read as follows: --*

"64. Locus standi of third petitioner was questioned. Petitioner No.3 is a Society registered under the Societies Registration Act of 1860. It is a non-political non-profit and voluntary organization. Its members consist of public spirited citizens who have taken up the cause of ventilating legitimate public problems. This Society

received a large number of representations from old pensioners, individually unable to undertake the journey through labyrinths of legal judicial proceeds, costly and protracted and, therefore, approached petitioner No.3 which espoused their cause. Objects for which the third petitioner-Society was formed were not questioned. The majority decision of this Court in S.P. Gupta v. Union of India, 1981 (Supp) SCC 87 (A.I.R 1982 S C 149) at p.194), rules that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provisions of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. Third petitioner seeks to enforce rights that may be available to a large number of old infirm retirees. Therefore, its locus standi is unquestionable."

16. The learned Bench further held that the upward revision of pay and pension by the government was in recognition of rising costs of living and escalating inflationary tendency in the economy and also decrease in the economic value of rupee and, therefore, the same consideration should apply to all the pensioners irrespective of their dates of retirement.

In the ultimate end the petition was allowed while invoking the jurisdiction of this Court under Article 184 (3) of the Constitution and the notification/enactment of the government denying increase of pension to a particular class of pensioners who had retired from a particular date and giving the same to the other class of pensioners who had retired from another particular date being discriminatory and violative of Article 25 of the Constitution and the prayed relief was thus, granted.

17. In the present case too, the Moharars, Readers and Examiners are holding similar grades/BPS scales like Senior and Junior

Clerks serving in the executive department. We deem it essential to clarify that post and grade are two different nomenclatures. Realizing the mistake committed by the Finance Department, the same was clarified vide letter dated 27.07.1989 holding the petitioners working as Readers, Moharars, Examiners etc. attached to the District Judiciary entitled to the same benefit like others therefore, the objection of the Accountant General or anybody else would be of no legal effect as it would be hit by the prohibition contained in Article 25 of the Constitution. Under Article 5 of the Constitution it is the imperative obligation of the functionaries of the State to abide by the Constitution and the law because it has been held inviolable obligation of every citizen wherever he may be and of every other person for the time being within Pakistan.

18. Now we are confronted with another situation because while exercising limited revisional jurisdiction the learned Judge of the Peshawar High Court, Mingora Bench Swat after setting aside the judgment and decree of the Civil Court remanded the case to it with further directions to return the plaint to the petitioners-plaintiffs to approach the Provincial Service Tribunal. In this regard while placing reliance on the dicta laid down by this Court in the case of **I.A. Sherwani** (*supra*) it would be highly painful and tiring-some for the petitioners plaintiffs if the case is remanded to the High Court, to be re-decided in light of the above proposition of law and Constitution because they would again incur heavy expenses on the fresh litigation before the High Court, engaging services of lawyers besides it will be time consuming factor as well, while on the other hand they have been given highly discriminatory treatment for no plausible reason whatsoever and deduction is being made from their monthly salaries

or the pensionary benefits, thus, they would suffer agony of a substantial nature.

19. Accordingly, while following the principle of law enunciated in **L.A. Sherwani's case** (*ibid*), and in view of the peculiar facts and circumstances of the present case while invoking the jurisdiction conferred upon this Court under Article 184(3) of the Constitution we hereby declare the impugned action/orders of the official respondents No.1 to 4 to be in violation of strict and prohibitory command contained in Article 25 of the Constitution because the petitioners and proforma respondents/plaintiffs have been treated with sheer discrimination which cannot be approved on any premises whatsoever, therefore, this petition is converted into appeal and the same is allowed.

All the deductions so far made from the monthly salaries/pensionary benefits of the petitioners, proforma respondents/plaintiffs and other alike shall be paid to them back within a period of two months by the official respondents and they are further restrained from deducting the same from the monthly salary/pension of the petitioners/proforma respondents, plaintiffs and other alike and all benefits being accrued to them shall be returned by the official respondents in lump-sum within two months at the most.

Judge

Judge

Judge

Islamabad, the
16th March, 2016
Nisar /-'

'Approved for reporting'